No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF WEST VIRGINIA; STATE OF KANSAS; STATE OF MISSISSIPPI,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security; TROY MILLER, Acting Commissioner, U.S. Customs and Border Protection; TAE D. JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement; UR M. JADDOU, Director of U.S. Citizenship and Immigration Services,

Defendants-Appellants,

ELIZABETH DIAZ; JOSE MAGANA-SALGADO; KARINA RUIZ DE DIAZ; JIN PARK; DENISE ROMERO; ANGEL SILVA; MOSES KAMAU CHEGE; HYO-WON JEON; BLANCA GONZALEZ; MARIA ROCHA; MARIA DIAZ; ELLY MARISOL ESTRADA; DARWIN VELASQUEZ; OSCAR ALVAREZ; LUIS A. RAFAEL; NANCI J. PALACIOS GODINEZ; JUNG WOO KIM; CARLOS AGUILAR GONZALEZ; STATE OF NEW JERSEY,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF FOR FEDERAL APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Texas v. United States, No. 21-40680

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

Plaintiffs-Appellees:

State of Texas; State of Alabama; State of Arkansas; State of Louisiana; State of Nebraska; State of South Carolina; State of West Virginia; State of Kansas; State of Mississippi.

Defendants-Appellants:

United States of America; Alejandro N. Mayorkas, Secretary, U.S. Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; Tae D. Johnson, Acting Director of U.S. Immigration and Customs Enforcement; Ur M. Jaddou, Director of U.S. Citizenship and Immigration Services.

Intervenor Defendants-Appellants:

Elizabeth Diaz; Jose Magana-Salgado; Karina Ruiz De Diaz; Jin Park; Denise Romero; Angel Silva; Moses Kamau Chege; Hyo-Won Jeon; Blanca Gonzalez; Maria Rocha; Maria Diaz; Elly Marisol Estrada; Darwin Velasquez; Oscar Alvarez; Luis A. Rafael; Nanci J. Palacios Godinez; Jung Woo Kim; Carlos Aguilar Gonzalez; State of New Jersey.

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/s/ Joshua M. Koppel
JOSHUA M. KOPPEL

STATEMENT REGARDING ORAL ARGUMENT

This case presents substantial legal questions that profoundly affect the federal government's power to administer the Nation's immigration laws and the lives of hundreds of thousands of Deferred Action for Childhood Arrival recipients. Oral argument is necessary for full consideration of these issues.

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INTRODUCTION

For nearly a decade, the U.S. Department of Homeland Security (DHS) has deferred the removal of certain undocumented immigrants who entered the United States years earlier as children and know only this country as home. This policy, known as Deferred Action for Childhood Arrivals (DACA), allows DHS to focus its limited enforcement resources on higher priorities, while furthering significant humanitarian interests. DHS is thereby able to better target noncitizens who threaten national security, public safety, and border security—individuals who are higher priorities for removal from the United States than the students, veterans, and other individuals who comprise the DACA population.

DACA is a straightforward exercise of DHS's statutory authority to administer the Nation's immigration laws and "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). The policy is faithful to the text of the Immigration and Nationality Act (INA). It is consistent with decades of agency practice, approved by Congress and the Supreme Court, to grant deferred action (or exercise similar forms of enforcement discretion) and issue work authorization in comparable circumstances. And it satisfies the procedural requirements of the Administrative Procedure Act (APA). The district court erred in holding otherwise. This Court should reverse.

STATEMENT OF JURISDICTION

Plaintiffs asserted jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. ROA.4180. The district court granted summary judgment to plaintiffs and entered a permanent injunction on July 16, 2021, which the court partially stayed on the same date. The government filed a notice of appeal on September 10, 2021. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs lack Article III standing.

2. Whether plaintiffs fall outside the relevant zone of interests of the INA.

3. Whether DACA is a general statement of policy that is exempt from the APA's notice-and-comment rulemaking requirements.

