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 U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION, CIVIL NO. 1:14-CV-0254, HON. ANDREW S. HANEN

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The case number is 15-40238. The case is styled as *Texas v. United States.* Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund is a nonprofit corporation with no parent corporation and that no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: May 11, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

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Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") is a nonprofit corporation founded in 1981. For more than thirty years, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, they have consistently opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Twenty six states (collectively, hereinafter, "States") sued several federal officers with duties over federal immigration law (collectively, hereinafter, the "Administration") to challenge the officers' implementation of a program known as "DAPA" as well as its expansion of a prior program known as Deferred Action for Childhood Arrivals ("DACA"). Like DACA, DAPA seeks to protect illegal aliens from removal under federal immigration law by upgrading their immigration status to lawfully present aliens and allowing them, thereby, to obtain a variety of benefits, including work authorization. Although the States challenge DAPA as

[1] *Amicus* files this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for the *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

both substantively and procedurally invalid, the District Court issued a preliminary injunction based only on DAPA's failure to undergo the notice-and-comment rulemaking required by the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"). The Administration filed this interlocutory appeal.

Before explaining why this Court should affirm the District Court's thoughtful opinion, *amicus* EFELDF first responds to the Administration's hyperbolic characterization of this case as "justify[ing] a vast interference with countless exercises of federal immigration enforcement discretion, upsetting both the uniquely federal interest in immigration matters and separation-of-powers principles," Admin. Br. at 16, that "threatens to radically alter the balance between the States and the federal government contemplated by Article III." *Id.* at 26. The Administration supports its position with *Arizona v. U.S.*, 132 S.Ct. 2492 (2012), a preemption case that denied the States a significant independent role in regulating illegal immigration. Denied there, the States merely seek here to ensure that the Administration faithfully executes the laws enacted by Congress. Article III and the judiciary's corresponding prudential restrictions open federal courts to anyone with a case or controversy sufficiently related the intent of the Congress in enacting our laws. It is troubling that the Administration finds that troubling.

SUMMARY OF ARGUMENT

Because the States' merits arguments under both the APA and immigration

law reinforce the States' arguments for standing and justiciability, *amicus* EFELDF first shows that DAPA's promulgation (and the its amendments to DACA) violated the APA's notice-and-comment procedures (Section I.A), federal immigration law's substantive requirements (Section I.B), and thus the separation-of-powers doctrine (Section I.C). Significantly, the Administration's opening brief did not contest the substantive merits, which forfeits those issues and renders the Administration unable to deny the States' likelihood of prevailing on the merits (Section I.D).

The States have standing not only because they provided ample evidence of financial injury and because federal courts owe states "special solicitude in standing analysis" under *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), but also because – aside from costs – DAPA imposes administrative burdens (Section II.A.1) and because the standing analysis is relaxed for immediacy and redressability with procedural-rights plaintiffs (Section II.A.2). Further, this Court can and should recognize that states can have *parens patriae* standing to enforce federal law against *ultra vires* administrative action because federal officers' *ultra vires* actions are not sovereign (Section II.A.3), standing based on abdication merely acknowledges that, even for third-party injuries, causation and redressability are readily met for federal action in areas of exclusive federal control (Section II.A.4), and standing analysis does consider net, dollar-for-dollar

economic benefit where discrete state agencies suffer injuries – both financial and administrative – regardless of other state agencies' benefits (Section II.A.5). Finally, insofar as the States allege that DAPA is *ultra vires* DHS's authority and violates constitutional separation-of-powers principles, the zone-of-interest test uses the broadest-possible zone, rather than the more narrow, immigration-law zones of interest that the Administration suggests (Section II.B).

