No. 15-40238

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES, *et al.*,

Defendants-Appellants.

AMICUS CURIAE BRIEF OF STATE LEGISLATORS FOR LEGAL IMMIGRATION IN SUPPORT OF APPELLEES

On Appeal From the U.S. District Court
For the Southern District of Texas
Brownsville Division

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

- State Legislators for Legal Immigration, Amicus Curiae. Joining in this brief are Rep. Daryl Metcalfe (Pennsylvania House of Representatives, District 12); Sen. John Kavanagh (Arizona House of Representatives, 23rd District); Sen. Kent Lambert (Colorado State Senate, District 9); Rep. Eric A. Koch (Indiana House of Representatives, District 65); Rep. Peggy Mast (Kansas House of Representatives, District 76); Del. Neil Parrott (Maryland House of Delegates, District 2A); Rep. Becky Currie (Mississippi House of Representatives, District 92); Rep. Laurence Rappaport (New Hampshire House of Representatives District 1); Rep. Jordan Ulery (New Hampshire House of Representatives, District 37); Rep. William O'Brien (New Hampshire House of Representatives, District 05); Sen. Steven Oroho (New Jersey State Senate, District 24); Assemblywoman Alison Littell McHose (New Jersey Assembly, District 24); Assemblyman Parker Space (New Jersey Assembly,

District 24); Rep. Yvette Herrell (New Mexico House of Representatives, District 51); Rep. George Cleveland (North Carolina House of Representatives, District 14); Sen. Kim Thatcher (Oregon State Senate, District 13); Sen. Charles McIlhinney Jr. (Pennsylvania State Senate, District 10); Rep. Mark Mustio (Pennsylvania House of Representatives, District 44); Rep. Brad Roae (Pennsylvania House of Representative, District 6); Sen. Marc Cote (Rhode Island State Senate, District 24); Rep. Michael Pitts (South Carolina House of Representatives, District 14); Sen. Bill Ketron (Tennessee State Senate, District 13); Rep. Sheila Butt (Tennessee House of Representatives, District 64); Rep. James White (Texas House of Representatives, District 19); Del. John Overington (West Virginia House of Delegates, District 62); Del. Kelli Sobonya (West Virginia House of Delegates, District 18).

- James F. Peterson, Counsel for Amicus Curiae State Legislators for Legal Immigration

/s/ James F. Peterson

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INTEREST OF AMICUS CURIAE

State Legislators for Legal Immigration ("SLLI") is an unincorporated nationwide coalition of state legislators ("Amicus") who seek enforcement of our nation's immigration laws.[1] Founded by Pennsylvania State Representative Daryl Metcalfe, the coalition also is committed to respecting the principles of federalism and state sovereignty that underlie our system of government.

Members of SLLI were elected to represent and protect the interest of the people – the citizens and lawfully present aliens – of their states. The

[1] The following 26 Legislators from 18 States join in SLLI's amicus brief: Rep. Daryl Metcalfe (Pennsylvania House of Representatives, District 12); Sen. John Kavanagh (Arizona House of Representatives, 23rd District); Sen. Kent Lambert (Colorado State Senate, District 9); Rep. Eric A. Koch (Indiana House of Representatives, District 65); Rep. Peggy Mast (Kansas House of Representatives, District 76); Del. Neil Parrott (Maryland House of Delegates, District 2A); Rep. Becky Currie (Mississippi House of Representatives, District 92); Rep. Laurence Rappaport (New Hampshire House of Representatives District 1); Rep. Jordan Ulery (New Hampshire House of Representatives, District 37); Rep. William O'Brien (New Hampshire House of Representatives, District 05); Sen. Steven Oroho (New Jersey State Senate, District 24); Assemblywoman Alison Littell McHose (New Jersey Assembly, District 24); Assemblyman Parker Space (New Jersey Assembly, District 24); Rep. Yvette Herrell (New Mexico House of Representatives, District 51); Rep. George Cleveland (North Carolina House of Representatives, District 14); Sen. Kim Thatcher (Oregon State Senate, District 13); Sen. Charles McIlhinney Jr. (Pennsylvania State Senate, District 10); Rep. Mark Mustio (Pennsylvania House of Representatives, District 44); Rep. Brad Roae (Pennsylvania House of Representative, District 6); Sen. Marc Cote (Rhode Island State Senate, District 24); Rep. Michael Pitts (South Carolina House of Representatives, District 14); Sen. Bill Ketron (Tennessee State Senate, District 13); Rep. Sheila Butt (Tennessee House of Representatives, District 64); Rep. James White (Texas House of Representatives, District 19); Del. John Overington (West Virginia House of Delegates, District 62); Del. Kelli Sobonya (West Virginia House of Delegates, District 18).

