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.

No. 15-40238

PLAINTIFFS' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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Defendants wish to implement a massive new program that dispenses with immigration law and grants work permits and lawful-presence status—which will confer Social Security cards and a bevy of other state and federal benefits—to 40% of the unauthorized aliens in the United States. In over 100 pages of district court briefing, supported by over 1,000 pages of evidence, Plaintiffs representing 26 States explained their entitlement to a preliminary injunction. The district court agreed in a 123-page opinion, preserving the status quo that has existed for decades. And the district court made clear that Defendants remain free to allocate enforcement resources. The injunction does not touch (and this lawsuit does not challenge) a separate Executive action establishing three categories for removal prioritization.

Unilaterally issuing a plethora of benefits to millions of unauthorized aliens would mark one of the largest changes of immigration policy in this Nation's history. Defendants now move to implement this benefits program immediately without meaningful judicial review—not even the resolution of this appeal. Such a drastic step would require an extraordinary showing of emergency and legal merit, and Defendants have failed to show anything close. In particular, they have identified no looming injury that could justify an "emergency" stay. The preliminary injunction simply confines the Executive to what it previously admitted were the limits of its powers, temporarily preventing the implementation of an unprecedented and practically irreversible benefits program in order to allow the Judicial Branch to review its validity.

STATEMENT OF THE CASE

Congressional directives. Congress has not given the Executive *carte blanche* to grant lawful presence to unauthorized aliens. It has directed that each individual who is

not present in the United States legally "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). Unless Congress creates a specific exception, the Executive must remove any unauthorized alien present in violation of federal law. *See* 8 U.S.C. §§ 1182, 1227(a)(1), 1229b (standards for removability, along with limited statutory exceptions, such as cancellation of removal). Additionally, Congress has made it "unlawful" to hire an "unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A).

DACA. Despite the Executive's urgings, Congress has chosen not to pass the "DREAM Act," which would allow unauthorized aliens to apply for lawful status if, among other things, they entered the country at a young age.[1] The President urged its passage, noting that he could not achieve its goals by executive action. PA.1250-52.[2,3]

In 2012, however, the DHS issued a memorandum creating a program called "DACA" to provide two-year "deferred action" to unauthorized aliens who came to the U.S. before the age of 16, entered before June 15, 2007, and were under age 31 on June 15, 2012, among other criteria. DA2.1-3. DHS characterized this as an "exercise of prosecutorial discretion," "on an individual basis." DA2.2. In reality, the Executive mechanically approved applications that met DACA's criteria; between 95%-99.5% of

[1] *See, e.g.*, DREAM Act of 2011, S. 1258, 112th Cong. (2011); DREAM Act of 2011, S. 952, 112th Cong. (2011); DREAM Act of 2011, H.R. 1842, 112th Cong. (2011).

[2] PA.*p* refers to page *p* of Plaintiffs' appendix to this stay opposition, which maintains and extends the numbering of their appendix to their motion for a preliminary injunction. DA*n.p* refers to page *p* of attachment *n* to Defendants' stay motion in this Court. Op. *p* cites page *p* of the Memorandum Opinion and Order granting the preliminary injunction (district court ECF entry 145).

[3] PA.1250-52 (First. Am. Compl.); *e.g.*, *id.* at 1251-52 ("With respect to the notion that I can just *suspend deportations through executive order, that's just not the case*, because there are laws on the books that Congress has passed. . . . There are enough laws on the books by Congress that are *very clear in terms of how we have to enforce our immigration system* that for me to simply through executive order *ignore those congressional mandates* would not conform with my appropriate role as President.").

all applications were granted, and the Executive has not been able to identify a single application that was denied for a discretionary reason. Op. 108, 109 n.101.

The President said DACA was the outer limit of his authority,[4] and cautioned that any expansion of the program would be unlawful.[5] He called on Congress to pass an immigration-reform bill, altering its family-unification policy.[6] Congress did not oblige.

The President expands DACA and creates DAPA. On November 20, 2014, the President announced a program to confer lawful presence and work authorizations on about 4 million unauthorized aliens. In a primetime address, the President set out the terms of the "deal": anyone meeting the program's criteria was "not going to be deported." PA.1263-64. This was done without notice-and-comment procedure.

To implement the President's "deal," DHS Secretary Johnson issued a directive on November 20, 2014. DA3. That is the Directive challenged here. First, it "direct[s] USCIS to expand DACA" by (1) eliminating the age cap, (2) increasing the term of deferred action and employment authorization from two to three years, and (3) adjusting the date-of-entry requirement to January 1, 2010. DA3.3-4. Second, it "direct[s] USCIS to establish a process," now known as "DAPA," to confer deferred action on unauthorized aliens who have children who are citizens or lawful permanent residents,

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[4] PA.1260-62; *e.g.*, *id.* at 1260 ("This is why we need comprehensive immigration reform. . . . [I]f this was an issue that I could do unilaterally I would have done it a long time ago. . . . The way our system works is Congress has to pass legislation."); *id.* at 1261 ("I'm not the emperor of the United States. . . . And what that means is that we have certain obligations to enforce the laws that are in place. . . . [W]e've kind of stretched our administrative flexibility as much as we can."); *see* Steve Contoro, PolitiFact.com, *Barack Obama: Position on Immigration Action Through Executive Orders 'Hasn't Changed,'* Tampa Bay Times, Nov. 20, 2014.

[5] PA.1261 ("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. So, that's not an option.").