With respect to the availability of judicial review, the general, rebuttable presumption that enforcement discretion is unreviewable from *Heckler v. Chaney*, 470 U.S. 821 (1985), is inapplicable here for two reasons: (1) the relevant statutes here require these enforcement proceedings, which gives a reviewing court "law to apply" versus the agency's chosen nonenforcement path (Section III.A); and (2) unlike an instance of nonenforcement like *Heckler*, the Administration here has taken final agency action in the form of the promulgated DAPA (Section III.B). In addition, the issues raised here are neither procedurally nor substantively committed to agency discretion and thus fall within the APA's "hospitable" and presumptive review (Section III.A). Further, the APA requires that post-APA preclusion-of-review statutes displace APA review *expressly*, which no statute does here (Section III.B.2). Indeed, pre-APA equity review would be available, even if APA review were not (Sections III.B.3-III.B.2), placing the Administration's interpretation at odds with the canon against construing

subsequent statutes to repeal prior ones by implication – a canon that that applies with particular strength to judicial review (Section III.B.4).

ARGUMENT

I. THE ADMINISTRATION'S ACTIONS ARE PROCEDURALLY AND SUBSTANTIVELY *ULTRA VIRES*

Federal courts have jurisdiction over a case if "the right of [plaintiffs] to recover under [their] complaint will be sustained if the ... laws of the United States are given one construction," even if the plaintiffs' rights "will be defeated if [those federal laws] are given another." *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963) (interior quotations omitted). Accordingly, federal courts typically consider their jurisdiction before the merits. Indeed, federal courts should assume *the plaintiff's* merits views in evaluating their jurisdiction to hear the plaintiff's claims: "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"). Here, the States' merits arguments *reinforce* their jurisdictional arguments in several respects. *See* Sections II.B (zone of interest for *ultra vires* agency action), II.A.1 (procedural-rights standing), *infra.* For these reasons – and to emphasize the serious constitutional issues raised here – *amicus* EFELDF inverts the usual order of analysis.

A. The Administration's Actions Violate the APA

DAPA violates the APA's rulemaking requirements as a legislative rule[2] issued without meeting the APA's notice-and-comment requirements, 5 U.S.C. §553(b), and without eligibility for any APA exceptions to those requirements. *Id.* at §553(b)(A)-(B). As such, DAPA is void ab *initio.*

Even if DAPA were *substantively* consistent with federal immigration law, *but see* Section I.B, *infra,* its promulgation nonetheless would violate the APA notice-and-comment requirements. The APA exemptions for policy statements and interpretive rules do not apply when agency action narrows the discretion otherwise available to agency staff, *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2001); *General Elec. Co. v. EPA,* 290 F.3d 377, 380 (D.C. Cir. 2002), and cannot be used to promulgate the regulatory basis on which to confer benefits, *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 908 (5th Cir. 1983) ("Legislative rules ... grant rights, impose obligations, or produce other significant effects on private interests") (interior quotations omitted, alteration in original); *Am. Mining Congress v. Mine Safety &*

[2] "Generally speaking, it seems to be established that regulations, substantive rules, or legislative rules are those which create law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means." *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (internal quotations omitted). DAPA in no way interprets other statutes or rules, but instead creates new rules.

Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Mercy Hosp. of Laredo v. Heckler*, 777 F.2d 1028, 1032 (5th Cir. 1985); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (defining a "substantive rule – or a legislative-type rule – as one affecting individual rights and obligations") (internal quotations omitted). DAPA fails these tests.

Under the APA, DAPA plainly required notice-and-comment rulemaking. For example, employment authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. §274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. §274a.12(a)(1)-(16), none of which apply to the across-the-board DAPA program. *Cf. U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DAPA qualifies as a legislative rule, which agencies cannot issue by memoranda or interpretation.

Procedurally infirm rules are a nullity, *Avoyelles Sportsmen's League,* 715 F.2d 897, 909-10; *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *State of Ohio Dep't of Human Serv. v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin.*, 862 F.2d 1228, 1237 (6th Cir. 1988); *North Am. Coal Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 854 F.2d 386, 388 (10th Cir. 1988), even if they would have been substantively valid if promulgated via notice-and-comment

rulemaking. Thus, DAPA is a nullity.