neighborhoods, cities, counties, and states that Amicus represents are being adversely affected by the influx of large populations of unlawfully present aliens. Amicus is concerned that these effects will be exacerbated by the Deferred Action for Parents of American and Lawful Permanent Residents ("DAPA") program at issue in this case. The DAPA program – or "Executive amnesty" – will further strain the resources of the States and continue to erode the rule of law. Amicus submits this brief to support the States challenging the implementation of the DAPA program and to provide perspective of States attempting to protect their citizens from the ill effects of illegal immigration.[2]

ARGUMENT

I. Sovereign States Are Entitled To Protect Their Citizens from the Effects of Illegal Immigration.

Upon taking office, the President of the United States takes an oath that he will "faithfully execute" the law. U.S. CONST., art. 2, § 1, cl. 8. In a stunning abdication of that duty, the Executive Branch has unilaterally rewritten longstanding federal immigration law, purportedly granting "legal presence" to over four million individuals who are currently in the country illegally. The

[2] Amicus files this brief with the consent of all parties and pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure. In addition, pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, Amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person other than Amicus or its counsel make a monetary contribution to its preparation or submission.

DAPA program would also make those individuals eligible for a wide variety of state and federal benefits, including driver licenses and Social Security benefits.

The U.S. Supreme Court has limited States' ability to act in regard to immigration, on the basis that immigration is a federal domain. *See Arizona v. United States*, 132 S. Ct. 2492 (2012). Implicit in its decision was that the Federal government would follow its own laws. Instead, we now have the situation where States must endure not just lack of enforcement, but purposeful abdication of the duty to faithfully execute the law. The States must be allowed to protect themselves from this lawless action.

A. The Illegal Immigration Crisis and the Role of the States.

Many States, including those represented by Amicus, continue to grapple with the severe costs imposed by the presence of unlawfully present aliens. The U.S. Supreme Court has acknowledged the severe consequences of unlawful immigration upon States, such as in Arizona, where there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of unlawfully present aliens. *U.S. v. Arizona*, 132 S. Ct. at 2500. The Court recognized that these problems posed to Arizona – and experienced in many other States – "must not be underestimated." *Id*. These problems and costs are the direct result of the Federal government's failure to enforce our nation's immigration laws.

In the absence of Federal action, the States have tried to fill the void. A number of States adopted laws intended to address the effects of unlawfully present aliens. *See, e.g.,* Stephen Ceasar, *Immigration Bills at Record High for States: The Legislation Points Up Frustration with the Federal Government's Lack of Action,* Los Angeles Times at AA2 (Aug. 10, 2011) (citing to a total of 1,592 immigration-related bills nationwide). These measures relied on States' longstanding and well-established police power to protect their citizens and lawfully present aliens within their jurisdiction. Consistent with the principles of federalism, these measures did not challenge the primacy of the federal government's authority to regulate immigration. Instead, they were in harmony with the directives and goals of federal immigration law.

Ultimately, the U.S. Supreme Court reviewed the best known of these State laws – Arizona's S.B. 1070. With the stated goal of "attrition through enforcement," S.B. 1070 created disincentives for unlawfully present aliens to enter or remain in the United States. 132 S. Ct. at 2497. These included creating misdemeanor offences for failure to comply with federal alien-registration requirements and for an unlawfully present alien to seek or engage in work. A five member majority of the Court ruled that most of the challenged provisions of S.B.

1070 were preempted by federal law.[3] The Court's majority based its ruling on what it saw as the "broad, undoubted power" of the Federal Government in relation to immigration, its inherent power to "conduct relations with foreign nations," and its "extensive and complex" regulation of aliens who may not be admitted to the United States. *Id*. at 2498-99.

The ruling in *Arizona v. United States* significantly curtailed the room for the States to act. Nevertheless, recognizing that it was foreclosing a significant role for the States, the Court majority emphasized that the Federal Government must act. As stated by the Court:

> The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

132 S. Ct. at 2510. It is at least implicit in this conclusion that the "sound exercise of national power" involves enforcing the laws. It is more than implicit that unilateral re-writing of the law is not part of a "rational civic discourse."

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[3] Only one provision requiring police officers to inquire as to the immigration status of a person while conducting a lawful stop (Section 2(B)) survived largely because it had not yet gone into effect and there was no evidence as to how it would be applied in practice.

B. The Federalist Structure Does Not Function When One Party Ignores the Law.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). It is also axiomatic that under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Hence, while the states have surrendered certain powers to the federal government, they retain "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST No. 39 (J. Madison)). The U.S. Supreme Court has described this constitutional scheme of dual sovereigns as follows:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . Without the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory, 501 U.S. at 457 (citing *Texas v. White*, 74 U.S. 700 (1869), quoting *Lane County v. Oregon*, 74 U.S. 71 (1869)). This concept of dual sovereignty is embodied by the Constitution's conferral upon Congress of not all government powers, but only discrete, enumerated powers. *Printz*, 521 U.S. at 919 (citing Art. I, § 8 and Amend. X). As James Madison described:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, pp. 292-93 (C. Rossiter ed. 1961). As noted above, often overlooked is the fundamental purpose of the federal structure of joint sovereigns.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 505 U.S. 144, 181 (1992); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties."); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (The Federal

System exists "not as a matter of doctrinaire localism but as a promoter of democracy."). As the Supreme Court explained:

> The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control.