[6] Congress has required an intricate process, taking at least ten years, for aliens to lawfully reside here on account of their children's status, generally requiring: (i) waiting until their child turns 21, (ii) leaving the country, (iii) waiting 10 more years, and then (iv) obtaining a family-preference visa from a U.S. consulate abroad. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255.

provided they "are not an enforcement priority" and "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." DA3.4.

The Directive expressly acknowledges that "deferred action"—as the Executive is using the phrase—confers lawful presence: "Deferred action . . . simply means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States."[7] In addition to lawful presence, the Executive's action will confer a host of benefits on deferred-action recipients, such as (1) work authorizations, (2) driver's licenses, (3) Social Security, (4) the Earned Income Tax Credit, (5) Medicare, (6) unemployment insurance, and (7) access to international travel, via "advance parole."[8] USCIS

[7] DA3.2 (emphasis added); *accord* DA6.20 (Bates-stamped as page 521) (USCIS's explanation: "An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect"); PA.71 (DOJ's explanation in *Arizona Dream* brief: "Congress, through the REAL ID Act, has expressed its judgment that 'approved deferred action status' is 'lawful status' that affords a period of 'authorized stay' for purposes of issuing identification."); *see also* 8 C.F.R. § 1.3(a)(4)(vi) ("deferred action" qualifies as lawful presence); 45 C.F.R. § 152.2(4)(vi) (same).

[8] These additional benefits are discussed at:

(1) work authorizations: DA3.4 (Bates-stamped as 139); *see also* 8 C.F.R. § 274a.12(c)(14);

(2) driver's licenses: REAL ID Act, Pub. L. 109-13, 119 Stat. 302, 313 § 202(c)(2)(B)(viii) (2005) (including "deferred action status" as a minimum basis sufficient for issuing a driver's license); *see, e.g.*, Tex. Transp. Code § 521.142 (2013); La. Rev. Stat. Ann. 32:409.1 (2002);

(3) Social Security: 42 U.S.C. § 405(c)(2)(B)(i)(I) (Social Security card eligibility for those lawfully permitted "to engage in employment in the United States"); 8 U.S.C. § 1611(a), (b)(2) (Social Security benefits available to those "lawfully present in the United States as determined by the Attorney General"); 20 C.F.R. §§ 422.104(a), 422.107(a), (e); 8 C.F.R. § 1.3(a)(4)(vi) (for purposes of applying for Social Security benefits, individuals in deferred action status qualify as being "lawfully present"); *see* PA.1422 (Social Security Administration: "After you get your (I-766) Employment Authorization Card, you can apply for a Social Security number.");

(4) Earned Income Tax Credit: 26 U.S.C. § 32(c)(1)(A), (c)(1)(E), (m) (eligibility for earned income tax credit limited to taxpayers with valid Social Security numbers); 20 C.F.R. §§ 422.104(a), 422.107(a), (e); PA.1419 (IRS letter to Sen. Grassley 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"); *see also* PA.1421 (noting estimate of congressional Joint Committee on Taxation that EITC refunds to beneficiaries of the 2012 and 2014 deferred-action programs could total $1.7 billion over 10 years);

(5) Medicare: 8 U.S.C. § 1611(b)(2)-(3) (certain Medicare benefits available to those who are "lawfully present in the United States as determined by the Attorney General"); 42 U.S.C. § 1395c (describing eligibility for Medicare as being concurrent to eligibility standards for Social Security); 42 U.S.C. § 414 (describing eligibility for Social Security without reference to citizenship);

(6) Unemployment insurance: 26 U.S.C. § 3304(a)(14)(A) (unauthorized aliens who are "lawfully present" in the United States for purposes of performing services are eligible for unemployment benefits); *see, e.g.*, Ark. Code Ann. § 11-10-511 (unemployment benefits for lawfully present aliens); Tex.

acknowledges DAPA would cost over $324 million over the next three years.[9]

After the Directive issued, the President candidly acknowledged, "I just took an action to change the law," PA.1247, subsequently explaining that "we've expanded my authorities," PA.1465. The President also made clear that the Directive binds DHS employees: 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]," PA.1461, and, if employees "don't follow the policy, there are going to be consequences to it." PA.1462. The President stated that he would veto any bill seeking to end this program. PA.1460.

Procedural history. Plaintiffs represent a majority of the States in the Union. They allege that the Directive violates the Take Care Clause, U.S. Const. art. II, § 3, cl. 5, and the Administrative Procedure Act, 5 U.S.C. §§ 553, 706. PA.1270-73.[10] The district court issued a 123-page opinion and a preliminary injunction of the Directive (henceforth referred to for convenience as "DAPA"), on the basis that it violated the APA's notice-and-comment requirements. Seven days later, Defendants moved in district court for a stay. And 24 days after the preliminary injunction, they moved in this Court for an "emergency" stay.

Labor Code § 207.043(a)(3) (benefits payable to alien lawfully present for purposes of work);

(7) International travel: DA6.30 (Bates-stamped as page 531) (Answer 57, explaining that, to travel internationally, a deferred-action recipient must file Form I-131 for advance parole, which allows travel outside the United States, even for extended period, generally for humanitarian, educational, or employment purposes); *cf.* 8 U.S.C. § 1641(b)(4) (providing that a deferred-action recipient may become a "qualified alien" if the alien is "paroled into the United States . . . for at least one year"); 8 U.S.C. § 1611(a), (c)(1)(B) (creating a bar to access to "Federal public benefits," which include Medicaid and subsidies under the Affordable Care Act, to "an alien who is not a qualified alien," meaning that advance parole may lead to those benefits).