B. The Administration's Actions Violate Federal Immigration Law

As the States argue convincingly here, State Br. at 39-50, DAPA violates the substance and the procedure of federal immigration law. Either flaw is fatal under the APA, rendering DAPA *ultra vires* and thus void.

Substantively, immigration law already set the criteria for a parent to obtain lawfully-present status based on a child's citizenship (*e.g.*, leave the country for their inadmissibility bar of at least three years, await the child's turning 21, and then obtain a family-preference visa while abroad), with no corresponding path for a parent to obtain lawfully-present status based on a child's mere lawfully-present status. 8 U.S.C. §§1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255. DAPA short-circuits these restrictions (on parents with citizen children) and the implied ban (on parents with lawfully present children), thereby exceeding the Administration's delegated authority.

Procedurally, through DAPA, a non-enforcement agency purports to channel aliens into deferred-action under prosecutorial discretion, without initiating the statutorily mandated removal proceeding. Specifically, under 8 U.S.C. §1225(a)(1), "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." That designation triggers 8 U.S.C. §1225(a)(3), which requires that all applicants for

admission "shall be inspected by immigration officers," which triggers 8 U.S.C. §1225(b)(2)(A)'s mandate that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a of this title." In essence, DAPA jumps aliens to a favorable possible result of the removal process, without the statutorily required process that must precede that outcome.

C. The Administration's Actions Violate the Constitution

Although the more typically contested procedural issues arise under the APA – and the Administration's failure to comply with the APA – this Court should not forget the underlying *constitutional* issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.,* 517 U.S. 748, 771 (1996). In this action, the Administration purports to rely on exceptions to congressional lawmaking that Congress itself enacted in the APA. *See* 5 U.S.C. §553(b). But failure to follow those APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). In essence, when an agency fails to follow the procedures ordained by Congress – in its APA delegation of lawmaking power – the resulting

rule violates the core constitutional requirements for making law, which "are *integral* parts of the constitutional design for the separation of powers." *INS v. Chadha,* 462 U.S. 919, 946 (1983) (emphasis added). Valid laws, of course, "must satisfy bicameralism and presentment requirements, which 'represent[] the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" *Medical Ctr. Pharm. v. Mukasey*, 536 F.3d 383, 401 (5th Cir. 2008) (*quoting Chadha,* 462 U.S. at 951) (alteration in *Mukasey*). Within the APA, federal agencies can be on solid ground. Outside it, federal agencies unconstitutionally seek to usurp congressional power.

Our quadrennial elections do not choose a temporary despot. Instead, the Constitution requires presidents to faithfully execute the laws that Congress has passed. U.S. CONST. art. II, §3. Thus, if the Administration failed to comply with the APA and federal immigration law, the Administration's attempt to make law violates not only the APA, but also the Constitution.[3]

D. The Administration Forfeited a Substantive Defense to DAPA

Although it defended DAPA against the APA procedural argument that the

[3] The question of whether the Administration violated Articles I and II of the Constitution is different from the question of who has the right under Article III to enjoin the Administration's actions. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 576-77 (1992); Section II, *infra.*

District Court reached, Admin. Br. at 33-50, the Administration completely failed to defend DAPA substantively. Given that appellate courts can uphold lower-court rulings on any basis raised or reached below, *U.S. v. Williams*, 504 U.S. 36, 41 (1992), and that the States raised their substantive arguments both below and here, States' Br. at 39-50, the Administration has forfeited a substantive defense. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 594 (5th Cir. 2006); *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 153 (5th Cir. 2008). This Court routinely holds private parties to these standards, and it would violate Due Process to fail to apply them to the Administration.

II. THE STATES HAVE STANDING

To establish standing, a plaintiff must show an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The States readily meet these tests.

