No. 15-40238

In the United States Court of Appeals for the Fifth Circuit

State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Attorney General Bill Schuette; State of Nevada; State of Tennessee, Plaintiffs-Appellees,

v.

United States of America; Jeh Charles Johnson, Secretary, Department of Homeland Security; R. Gil Kerlikowske, Commissioner of U.S. Customs and Border Protection; Ronald D. Vitiello, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection; Sarah R. Saldaña, Director of U.S. Immigration and Customs Enforcement; León Rodríguez, Director of U.S. Citizenship and Immigration Services, Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Brownsville, No. 1:14-cv-254 (Hanen, J.)

BRIEF FOR APPELLEES

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

Office of the Attorney General
209 W. 14th Street
Austin, Texas 78711-2548
(512) 936-1700 tel.
(512) 474-2697 fax

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

APRIL L. FARRIS
ALEX POTAPOV
Assistant Solicitors General

Counsel for Plaintiffs-Appellees

Certificate of Interested Persons

Pursuant to Fifth Circuit Rule 28.2.1, a certificate of interested persons is not provided because all parties to this case are governmental parties.

Table of Contents

Table of Authorities

Page(s)

Cases:

Constitutional provisions, statutes, and regulations:

Other authorities:

Introduction

The Executive Branch unilaterally created a program that will grant millions of unauthorized aliens lawful presence and eligibility for work permits and a host of significant benefits. The district court did not abuse its discretion by preliminarily enjoining that program, known as DAPA.

The Executive does not dispute that DAPA would be one of the largest changes in immigration policy in our Nation's history. The President himself described DAPA as "an action to change the law." ROA.69. At a minimum, this change required notice and comment under the Administrative Procedure Act. The preliminary injunction maintains the longstanding status quo pending trial, and this preserves an effective remedy: Once this program goes into effect, it will be practically impossible to unwind all of its derivative consequences.

The Executive pretends that DAPA is mere inaction amounting to unreviewable "enforcement discretion." But DAPA does not simply abandon removal proceedings. It explicitly grants aliens lawful presence in this country and eligibility for work permits. "Lawful presence" is not some empty label; it is a status used throughout the United States Code. It has significant legal consequences, such as creating eligibility for numerous benefits—including Social Security, Medicare, the Earned Income Tax Credit, and unemployment benefits. In contrast, the Executive's decision not to remove someone does not change that person's preexisting legal status or confer eligibility for new

benefits. Indeed, the district court's injunction does not touch—and this lawsuit has never challenged—the Executive's separate memorandum establishing three categories for removal prioritization, or any decision by the Executive to forego a removal proceeding.

Courts act within the public interest by maintaining the separation of powers. DAPA's sweeping change in immigration policy must come from Congress—or at the very least, only after notice and comment. The preliminary injunction thus preserves the Judiciary's ability to protect the separation of powers and the rule of law.

Statement of Jurisdiction

The district court's jurisdiction rested on 28 U.S.C. §§ 1331 and 1346. The district court entered a preliminary injunction on February 16, 2015, and Defendants timely appealed on February 23, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1292(a).

Statement of the Case

A. Statutory Background.

1. Lawful presence. Congress has not given the Executive *carte blanche* to grant lawful presence to aliens.[1] Statutes delineate detailed criteria for an alien to obtain legal authorization to be in the country, for example:

[1] Congress has also directed that each individual who is unlawfully present "shall" be "inspected" by immigration officers; if the officer determines that the individual is not clearly entitled to be admitted, the individual "shall be detained" for removal proceedings. 8 U.S.C. § 1225(a)(1), (a)(3), (b)(2)(A). And Congress has created specific removal exceptions. *E.g.*, *id.* §§ 1182, 1227(a)(1), 1229b.

- Lawful-permanent-resident (LPR) status—commonly known as immigrant status or a "green card." *See* 8 U.S.C. §§ 1101(a)(20), 1255.
- Nonimmigrant status, *i.e.*, temporary visas. *See id.* §§ 1101(a)(15)(A)-(V), 1201(a)(1), 1227(a)(1).
- Refugee status, which can lead to asylum or withholding of removal. *Id.* §§ 1101(a)(42), 1158, 1231(b)(3).
- Humanitarian parole. *Id.* § 1182(d)(5).
- Temporary protected status. *Id.* § 1254a.
- Deferred-action status for narrow classes of aliens. *E.g.*, *id.* §§ 1154(a)(1)(D)(i), 1227(d)(2); *see infra* p.5.

2. Work authorizations. Nor has Congress granted the Executive free rein to grant work authorizations to aliens. Instead, "Congress enacted [the Immigration Reform Control Act of 1986], a comprehensive scheme" that "'forcefully' made combating the employment of [unauthorized] aliens central to 'the policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 & n.8 (1991)) (alteration marks omitted).

Congress established penalties against employers who hire an "unauthorized alien." 8 U.S.C. § 1324a(a), (f). The statute defines "unauthorized alien" as an alien who is neither an LPR nor "authorized to be so employed by this chapter or by the Attorney General [now, the Secretary of Homeland Security]." *Id.* § 1324a(h)(3) ("Definition of unauthorized alien"). This definitional subsection, which concerns *employer* liability, does not address the Executive's authority to issue work permits.

Instead, Congress has separately demarcated the Executive's delegated authority to issue work permits, as in:

- 8 U.S.C. § 1101(i)(2) (human-trafficking victims);
- *id.* § 1105a(a) (battered spouses);
- *id.* § 1154(a)(1)(D)(i), (K) (self-petitioners under the Violence Against Women Act);
- *id.* § 1158(c)(1)(B), (d)(2) (asylum applicants);
- *id.* § 1160(a)(4) (certain agricultural workers);
- *id.* § 1184(c)(2)(E), (e)(6), (p)(3), (p)(6), (q)(1)(A) (spouses of L-and-E-visa holders; certain victims of criminal activity; spouse and certain children of LPRs);
- *id.* § 1226(a)(3) (limits on work authorizations to aliens with pending removal proceedings);
- *id.* § 1231(a)(7) (limits on work authorizations to aliens ordered removed);
- *id.* § 1254a(a)(1) (temporary-protected-status holders); and
- *id.* § 1255a(b)(3)(B) (temporary-resident-status holders).

Congress also has provided for certain nonimmigrant visas that automatically provide work authorization. *See, e.g.*, *id.* § 1101(a)(15)(E), (H), (I), (L) (commercial work); *id.* § 1101(a)(15)(A), (G) (foreign-government-or-international-organization work); *id.* § 1101(a)(15)(P) (athlete or entertainer).

3. Family reunification. Congress has strictly limited the ability of aliens to acquire lawful presence on the basis of family reunification. Congress

has created *no* path for alien parents to obtain lawful presence based on their child's LPR status. And alien parents can obtain lawful presence based on their child's citizenship *only* if they (1) voluntarily leave the country, (2) wait out their inadmissibility bar (3 or 10 years) triggered by six months or more of unlawful presence, (3) wait until the child is 21, and then (4) obtain a family-preference visa from a U.S. consulate abroad. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255.

4. Deferred action. Congress has also never delegated to the Executive authority to grant deferred-action status, with attendant legal consequences, outside of narrow, statutorily defined circumstances. For instance, Congress has provided that certain children who are self-petitioning for immigrant status, under the Violence Against Women Act, are "eligible for deferred action and work authorization." *Id.* § 1154(a)(1)(D)(i)(II), (IV). Certain victims of human-trafficking-related crimes who help law enforcement (T-and-U-visa applicants) are also eligible for "deferred action" status if an administrative stay of removal is denied. *Id.* § 1227(d)(1). And Congress has made two other limited classes of individuals "eligible for deferred action" status: certain immediate family members of (1) LPRs killed on September 11, 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and (2) U.S. citizens killed in combat, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-95.

Every time Congress has expressly granted the Executive authority to confer deferred-action status, it served as a temporary bridge to lawful status. The

alien either had a preexisting lawful status or would imminently obtain lawful status. *See* ROA.1194-99.

B. Deferred Action for Childhood Arrivals (DACA).

In 2009, the President encouraged Congress to pass the "DREAM Act," proposed legislation that would have permitted unauthorized aliens to apply for lawful status if, among other things, they entered the U.S. at a young age. *See, e.g.*, DREAM Act of 2011, S. 952, 112th Cong. (2011). The President repeatedly urged its passage, emphasizing that he could not achieve the DREAM Act's goals through executive action. *See* ROA.222-23.

When Congress declined to pass the DREAM Act, the Executive created a program called Deferred Action for Childhood Arrivals, or DACA. ROA.123-25 (June 15, 2012 DHS memo). DACA grants a two-year term of "deferred action" to unauthorized aliens who came here before June 15, 2007, were under age 16 at the time of entry, and were under age 31 on June 15, 2012, among other criteria. ROA.123-25. DHS described DACA as an "exercise of prosecutorial discretion," "on an individual basis." ROA.124. In practice, however, the Executive reflexively approves applications that meet DACA's eligibility criteria. ROA.1989, 2224, 4148, 4193, 4484-85.

DACA recipients are also deemed eligible for work permits, ROA.125, for which they are required to apply. ROA.1306, 1941; *accord* DACA Instructions, www.uscis.gov/i-821d ("Individuals filing [DACA] Form I-821D must also file Form I-765, Application for Employment Authorization"). And although

the DACA Memo did not indicate as much, DACA recipients are also granted lawful presence. ROA.4158.

After DACA's announcement, the President repeatedly emphasized that DACA marked the outer limit of his administrative powers: "But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally." ROA.67; *see* ROA.65-66. The President again called upon Congress to change immigration laws. ROA.68. Congress did not oblige.

C. DAPA—The Challenged Directive.

On November 20, 2014, despite the President's statements about the limits of executive authority, Secretary Johnson issued the immigration directive challenged here. The DAPA Directive was issued to the three DHS components with immigration responsibilities (USCIS, ICE, and CBP). ROA.83-87; *see* ROA.4140. It does four significant things:

First, it "direct[s] USCIS to expand DACA" by (1) eliminating the age cap, (2) increasing the term of deferred action and work authorization from two to three years, and (3) adjusting the date-of-entry requirement to January 1, 2010. ROA.85-86.