[9] PA.1443. USCIS estimates the DAPA-eligible population to be 3.85 million. DA6.13. Based on its experience with DACA, USCIS anticipates that approximately 50% of the eligible population will file for DAPA in the 18 months following implementation. DA6.13.

[10] Plaintiffs have not challenged the DHS memorandum entitled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," also issued on Nov. 20, 2014. Op. 69.

ARGUMENT

A stay applicant must show "sufficient reason for granting the extraordinary remedy of stay pending appeal." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968). The factors considered are the likelihood of the applicant's success in the appeal, irreparable injury, harm to other interested parties, and the public interest. *Id.* at 685-86.[11] To succeed in this appeal, Defendants will have to show that the district court abused its discretion in issuing the preliminary injunction.[12]

I. THE EXECUTIVE FAILS TO SHOW A STRONG LIKELIHOOD OF REVERSING THE PRELIMINARY INJUNCTION.

A. Plaintiffs Have Standing.

1. The States have standing on three independently sufficient grounds.

a. First, as the district court correctly held, the threatened cost of issuing additional driver's licenses gives the States standing. Op. 27-28.[13] Defendants do not challenge the fact findings underpinning that conclusion, namely that (1) deferred-action recipients are eligible for driver's licenses under Texas law, Op. 115-116 & n.107; (2) DAPA would therefore make hundreds of thousands of people eligible for licenses in Texas alone, Op. 22; (3) processing driver's licenses is costly, Op. 22; and (4) if even

[11] The merits prong of the stay analysis requires Defendants to make "a strong showing that [they are] likely to succeed on the merits." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (internal quotation marks omitted). Even if the equities were "heavily tilted" in Defendants' favor, they would still have to show that their position has patent substantial merit. *In re First S. Sav. Ass'n*, 820 F.2d 700, 709 n.10 (5th Cir. 1987).

[12] *Bluefield Water Assoc. Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009). The district court has yet to rule on Defendants' stay motion. If the district court denies that motion, this Rule 8 motion would effectively become "an appeal from the district judge's denial of the stay." *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986). Under those circumstances, this Court should "give the district judge's action the appropriate deference" unless the motion rests on "events occurring after" the district court's ruling. *Id.*; *see, e.g.*, *Beverly v. United States*, 468 F.2d 732, 740 n.13 (5th Cir. 1972) ("accepted standard" is whether the "court abused its sound discretion in denying the stay").

[13] A threatened injury suffices to confer standing where there is a "substantial risk" that the harm will occur. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

a small fraction of the newly-eligible DAPA recipients apply for driver's licenses, Texas will incur millions of dollars in costs, PA.860-62, 1384-86. This direct, non-speculative, and redressable injury easily establishes standing. Op. 32-34.[14]

Defendants' incorrect argument that this injury is "self-inflicted," Mot. 12, is "at best, disingenuous." Op. 24. The Executive itself has taken the position that federal law *prohibits* denying driver's licenses to deferred-action recipients. PA.63-72 (*Arizona Dream* brief). Defendants suggest, here, that Arizona was free to deny driver's licenses, "as long as [it] base[d] eligibility on federal immigration classifications." Mot. 12. But in its prior brief, the Executive acknowledged that Arizona *did* rely on a federal immigration classification: it denied driver's licenses to all deferred-action recipients. PA.61. The Executive asserted preemption anyway. PA.63-70.

Moreover, the Ninth Circuit held that Arizona's policy violated the Equal Protection Clause and was likely preempted. Op. 24-25 (discussing *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014)).[15] Four Plaintiffs (Arizona, Idaho, Montana, and Nevada) are in the Ninth Circuit and are bound by that decision. Accordingly, the Executive's "argument with respect to these states is totally meritless." Op. 25 n.16.

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[14] Only one plaintiff needs to have standing to satisfy Article III, Op. 21, but other States will also suffer concrete, redressable injuries regarding driver's licenses. *See* PA.794, 801 (Wisconsin); PA.804-05, 998, 1001 (Indiana). And the magnitude of the injury is irrelevant to standing. Op. 23 n.15 (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 525-526 (2007)). Defendants suggest that there is no injury because States could charge more for driver's licenses. Mot. 12. But a State could theoretically offset any financial injury by levying additional taxes or fees on its citizens; that cannot be enough to defeat standing. This argument is particularly untenable here because part of the relevant cost is imposed directly by the federal government. Under the REAL ID Act, States must pay a per-license federal fee. Op. 23, 31 (discussing Pub. L. 109-13, 119 Stat. 231 (2005)). In all events, the States have chosen to make driver's licenses affordable, and forcing them into a different choice is itself an injury. *See* PA.1388-89 (citing *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007)).

[15] Defendants misdescribe that court's opinion by suggesting it adopted "rational-basis scrutiny." Mot. 12. In fact, the Ninth Circuit expressly declined to reach the standard of scrutiny, while strongly suggesting that strict scrutiny was the appropriate standard. 757 F.3d at 1065 & n.4.