4. Whether DACA is consistent with the INA.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. Congress has granted the Secretary of Homeland Security broad discretion to administer and enforce the Nation's immigration laws. He is empowered to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), including to carry out the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1); *see id.* § 1103(a)(3) (authorizing the Secretary to "establish such

regulations," "issue such instructions," and "perform such other acts as he deems necessary for carrying out his authority under the [INA]").

Enforcement discretion is essential to DHS's mission. Each year, DHS is allocated sufficient resources to remove only a small fraction of individuals who are removable from the United States. In 2019, U.S. Immigration and Customs Enforcement (ICE) was able to remove about 2.4% of the estimated undocumented population. *See* ICE, *Fiscal Year 2019 Enforcement and Removal Operations Report* 19 (2019), https://go.usa.gov/xMdpH (2019 ICE Report); DHS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018*, at 1 (2021), https://go.usa.gov/xFyw6 (DHS Estimates). Accordingly, the Secretary has long prioritized criminals, threats to national security, and recent border crossers for immigration enforcement. *See* 2019 ICE Report 21 (noting that 91% of interior removals were of individuals with criminal convictions or charges). Congress has endorsed that approach, directing the agency to focus a significant portion of its limited enforcement resources on criminals and recent border crossers. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. F, tit. II, 129 Stat. 2242, 2497 (2015) (2016 Appropriations Act).

One measure DHS uses to implement these enforcement priorities is deferred action, which permits the agency to identify individuals who are lower priorities for enforcement, freeing up resources for higher-priority targets. As the government explained over thirty years ago, deferred action is an "act of administrative

convenience to the government which gives some cases lower priority" by deferring removal for a temporary period. 8 C.F.R. § 274a.12(c)(14). Deferred action does not confer any legal right to remain in the United States, and DHS still may remove those individuals. DHS and its predecessors have implemented more than twenty policies granting deferred action or related temporary, discretionary reprieves from removal since the 1950s, including the Family Fairness policy under which an estimated 1.5 million people could apply. *See* Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 20-23 (2012), https://perma.cc/42DA-L8V6 (CRS Analysis).

Congress has approved a number of these policies, including Family Fairness. *See, e.g.*, Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 301(g), 104 Stat. 4978, 5030 (specifying that the policy "should [not] be modified in any way" until the covered individuals received lawful immigration status). Congress has also recognized the agency's authority to grant deferred action. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 302, 313. At no point, despite repeatedly amending the INA, has Congress ever prohibited or restricted the Secretary's longstanding practice of granting deferred action to low-priority individuals.

2. Congress also has authorized DHS to grant work authorization to noncitizens. The INA, as amended by the Immigration Reform and Control Act of 1986 (IRCA), expressly permits the employment of noncitizens who are "authorized to be so employed by … the Attorney General" (now, the Secretary). 8 U.S.C.

§ 1324a(h)(3); *see* 6 U.S.C. § 557 (modifying statutory terms to refer to the Secretary). When Congress enacted IRCA in 1986, the federal government had already been granting work authorization to deferred-action recipients under a regulation adopted in 1981. *See* 8 C.F.R. § 274a.12(c)(14). IRCA thus endorsed that regulation, which remains in place today.

DHS and its predecessors have extended work authorization under every deferred-action and similar policy since at least the 1970s. *See, e.g.*, ROA.6574-75, 7634-35; *see also* ROA.7079 (Family Fairness). Congress has approved many such work-authorization policies, including under Family Fairness and for domestic-violence victims. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV). And in statutes other than IRCA, Congress has recognized DHS's authority to grant work authorization to noncitizens. *See, e.g.*, *id.* § 1184(p)(6); Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 11(a)(3), 88 Stat. 1652, 1655 (prohibiting certain employment of an undocumented immigrant "who has not been authorized by the Attorney General to accept employment").