Second, the Directive creates the program specifically known as DAPA.[2] It "direct[s] USCIS to establish a process, similar to DACA," to grant three-

[2] DAPA is short for Deferred Action for Parents of Americans and Lawful Permanent Residents. ROA.4376, 4481, 4791; *see* USCIS Flier, www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf. For brevity, this brief will use "DAPA" to refer to the Directive creating DAPA and Expanded DACA.

year terms of deferred action to aliens who (1) have a child who is a citizen or LPR, (2) are not authorized to be present in this country, (3) have been present since January 1, 2010, (4) are not one of three enforcement priorities, and (5) "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." ROA.86. Applicants must file certain paperwork, pay a specified fee, and submit biometrics for a background check. ROA.86-87.

Third, the Directive makes explicit that the "deferred action" awarded under DAPA and Expanded DACA grants *lawful presence* to aliens who would otherwise be unlawfully present: "Deferred action . . . means that, for a specified period of time, an individual is permitted to be lawfully present in the United States." ROA.84; *accord* ROA.1317; 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi).

Fourth, the Directive states that DAPA and Expanded DACA recipients are eligible for work authorizations. *See* ROA.86-87 (stating that Secretary Johnson exercises his purported "authority to grant [work] authorization" to any aliens granted deferred action); *see also* 8 C.F.R. § 274a.12(c)(14).

But DAPA recipients will get much more than work authorizations. DAPA's granting of lawful presence triggers a host of benefits, including:

(1) *driver's licenses*, *see* REAL ID Act, Pub. L. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 302, 313 (2005) ("deferred action status" can be a basis for issuing driver's licenses); *see, e.g.*, Tex. Transp. Code § 521.142; La. Rev. Stat. Ann. 32:409.1;

(2) *Social Security*, 42 U.S.C. § 405(c)(2)(B)(i)(I) (card eligibility for those lawfully permitted "to engage in employment in the United States"); 8 U.S.C. § 1611(a), (b)(2) (benefits available to those "lawfully present"); 20 C.F.R. §§ 422.104(a), 422.107(a), (e); 8 C.F.R. § 1.3(a)(4)(vi);[3]

(3) *the Earned Income Tax Credit*, 26 U.S.C. § 32(c)(1)(A), (c)(1)(E), (m) (eligibility based on valid Social Security numbers); 20 C.F.R. §§ 422.104(a), 422.107(a), (e);[4]

(4) *Medicare*, 8 U.S.C. § 1611(b)(2)-(3) (certain benefits available to those "lawfully present"); 42 U.S.C. § 1395c (Medicare eligibility concurrent with Social Security eligibility);

(5) *unemployment insurance*, 26 U.S.C. § 3304(a)(14)(A) (eligibility for aliens who are "lawfully present"); *see, e.g.*, Ark. Code Ann. § 11-10-511; Tex. Labor Code § 207.043(a)(3); Wis. Stat. § 108.04(18); ROA.2127, and

(6) *access to international travel*, via "advance parole," ROA.587-88; *cf.* 8 U.S.C. § 1182(d)(5)(A).

USCIS acknowledges that DAPA would cost more than $324 million over the next three years.[5]

---

[3] *See* Social Security Number and Card—Deferred Action for Childhood Arrivals, www.socialsecurity.gov/pubs/deferred_action.pdf ("After you get your (I-766) Employment Authorization Card, you can apply for a Social Security number.").

[4] *See* Letter from John A. Koskinen, Comm'r, Internal Revenue Service, to Sen. Charles E. Grassley (Feb. 25, 2015), www.grassley.senate.gov/news/news-releases/irs-earned-income-tax-credit-immigration (confirming "that a taxpayer may claim the earned income tax credit (EITC) for a taxable year using a social security number (SSN) acquired in a later taxable year"); Office of Senator Charles E. Grassley, Senators Introduce Bill Disallowing Tax Credit Under 2014 Executive Actions (Mar. 10, 2015), www.grassley.senate.gov/news/news-releases/senators-introduce-bill-disallowing-tax-credit-under-2014-executive-actions (Joint Committee on Taxation estimates that EITC refunds to beneficiaries of the 2012 and 2014 deferred-action programs could total $1.7 billion over 10 years).

[5] *See* Oversight of U.S. Citizenship and Immigration Services, Hearing Before the Subcomm. on Immigration and the National Interest of the S. Comm. on the Judiciary, 114th Cong., at 21 (Mar. 3, 2015), *available at* www.fnsg.com (transcript no. 559207).

In a primetime address announcing the program, the President urged unauthorized aliens meeting the relevant criteria to "come out of the shadows" and stated that he was "offer[ing] the following deal": anyone meeting the program's criteria was "not going to be deported." ROA.69. Shortly after the Directive issued, the President candidly stated that "I just took an action to change the law," ROA.2142, later explaining that "we've expanded my authorities," The White House, Office of the Press Secretary, Remarks by the President in Immigration Town Hall—Miami, FL (Feb. 25, 2015), www.whitehouse.gov/the-press-office/2015/02/25/remarks-president-immigration-town-hall-miami-fl.

The President also confirmed that the Directive is not tentative: Any "individual ICE officials or border patrol who aren't paying attention to our new directives" would "be answerable to the head of the [DHS]," and if employees "don't follow the policy, there are going to be consequences to it." *Id.*

The President said he would veto any bill ending the program. *Id.*

D. Procedural History.

Plaintiffs represent a majority of the States in the Union. This lawsuit alleges that the DAPA Directive violates constitutional limits, *see* U.S. Const. art. II, § 3, cl. 5, and the Administrative Procedure Act, 5 U.S.C. §§ 553, 706. ROA.241-44. Although DHS issued other memoranda on November 20, 2014, only the DAPA Directive is challenged here. ROA.218-19. In particular, Plaintiffs do not challenge the separate DHS memorandum that identifies three categories of aliens prioritized for removal. *See* ROA.558-63, ROA.4444.

Plaintiffs moved for a preliminary injunction on December 4, 2014—the day after filing this lawsuit. ROA.137-81. Plaintiffs subsequently submitted over 1,000 pages of evidence. ROA.1247-2307.

After a hearing on Plaintiffs' motion, ROA.5120-5257,[6] the district court issued a 123-page opinion and preliminarily enjoined the DAPA Directive. ROA.4376-4498. The court found a substantial likelihood of success on Plaintiffs' claim that DAPA violates the APA's notice-and-comment requirements. ROA.4448-87. The district court did not address Plaintiffs' other two claims, because those substantive claims would result in the same preliminary relief. *See* ROA.4449 (n.53), 4487 (n.105). The court found irreparable injury to Plaintiffs from allowing implementation of DAPA before a judgment, as it will be impossible to "unscramble the egg" once DAPA goes into effect. ROA.4490. And "any injury to Defendants, even if DAPA is ultimately found lawful, will be insubstantial in comparison" to Plaintiffs' irreparable injuries. ROA.4491. The district court noted that Plaintiffs "seek to preserve the status quo," ROA.4494; that the preliminary injunction addresses the irreparable harm to Plaintiffs without excessively burdening Defendants, ROA.4494-95; and that "the public interest factor that weighs the heaviest is ensuring that the actions of the Executive Branch . . . comply with this country's laws and its Constitution," ROA.4495-96.

[6] After the hearing, Defendants submitted additional evidence. ROA.4080-95, 4139-51. Plaintiffs explained that this submission created no material factual dispute. ROA.4219. In the alternative, Plaintiffs objected to the submission as untimely and requested a second hearing were it considered. ROA.4219.

Defendants appealed and moved in district court for a stay pending appeal. ROA.4508-30. After Plaintiffs filed their response to that motion, ROA.4912-36, Defendants notified the district court that they had issued over 100,000 three-year terms of deferred action under the Directive's Expanded DACA provision. ROA.4941-44. Plaintiffs moved for discovery into Defendants' actions, ROA.4960-68, which the district court has granted, 2015 WL 1540152.

The district court denied Defendants' stay motion. 2015 WL 1540022. Defendants also moved in this Court for a stay of the preliminary injunction pending appeal. That motion is currently pending, with oral argument heard on April 17, 2015.

Summary of the Argument

The district court did not abuse its discretion in enjoining the Executive's attempt to rewrite immigration law by unilaterally conferring lawful presence on a class of millions of unauthorized aliens.

I.A. Defendants argue that DAPA is "discretionary non-enforcement" challengeable by no plaintiff, reviewable by no court, and subject to no public input under the APA. That is wrong. Plaintiffs are challenging what Defendants did—not what they declined to do. As the district court found, Defendants legislated eligibility criteria for granting lawful presence. Defendants do not deny that DAPA will confer eligibility for benefits. Rather, they insist that any government action (even action of this profound magnitude) must be treated as unreviewable enforcement discretion whenever that action is bun-

dled with a policy of inaction on a separate, related matter. No court has embraced that novel theory, which would cordon off large swaths of executive action from judicial review and the APA.

I.B. Plaintiffs have standing on three independently sufficient grounds, as confirmed by over a dozen declarations they submitted. First, DAPA will cause States to incur costs for issuing driver's licenses. Second, DAPA will force States to incur additional costs for healthcare, education, and law-enforcement programs. And third, States have *parens patriae* standing to protect their citizens from labor-market distortions. This satisfies ordinary standing principles, and these injuries are certainly more direct than the injuries in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which provides that States are due "special solicitude" in the standing analysis.

I.C. DAPA is a substantive rule that required notice and comment. DAPA changed the law, and it significantly affects private interests by conferring lawful presence, work authorizations, and other benefits on millions of unauthorized aliens. Accordingly, DAPA is not a mere general statement of policy, and that is true regardless of any discretion officials may have in applying it. In any event, DAPA applications will be rubber-stamped in practice, just like DACA applications, as the district court found based on record evidence.

I.D. Although the district court did not reach Plaintiffs' substantive-APA and separation-of-powers claims, its fact findings support a likelihood of success on those claims. The Executive's attempt to grant millions of potential

DAPA recipients lawful presence and work authorizations violates both the Constitution and the APA.

II. The district court likewise did not abuse its discretion in concluding that the other preliminary-injunction factors favored relief. Plaintiffs would suffer irreparable injuries if DAPA took effect now, foreclosing an effective judicial remedy. The district court understood that it would be impossible to "unscramble the egg" once DAPA is implemented. By contrast, Defendants are not injured by maintaining the longstanding status quo until the litigation concludes. The preliminary injunction does not require the Executive to remove or not remove any alien. And the Executive's claimed need for immediate implementation of DAPA in the name of "national security" is vastly less compelling than the national-security justification deemed insufficient at the height of the Korean War in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

III. This Court should also reject Defendants' belated efforts to cabin the injunction's geographical scope. Defendants forfeited this argument by not raising it below when opposing the preliminary injunction. Regardless, the district court correctly understood that patchwork relief could not prevent the irreversible harms threatened by federal officials conferring lawful presence and work permits with nationwide effect. The district court unquestionably had remedial power to bind Defendants and prevent them from implementing DAPA.