Indeed, Arizona is bound by a permanent injunction, as the district court on remand enjoined it "from enforcing any policy or practice by which [Arizona] refuses to accept Employment Authorization Documents, issued under DACA, . . . for purposes of obtaining a driver's license." PA.1229-30. Other Plaintiffs are concerned that, if they attempted to deny driver's licenses to deferred-action recipients, the same rule would be imposed on them. Op. 26. In short, the States' options for avoiding this injury "are virtually non-existent." Op. 25.[16]

In any event, an injury is self-inflicted "only if . . . [it] 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 v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013)); *see, e.g.*, *NRDC v. FDA*, 710 F.3d 71, 85 (2d Cir. 2013) (no "self-inflicted" injury when defendant's actions were a "contributing factor"). *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), recognizes this principle. There, this Court held Texas had standing—and rejected the argument that "Texas brought the injury on itself by invoking a sovereign immunity defense"—because Texas could not be forced to choose between forfeiting its policy prerogative or submitting to an unlawful regulatory process. *Id.* at 498. Where a State's program predates a federal action, and the State would not incur costs in that program without the federal action, the State has standing to challenge the federal action.[17]

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[16] Defendants rely on two out-of-context quotes from *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997), neither of which concern standing (in fact, the *Texas* court assumed there was standing, *id.* at 664 n.2). The first of these quotes pertained to a Tenth Amendment commandeering claim; the second merely reaffirmed that genuine prosecutorial discretion is typically unreviewable (the Court noted specifically that Texas had not alleged abdication). *Id.* at 666-67.

[17] *See, e.g.*, *Alaska v. DOT*, 868 F.2d 441, 443 (D.C. Cir. 1999); *cf. Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (States have a "sovereign interest" in "the power to create and enforce a legal code"). Here, the Executive has put the States to an untenable choice: they must either tolerate the injuries regarding their driver's license programs, or deny licenses to an entire class of "individuals [the States] had previously decided should be eligible for them." Op. 27. Such an "illusion of choice" cannot negate standing. *Id.* In contrast, the self-inflicted-injury doctrine may apply where a State passes

b. Second, the Executive ignores the other direct costs the district court found Plaintiffs will incur: namely, the costs of education, healthcare, and law-enforcement regarding unauthorized aliens. Op. 43-46.[18] The district court correctly concluded that Plaintiffs will incur these costs for two categories of unauthorized aliens only if DAPA goes into effect: DAPA recipients who otherwise (1) would have voluntarily left the country, or (2) would have been removed. Op. 53-54.[19]

The district court declined to find standing on this ground because it accepted Defendants' suggestion that those costs might "be offset by the productivity of the DAPA recipients." Op. 54. But that is legally irrelevant; a concrete injury cannot be "offset" by some separate benefit in the standing calculus.[20] Moreover, "[s]peculation . . . is insufficient to defeat standing," *Ctr. for Auto Safety, Inc. v. NHTSA*, 342 F. Supp. 2d 1, 10 (D.D.C. 2004), and the district court acknowledged that there was "no empirical way to evaluate the accuracy of these economic projections," Op. 54.[21]

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a law in order to create standing to challenge an earlier federal action. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011).

[18] *See, e.g.*, PA.6 (Texas spent, in most recent two years with data, approximately $1.3 billion in uncompensated medical care for unauthorized aliens); PA.4-5 (Texas spent, in most recent four years with data, approximately $303 million for Emergency Medicaid services to unauthorized aliens); PA.5 (Texas spent, in most recent three years with data, approximately $106 million to provide CHIP Perinatal Coverage to unauthorized aliens); PA.5 (Texas spent, in most recent four years with data, approximately $5.2 million to provide Family Violence Program services to unauthorized aliens); PA.739 (Texas spends approximately $9,473 per year to educate each unauthorized alien in its school system, as required by *Plyler v. Doe*, 457 U.S. 202 (1982)); PA.78 (regarding Wisconsin's costs from provision of emergency and prenatal care for unauthorized aliens).

[19] Plaintiffs also presented evidence, including an expert demographer's declaration, that DAPA would "discernibly and significantly" increase the inflow of *new* unauthorized aliens. PA.752-53.

[20] *See, e.g.*, *NCAA v. Governor of New Jersey*, 730 F.3d 208, 223 (3d Cir. 2013); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006); *Markva v. Haveman*, 317 F.3d 547, 557-58 (6th Cir. 2003); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 903 F.2d 585, 590 (9th Cir. 1989); *see also* 13A Fed. Prac. & Proc. Juris. § 3531.4.

[21] Plaintiffs' position is strengthened by the "special solicitude" States enjoy in the standing analysis. *Massachusetts*, 549 U.S. at 520. The chain of causation posited by the States is far less attenuated than the one that the Supreme Court approved in *Massachusetts*. Op. 48. Finally, Plaintiffs' standing is reinforced by the Executive's "total abdication" of its responsibilities in this area (discussed more fully below). Op. 64. The federal government has monopolized immigration policymaking, "effectively

c. Third, the Plaintiff States have *parens patriae* standing to protect their citizens from economic discrimination. Op. 40 (discussing *Snapp*). DAPA would subject citizens of the Plaintiff States to precisely such discrimination. Op. 40-41. DAPA recipients are ineligible to purchase subsidized health insurance under the Affordable Care Act. 8 U.S.C. § 1611(a). Employers may therefore deny them coverage without paying a penalty. 26 U.S.C. § 4980H(b). That makes employers substantially more likely to hire DAPA recipients instead of citizens of the States. PA.1039.

The district court rejected this *parens patriae* theory only because the Executive has yet to promulgate *regulations* excluding DAPA recipients from ACA subsidies. Op. 41-42. But DAPA recipients are already barred *by statute* from receiving ACA benefits. 8 U.S.C. § 1611(a). Additionally, DACA recipients do not receive subsidies, 45 C.F.R. § 152.2(8), and Secretary Johnson has publicly confirmed that DAPA recipients "will not be eligible for" the ACA. PA.1550.