A. The States Are Enforcing Cognizable Injuries in Fact

An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 561-62. For injuries directly caused by government action, plaintiffs can show injury with "little question" of causation or redressability; by contrast,

when government action causes third parties to inflict injury, plaintiffs must show more to establish causation and redressability. *Defenders of Wildlife*, 504 U.S. at 561-62. Here, the States suffer both direct and indirect injury from DAPA, which makes causation and redressability obvious: enjoin enforcement of DAPA, and the States' injuries will cease or *at least* lessen. That is particularly so given the "special solicitude in standing analysis" that federal courts must accord to states "protecting [their] quasi-sovereign interests." *Massachusetts*, 549 U.S. at 520. The following subsections analyze the States' injuries for purposes of standing.

1. The States Suffer Increased Costs and Administrative Burdens from the Administration's Converting Illegal Aliens into Aliens Lawfully Present Here

Plaintiffs obviously have standing to challenge actions that negatively impact them economically, *Diamond v. Charles*, 476 U.S. 54, 66 (1986), and the burden need not be crushing: an "identifiable trifle" suffices. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996). That trifle includes "plaintiffs with no more at stake … than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (citations omitted). *Amicus* EFELDF respectfully submits, however, that the arguments here make standing more complex than necessary. Whereas the *type of standing* can trigger higher standards of review – and thus be outcome-determinative on the merits – with, for

example, equal-protection claims, garden-variety Article III injury can be as simple as increased administrative burdens, which "[c]learly… me[e]t the constitutional requirements" for injury for plaintiffs asserting the "right to be free of arbitrary or irrational [government] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). As explained below, the States readily meet these tests for both economic and administrative burdens.

2. Courts Relax Article III's Immediacy Requirements for Procedural-Rights Violations Like DAPA

Significantly, this case concerns procedural violations, *see* Sections I.A, I.C. *supra*, which lower the bar for Article III standing. States Br. at 39. "The history of liberty has largely been the history of observance of procedural safeguards," *Corley v. U.S.*, 556 U.S. 303, 321 (2009) (interior quotations omitted), and "'procedural rights' are special," *Defenders of Wildlife*, 504 U.S. at 572 n.7. For procedural injuries, Article III's redressability and immediacy requirements apply to the *present procedural violation* (which may someday injure a concrete interest) rather than to the concrete future injury. *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7; *U.S. v. Johnson*, 632 F.3d 912, 921 (5th Cir. 2011); *cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006) ("once a litigant has standing to request invalidation of a particular [government] action, [the litigant] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate"); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438

U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing). Procedural-rights standing thus undercuts the Administration's miserly interpretation of Article III.

Significantly, the States need not show that notice-and-comment rulemaking would result in a rule more to their liking: "If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). Instead, *vacatur* would put the parties back in the position they should have been in all along, which provides enough redress even if the Administration *potentially could* take action on remand, leaving the plaintiff no better off. Remand redresses the injury "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998). When considered in the procedural-rights context, the States clearly have standing.

3. This Court Should Recognize the States' *Parens Patriae* Standing against *Ultra Vires* Administrative Action

Notwithstanding the Supreme Court's suggestion states lack *parens patriae* standing against the Federal Government, *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 610 n.16 (1982), the States press *parens patriae* standing to protect their citizens from the unlawful competition that DAPA beneficiaries will present,

States Br. at 37-38, arguing that the negative Supreme Court precedent concerns state efforts to protect their citizens from federal law, as distinct from the States' efforts here to enforce federal law against *ultra vires* administrative action. *Amicus* EFELDF respectfully submits that this Court should accept the States' distinction.

The States have named not only federal administrative officers, but also the United States as defendants, as the Federal Government's waiver of sovereign immunity expressly allows. 5 U.S.C. §702. Even if the federal sovereign outranks the States for purposes of *parens patriae,* the officer defendants do not: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949). For purposes of making law, Congress – not the Executive Branch – represents the United States' sovereignty, U.S. CONST. art. I, §1, but enjoining the officers' *ultra vires* actions will redress the States' injuries, even if injunctive relief is unavailable against the United States itself:

> For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.