Argument

This Court reviews a district court's "grant of a preliminary injunction for an abuse of discretion," its "findings of fact for clear error and its conclusions of law[] de novo." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 451-52 (5th Cir. 2014). To obtain a preliminary injunction, a plaintiff must establish "a substantial likelihood of success on the merits," "irreparable injury" that "outweighs any damage that the injunction might cause the defendant," and "that the injunction will not disserve the public interest." *Id.* at 452.

I. Plaintiffs Are Likely to Succeed on the Merits.

The district court did not abuse its discretion in ruling that DAPA is reviewable, Plaintiffs have standing, and DAPA required notice and comment.

A. DAPA Is Reviewable Agency Action, Not Enforcement Discretion.

Defendants repeatedly argue—with respect to standing, APA reviewability, notice-and-comment, irreparable injury, and public interest—that DAPA is a "quintessential exercise of prosecutorial discretion." Appellants' Brief ("Br.") 1. That is fundamentally mistaken. The district court correctly concluded that Plaintiffs' attack on DAPA is a challenge to reviewable government *action*, namely, Defendants' affirmative granting of work-permit eligibility and lawful presence, which leads to numerous other benefits. ROA.601. DAPA cannot be "inaction" because, without it, DAPA recipients would not be entitled to the benefits it confers.

By contrast, the district court's injunction does not implicate any "prosecutorial discretion" functions. It neither prohibits nor requires any removal proceedings, and it does not prevent the Executive from identifying aliens based on whether they are a removal priority. ROA.4443-45, 4498.

Defendants nowhere challenge the district court's observation that enforcement discretion "does not also entail bestowing benefits." ROA.4462; *see* ROA.705 (memorandum of INS Commissioner Meissner) ("Prosecutorial discretion does not apply to . . . grants of benefits."). That is enough to find DAPA reviewable. As this Court noted recently, "agency decisions to affirmatively do something are presumptively reviewable." *Gulf Restoration Network v. McCarthy*, 2015 WL 1566608, at *4 (5th Cir. 2015).

1. *Heckler v. Chaney*'s presumption of unreviewability does not encompass affirmative government action.

Declaring unlawful presence to be lawful and granting eligibility for work permits are not exercises of enforcement discretion—that is, "agency action" that has been "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Section 701(a)(2)'s committed-to-agency-discretion exception is "very narrow." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "Congress's 'evident intent' when enacting the APA" was "to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012).

Heckler explained that this presumption of reviewability is reversed for "an agency's refusal to take . . . action." 470 U.S. at 831. Thus "an agency's

decision not to take enforcement action" is "presumptively unreviewable" under § 701(a)(2). *Id.* at 832. For example, *Heckler* held that plaintiffs could not rely upon the APA to force the Food and Drug Administration to take enforcement actions related to lethal-injection drugs. *Id.* at 827.

By contrast, "when an agency *does* act," then "that action itself provides a focus for judicial review" and "can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* (emphasis in original). And DAPA's granting of lawful presence and work authorizations is action that provides a focus for judicial review. No case holds that *Heckler*'s presumption of unreviewability extends to affirmative changes in immigration status or eligibility for benefits. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AAADC*"), and *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), simply reiterate that the Executive's decision not to bring *enforcement* proceedings in a particular case is presumptively unreviewable. *Cf.* Br.33-34.

AAADC confirms that the Executive has transformed deferred action into something far different than the Supreme Court's conception of it. The Court explained that "deferred action" entailed simply the "discretion to abandon" removal proceedings. 525 U.S. at 483-84. It relied (*id.* at 484) on this Court's decision in *Johns v. DOJ*, which similarly explained that deferred action is merely the decision "to refrain from . . . executing an outstanding order of deportation." 653 F.2d 884, 890 & n.14 (5th Cir. 1981); *see also Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1008 n.1 (9th Cir. 1987) ("deferred action" is only

"*an act of administrative choice* to give some cases lower priority"). Abandoning a removal proceeding, of course, is "an agency's decision not to take enforcement action," which is "presumptively unreviewable" under *Heckler*. 470 U.S. at 832. Defendants are therefore mistaken in asserting that States could interfere "with countless exercises of federal immigration enforcement discretion." Br.16; *cf. INS v. Legalization Assistance Proj.*, 510 U.S. 1301, 1302-03 (1993) (O'Connor, J., in chambers) (staying an order requiring the Executive to *act* by considering certain applications and granting employment authorization to certain classes of aliens).

However, when the Executive goes beyond abandoning the removal process, and takes the further step of granting a removable alien lawful presence and work-authorization eligibility, these affirmative acts are reviewable agency action. As counsel for Defendants conceded at a recent district court hearing, "deferred action . . . works in a way *that's different than* the prosecutorial discretion" because it affirmatively provides "an incentive for people to come out and identify themselves." ROA.5287 (emphasis added).

Defendants are therefore advocating for a novel extension of *Heckler*—to affirmative action undertaken with some connection to a separate decision not to enforce the law. *But see Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005) (finding that a permitting scheme adopted to support a non-enforcement policy was reviewable "agency action"). Indeed, at the stay argument, Defendants were unable to articulate any doctrinal limitation that would prevent *Heckler*'s unreviewability presumption

from attaching even to grants of voting rights if conferred in conjunction with a non-removal policy. Arg. Recording 0:08:50-0:11:12, No. 15-40238 (5th Cir. Apr. 17, 2015).

Defendants support their proposed extension of *Heckler* by analogizing DAPA to a hypothetical executive decision not to prosecute small-scale theft. Br.41. This example only illuminates the profound differences between DAPA and enforcement discretion. To make the hypothetical analogous to DAPA, the Executive would need an application process to deem continued small-scale theft lawful for a renewable period of three years, which would then trigger a panoply of additional benefits (such as tax credits). *See* ROA.4462. The example of an executive decision not to prosecute small-scale marijuana possession is equally dissimilar to DAPA. What these examples of enforcement discretion actually resemble is the separate DHS memo defining three categories of priority for removal proceedings. ROA.558-63. That memo is neither enjoined nor challenged, as Defendants admit (Br.11). Plaintiffs are challenging affirmative government action, not any non-removal decision.

2. DAPA affirmatively confers status and eligibility for benefits.

The district court and Plaintiffs identified numerous respects in which DAPA confers legally cognizable status and attendant benefits—making it affirmative, reviewable action. Defendants fail to even contest some, such as the Earned Income Tax Credit, unemployment insurance, and access to foreign travel. ROA.4461. Defendants' other responses are unavailing.

a. Lawful presence. Defendants admit that DAPA explicitly deems recipients "lawfully present." Br.45; ROA.84. They insist, however, that "lawful presence" is not the same as "legal status." Br.45. This linguistic quibbling is immaterial without some explanation of why "legal status," as the Executive defines it, is the touchstone for reviewability when "lawful presence" indisputably has significant legal consequence. Moreover, this is an about-face from what the Executive previously (and correctly) told the Ninth Circuit—that "'approved deferred action status' is 'lawful status' that affords a period of 'authorized stay' for purposes of issuing identification." ROA.1317 (*Arizona Dream Act* brief); *see* ROA.4158 (DACA FAQ: "'lawful presence,' 'lawful status' and similar terms are used in various . . . federal and state laws").

The district court correctly found that "DAPA awards *some* form of affirmative status." ROA.4470 (emphasis added). The Executive is declaring unlawful presence in this country lawful, and that designation has legal consequence. "Lawful presence" is not an empty label. It appears throughout federal statutes. As explained above, lawful presence confers eligibility for Social Security, Medicare, the Earned Income Tax Credit, and a host of other benefits. *See supra* pp.8-9. Lawful presence also tolls the recipients' *unlawful*-presence clock under the INA's reentry bars. 8 U.S.C. § 1182(a)(9)(B)(i), (a)(9)(C)(i)(I); *see* ROA.512 (OLC Memo); ROA.4158 (FAQ 5).[7] And lawful

[7] During the stay argument, Defendants suggested this tolling has no practical consequence because the statutory penalties do not increase after one year of unlawful presence, whereas DAPA requires presence since January 2010. Arg. Recording, *supra*, at 0:52:45-0:53:30. But the tolling of unlawful presence will have very real consequences for any alien

presence protects recipients from the consequences of their "continuing [immigration] offenses," such as failure to register under 8 U.S.C. §§ 1302 and 1306. ROA.714 (Meissner Memo); *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 n.3 (1984).

Defendants argue that DAPA is unreviewable because it is revocable in principle as to any recipient. Br.45. But the Executive still takes affirmative action in conferring lawful presence to begin with, and lawful presence is valuable while possessed. ROA.4485. Under the Executive's logic, granting visas does not count as affirmative government action: Visas are revocable at the Executive's discretion, 8 U.S.C. § 1201(i), and aliens with revoked visas are removable, *id.* § 1227(a)(1)(B).[8]

b. Work permits. Defendants assert that DAPA recipients' eligibility for work permits "result[s]" from a prior regulation, so DAPA's express grant of work-permit eligibility cannot constitute affirmative executive action. Br.46-47 (citing 8 C.F.R. § 274a.12(c)(14)).[9] But the simple fact is that, without DAPA, four million aliens are *not* eligible for work permits, and with DAPA

---

who receives Expanded DACA before turning 19 years old, because the unlawful-presence clock does not begin to run until age 18. 8 U.S.C. § 1182(a)(9)(B)(iii). Likewise with aliens receiving DAPA before age 19.

[8] The prospect of DAPA revocation is exceedingly remote. Only 113 out of 591,555 DACA grants have been revoked (0.019%), none for discretionary reasons. ROA.2225-26.

[9] This regulation is not facially invalid because Congress has expressly provided that narrow classes of individuals with deferred action can get work authorizations. 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (VAWA self-petitioners); *id.* § 1227(d)(2) (T-and-U-visa applicants). But even assuming *arguendo* that the regulation is valid in all applications, that only makes it clearer that deferred action itself is a distinct legal status (conferring privileges such as work-permit eligibility).

they will be. *See* ROA.520 (OLC Memo) (deferred action "confer[s] eligibility [for] work authorization"). That change is reviewable agency action.