2. After finding Article III standing, the district court correctly rejected the Executive's prudential-standing argument. Op. 35-36. Contrary to Defendants' claim that this case is simply too delicate for judicial resolution, Mot. 13, "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)).[22] Hence, the Judiciary routinely decides cases that

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den[ying] the states any means to protect themselves from these harms." Op. 45.

[22] Defendants insinuate that "'state interference'" with federal powers undermines standing here. Mot. 13 (quoting *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 678 (D.C. Cir. 1976)). But the *Shapp* discussion is limited to *parens patriae* standing. 533 F.2d at 678. And *Massachusetts* has since made clear that States can sue the federal government as *parens patriae*, as long as they seek the protection of federal law (rather than protection *from* federal law). 549 U.S. at 520 n.17; Mot. 13. Defendants also suggest in passing that Plaintiffs are not within the "zone of interests" of the INA. Mot. 15. But the immigration statutes were "enacted to protect the states," so Plaintiffs are "squarely within [their] zone of interest." Op. 35; *see Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) ("[T]he pervasiveness of

involve sensitive policy issues, such as the President's power to seize steel mills in wartime (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), the constitutionality of the Affordable Care Act (*NFIB v. Sebelius*, 132 S. Ct. 2566 (2012)), and the proper approach to worldwide carbon emissions (*Massachusetts*).

B. The States' Claims Are Meritorious.

1. DAPA is reviewable. The Executive's claim that the district court interfered with its enforcement discretion, Mot. 15, is a red herring. As the district court made clear, the Executive is not required to remove any particular alien, is free to set removal priorities, and can marshal its resources as it sees fit. Op. 68-70, 123.

DAPA was enjoined precisely because it goes beyond enforcement discretion, by unlawfully granting benefits.[23] As *Heckler v. Chaney* explained, enforcement discretion involves "an agency's refusal to take . . . action." 470 U.S. 821, 831 (1985). But when an agency "does act," the action "provides a focus for judicial review." *Id.* at 832. As the district court correctly recognized, DAPA "is actually affirmative action," because "prosecutorial discretion . . . does not also entail bestowing benefits." Op. 85, 87.[24]

Accordingly, *Heckler*'s presumption of unreviewability is inapplicable. And, even if

federal regulation does not diminish the importance of immigration policy to the States.").

[23] Even setting the benefits aside, DAPA is not a simple refusal to remove a group of aliens. Instead, it offers "three years of immunity from [the] law." Op. 87. The President's own Office of Legal Counsel has acknowledged that conventional prosecutorial discretion does not offer this sort of open toleration of continued illegality. DA5.20-21. Prosecutorial discretion also does not create a bureaucracy charged with processing millions of applications. *See* Op.16 n.13; Op.76 & n.55.

[24] 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 also provides work authorization and therefore "an incentive for people to come out and identify themselves." PA.1498 (emphasis added). This understanding of deferred action, incidentally, is far broader than any endorsed by courts. The Supreme Court has explained that "deferred action" is simply the "discretion to abandon" the removal process. *Reno v. AAADC*, 525 U.S. 471, 483-84 (1999). *Reno* relied (at 484) on this Court's decision in *Johns v. DOJ*, which similarly explained that deferred action is the decision "to refrain from . . . executing an outstanding order of deportation." 653 F.2d 884, 890 & n.14 (5th Cir. 1981). These cases said nothing about "deferred action" programs that also confer lawful presence, work authorizations, or other benefits.

it did apply, it would be rebutted. Op. 88, 98 n.82. *Heckler* stated that judicial review 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)). Here, the Executive has announced a policy of non-enforcement as to "a class of millions of individuals." Op. 99. And the district court found that the Executive generally would not enforce the law even against aliens whose applications are denied. Op. 99. Accordingly, almost all unauthorized aliens could benefit from the policy of non-enforcement. Op. 99. That is nothing short of "complete abdication." Op. 99.

Executive discretion also does not allow the Executive to "'effectively rewrite the laws to match its policy preferences.'" Op. 99 (quoting OLC, DA5.6); *see Heckler*, 470 U.S. at 833 (an agency may not "disregard legislative direction"). And DAPA rewrites the immigration laws in multiple ways. First, it confers benefits the Executive is not authorized to confer. In particular, the Executive cannot unilaterally grant lawful presence,[25] work permits,[26] and a host of other benefits to 40% of the unauthorized aliens in the U.S. Such unlawful action cannot be papered over as "enforcement discretion."

Second, DAPA adopts a policy of family reunification that Congress specifically

[25] *See supra* pp. 1-2 (citing statutes); PA.1351-55 (on steps to get lawful presence); PA.1359-64 (demonstrating no history of congressional acquiescence in programs like this one).

[26] The Executive relies on 8 U.S.C. § 1324a(h)(3), which defines "unauthorized alien" to exclude aliens "authorized [to work] by the Attorney General." But this is a mere definitional provision (it is entitled "Definition of unauthorized alien"). It would be passing strange—and raise serious nondelegation-doctrine questions—to interpret it as a *substantive* grant of authority to extend a work permit to any and every unauthorized alien. It would also make surplusage of other sections of the INA, which empower the Executive to authorize work for certain targeted groups of aliens. *E.g.*, 8 U.S.C. § 1101(i)(2); *id.* § 1105a(a); *id.* § 1154(a)(1)(D)(i)(II), (IV); *id.* § 1154(a)(1)(K); *id.* § 1158(c)(1)(B), (d)(2); *id.* § 1160(a)(4); *id.* § 1184(c)(2)(E), (e)(6), (p)(3), (p)(6), (q)(1)(A); *id.* § 1226(a)(3); *id.* § 1231(a)(7); *id.* § 1254a(a)(1); *id.* § 1255a(b)(3)(B).