Franklin v. Massachusetts, 505 U.S. 788, 803 (1992). Accordingly, the States have *parens patriae* standing against the officer defendants.

4. The States Can Assert "Standing Created by Abdication"

Although the Administration considers it unfounded, the district court's notion of "standing created by abdication" is straightforward and uncontestable. When the federal government controls an area exclusively, causation and redressability are obvious. *Cf. Tele. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (injury "fairly traceable to the administrative action contested… if that action authorized the conduct or established its legality"). Presumably, plaintiffs still must suffer cognizable injury, but the States have done so here.

5. Standing Analysis Does Not Consider Indirect Benefits That May Offset Costs Imposed by a Defendant's Actions

The Administration's claim that tax benefits to some State agencies will offset DAPA's increased licensing and Medicare administrative burdens and costs, for example, at the Texas Department of Motor Vehicles ("DMV") and Health and Human Services Commission ("HHSC"), respectively, would be irrelevant, even if the Administration could support that claim factually.[4] As the States explain, the law of standing does not engage in dollar-for-dollar economic netting in the circumstances here, States' Br. at 35-37, but such netting would not save the Administration *even if it applied*. Specifically, economic netting would not undercut the States' standing from *administrative burden* (as distinct from out-of-

[4] *Amicus* EFELDF understands that Texas has no income tax, which undercuts the Administration's arguments vis-à-vis Texas.

pocket costs), and it would not prevent discrete state agencies such as Texas's DMV or HSSC from pressing *their* economic claims. Those agencies do not receive the alleged tax boon, even if some other State agency would. To the extent that these discrete agencies constitute necessary parties not subsumed with the nominal State parties, these agencies can, of course, be joined, even on appeal. *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) ("dismiss[ing] the present petition and require[ing] the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration"); *cf. Lynch v. Baxley*, 651 F.2d 387, 388 (5th Cir. 1981).

6. Increased Licensing Costs Are Not Self-Inflicted Injuries

Notwithstanding its support for DACA beneficiaries' equal-protection rights to driver's licenses in *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), the Administration claims that the States' – and particularly Texas's – decision to subsidize driver's licenses does not support standing here because that decision constitutes a self-inflicted injury by Texas. Admin. Br. at 27-28. To make that argument work, the Administration would need to establish that the States can offer subsidies to all applicants except DAPA beneficiaries and deny either the subsidies or licenses altogether to DAPA beneficiaries. It would be no defense for the Administration to argue that the Equal Protection Clause – and not DAPA – would require the States to provide benefits to DAPA beneficiaries. Such third-

party indirection easily equates to first-party injury when the result is compelled by law, as opposed to policy choices. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). The Administration cannot have it both ways (*i.e.*, DAPA avoids review on standing, but DAPA beneficiaries get State benefits under Equal Protection).

As interesting as it might be to watch this Administration attempt to make the required showing for driver's licenses, it would prove to be for naught because the Administration would then need to make the same showing for Medicare and every other benefit that the States identify. *See* States Br. at 8-9. At some point, the task would prove impossible. For example, 8 U.S.C. §1611(b)(2)-(3) provides certain Medicare benefits immediately upon an illegal alien's obtaining DAPA's lawful-presence status. The Administration cannot defend these imposed costs as self-inflicted injuries because the States have a right to continue their chosen, pre-DAPA public policies without the Administration's *unlawfully* imposing higher costs and administrative burdens. Forcing the States to withdraw these programs for everyone as a basis for avoiding them on DAPA beneficiaries would inflict sovereign injuries on the States, so the only way for the Administration's self-inflicted-injury argument to work would be if the States could carve DAPA beneficiaries out of all these pre-DAPA benefits.