Indeed, Defendants' argument that these work permits are part and parcel of prosecutorial discretion is foreclosed. Just weeks ago, this Court recognized that DACA contains an "employment authorization provision," which the Court explicitly distinguished from "prosecutorial discretion." *Crane v. Johnson*, 2015 WL 1566621, at *3 (5th Cir. 2015).

c. Social Security and Medicare. Defendants concede that DAPA makes recipients eligible for "social security retirement benefits, social security disability benefits, [and] health insurance under [Medicare]." Br.48-49. They attempt to minimize these benefits by arguing that "generally" recipients would not receive Social Security or Medicare for at least five years. Br.49. But granting a new legal status, even one whose consequences take time to accrue, is affirmative government action. And the Executive itself has acknowledged that DAPA will meaningfully increase the number of Social Security beneficiaries.[10]

3. *Heckler*'s unreviewability presumption would be rebutted if it applied.

Even if the *Heckler* presumption somehow applied, the preliminary record in this case is more than sufficient to show a likelihood of rebutting the presumption. ROA.4463, 4473. *Heckler* recognized that judicial review of inaction

[10] *See* Letter from Stephen C. Goss, Chief Actuary, Social Security Administration 3-4 (Feb. 2, 2015), www.ssa.gov/OACT/solvency/BObama_20150202.pdf.

would be available if an agency "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Defendants have done just that.

The Executive has announced a non-enforcement policy of "complete abdication" as to "a class of millions of individuals." ROA.4474. The district court even found that the Executive generally would not enforce the law even against aliens whose applications are denied. ROA.4474. Accordingly, almost all unauthorized aliens could benefit from the policy of non-enforcement.

Moreover, enforcement discretion does not allow the Executive to "'effectively rewrite the laws to match its policy preferences.'" ROA.4474 (quoting OLC Memo, ROA.94); *see Heckler*, 470 U.S. at 833 (an agency may not "disregard legislative direction"). DAPA rewrites immigration statutes by unlawfully conferring lawful presence, work authorization, and other benefits on millions of recipients. *See supra* pp.2-9; *infra* pp.47-50.

The record also confirms that DAPA will not allow for case-by-case discretion, which OLC has declared to be "critical" to the substantive legality of deferred-action programs. ROA.510 (n.8); *see* ROA.499, 515. Defendants have demonstrated no clear error in the district court's findings that DAPA as implemented would entail no individual discretion, ROA.4474, 4483-85, but rather would track the programmatic implementation of DACA.[11] ROA.4452,

[11] DACA applications are denied at an extremely low rate, ROA.4193, 4484, which cannot be explained by applicant self-selection. After all, as the district court found, even

4474, 4484; *see* ROA.86, ROA.1841 (denial template lacking "discretionary" checkbox), ROA.2100-01 (USCIS-employee-union president). Defendants have yet to identify a single DACA application rejected for a genuinely discretionary reason. ROA.4386.[12] They have even created a hotline that DACA-eligible individuals can call to "make sure they can terminate removal proceedings" if they are apprehended. ROA.4386 (n.9). And as the district court noted, the President himself reassured potential DAPA recipients that "[i]f you meet the criteria, you can come out of the shadows" and "you're not going to be deported." ROA.4482.

The record here distinguishes this case from *Crane,* where this Court had no evidence of how DACA was implemented in practice. *Crane* credited DACA's and DAPA's facial disclaimers about case-by-case discretion, absent any factual allegations about DACA's implementation. 2015 WL 1566621, at *6-7. The evidence here supports the finding that DAPA will not entail individualized assessments, but rather formulaic application of criteria without real, case-by-case discretion. *See also DOL v. Kast Metals Corp.*, 744 F.2d 1145,

applicants who were denied DACA generally would not be referred for removal, so the incentive not to apply is minimal, whereas the potential gain is great. ROA.4474. And as noted above, the low overall rate of denials is far from the only piece of evidence the district court considered. The record confirms that officials have no real discretion to deny the applications from applicants who meet DACA's eligibility criteria. *E.g.*, ROA.2100.

[12] Defendants pointed only to two notices of denial in which the applicant did violate eligibility criteria as a juvenile and to an instance of application fraud, which is prohibited in every application. ROA.4190-91, 4146, 4484.

1149 (5th Cir. 1984) ("the substance, not the label, is determinative"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (disregarding similar disclaimer when there were contrary indications).

In short, any presumption of unreviewability would be rebutted here. Even if somehow characterized as mere "inaction," DAPA is reviewable.

B. Plaintiffs Have Standing.

The core standing question is whether the plaintiff has a "personal stake" in the outcome of the litigation. *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014); *Texas v. United States*, 497 F.3d 491, 496 (5th Cir. 2007). Plaintiffs here—representing 26 States—meet that standard.[13] Standing is established "if the threatened injury is 'certainly impending,' *or there is 'a "substantial risk" that the harm will occur.'*" *Susan B. Anthony List*, 134 S.Ct. at 2341 (quoting *Clapper v. Amnesty Int'l, USA*, 133 S.Ct. 1138, 1150 n.5 (2013)) (emphasis added); *see Crane*, 2015 WL 1566621, at *7 (Owen, J., concurring) (citing *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160-61 (1981)). "[O]ne party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006), and the magnitude of the injury is irrelevant to standing, *Massachusetts*, 549 U.S. at 525-26.

[13] At this preliminary-injunction stage, the question is simply *likelihood* of success in proving standing. As the district court explained, counsel "operated on a short schedule" given "the emergent nature of this temporary injunction," and Plaintiffs may well present additional evidence confirming their injuries. 2015 WL 1540022, at *2 n.5.

The Plaintiff States have standing on three independent grounds.[14]

1. Driver's-license costs.

The district court found that DAPA would impose substantial costs on the Plaintiff States' driver's-license programs. ROA.4410.[15] Notably, *Crane*—which held that Mississippi lacked standing, on that particular record, to challenge DACA—did not consider standing based on driver's-license costs. 2015 WL 1566621, at *5 n.34.

a. The district court's fact findings are based on record evidence. USCIS estimates that approximately 3.85 million individuals will be eligible for DAPA and that half will apply within 18 months of implementation. ROA.4150. Texas statutes *require* the State to issue driver's licenses to deferred-action recipients. If a non-citizen presents "documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States," Tex. Transp. Code § 521.142(a); *id.* § 521.1425(d), and pays the required fee, the Department of Public Safety "shall issue" a driver's license, *id.* § 521.181. *See* ROA.2105. The driver's license fee of $24, *id.* § 521.421(a), (a-3), does not come close to covering the cost of the license.

[14] *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997), does not help Defendants. *Cf.* Br.19. As the district court demonstrated, this case can be resolved under the APA, without addressing any constitutional claims. Also, once an injury is shown, a plaintiff has standing regardless of whether the injury is caused by a statutory or constitutional violation.

[15] DAPA will also cause some States to incur additional unemployment-insurance costs. ROA.2127 (Wisconsin official); ROA.2050-51 (Indiana official).

The district court found that, in Texas, at least 500,000 aliens are eligible for DAPA. ROA.4397; *see* ROA.2106. If even a small fraction of DAPA recipients apply for driver's licenses, the evidence establishes that Texas will incur millions of dollars in costs. *See* ROA.2106-07 (Texas official). Other States will incur similar costs. *See, e.g.*, ROA.2040, 2047 (Wisconsin official); ROA.2247 (Indiana official).

b. Defendants' self-inflicted-injury argument (Br.25-29) rests on a radically overbroad conception of that doctrine. Defendants believe that any element of choice from a plaintiff is sufficient to defeat standing. Br.25-26. This Court has already rejected that argument. *Texas*, 497 F.3d at 498 (refusing to find that "Texas brought the injury on itself" when forced to choose between waiving sovereign immunity and submitting to an unlawful regulatory program). If the possibility of avoiding harm through a change of policy or behavior were sufficient to defeat standing, any number of familiar standing cases would be wrongly decided. *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 & n.4 (1986) (conservation groups established standing because "the whale watching and studying of their members [would] be adversely affected," even though members could have chosen to watch and study other species).

The self-inflicted-injury doctrine is much narrower. It applies only where a plaintiff "manufacture[s]" standing. *Clapper*, 133 S.Ct. at 1143. For example, Plaintiffs' injuries would be self-inflicted if they had amended their driver's-

license laws in reaction to DAPA simply to incur costs and manufacture standing. *Cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011). But Plaintiffs have done nothing of the sort; their laws predate DAPA (and DACA).

In other words, the self-inflicted-injury doctrine applies only if "the injury is so completely due to the plaintiff's own fault as to break the causal chain." 13A Fed. Prac. & Proc. Juris. § 3531.5 (citing *Clapper*, 133 S.Ct. 1138); *St. Pierre v. Dyer,* 208 F.3d 394, 402 (2d Cir. 2000). The question is simply whether the defendant *caused* the plaintiff's injury. If the challenged action was a "contributing factor" to the plaintiff's injury, then there is no "self-inflicted" injury. *NRDC v. FDA*, 710 F.3d 71, 85 (2d Cir. 2013).

Wyoming v. Oklahoma, 502 U.S. 437 (1992), confirms that the self-inflicted-injury doctrine does not apply here. There, Wyoming had standing to challenge action decreasing coal sales and resulting in "direct injury in the form of a loss of specific tax revenues"—even though Wyoming could have raised the tax rate or taxed something else. *Id.* at 447-48. The Court did not deny Wyoming standing because it selected the class of taxed items or the tax rate. Likewise, Plaintiffs do not lose standing because they have legislated who is eligible for driver's licenses and the fees.

Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (per curiam), predates *Wyoming* and is not to the contrary. *Cf.* Br.27. Each plaintiff State's injury in *Pennsylvania* resulted from its own policy of giving its taxpayers credit for commuter taxes paid in neighboring States; the Court held the plaintiff

States lacked standing to challenge the constitutionality of other States' commuter taxes. *Pennsylvania* stands at most for the proposition that taxation by one State is not inconsistent with taxation by another. 7 Fed. Prac. & Proc. Juris. § 4051. Thus, the special master in *Wyoming* found *Pennsylvania* distinguishable. Special Master's Report, 1990 WL 10561260, at *14 (June 29, 1990) (noting that electing classifications for statutory coverage or setting the rate of taxes "is not analogous to the reciprocity provisions [in *Pennsylvania*] that the Court has held to constitute 'self inflicted injury'"); *see Wyoming*, 502 U.S. at 442, 454 (accepting special master's recommendation to find standing). Furthermore, the standing analysis in *Pennsylvania* turned on the constitutional provisions at issue (the Privileges and Immunities and Equal Protection Clauses), which "protect people, not States," 426 U.S. at 665.