rejected. As OLC acknowledged (at DA5.26), DAPA is based on a humanitarian interest in promoting family unity. But Congress intentionally made it difficult for unauthorized alien parents of U.S. citizens to establish lawful presence, *see supra* n.6, and it has allowed *no way at all* for parents of LPRs to do so.[27] In other words, Congress pointedly *rejected* precisely the interest the Executive now trumpets. Enforcement discretion cannot justify replacing congressional lawmaking with Executive will.[28]

2. DAPA is unlawful. To prevail on a procedural APA claim, Plaintiffs do not have to show that the Executive lacked authority to confer lawful presence or other benefits on millions of unauthorized aliens (although it does lack this power). Plaintiffs need only show that, as the district court correctly held, DAPA is a *substantive rule*, which requires notice and comment. Op. 112. The Executive's only counterargument is that DAPA is a "general statement of policy." Mot. 14; *see* 5 U.S.C. § 553(b)(3)(A).[29] But "notice and comment exemptions must be narrowly construed,"[30] and DAPA would not qualify as a general policy statement even under the loosest interpretation.

First, an agency statement must be *tentative* to count as a "general statement of policy."[31] There is nothing tentative about DAPA. To the contrary, it "order[s] immediate

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[27] *See* 8 U.S.C. §§ 1151(a)(1), 1153(a)(1)-(4).

[28] In addition, the categorical refusal to remove a large category of aliens cannot be squared with the applicable statutory provisions, which use mandatory "shall" language. *See* 8 U.S.C. § 1225(b)(2)(A)("[T]he alien shall be detained for a [removal] proceeding."); Op. 96 (discussing 8 U.S.C. §§ 1225(b)(1)(A), 1227). The district court held that the word "shall" reflects a congressional mandate "which should be complied with to the extent possible and to the extent one's resources allow." Op. 97. The Executive has flouted this mandate by refusing to deport this entire class of unauthorized aliens, and affirmatively "giv[ing] them legal presence and work permits." *Id.*

[29] Puzzlingly, the Executive relies on two cases (Mot. 15) that interpreted a different notice-and-comment exception (addressing rules of agency procedure). *See Dep't of Labor v. Kast Metals Corp.,* 744 F.2d 1145, 1155 (5th Cir. 1984); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987). The Executive has not invoked that exception here, and rightly so: it does not apply to actions (such as DAPA) that have a "substantial impact" on regulated entities. *Kast Metals*, 744 F.2d at 1153.

[30] *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995).

[31] *See, e.g., Prof'ls & Patients*, 56 F.3d at 596 ("A policy statement announces the agency's tentative

implementation" of a variety of measures, Op. 75, and it is filled with mandatory language, Op. 111 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. DA3.3-5. In short, "the entire [Directive], from beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates."[32]

The Executive's own actions reveal that DAPA is not tentative. First, the Executive immediately began implementing it, granting Expanded-DACA relief to over *100,000* aliens in under three months.[33] Second, the Executive has strenuously argued—in this very motion—that the preliminary injunction would cause irreparable harm. Mot. 17. The Executive's own belief that it is so crucial to implement the Directive immediately makes it even harder to understand how it could be a mere tentative statement of future intentions.[34] Ultimately, DAPA is about as tentative as an order in the military—which is precisely how the President has described it.[35]

Second, a rule is substantive if it creates "rights and obligations," *Prof'ls & Patients*, 56 F.3d at 595, or has "a [s]ubstantial impact" on regulated entities, *Brown Express v.*

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intentions for the future."); *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 59 (D.C. Cir. 2002); *Hoctor v. USDA*, 82 F.3d 165, 169 (7th Cir. 1996).

[32] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

[33] PA.1493 (108,081 grants); PA.1488 (DOJ: "There was a big apparatus in motion . . . ."); *Phillips Petrol Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994) (order changing policy "immediately upon its effective date," instead of "sett[ing] a goal that future proceedings may achieve," is not a general policy statement).

[34] To put it another way, when an agency applies a policy statement to a given situation, "it must be prepared to support the policy just as if the policy statement had never been issued." *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.,* 847 F.2d 1168, 1175 (5th Cir. 1988). Yet the Executive has made clear that it cannot proceed with granting lawful presence and work authorizations without the DAPA memo. *E.g.*, PA.1488 ("big apparatus" halted after injunction of DAPA).

[35] PA.1462 ("In the U.S. [M]ilitary, when you get an order, you're expected to follow it."); *see id.* at 1461 (promising consequences for agents who "aren't paying attention to our new directives").

United States, 607 F.2d 695, 702 (5th Cir. 1979). DAPA easily meets this test by giving a variety of benefits—including lawful presence,[36] work permits, Social Security, the Earned Income Tax Credit, and access to foreign travel (via advance parole).[37]

Third, DAPA is a substantive rule because it has a "restrictive effect on the agency's decisionmakers." *Prof'ls & Patients*, 56 F.3d at 601; *see id.* at 595 (policy statements "genuinely leave[] the agency and its decisionmakers free to exercise discretion"); Op. 108. DAPA will operate precisely like the 2012 DACA, which allowed no case-by-case discretion; indeed, the government could not identify a single application which was denied for any discretionary reason. Op. 109-10.[38] In fact, DAPA *must* work this way. Recall the "deal" offered to induce DAPA applicants to "come out of the shadows": the President explained that they were "not going to be deported." PA.1264-65.[39]

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[36] Defendants have previously argued that lawful presence is not a lawful status. But in its *Arizona Dream* brief, the federal government claimed that "Congress, through the REAL ID Act, has expressed its judgment that 'approved deferred action status' is 'lawful status.'" PA.71. In any event, "it cannot be questioned that DAPA awards some form of affirmative status." Op. 95.