B. Factual Background

1. In 2012, the Secretary of Homeland Security issued a memorandum establishing the DACA policy. The memorandum announced how the agency will exercise its enforcement discretion with respect to "certain young people" who entered the United States as children and "know only this country as home." ROA.18741. The memorandum explained that "additional measures are necessary to

ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." ROA.18741. Accordingly, DACA recipients generally would not be "placed into removal proceedings or removed from the United States," and U.S. Citizenship and Immigration Services (USCIS) was instructed to "accept applications to determine whether these individuals qualify for work authorization" during the period of deferred action. ROA.18742-43. The memorandum cautioned that this "exercise of discretion," like other deferred-action policies before it, conferred "no substantive right, immigration status or pathway to citizenship." ROA.18743.

The DACA memorandum provides that individuals may be considered for deferred action if they came to the United States under age 16; were not above the age of 30 when the memorandum issued; continuously resided in the United States since June 2007; have not been convicted of a felony, a significant misdemeanor, or multiple other misdemeanors, and do not otherwise pose a threat to national security or public safety; and are enrolled in school, have graduated from high school or obtained a general-education-development certificate, or are an honorably discharged veteran. ROA.18741. Requests for deferred action are considered "on a case by case basis" by immigration officers, who review whether the individual satisfies those criteria and whether other factors militate against deferred action. ROA.18742. There are under 600,000 current DACA recipients. USCIS, *Count of Active DACA Recipients*

by Month of Current DACA Expiration—June 30, 2021, https://go.usa.gov/xMwtK (USCIS Count).

2. In November 2014, the Secretary issued another memorandum that permitted other individuals to request deferred action under a policy known as Deferred Action for Parents of Americans (DAPA). ROA.22714-15. The DAPA memorandum also broadened the guidelines for deferred action under DACA. ROA.22713-14.

Shortly after, twenty-six States challenged the legality of DAPA and expansion of DACA as announced in the 2014 memorandum. They did not challenge the 2012 DACA memorandum or seek to enjoin DACA in its original form. The district court entered a preliminary injunction barring implementation of expanded DACA and DAPA, and a divided panel of this Court affirmed. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015). The Supreme Court affirmed by an equally divided Court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

3. In 2017, DHS rescinded the 2012 memorandum, and various plaintiffs challenged its rescission. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020). In its 2020 *Regents* decision, the Supreme Court vacated the rescission as arbitrary and capricious under the APA, holding that DHS failed to adequately consider alternatives to terminating DACA and failed to address the reliance interests of DACA recipients, their families, and their communities. *Id.* at 1910-16.

C. Prior Proceedings

In 2018, six years after the DACA policy was adopted, ten plaintiff States filed this suit to challenge the legality of DACA. ROA.4175, 4179. They claimed that DACA was issued in contravention of the APA's notice-and-comment rulemaking requirements, is contrary to the INA, and violates the Constitution's Take Care Clause. ROA.4179. After denying plaintiffs' motion for a preliminary injunction, ROA.15469, the district court stayed the case until the Supreme Court decided the challenge to DACA's rescission in *Regents*. Following *Regents*, during summary-judgment briefing, the United States initially asserted that DACA was unlawful but subsequently filed a supplemental brief defending DACA.

On July 16, 2021, the district court granted summary judgment in favor of plaintiffs. The court held that plaintiffs have standing because the presence of DACA recipients increases Texas's costs of providing emergency healthcare and public education; that DACA is procedurally unlawful because it was instituted without notice-and-comment rulemaking; and that DACA conflicts with the INA. ROA.25176-235. The court declined to reach plaintiffs' Take Care Clause claim. ROA.25235-36. The court vacated the DACA memorandum, remanded for further administrative proceedings, and entered a nationwide permanent injunction prohibiting the government "from administering the DACA program and from reimplementing DACA without compliance with the APA." ROA.25242-43, 25238-

39. The court temporarily stayed the injunction as to existing DACA recipients. ROA.25243.

Since then, DHS has published a notice of proposed rulemaking to promulgate a new DACA rule that would supersede the DACA memorandum. 86 Fed. Reg. 53,736 (Sept. 28, 2021).