Even under Defendants' unprecedented view of the self-inflicted-injury doctrine, standing is not defeated by either of the supposed "choices" open to the States: deny driver's licenses to deferred-action recipients or increase the driver's-license fees.

First, it is quite dubious that States can avoid injury by denying driver's licenses to DAPA recipients. In *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), the Executive argued that federal law prohibited Arizona from denying driver's licenses to all deferred-action recipients. ROA.1309-18. The Ninth Circuit agreed, holding that equal protection—and likely preemption—compelled Arizona to grant driver's licenses to all deferred-action beneficiaries. ROA.4599-4600 (discussing *Arizona Dream Act*).

Four Plaintiffs here (Arizona, Idaho, Montana, and Nevada) are in the Ninth Circuit and bound by that decision; Plaintiff Arizona is bound by a permanent injunction. 2015 WL 300376 (D. Ariz. 2015).

Defendants cannot backpedal from their *Arizona Dream Act* position by positing a novel preemption test that federal law "may" permit States to deny DAPA recipients driver's licenses if a State's classifications are "borrowed from federal law and further a substantial state purpose." Br.29. If Arizona did not have a "substantial" purpose (according to Defendants), presumably other States do not either. At the stay argument, Defendants claimed that "costs" might be a substantial purpose for denying licenses to deferred-action recipients. Arg. Recording, *supra*, at 2:10:13-2:10:59. But that rationale would have justified Arizona's program. And it is unclear how Defendants could believe those costs are a "substantial" state concern, when Defendants believe (Br.25-26) those costs are not even a concrete injury conferring standing.

The district court was correct in finding it "apparent that the federal government will compel compliance by all states regarding the issuance of driver's licenses to recipients of deferred action." ROA.4599; *see Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 189-90 (D.C. Cir. 2014) (State's injury not self-inflicted when Executive "stopped short, both in its brief and at oral argument, of stating that Oklahoma would be entitled" to enforce its law without federal interference). Similarly, the Executive successfully argued in this Court that federal law preempted a housing ordinance that made a classification based on lawful presence. *See Villas at Parkside Partners v. City of Farmers*

Branch, 726 F.3d 524 (5th Cir. 2013) (en banc). There, the Executive's brief argued that laws making immigration-status classifications are preempted if such laws prevent "obtaining other necessities of day-to-day existence." 2012 WL 4208119, at *2 (Sept. 6, 2012).

Even if the Executive retreated from this preemption theory, other groups—including DAPA recipients—would still assert it. *See* Appellants' Resp. 2, *Texas v. United States*, No. 15-40333 (5th Cir. Apr. 2, 2015) (group of potential DAPA recipients arguing for intervention in this case because they "fervently disagree" that States can refuse to grant them driver's licenses); *Arizona Dream Act*, 757 F.3d at 1058 (suit brought by DACA recipients and an organization).

And even if Plaintiffs were able to exclude deferred-action recipients from their driver's-license programs, this would only be an "illusion" of choice. ROA.4402. Texas would have a choice between two injuries: either accepting the costs of DAPA, or abandoning its policy choice of granting driver's licenses to, for example, human-trafficking victims who receive deferred action. States have a "sovereign interest" in "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). States have "standing" to challenge the Executive's interference with this "sovereign power." *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1999); *see Ill. Dep't of Transp. v. Hinson*, 122 F.3d 370, 371-72 (7th Cir. 1997).

Second, Defendants' argument that States have a standing-negating "choice" to charge more for driver's licenses (Br.27) proves too much. States theoretically could pass on *any* financial injury through taxes or fees, yet States routinely have standing based on financial losses. *E.g.*, *Wyoming*, 502 U.S. at 447-48 (Wyoming's "loss of specific tax revenues"); *Watt*, 454 U.S. at 160-61 (California's "direct financial stake"); *Maryland v. Louisiana*, 451 U.S. 725, 736-37 (1981) (States injured as "major purchasers of natural gas whose cost has increased").

Defendants' argument is particularly out of place given that part of each license's cost is imposed by the federal REAL ID Act. ROA.4405-06; *see* 6 C.F.R. § 37.13(b)(1). While Defendants assert that the REAL ID Act is not mandatory (Br.27 n.2), "the states have no choice but to pay these fees," because if they do not, "their citizens will lose their rights to access federal facilities and to fly on commercial airlines." ROA.4406.

In any event, the "choice" whether to charge more for driver's licenses is illusory for standing purposes. The district court found (ROA.4397) that, if a fraction of unauthorized aliens in Texas obtain DAPA and apply for driver's licenses, it would cost Texas over $100 to process each license—requiring a significant increase in the $24 fee to make up the loss. ROA.2106-07. Accordingly, Texas could avoid this cost only by abandoning its policy of making driver's licenses affordable. This too would be an injury. *See* ROA.1223-24 (citing *Texas*, 497 F.3d at 496-98).

In sum, an injury is not self-inflicted unless the plaintiff has made an "unreasonable decision . . . to bring about a harm that he knew to be avoidable." *St. Pierre*, 208 F.3d at 403. The Plaintiff States have done no such thing here.

2. Healthcare, education, and law-enforcement costs.

Standing based on DAPA-imposed healthcare, education, and law-enforcement costs is supported by the district court's extensive fact findings.

a. The district court found, based on record evidence, that Texas spends over $9,000 annually to educate each unauthorized alien in school—as required by *Plyler v. Doe*, 457 U.S. 202 (1982)—and that Texas absorbed total education costs of almost $60 million in a single year relating to illegal immigration. ROA.4420; *see* ROA.1983-87 (Texas official). Texas also submitted evidence that it spends hundreds of millions on healthcare for unauthorized aliens. ROA.1248-92 (Texas official). The district court found that, in 2008 alone, Texas incurred over $716 million in uncompensated medical services for unauthorized aliens. ROA.4421. Defendants made "no serious attempt" to counter these costs in district court, ROA.4423, but rather "concede[d] that many costs associated with illegal immigration must be borne by the states, particularly in the areas of education, law enforcement, and medical care." ROA.4426 n.39; *see* ROA.1327-28. This is far from a "generalized grievance" (Br.21) that some other person is getting a benefit while the plaintiff is not.

The district court then credited evidence that DAPA—as opposed to illegal immigration generally—will *cause* such education, healthcare, and law-enforcement costs for Plaintiffs. ROA.4428 ("The States rightfully point out that DAPA will increase their damages with respect to the category of services discussed above because it will increase the number of individuals that demand them.").[16] Quite apart from any future increase in immigration,[17] there are two categories of unauthorized aliens who will impose these costs *only* as a result of DAPA. First, there are aliens who would have emigrated but for DAPA's benefits. ROA.4429. The Executive has now admitted that the challenged Directive would reduce emigration by an estimated total of 382,000 people by the year 2050.[18] Second, there are aliens who would have been removed but for DAPA. ROA.4429. Record evidence supports the finding that DAPA will cause States to bear costs for these categories of aliens who otherwise would not impose them. *E.g.*, ROA.1998, 2000-05 (expert demographer).

---

[16] Defendants' reliance on *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997), is misplaced. The Court there assumed standing. *Id.* at 664 n.2. It then rejected plaintiffs' Naturalization Clause, Tenth Amendment, Guaranty Clause, and statutory claims seeking *payment* from the federal government reimbursing plaintiffs for costs associated with illegal immigration in general. *Id.* at 664-67. Plaintiffs here are not seeking monetary reimbursement. Moreover, on the statutory claim, *Texas* found the claimed reimbursement was based only on costs caused by the decision not to initiate removal proceedings. *Id.* at 667. Here, in contrast, Plaintiffs complain of injuries directly caused by the Executive's affirmative granting of lawful presence and work-authorization eligibility.

[17] *See* ROA.1998 (expert demographer's affirmation that DAPA will "discernibly and significantly" increase undocumented immigration); ROA.4430 & n.43 (district court noting Defendants' failure to deny that some of their actions had the effect of encouraging illegal immigration).

[18] *See* Letter from Stephen C. Goss, *supra* note 10, at 4.

In *Crane*, by contrast, Mississippi submitted no evidence that any DACA-eligible aliens resided in the State or that it would incur any costs if such aliens arrived. *Crane*, 2015 WL 1566621, at *5; *cf.* ROA.4397 (finding that 500,000 of Texas's 1.6 million unauthorized aliens would be DAPA-eligible); ROA.4420-21 (detailing cost to Texas of each additional unauthorized alien). While Mississippi pointed only to a single study stating the cost of illegal immigration in general, Plaintiffs introduced numerous declarations and exhibits, *see* ROA.1247-2307, 4222-73, showing that DAPA would increase the number of aliens imposing costs, and the district court credited that evidence. ROA.4428.

b. The causal link between DAPA and the costs to Plaintiff States from aliens who would have emigrated or been removed but for DAPA is far less attenuated than standing theories the Supreme Court has endorsed in cases like *Watt*, 454 U.S. at 160-62, *Japan Whaling*, 478 U.S. at 230-31, and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72-81 (1978). And, as the district court found, the causal chain is substantially "more direct" than the link between EPA's refusal to regulate certain emissions from new cars sold in the U.S. and the alleged loss of Massachusetts coastline, which was sufficient for standing in *Massachusetts*, 549 U.S. at 523-25. ROA.4423.

c. The district court made every fact finding necessary to support standing based on Plaintiffs' healthcare, education, and law-enforcement costs. It denied standing on this basis only because it accepted Defendants' argument

that DAPA may offer offsetting economic benefits to the States (due to potential productivity gains or taxes paid by DAPA recipients). This was error.

Multiple courts have rejected any "offset" inquiry for standing, recognizing that a concrete injury is sufficient even if a plaintiff obtains benefits from the challenged action. As the Third Circuit put it, standing is "not an accounting exercise" that asks whether a concrete injury is offset by "some benefit" from the "injurious action." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013); *accord, e.g.*, *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 657 (9th Cir. 2011) (plaintiff "has standing to challenge the . . . regulation even though . . . it may also have enjoyed some offsetting benefits from the operation of the current regulation"); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008) ("the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing"); 13A Fed. Prac. & Proc. Juris. § 3531.4 ("Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant.").