Alden v. Maine, 527 U.S. 706, 759 (1999).

Similar to checks and balances between co-equal branches of government, this Federalist structure and the separation of powers was consciously designed to prevent "governmental tyranny which ... is closely related to [the] arbitrary and capricious government." Robert J. Delhunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781 (2013) (citing George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to Critics*, 72 Am. Pol. Sci. Rev. 151, 156 (1978)). Because the Federal government has abdicated its duties with respect to immigration and has ignored the rule of law, the Federalist structure has been weakened.

C. Sovereign States Are Not Powerless When the Federal Government Ignores Its Own Laws.

Federal failure to effectively enforce immigration laws is not a new development. As Justice Scalia once wryly noted, "nobody would [have thought]

that . . . the Federal Government would not enforce [immigration laws]. Of course, no one would have expected that." *Chamber of Commerce v. Whiting*, No. 09-115, Tr. of Oral Arg. at pp. 7-8 (U.S. Dec. 8, 2010). While not surprising, this failure to enforce the law has left the States dealing with the consequences for many years.

The federal neglect of enforcement of the law has now been compounded by something new: an intentional abdication of statutory responsibility and a rewriting of the law by the Executive Branch. While it was not at issue before the Supreme Court in *Arizona v. United States*, it was on the horizon. The DAPA program at issue in this case was preceded in 2012 by another blanket amnesty program for so-called "dreamers," exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30. As in this case, the Federal government claimed it was exercising "prosecutorial discretion" and allocating "scarce enforcement resources." In his prescient dissent in *Arizona v. United States*, Justice Scalia wrote:

> Must Arizona's ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement -- or, even worse, to the Executive's unwise targeting of that funding? But leave that aside. It has become clear that federal enforcement priorities -- in the sense of priorities based on the need to allocate "scarce enforcement resources" -- is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30.

132 S. Ct. 2521. This previous program, like the current DAPA program, involved "deferred action" against unlawfully present aliens for a period of two years subject to renewal. As Justice Scalia noted, a wide-spread amnesty program – such as the DAPA program – actually hinders enforcement of the law:

> The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement.

Id. (emphasis in original).

In this case, the States are seeking to protect their sovereignty from a Federal government that now openly and willfully disregards the plain language of the law. As the States are seeking nothing more than that Federal law be obeyed, the argument that they are somehow limited in doing this "boggles the mind." 132 S. Ct. at 2521 (Scalia, dissenting). The States are entitled to protect themselves.

II. The States are Likely to Succeed on the Merits As the Federal Government Must Comply With Its Own Laws.

The Federal government is bound to follow the law. This principle, which should be unremarkable, was considered in detail in a case that has not been discussed by the parties. In a case that "raise[d] significant questions about the scope of the Executive's authority to disregard federal statutes," the U.S. Court of

Appeals for the D.C. Circuit declared that "[u]nder Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute." *In re Aiken County*, 725 F.3d 255, 257-59 (D.C. Cir. 2013). At issue in *Aiken County* was a petition for a writ of mandamus that sought to compel the Nuclear Regulatory Commission to adhere to a statutory deadline for completing the licensing process for approving or disapproving an application to store nuclear waste at Yucca Mountain in Nevada. As the Court explained,

> [i]f the President has a constitutional objection to a statutory mandate . . . the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate . . . simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates. These basic constitutional privileges apply to the President and subordinate executive agencies.

In re Aiken County, 725 F.3d at 259. In granting the petition, the D.C. Circuit concluded:

> It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted

> in this case by the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here.

Id. at 267.

The same is true here. The Executive Branch has claimed no constitutional concerns with existing federal immigration statutes. The Executive Branch simply seeks to replace Congress' policy choice about whether unlawfully present aliens may remain in the United States with its own preference. The plain language and express purposes of federal immigration law make clear Congress' policy choices. The Constitutional authority of Congress – as well as the respect that the Executive and Judicial Branches owe to Congress – demands that Congress' policy choice prevails. "When the legislative and executive powers are united in the same person or body . . . there can be no liberty . . . ." THE FEDERALIST No. 47 at 271 (James Madison) (C. Rossiter ed. 1999) (quoting Montesquieu). The States should be allowed to proceed.

CONCLUSION

For these reasons, the preliminary injunction should be affirmed.

Dated: May 11, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in proportional Times New Roman, 14-point font.

/s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2015, I filed the foregoing via the CM/ECF system and served the foregoing via the CM/ECF system on all counsel who are registered CM/ECF users.

/s/ James F. Peterson