B. The Zone of Interests Test Does Not Pose Any Limits

The "zone of interest" prong of standing is a prudential doctrine that asks "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected… by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998) (interior quotations omitted, emphasis and alteration in original). Because standing assumes the plaintiffs' merits views – here, that the Administration lacks substantive and procedural authority for DAPA – either the zone-of-interest test is inapplicable or it applies the zone from the overarching constitutional issues raised by lawless agency action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987); *Chiles v. Thornburgh*, 865 F.2d 1197, 1211 (11th Cir. 1989) (same). By acting outside its constitutional power and delegation, the Administration purports to make law

without the constitutional process for doing so.[5]

The Constitution's separation of powers is not a mere technicality – it is an indispensable bulwark against executive tyranny. The Founders regarded the Constitution's "separation of governmental powers into three coordinate Branches [as] *essential* to the preservation of liberty." *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989) (emphasis added). By decentralizing power among the three branches (and between the House and the Senate within the legislative branch), the Founders intended separation of powers to protect liberty. *U.S. v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990); *Bond v. U.S.*, 131 S.Ct. 2355, 2365 (2011) ("[t]he structural principles secured by the separation of powers protect the individual"). Indeed, the "aim of [the separation of powers] is to protect … the whole people from improvident laws," *Metro. Washington Airports Auth. v. Citizens for the*

[5] In defending similar federal overreach, the U.S. Department of Justice often cites *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984), for the proposition that "[a] claim of error in the exercise of [delegated] power is … not sufficient" to allege *ultra vires* action. Because it involved an agency delegated "broad discretion to provide *'adequate'* mental health services" and plaintiffs who argued "that [officers] have not provided such services *adequately*," 465 U.S. at 102 (emphasis added), *Pennhurst* could not erase the bright line that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. The Supreme Court recently clarified that there are no sliding scales of *ultra vires* conduct: "Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires.*" *City of Arlington v. FCC*, 133 S.Ct. 1863, 1869 (2013) (emphasis added). DAPA is no mere mistaken exercise of delegated power. It is a wholesale power grab.

Abatement of Aircraft Noise, 501 U.S. 252, 271 (1991), not merely to protect the institutional prerogatives of the respective branches. Provided that parties who seek to assert separation-of-powers injuries have otherwise justiciable claims, *Bond*, 131 S.Ct. at 2366, they may assert the procedural injuries from separation-of-powers violations and, as relevant here, the zone of interests is "to protect … *the whole people* from improvident laws." That zone obviously includes the circumstances here.

Even if not the intended beneficiaries, the States can satisfy the zone of interests as "suitable challengers" if their "interests… [are] sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." *First Nat'l Bank & Trust Co. v. N.C.U.A.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) ("*NCUA*"). Here, the States' claims are congruent with their citizens' interests in immigration law's protection of the U.S. workforce: "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). Indeed, the D.C. Circuit has found even otherwise-unsuitable challengers as nonetheless suitable to enforce "statutory demarcation[s], *such as an entry restriction*, because the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation." *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1370 (D.C. Cir. 2004)

(citing cases) (emphasis added, alteration in original), *withdrawn on part on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005); *NCUA*, 988 F.2d at 1278; *Scheduled Airlines Traffic Offices, Inc. v. D.O.D.*, 87 F.3d 1356, 1360-61 (D.C. Cir. 1996). For these reasons, amicus EFELDF respectfully submits, this Court should find the zone-of-interest test readily satisfied here.

III. ENFORCEMENT DISCRETION UNDER *HECKLER* IS NOT THE ISSUE PRESENTED HERE

The types of enforcement discretion that *Heckler* insulates from review are agency *inaction* on a particular enforcement matter, not final agency action in the issuance of a specific rule. Although inaction can constitute "agency action" under the APA, 5 U.S.C. §551(13), that extends only to inaction on discrete actions that the agency was legally required to take, as distinct from programmatic inaction. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). Where agencies indeed act, "applying some particular measure across the board … it can of course be challenged under the APA." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990). The Administration's arguments under *Heckler* are specious.