Henderson v. Stadler, 287 F.3d 374, 379 (5th Cir. 2002), dealt only with the unique doctrine of taxpayer standing. *Henderson* held that state taxpayers, who "ordinarily lack a sufficient personal stake to challenge laws of general applicability," made no showing of any increased state expenditure beyond that recovered through the administrative fee charged to the purchaser of a specialty license plate. *Id. Henderson* does not control here. If Defendants were correct, standing in *Massachusetts* could have been defeated by potential benefits to

Massachusetts such as a longer growing season or increased tourism during warm weather resulting from the EPA's refusal to regulate greenhouse gases.

Even if a "standing offset" analysis were appropriate, the district court correctly noted that DAPA's potential economic benefits are speculative. ROA.4429. The only source supporting the existence of these supposed benefits was a projection by the Center for American Progress, an ideological think tank. *See* ROA.2473 (n.22). Accordingly, the district court determined that it had "no empirical way to evaluate the accuracy of [Defendants'] economic projections." ROA.4429. Without such an empirical basis, Defendants' argument is reduced to mere "[s]peculation," which "is insufficient to defeat standing." *Ctr. for Auto Safety, Inc. v. NHTSA*, 342 F. Supp. 2d 1, 10 (D.D.C. 2004).

3. *Parens patriae* standing.

States have *parens patriae* standing to vindicate their "quasi-sovereign" interest in protecting their citizens' "economic well-being." *Snapp*, 458 U.S. at 601, 605. States can sue the federal government as *parens patriae* to *enforce* federal law, as Plaintiffs do here; in contrast, a State cannot sue the federal government to "protect her citizens *from* the operation of federal statutes." *Massachusetts*, 549 U.S. at 520 n.17 (emphasis added).

During the stay argument, Defendants admitted that "competitor standing" would exist to challenge the Executive's legalization of work by unauthorized aliens, who would compete for jobs with lawful-resident plaintiffs.

Arg. Recording, *supra*, at 0:06:40-0:07:10, 0:07:55-0:08:19. As *parens patriae*, the States have the same standing.

In addition, Plaintiffs seek to protect their citizens from economic discrimination in favor of DAPA recipients authorized to work. ROA.2285. The Affordable Care Act imposes this preference. Its employer mandate and corresponding penalties do not apply when employers hire deferred-action beneficiaries. 8 U.S.C. § 1611(a); 26 U.S.C. § 4980H(b). As expert evidence demonstrates, that makes it cheaper for employers to hire DAPA recipients than citizens. ROA.2285. The district court rejected this *parens patriae* theory only because the Executive has yet to promulgate *regulations* excluding DAPA recipients from ACA subsidies. ROA.4416-17. But DAPA recipients are already barred *by statute* from receiving ACA benefits. 8 U.S.C. § 1611(a); *see also* 45 C.F.R. § 152.2(8) (DACA recipients ineligible for ACA benefits).

4. Defendants' prudential-standing arguments fail.

Defendants wrongly suggest that this case is too "delicate" (Br.21) for judicial resolution. But "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). The Judiciary routinely decides cases that involve issues of public concern, such as the President's power to seize steel mills in wartime (*Youngstown*, 343 U.S. 579), the constitutionality of the Affordable Care Act (*NFIB v. Sebelius*, 132 S.Ct. 2566 (2012)), and the need for action on worldwide carbon emissions (*Massachusetts*, 549 U.S. 497).

Defendants' argument that standing is somehow less appropriate when Plaintiffs are States (Br. 20-22) is untenable. Precisely the opposite is true. The 26 States represented here are facing a more certain risk of harm than the state plaintiffs who had standing in *Massachusetts*, 549 U.S. at 519. Plaintiffs also allege that the federal government has "abdicated its responsibility." *Id.* at 505. In addition, just as in *Massachusetts*, Plaintiffs seek to vindicate a procedural right—namely, the right to be heard under the APA's notice-and-comment procedures—and the standing inquiry for such a claim is relaxed. *Id.* at 518. Plaintiff States also possess the same "quasi-sovereign interests" in the enforcement of federal law. *Id.* at 520.

Under these circumstances, the States are due the same "special solicitude" that Massachusetts was afforded in the Supreme Court's standing analysis. *Id.* That special solicitude, together with the district court's numerous fact findings regarding injury, satisfy even the "most demanding standards." *Id.* at 521.

C. Plaintiffs' Notice-and-Comment Claim Is Meritorious.

1. DAPA is reviewable under the APA.

As explained above, APA review is not barred by § 701(a)(2)'s committed-to-agency-discretion exception. *See supra* pp.15-25. Defendants' additional arguments also pose no barriers to APA review.

Plaintiffs are within the APA's "zone of interests." *Cf.* Br.33. This test is not "especially demanding," and it must be applied in a manner consistent

with "Congress's evident intent . . . to make agency action presumptively reviewable." *Patchak*, 132 S.Ct. at 2210 (quotation marks omitted); *see Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S.Ct. 1377, 1389 (2014). Plaintiffs meet this test in at least three ways. First, the Supreme Court has recognized "the importance of immigration policy to the States." *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012); *see* ROA.4454-55; *cf. Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d 897, 901 (D.C. Cir. 1996) (analyzing zone of interests for "citizen qua citizen"). Second, States have an interest in protecting their citizens by reserving jobs for those lawfully in the country—a key goal of immigration law. *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194. Third, Plaintiffs are squarely within the zone of interests of the APA's notice-and-comment provision, which "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

Defendants next argue that APA review is "implicitly preclude[d]." Br.34. But "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," and there is "a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 2015 WL 1913911, at *5 (U.S. Apr. 29, 2015) (quotation marks omitted). Defendants identify no "clear and convincing evidence of legislative intention to preclude review." *Japan Whaling*, 478 U.S. at 230 n.4; *cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) (statute expressly allowed handlers and producers—

but not consumers—to participate in agency process). Defendants rely primarily on 8 U.S.C. § 1252(g), which deprives courts of jurisdiction to hear a claim "by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Br.34. But Plaintiffs' lawsuit (1) is not brought "by or on behalf of any alien" and (2) does not concern any of the listed actions. Moreover, the statute's "theme" of protecting the Executive's discretion is articulated through numerous specific provisions. *AADC*, 525 U.S. at 486-87 (listing sections). The existence of these narrow, reticulated provisions forecloses—rather than suggests—the idea that the statute incorporates some broader jurisdiction-stripping principle that would render the specific provisions redundant.

2. DAPA is unlawful for lack of notice and comment.

To prevail on a procedural APA claim, Plaintiffs do not have to show that the Executive lacked delegated authority to confer lawful presence and other benefits on millions of unauthorized aliens (although it does lack this authority). Plaintiffs need only show that, as the district court held, DAPA is a *substantive rule*, and thus required notice-and-comment procedure (which undisputedly did not occur). *See* 5 U.S.C. § 553(b)(3)(A).[19]

[19] Defendants do not dispute that DAPA is a "rule," defined by the APA to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

Defendants argue that DAPA is a "general statement of policy" exempt from APA notice-and-comment requirements.[20] Br.36-42. But "notice and comment exemptions must be narrowly construed." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *see, e.g.*, *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987). And the Executive's own label is not controlling. *See, e.g.*, *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) (finding a substantive rule where the agency called its action a "policy guideline").

DAPA is not a general statement of policy, for multiple reasons.[21]

a. Most importantly, DAPA would be one of the largest changes in immigration policy in our Nation's history. It is therefore "easy" to find that DAPA is a substantive rule because it "changed the law." *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011). And it did so in a way that produces "significant effects on private interests," which is sufficient to find a substantive rule.

---

[20] The Executive references (Br.47) another exemption concerning "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). Lawful presence is an immigration status, not a grant of money, goods, services, or any kind of "public benefit." Neither are work authorizations or travel rights. This exemption, furthermore, must be limited to instances where the government has "a 'proprietary' or other unique interest." *Hous. Auth. of City of Omaha v. U.S. Hous. Auth.*, 468 F.2d 1, 9 (8th Cir. 1972) (explaining that an expansive and acontextual reading of this exemption could "include virtually every activity of government" and "carve the heart out of the notice provisions").

[21] The Executive relies on some cases (Br.38) interpreting a separate notice-and-comment exception, concerning rules of internal agency procedure. *See Kast Metals,* 744 F.2d at 1155; *Am. Hosp.*, 834 F.2d at 1051. But the Executive has not invoked that exception, as it does not apply to actions (such as DAPA) that have a "substantial impact" on regulated entities. *Kast Metals*, 744 F.2d at 1153.

Gulf Restoration, 2015 WL 1566608, at *5; Br.37. No "statute, prior regulations, or case law" authorize the Executive to grant lawful presence to millions of unauthorized aliens. *NRDC*, 643 F.3d at 321. The Executive has made clear that it cannot proceed with granting lawful presence without the DAPA memo. *E.g.*, ROA.5277 ("big apparatus" halted after injunction of DAPA). That confirms DAPA is a substantive rule, as DAPA is not providing any guidance on "some extant statute or rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014); *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("in the absence of the rule there would not be an adequate legislative basis for . . . agency action to confer benefits").

Because DAPA involves eligibility criteria, *Morton v. Ruiz* is instructive. *Ruiz* held notice-and-comment procedures were needed to change "eligibility requirements" for benefits to Native Americans. 415 U.S. 199, 235-36 (1974). Likewise here. DAPA's criteria are eligibility requirements for lawful-presence status and work authorization.

Lincoln v. Vigil is inapposite. 508 U.S. 182 (1993). *Lincoln* held that an agency's unreviewable decision to "discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation" was not a substantive rule.[22] *Id.* at 197. *Lincoln* noted that the *Ruiz* agency's own regulations required publication in the Federal Register. *Id.* at 199. But *Lincoln* expressly

[22] Defendants' argument (Br.7) concerning the 2015 DHS appropriation is another version of their mistaken argument that DAPA is an exercise of enforcement discretion.

distinguished *Ruiz* on the basis that the agency in *Lincoln* did not "modify eligibility standards." *Id.* at 198. *Lincoln* reinforces—rather than undermines—the Supreme Court's doctrine that a "substantive rule" is one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting *Ruiz*, 415 U.S. at 232).

b. An agency action must also be *tentative* to count as a "general statement of policy." *See Prof'ls & Patients*, 56 F.3d at 596 ("A policy statement announces the agency's tentative intentions for the future."). There is nothing tentative about DAPA. To the contrary, it "order[s] immediate implementation" of a variety of measures, ROA.4450, and it is filled with mandatory language, ROA.4486 n.103 (collecting examples). Secretary Johnson "direct[s] USCIS to expand DACA," "direct[s] USCIS to establish [DAPA]," and "instruct[s]" ICE and CBP "to immediately begin identifying persons in their custody," among myriad similar examples. ROA.85-87. In short, "the entire [Directive], from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power*, 208 F.3d at 1023.