[37] The only one of these benefits that the Executive even addresses is work permits. The Executive suggests that DAPA does not confer work permits because a 1981 regulation allows deferred-action recipients to receive work authorization. Mot. 15. This is a non-sequitur; DAPA indisputably makes millions of people eligible for work permits under the Executive's view (by granting them deferred action). To say that DAPA has no legal consequences is akin to saying that a marriage license has no legal consequences (because the tax breaks and other benefits of marriage are prescribed in separate statutes and regulations). *Cf.* U.S. Amicus Br. 13-14, No. 14-556, *Obergefell v. Hodges* (U.S. Mar. 6, 2015) ("Marriage is the gateway to a vast array of governmental benefits.").

[38] Contrary to Defendants' argument, Mot. 16, there is no evidence of discretionary denials; the assertion they cite is based on two notices of denial in which the applicant *did* violate DHS's eligibility criteria as a juvenile and one instance of application fraud, which is prohibited in every application. *See* PA.1413-14 (rebutting Neufeld declaration's use of DA6.52-53 (Bates-stamped as pages 554 and 555)). As the district court noted, there is every reason to believe that DAPA will follow the pattern of DACA, which featured a 95%-99.5% approval rate, with the denials reserved for applicants who did not meet the program's criteria. Op. 99, 109 n.96 & 101. *See 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").

[39] DAPA also eliminates discretion in any number of other areas, such as the period of deferred action (must be three years), DA3.3; biometrics and background checks for applicants (always required), DA3.4; and application fees (set at $465, with no waivers available), DA3.5. And 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).

In short, DAPA "substantially changes both the status and the employability of millions" and is thus a substantive rule. Op. 112. As the President himself admitted, he "change[d] the law." PA.1247.[40] Notice and comment was therefore required.

II. MAINTAINING THE LONGSTANDING STATUS QUO DOES NOT IRREPARABLY INJURE DEFENDANTS.

A stay pending appeal requires the applicant to show irreparable injury absent a stay.[41] The Executive does not come close. For decades, it operated without a massive program conferring lawful-presence status, work permits, and other benefits on millions of unauthorized aliens. Indeed, the Executive eventually acted not because some emergency need for the program became manifest, but because Congress declined to adopt the President's preferred immigration policies. Accordingly, no new injury will occur while DAPA's legality is adjudicated. PA.1263. As the district court noted, it is hard to imagine a case warranting a preliminary injunction more than this one. Op. 121.

The Executive does not claim some inability to implement DAPA if ultimately upheld. It argues only that implementation now is needed to more efficiently ensure national security. That calls to mind the Executive's argument against preliminarily enjoining its seizure of steel mills during the Korean War. *See Youngstown*, 343 U.S. at 583. The national-security argument failed then, *id.* at 584, and it is vastly less compelling now.

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[40] The district court expressly did not reach Plaintiffs' remaining two claims: the substantive-APA claim and the separation-of-powers claim. Plaintiffs are likely to succeed on both. As noted above, DAPA "not only ignores the dictates of Congress, but actively . . . thwart[s] them." Op. 99. Accordingly, DAPA is "not in accordance with law," and must be set aside under the APA. 5 U.S.C. § 706(2)(A). For the same reason, DAPA 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 seizure of the steel mills in *Youngstown*, DAPA violates the separation of powers and must be invalidated on that ground as well.

[41] *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury" in the absence of a stay); *accord Rubin v. United States*, 524 U.S. 1301, 1301 (1998).

Nor can the Executive bootstrap a claim of irreparable injury by pointing to the costs it has voluntarily incurred to implement the Directive, while aware of this lawsuit. Voluntary spending, following notice of potential illegality, cannot manufacture irreparable injury.[42] It would be perverse to allow the Executive to exercise unlawful power by engaging in preemptive spending.

III. A STAY WOULD IRREPARABLY INJURE PLAINTIFFS BY EFFECTIVELY FORECLOSING THEIR REQUESTED REMEDIES.

A preliminary injunction should not be stayed when the stay would prevent meaningful judicial review. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (explaining the need "to preserve the court's ability to render a meaningful decision on the merits," which "often" is furthered "by preservation of the status quo"). That is precisely why the status quo must be preserved here.

As the district court noted, "legalizing the presence of millions of people is a 'virtually irreversible' action once taken." Op. 115. For example, the issuance of work permits would trigger a number of state benefits including driver's licenses, professional licenses, and unemployment benefits. Op. 116 & n.107. Texas alone would have to spend "several million dollars" issuing driver's licenses. Op. 22. Other Plaintiff States would suffer similar costs. Op. 22, 33, 45-46. If the States ultimately prevail, there would be no feasible way to identify and claw back benefits issued to millions of people, much less recover the millions of dollars spent issuing them. Op. 115.[43]

The USCIS Director has admitted that the program cannot readily be undone.[44] It

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[42] *See, e.g.*, *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 729 (3d Cir. 2004); *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 902-03 (7th Cir. 2001).

[43] *See* PA.1268-70 (First Am. Compl.); PA.1312-14 (Mot. for Prelim. Inj.); PA.1405-06 (Reply).