The Administration's claims of "enforcement discretion" under *Heckler* cannot insulate DAPA from review for two independent reasons. First, federal immigration law includes provisions that govern the procedural question presented here, so this is not a garden-variety statute with unfettered enforcement discretion. Instead, reviewability hinges on the specific fetters that Congress placed in *this*

statute. Second, DAPA is not simply a decision to focus the available enforcement resources; it is a rule that provides benefits to a class of DAPA beneficiaries and so remains reviewable as a rule. As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). EFELDF respectfully submits that this Court is obligated to provide judicial review here.

A. Enforcement Policies Are Reviewable Where – as Here – a Court Has Law to Apply

Heckler held that federal courts could not review the U.S. Food & Drug Administration's decision not to enforce the Federal Food, Drug, and Cosmetic Act against certain drugs in a challenge by prison inmates sentenced to death by lethal injection of those drugs. Although the Administration cites *Heckler* for the proposition that the Administration is best suited to set its enforcement priorities, federal law places both substantive and procedural limits on how those priorities get set.

The concept of unreviewable agency discretion did not begin with the APA much less with *Heckler*, *see, e.g.*, *Gray v. Powell*, 314 U.S. 402, 412 (1941); Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV.

749, 750-51 (1948), but the APA did provide "generous review provisions" and require "hospitable interpretation" favoring review, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), of final agency actions like DAPA. 5 U.S.C. §704. As relevant in *Heckler*, 5 U.S.C. §701(a)(2) exempts "agency action … committed to agency discretion by law" from APA review. *Heckler*, 470 U.S. at 830. Although recognizing this as "a *very narrow* exception," the Supreme Court has relied on the APA's legislative history to make this exception "applicable in those *rare instances* where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)) (interior quotations omitted, emphasis added). The question is whether that this is one of the "rare instances" where that "very narrow exception" applies.

Congress made removal proceedings mandatory precisely because the Administration's predecessors were too lenient in enforcing immigration laws. *Compare Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 483-84 (1999) (discussing deferred action) *with* H.R. REP. NO. 104-725, at 383 (1996) ("illegal aliens do not have the right to remain in the United States undetected and unapprehended"). Obviously, agency inaction in the face of statutory mandates cannot qualify as unreviewable enforcement discretion. *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007). Indeed,

Heckler itself recognizes as much by holding that, if there is "law to apply" for APA review, any presumption of non-reviewability is rebutted. *Heckler*, 470 U.S. at 834-35. That is the situation that applies here: non-enforcement is reviewable.

B. Enforcement Discretion Does Not Shield Agencies' Back-Door Issuance of Substantive or Legislative Rules from APA Review

An agency policy document like DAPA would be reviewable final agency action, even if a particular instance of discretion not to enforce a statute were not reviewable. Specifically, the APA allows review of not only actions made reviewable by statute, but also any final agency action not otherwise reviewable in court. 5 U.S.C. §704. Under the circumstances, DAPA's promulgation would be reviewable even if the Administration were correct that immigration law gives them the discretion to proceed as outlined in DAPA.

1. *Heckler* and Its Progeny Do Not Preclude Review of Agency Action to Issue Rules

Nothing in *Heckler* and the enforcement-discretion cases applies to written rules. *Heckler* specifically exempts the "abdication" claim in *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (*en banc*), for review of conscious, express policies of nonenforcement:

> Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e. g., Adams v. Richardson, ...* 480 F.2d 1159 (1973) (*en banc*).

Heckler, 470 U.S. at 833 n.4; *accord id.* at 839 ("the Court … does not decide today that nonenforcement decisions are unreviewable in cases where … an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams v. Richardson*") (Brennan, J., concurring) (citations omitted). In *Adams,* the conscious policy – namely, failing to terminate federal funding for schools found to have discriminated based on race in violation of Title VI – was unwritten.