Defendants' own actions reveal that the Directive is not tentative. First, Defendants immediately began implementing it, granting Expanded-DACA relief to over 100,000 aliens in under three months. ROA.5282. An order changing a policy "immediately upon its effective date," instead of "set[ting]

This appropriation deals with "necessary expenses for enforcement of immigration . . . laws, detention and removals" and money to "identify aliens convicted of a crime who may be deportable, and to remove them from the United States once they are judged deportable." Pub. L. No. 114-4, 129 Stat. 39, 42-43.

a goal that future proceedings may achieve," is not a general policy statement. *Phillips*, 22 F.3d at 620. Second, Defendants' wish to implement DAPA immediately shows that it is not a tentative statement of future intentions. In fact, DAPA is as tentative as a military order—which is precisely how the President has described it.[23]

c. The Executive, nevertheless, argues that DAPA is a general statement of policy because the Directive purports to give agency officials discretion in conferring lawful presence. It is irrelevant how much discretion DAPA gives officials because it is a change in the law that significantly affects private interests.

In any event, DAPA has a "restrictive effect on agency decisionmakers." *Prof'ls & Patients*, 56 F.3d at 601; ROA.4483; *see Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) ("Guidance Document" was a substantive rule where any possible discretion would not be exercised in "standard cases"). The district court correctly found that DAPA allows *no* discretion with respect to the eligibility criteria. *See supra* pp.23-25. When a rule purports to allow discretion but is frequently treated as binding in practice, courts uniformly look past the label and find the rule is substantive. *E.g.*, *Phillips*, 22 F.3d at 619-20 (substantive rule even where agency characterized its "Procedure Paper" standard as a "yardstick"); *U.S. Telephone Ass'n v. FCC*, 28 F.3d 1232, 1234-

[23] The White House, Office of the Press Secretary, Remarks by the President in Immigration Town Hall—Miami, FL (Feb. 25, 2015) ("In the U.S. [M]ilitary, when you get an order, you're expected to follow it."); *see id.* (promising consequences for agents who "aren't paying attention to our new directives").

35 (D.C. Cir. 1994) (substantive rule where agency only possibly departed from criteria in 8 out of 300 cases); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988) (where model was used to resolve 96 out of 100 applications, it was a substantive rule); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013) (agency's "pro forma reference to . . . discretion" was "Orwellian newspeak").

DAPA also eliminates discretion in any number of other areas, such as the period of deferred action (must be three years), ROA.85; biometrics and background checks for applicants (always required), ROA.86; and application fees (set at $465, with no waivers available), ROA.87. *See McLouth*, 838 F.2d at 1321 (substantive rule where document "conclusively dispos[ed] of certain issues"). Furthermore, DAPA puts a "stamp of approval" on the behavior of its recipients, which is also sufficient to make it a substantive rule. *Chamber of Commerce v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999).

d. Defendants also concoct substantive-rule tests that have no basis in law.

Defendants assert that instructions to agency officers cannot be substantive rules. Br.39. That is refuted by the cases Defendants cite. *See Mada-Luna*, 813 F.2d at 1013-14 (notice-and-comment procedures required if action "limits [the] administrative discretion" of an "agency, *or its implementing official*") (emphasis added); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (regulation at issue exempt only because it was tentative).

Defendants suggest that constraints on agency decisionmakers require notice and comment only if they have a "coercive impact." Br.40. But the D.C. Circuit expressly rejected the argument that substantive rules must be "backed by a threat of legal sanction." *Chamber of Commerce*, 174 F.3d at 212. Indeed, *Ruiz* would have been wrongly decided under that view.

Finally, Defendants resort to policy arguments about notice-and-comment procedure. Br.41-42. But Congress has already weighed "the interests of agency efficiency and public input," *Kast Metals*, 744 F.2d at 1153, and provided that notice and comment will generally be available, unless one of the exemptions applies.

In short, DAPA "substantially changes both the status and the employability of millions" and is thus a substantive rule. ROA.4487. Even assuming *arguendo* that the Executive does have delegated authority to promulgate DAPA, notice and comment were required.

D. DAPA Is Contrary to Law and Violates the Constitution.

Plaintiffs' two substantive claims provide alternative, independent bases to affirm the district court's determination of likely success on the merits. *See J.E. Riley Inv. Co. v. Comm'r of Internal Revenue*, 311 U.S. 55, 59 (1940).

1. Plaintiffs are likely to prevail on their substantive APA claim because the Executive's unilateral granting of lawful presence and work authorizations under DAPA is "not in accordance with law," 5 U.S.C. § 706(2)(A). *See Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2446 (2014) (holding that the

Executive lacks "a power to revise clear statutory terms that turn out not to work in practice"). As explained above, Congress created intricate statutory limitations cabining when the Executive can grant lawful presence and work authorization and invoke family reunification to change immigration status. *See supra* pp.2-4. Those statutes provide no footing for DAPA. Neither delegation at 8 U.S.C. § 1103(a)(3) or 6 U.S.C. § 202(5) modifies any of those statutory limitations. *Cf.* Br.5.

Nor has Congress given the Executive power to grant work authorizations to any alien of its choosing. To make this sweeping assertion, the Executive relies on 8 U.S.C. § 1324a(h)(3), which defines the term "unauthorized alien" in that section to exclude aliens "authorized [to work] by the Attorney General." But § 1324a regulates *employers*, banning and penalizing certain hiring decisions. Subsection (h)(3) is a definitional section, providing that employers can safely hire aliens issued work permits by the relevant Executive Branch official. It does not address the scope of *the Executive*'s authority at all. The definitional subsection of an employer regulation would be an unusual place to find a staggeringly broad grant of power for the Executive to issue work permits to any alien it chooses, with no bounds. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). This reading would also make surplusage of the numerous INA provisions that empower the Executive to authorize work for certain targeted classes of aliens. *See supra* p.4; *Bd. of Trustees of Leland Stanford Jr.*

Univ. v. Roche Molecular Sys., Inc., 131 S.Ct. 2188, 2196 (2011) (courts are reluctant to treat statutory terms as surplusage).[24]

The Executive's limited past use of deferred action for certain classes of aliens does not establish a precedent supporting DAPA. OLC has identified only four instances of such deferred-action programs before DACA (for foreign students affected by Hurricane Katrina, widows of U.S. citizens, T-and-U-visa applicants, and VAWA self-petitioners). ROA.507-09. Each of those was a temporary bridge of lawful status where an alien either had a preexisting lawful status or an otherwise lawful status was imminent. In contrast, DACA and DAPA grant class-wide deferred action, lawful presence, and work authorizations to individuals who lack a preexisting lawful status and are not otherwise entitled to an imminent lawful status.

The scale of past uses of deferred action also pales in comparison to DACA and DAPA. As the district court noted, estimates suggest 500 to 1,000 people received deferred action each year between 2005 and 2010. DACA, however, increased that figure to above 200,000 people each year. ROA.4436 (n.46). The 1990 "Family Fairness" program cited in the DAPA Directive did not even grant deferred action; it granted voluntary departure, a remedy provided for by statute. ROA.504, 506 (OLC Memo). And that program only granted relief to about 1% of the Nation's unauthorized alien population (about

[24] *Perales v. Casillas* does not help Defendants because that holding pertained only to the Executive's *refusal* to grant work permits. 903 F.2d 1043, 1050 (5th Cir. 1990) ("no regulation [was] violated by the denial of . . . work authorization").

47,000 people), ROA.2060—rather than 1.5 million people, as sometimes claimed, ROA.506 (OLC Memo).

2. Plaintiffs are also likely to prevail on their constitutional separation-of-powers claim. The Executive's attempt to confer lawful presence by fiat is in *Youngstown*'s third category: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." 343 U.S. at 637 (Jackson, J., concurring). Just like the Executive's seizure of steel mills in *Youngstown*, DAPA violates separation-of-powers limits and can be invalidated on that ground as well. *See* ROA.153-64, 1179-1210.

II. Other Factors Significantly Favor the Preliminary Injunction.

A. DAPA Would Irreparably Harm Plaintiffs and Foreclose Effective Remedies.

The quintessential function of a preliminary injunction is to "to preserve the court's ability to render a meaningful decision on the merits," which "often" is furthered "by preservation of the status quo." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). That is precisely what the district court did here. *See* ROA.4488-92. Defendants do not dispute that the preliminary injunction preserves the status quo—"the last peaceable uncontested status" between the parties. 11A Fed. Prac. & Proc. Civil § 2948.

As the district court noted, "legalizing the presence of millions of people is a 'virtually irreversible' action once taken." ROA.4490. For example, DAPA would trigger a number of state benefits including driver's licenses,

professional licenses, and unemployment benefits. ROA.4491. Texas alone would have to spend "several million dollars" issuing driver's licenses. ROA.4397. Other Plaintiffs would suffer similar costs. ROA.4397 (n.14), 4408, 4420-21. Upon a judgment for Plaintiffs, there would be no feasible way to identify, quantify, and claw back benefits issued to millions of people, much less recover the millions of dollars spent issuing them. ROA.4490.

DAPA's practical irreversibility is not seriously disputed. The Director of USCIS has even touted this as a *benefit*: "If this program does what we want it to do . . . [y]ou cannot so easily by fiat now remove those people from the economy."[25] As the district court found, "This genie would be impossible to put back in the bottle." ROA.4491.

Defendants' only response is that deferred action can be revoked. Br.51. Revocation, however, does not erase injuries that have already occurred, such as money spent on providing healthcare or processing a flood of driver's-license applications.

B. Preserving the Longstanding Status Quo Does Not Irreparably Injure Defendants.

The district court did not clearly err in finding that Defendants will not be harmed by preserving the longstanding status quo pending trial. ROA.4493-96. They will be able to implement DAPA if it is ultimately upheld. And the

[25] Stephen Dinan, *Obama Immigration Chief Says Amnesty Designed to Cement Illegals Place in Society*, Wash. Times, Dec. 9, 2014 (quoting Defendant León Rodríguez).

injunction does not touch executive discretion in marshaling resources or removing any particular alien. ROA.4494, 4498.