[44] "If this program does what we want it to do . . . [y]ou cannot so easily by fiat now remove those people from the economy." Stephen Dinan, *Obama Immigration Chief Says Amnesty Designed to Cement*

is thus imperative to preserve the status quo pending a final adjudication of the program's legality. As the district court put it: "[t]his genie would be impossible to put back into the bottle." Op. 116.

IV. THE PUBLIC INTEREST DOES NOT FAVOR A STAY.

Courts act within the "broad public interest[]" when they "maintain" the "proper balance" of "the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). Accordingly, "the public interest factor that weighs the heaviest" in this case is "ensuring that actions of the Executive Branch . . . comply with this country's laws and [the] Constitution." Op. 120-21. Against this, the Executive asserts only a public interest in security, which is immeasurably weaker than the corresponding interest in *Youngstown*—namely, "avert[ing] a national catastrophe which would inevitably result from a stoppage of steel production" during the Korean War. *Youngstown*, 343 U.S. at 582. And even that war-time exigency did not justify the Executive's actions. *Id.* at 585-86.

The Executive wants to impose one of the largest shifts in immigration policy in our Nation's history. The stay motion can be denied on that basis alone: such a questionable policy should not be implemented unilaterally before judicial review. "At a minimum, compliance with the notice-and-comment procedures of the APA will allow those interested to express their views and have them considered." Op. 121.

V. THE STATES' FACIAL CHALLENGE REQUIRES VACATING THE DIRECTIVE IN ITS ENTIRETY AND THEREFORE A NATIONWIDE INJUNCTION.

The Executive's proposal to stay the preliminary injunction "in" certain States but not others, Mot. 19, is nonsensical. Patchwork relief is powerless to prevent the harms threatened by officials acting with nationwide jurisdiction. Nor could benefits conferred

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Illegals Place in Society, Wash. Times, Dec. 9, 2014 (quoting Defendant León Rodríguez).

on applicants be meaningfully limited to certain States. Aliens with lawful presence are free to move between States, including the 26 Plaintiff States. Whether DAPA beneficiaries first settle in a given State or move there, the harms noted above will occur. As the district court correctly understood, immigration law requires a nationwide policy, and an unlawful immigration directive requires a nationwide remedy.[45]

Defendants' citation of 5 U.S.C. § 705, Mot. 20, only begs the question of whether allowing DAPA to go into effect anywhere would cause the Plaintiffs irreparable injury. It would, as explained above. Notably, nowhere in Defendants' motion response or surreply in district court did they suggest that a preliminary injunction could apply "in" only some States. And none of the cases that Defendants cite, Mot. 19-20, involve State plaintiffs threatened with spending money on transient populations whose size and status depend on a national action, State plaintiffs proceeding *parens patriae* on behalf of their citizens to address threatened economic discrimination favoring employment of such alien populations, or an APA challenge based on notice-and-comment procedure that can only be implemented nationwide.[46]

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[45] PA.1500-01; *Arizona v. United States*, 132 S. Ct. at 2502 ("Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders."). 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).

[46] *See Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1473 (9th Cir. 1994) (in a serviceman's lawsuit disputing his discharge from the federal military on account of his sexual orientation, explaining that the Supreme Court partially dissolved a permanent injunction because the plaintiff was not injured by the military's discharge of other service members); *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 to them, and rejecting the government's argument that the legal issue must be allowed to develop in other courts); *U.S. v. Mendoza*, 464 U.S. 154, 158-63 (1984) (merely addressing collateral estoppel against the government). Defendants' argument about ensuring future development of a legal issue is manifestly irrelevant here; the 26 challenging States joined this action, and the States who favor DAPA as good policy obviously would not sue to enjoin it.

A nationwide injunction is fitting because this is 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 in federal agency action invalidate it "nationwide," for "plaintiffs and non-parties alike." *Id.* at 1408-10.[47]

Lastly, Defendants mistakenly argue, Mot. 19, that injunctive relief must be tailored to the harm that creates standing (which, they wrongly assert, is limited to the costs of issuing additional driver's licenses). Courts' remedial powers are defined by a defendant's unlawful action—"the extent of the violation established"—not by the basis of the plaintiff's standing.[48] In any event, the 26 Plaintiff States—if not each State in the Union—would suffer concrete injuries caused by DAPA.[49]

CONCLUSION

Defendants' motion for a stay pending appeal should be denied.

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[47] *E.g.*, *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 19 (D.D.C. 2004) (mem. op.) (where rule establishing government program was invalid for insufficient commenting, rule should be enjoined as to "all persons subject to" the program and not simply as to the plaintiffs); *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."); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (where "no set of circumstances exists under which [challenged action] would be valid," a facial, nationwide remedy is proper).

[48] *Lewis v. Casey*, 518 U.S. 343, 360 (1996) ("the scope of injunctive relief is dictated by the extent of the violation established"); *id.* at 360 n.7 (breadth of remedy "d[id] not rest upon the application of standing rules" but rather the extent of the violation shown).

[49] Defendants mistakenly imply that only Texas presented evidence of irreparable harm. Mot. 19. Other representative States, Indiana and Wisconsin, submitted detailed declarations demonstrating their injuries, PA.791-805, 879-882, 996-1003, and the district court found that many or all States are affected. Op. 29. The few amici States who argue that DAPA will lead to offsetting benefits have done *nothing* to establish that as a factual matter; it is sheer speculation.

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1. I certify that, on March 23, 2015, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's electronic-document-filing system.

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