For rules like DAPA that "apply[] some particular measure across the board," "of course" a "challenge[] under the APA" is available. *Nat'l Wildlife Fed'n,* 497 U.S. at 890 n.2. Indeed, *amicus* EFELDF respectfully submits that it is commonplace to require considering *applications* of federal standards in specialized forums while allowing APA review of the systemic lawfulness of the federal standards in federal court:

> While the Act vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended § 2311(d) to deprive federal district courts of subject-matter jurisdiction under [28 U. S. C. §1331] to hear statutory or constitutional challenges to the federal guidelines themselves.

Int'l Union v. Brock, 477 U.S. 274, 285 (1986). Moreover, the Administration's narrow confines for judicial review are belied both by the availability of judicial review under the circumstances here before and after APA's enactment and by the lack of an express repeal of that review.

2. The Pre-INA APA Would Have Allowed Review, and INA Did Not Expressly Displace that Review

Nothing in the 1946 version of the APA would have denied review of DAPA that the States could have had in equity before 1946. Moreover, neither the Immigration and Nationality Act ("INA") in 1952 nor any of the subsequent INA amendments expressly precludes resort to APA review. For post-APA statutes, 5 U.S.C. §559 requires *express* statements to remove otherwise-applicable APA review.

Although the APA – as enacted – did not override any pre-APA statute that *expressly or impliedly* denied review, 5 U.S.C. §702 ("[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"), post-APA statutes must deny review *expressly*. 5 U.S.C. §559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999). Significantly, *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), the Administration's cited *implied-preclusion* decision (Admin Br. at 33), concerns the Agricultural Marketing Agreement Act of 1937, a *pre-APA* statute. Decisions finding implied preclusion for pre-APA statutes are inapposite to post-APA statutes. *Compare* 5

U.S.C. §702 *with id.* §559.[6] Consequently, as *post-APA* statutes, for INA and its subsequent amendments to preclude APA review, they would need to do so *expressly*, but they do not.

3. Pre-APA Equity Review Would Be Available, Even if Congress Had Never Enacted the APA

As indicated in the prior section, the APA does not preclude review. But even if the APA did preclude it, review would still lie with pre-APA equity review. Even before the original APA provided a cause of action or the APA's 1976 amendments waived federal sovereign immunity, judicial review was available in equity suits against federal officers: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689; *Ex parte Young*, 209 U.S. 123, 160 (1908); *U.S. v. Lee*, 106 U.S. 196, 213 (1882). Unlike the agencies for which they work, the individual Administration officials lack sovereign immunity here.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Significantly, the availability of declaratory relief against federal officers predates the APA,

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[6] The APA's 1976 amendments did not expand preclusion of review. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (*citing* 5 U.S.C. §559 and *Zurko*).

WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace that relief. *See* Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946); *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("Nothing in the [APA's] enactment … altered the *McAnnulty* doctrine of review …. It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*"); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* for the proposition that "generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). "Under the longstanding officer suit fiction …, … suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002). Thus, provided that a plaintiff alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.

In equity, plaintiffs threatened with *future* injury need not await an alternate legal remedy before filing suit in equity, and a *subsequent* legal remedy would not displace equity review: the "settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have

become available thereafter." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). Thus, even before the APA's enactment in 1946, injunctive or declaratory relief would have been available against DAPA.

4. Repeals by Implication Are Disfavored, Especially for Judicial Review

The canon against repeals by implication provides a similar basis to reject the Administration's suggestion that the INA provisions impliedly eliminated whatever APA review existed prior to INA's enactment: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original, interior quotations and citations omitted). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (internal quotations omitted).

Under that same clear-and-manifest standard, "[w]hen the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). Here, the relevant INA provision – 8 U.S.C. §1252(g) – is readily amenable to the States' no-preclusion interpretation. That section bars judicial review by aliens, not by U.S. citizens or states. Under *Home Builders*, this Court should adopt the no-preclusion interpretation.

CONCLUSION

The Court should affirm the entry of preliminary injunction.

Dated: May 11, 2015

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No. 15-40238, *Texas v. United States.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,997 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 11, 2015

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I hereby certify that, on May 11, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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