Defendants argue that it would be more expedient to identify in advance unauthorized aliens who are a low priority for removal, allowing field officers to process them more quickly in the future. Br.52. Yet Defendants can still create a system to track aliens they classify as non-priorities for removal (a class much bigger than DACA and DAPA beneficiaries). *See* ROA.558-63. As the district court explained, the injunction does not prevent Defendants from giving aliens documents reflecting their assigned priority level. 2015 WL 1540022, at *7. The inability to grant unauthorized benefits as a supposed incentive to facilitate prioritization does not impinge on enforcement discretion—as Defendants admitted in the district court. *Id.* at *6.

Defendants' argument that DAPA (driven by family-reunification concerns) is vital for "national security" and "protect[ing] the Homeland" (Br.52) is manifestly less persuasive than the national-security argument in *Youngstown*, which concerned the grave realities of the Korean War. The national-security argument failed in *Youngstown* when the Supreme Court affirmed the preliminary injunction for plaintiffs, 343 U.S. at 584, 589, and it is vastly less compelling here. Defendants did not perceive an "emergency" need to hand out these benefits until recently—just after the November elections in the middle of the President's second Term, when the Executive explained DAPA as based on Congress's failure to "[p]ass a bill." ROA.234.

Defendants finally claim "administrative" disruption (Br.53) from the preliminary injunction because of their decision to spend money and pursue hiring staff while DAPA's legality was challenged. Courts consistently reject such gamesmanship and disregard harms that are manufactured while a defendant had knowledge of the alleged illegality of its actions. *See, e.g.*, *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 729 (3d Cir. 2004); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 902-03 (7th Cir. 2001). And Defendants were on notice here. Within a day of DAPA's announcement, Texas announced that it would challenge DAPA.[26] Within two weeks, Texas filed this lawsuit along with a motion for a preliminary injunction. ROA.51, 137. Any burdens assumed by Defendants cannot block a preliminary injunction.

C. The Public Interest Favors a Preliminary Injunction.

The public interest overwhelmingly supports the preliminary injunction. Courts act within the "broad public interest[]" when they "maintain" rather than "derogat[e]" the "proper balance" of "the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). Not even "great public interest" can "deny inquiry into the President's power" to act unilaterally. *Youngstown*, 343 U.S. at 596 (Frankfurter, J., concurring).

Defendants' public-interest argument of DAPA's alleged beneficial effects on local economies and law enforcement, Br.53-54,[27] fails to grapple with

[26] Michael Muskal, *Texas, Oklahoma Threaten Suits to Block Obama Immigration Plan*, L.A. Times, Nov. 21, 2014.

[27] The supposed public benefits of DAPA are not "undisputed." Br.54. Plaintiffs expressly disputed them. ROA.1233-34.

the abuse-of-discretion standard of review. The district court heard those arguments but rightly recognized that "the public interest factor that weighs the heaviest is ensuring that actions of the Executive Branch . . . comply with this country's laws and its Constitution," such that it is "far preferable to have the legality of these actions determined before the fates of over four million individuals are decided." ROA.4495-96. Nor does *Nken v. Holder*, 556 U.S. 418 (2009), provide—as Defendants would have it (Br.51)—that the public interest is always aligned with executive actions. Supreme Court precedent is to the contrary. *E.g.*, *Nixon*, 457 U.S. at 754; *Youngstown*, 343 U.S. at 589. *Nken* simply recognized that the public shares the interest in promptly *removing* unauthorized aliens. *Nken*, 556 U.S. at 420.

The district court rightly observed that, under Defendants' position, future Presidents could cite limited resources "to cease enforcing environmental laws, or the Voting Rights Act, or even the various laws that protect civil rights and equal opportunity." ROA.4440-41; *see* ROA.178. Far from seriously grappling with these grave consequences of their position, Defendants have yet even to acknowledge this point.

III. The Injunction Properly Applies Nationwide.

Defendants attack the preliminary injunction's nationwide scope (Br.54-56) without acknowledging that they did not suggest a geographical limit when opposing the preliminary injunction below. They raised that issue only after the preliminary injunction issued, in their motion for a stay pending appeal,

ROA.4529, which is not the order on review. Accordingly, this objection is forfeited.

Regardless, Defendants still have not explained how they would "confine" the preliminary injunction to Texas (Br.56) or allow DAPA's "implementation in" some States but not others (Br.54). Resolving such ambiguity is the reason such proposals must be raised below.

At the stay argument, Defendants could identify no case limiting the geographical reach of a preliminary injunction. Arg. Recording, *supra*, at 0:37:20-0:37:35. If the idea is that the injunction would not bind any Defendants when they act outside the Plaintiff States, that notion would not address the irreparable injury. Defendants are federal officials acting with nationwide power, wherever they may be.

Nor could some form of residency determination work. The challenged program confers lawful presence and work permits that are valid *nationwide*. Defendants suggest that it is "attenuated" to envision that *any* of the millions of eligible aliens would either leave Texas (or a Plaintiff State) to get DAPA and return, or would move from a non-plaintiff State to Texas (or another Plaintiff State). Br.56. But that is a substantial certainty—and clearly a "substantial risk," *Susan B. Anthony List*, 134 S.Ct. at 2341—given the right to free interstate movement, the enormous number of affected aliens, and the size of the Plaintiff States' economies.

As the district court correctly understood, immigration law requires a nationwide policy, and an unlawful immigration directive requires a nationwide

remedy. ROA.5289-90; *see Arizona*, 132 S.Ct. at 2502. Allowing DAPA to take effect "in" fewer than all States would undermine the constitutional imperative of a "uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, as well as Congress's instruction that "the immigration laws of the United States should be enforced vigorously and *uniformly*," Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3384 (emphasis added).

Defendants' citation (Br.55) of 5 U.S.C. § 705 only begs the question of whether allowing DAPA to go into effect anywhere would cause Plaintiffs irreparable injury. It would, as explained above. None of the cases that Defendants cite, Br.54-55, involve States threatened with spending money on transient populations whose size and status depend on a national action, States proceeding *parens patriae* on behalf of their citizens to address competitive injuries from employment of such alien populations, or an APA challenge based on notice-and-comment procedure that can only be implemented nationwide. *See Califano v. Yamasaki*, 442 U.S. 682, 702-06 (1979) (affirming the certification of a nationwide class of plaintiffs to challenge procedures for recouping Social Security payments); *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (holding full refund of payments improper when challenger owed agency money); *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1473 (9th Cir. 1994) (noting partial dissolution of injunction where the plaintiff was not injured by the military's discharge of, or notekeeping about, other service members based on sexual orientation).

A nationwide injunction is proper because this case presents a *facial* challenge, which maintains that DAPA was invalid, in full, the moment it was issued. The D.C. Circuit expressly recognizes that a party brings a facial challenge when alleging that agency action violated APA procedures; it distinguishes cases granting partial remedies on the basis that those "did not involve a facial challenge to the validity of a regulation." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Likewise, courts routinely recognize that procedural failures invalidate executive action "nationwide," for "plaintiffs and non-parties alike." *Id.* at 1408-10; *see Lewis v. Casey*, 518 U.S. 343, 360 & n.7 (1996) ("the scope of injunctive relief is dictated by the extent of the violation established").[28] In that regard, the claims are similar to the claim in *Massachusetts*: the remedy there could not be limited to Massachusetts simply because a non-plaintiff State opposed regulating carbon emissions.

Finally, it is entirely appropriate to base "the scope of preliminary injunctive relief" on both the "likelihood of success and [the] showing of irreparable harm." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 487 (1st Cir.

[28] *E.g.*, *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 19 (D.D.C. 2004) (mem. op.) (rule establishing program was invalid for insufficient commenting and enjoined as to "all persons subject to" the program—not simply as to plaintiffs); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial remedy where "no set of circumstances exists under which [challenged action] would be valid").

2009). Plaintiffs have established that the Executive unlawfully rewrote immigration law to unilaterally impose one of the largest changes in immigration policy in our Nation's history. Nationwide relief is therefore necessary for the Judicial Branch to preserve its ability to render an effective remedy preventing the Executive's unprecedented aggrandizement of power.

Conclusion

The preliminary injunction should be affirmed.

Respectfully submitted.

LUTHER STRANGE
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

PAMELA JO BONDI
Attorney General of Florida

SAMUEL S. OLENS
Attorney General of Georgia

LAWRENCE G. WASDEN
Attorney General of Idaho

TOM C. PERRY
CALLY YOUNGER
Counsel for the Governor of Idaho

JOSEPH C. CHAPELLE
PETER J. RUSTHOVEN
Counsel for the State of Indiana

DEREK SCHMIDT
Attorney General of Kansas

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

PAUL R. LEPAGE
Governor of Maine

BILL SCHUETTE
Attorney General for the People of Michigan

DREW SNYDER
Counsel for the Governor of Mississippi

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

/s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
MATTHEW H. FREDERICK
Deputy Solicitors General

APRIL L. FARRIS
ALEX POTAPOV
Assistant Solicitors General

Office of the Attorney General
209 W. 14th Street
Austin, Texas 78711-2548
(512) 936-1700 tel.
(512) 474-2697 fax

Counsel for Plaintiffs-Appellees

TIMOTHY C. FOX
Attorney General of Montana

DOUG PETERSON
Attorney General of Nebraska

ADAM PAUL LAXALT
Attorney General of Nevada

ROBERT C. STEPHENS
Counsel for the Governor of North Carolina

WAYNE STENEHJEM
Attorney General of North Dakota

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY
Co-counsel for the State of Ohio

E. SCOTT PRUITT
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

HERBERT SLATERY III
Attorney General and Reporter of Tennessee

SEAN D. REYES
Attorney General of Utah

PATRICK MORRISEY
Attorney General of West Virginia

BRAD D. SCHIMEL
Attorney General of Wisconsin

CERTIFICATE OF SERVICE

I certify the service of this document by ECF or email on May 4, 2015 upon the following:

Beth S. Brinkmann
beth.brinkmann@usdoj.gov

Jeffrey A. Clair
jeffrey.clair@usdoj.gov

Kyle R. Freeny
kyle.freeny@usdoj.gov

Kathleen Roberta Hartnett
kathleen.r.hartnett@usdoj.gov

William E. Havemann
william.e.havemann@usdoj.gov

Scott R. McIntosh
scott.mcintosh@usdoj.gov

Benjamin C. Mizer
benjamin.c.mizer@usdoj.gov

Counsel for Defendants-Appellants

/s/ Scott A. Keller
SCOTT A. KELLER

Certificate of Compliance

1. I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

2. I certify that this brief complies with the requirements of the Federal Rule of Appellate Procedure 32(a) because it contains 13,997 words and was prepared in 14-point, proportionally spaced Equity typeface.

/s/ Scott A. Keller
Scott A. Keller