SUMMARY OF ARGUMENT

I. The district court erred in concluding that Texas has Article III standing. The DACA memorandum indisputably applies only to individuals and not the States, and the Supreme Court has repeatedly admonished that a plaintiff's cognizable injury cannot be based on the federal government's alleged non-enforcement as to other individuals. That instruction is particularly apt where, as here, States attempt to overturn national immigration policies, which the Constitution and Congress have entrusted to the federal government. The district court held that Texas has standing on its purported, incidental costs incurred in providing social services to DACA recipients. But even assuming those costs (if proven) could form a cognizable injury, that injury is not traceable to DACA because other sources of federal law—not DACA—require States to pay those costs for all undocumented immigrants, regardless of whether they receive deferred action under DACA. In any case, Texas has not demonstrated that DACA recipients, who entered this country many years ago as children, would voluntarily depart absent the policy.

II. Plaintiffs also are not within the zone of interests protected by the INA. The INA establishes procedures and policies that apply to noncitizens and their sponsors. Nothing in the text, structure, or purpose of the INA suggests that Congress intended to permit States to invoke incidental and attenuated effects of federal immigration policies to contest their procedural or substantive validity.

III. The DACA memorandum was not required to undergo notice-and-comment rulemaking under the APA because the memorandum is a general statement of policy. A policy statement "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quotation omitted). That is precisely what the DACA memorandum does. It does not have the force and effect of law, it does not bind DHS itself, and it does not eliminate the discretion of agency officers to consider case-specific reasons to refuse to defer the removal of any particular undocumented immigrant. In any event, DHS is currently engaged in a new DACA notice-and-comment rulemaking that, regardless of its outcome, will render plaintiffs' procedural claim moot.

IV. DACA is also consistent with the INA. The policy is supported by the statutory text, longstanding agency practice, congressional approval, and judicial precedent.

A. The heart of DACA is a deferred-action policy under which certain people who entered the country as children, who are low priorities for enforcement, and who

have strong humanitarian equities are given temporary forbearance from removal. This forbearance does not of its own accord confer any substantive right or entitle recipients to remain in the United States. It is an act of prosecutorial discretion that frees up enforcement resources to be spent on higher-priority targets such as criminals, threats to national security, and recent border crossers. Forbearance under DACA thus falls squarely within the Secretary's statutory responsibility to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and administer the immigration laws, *see* 8 U.S.C. § 1103(a)(1), (3). It also is supported by longstanding historical practice. The agency has implemented more than twenty deferred-action and similar forbearance policies to identify low-priority individuals based on membership in defined categories, including a policy known as Family Fairness under which an estimated 1.5 million people were eligible to apply. Congress approved many of those policies, including Family Fairness, without ever curtailing the Secretary's authority.

The district court relied principally on this Court's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), to hold DACA unlawful, but *Texas* does not compel that result. As the Supreme Court explained, *Texas* invalidated DAPA recipients' eligibility for benefits, but it left "the Secretary's forbearance authority … unimpaired." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020).

B. DACA recipients are eligible for work authorization under a 1981 regulation, promulgated through notice-and-comment rulemaking, that applies to all

deferred-action recipients. *See* 8 C.F.R. § 274a.12(c)(14). The agency has granted work authorization under every deferred-action and similar policy since at least the 1970s, and Congress has approved many of those policies as well. Work authorization supports the Secretary's exercise of his statutory authority to set "enforcement policies and priorities." 6 U.S.C. § 202(5). It ensures that deferred-action recipients do not become a burden on their communities, by providing a means for them to contribute fully to society and the economy. Moreover, when Congress enacted IRCA in 1986, it expressly permitted the employment of noncitizens where "authorized to be so employed … by the Attorney General" (now, the Secretary), 8 U.S.C. § 1324a(h)(3), thereby preserving and approving the agency's interpretation of its statutory authority.

C. Treatment of DACA recipients as "lawfully present" in the United States for certain statutory purposes is also consistent with the INA. Contrary to the district court's view, lawful presence does not affect removability; it only affects a limited set of federal-benefits programs including Social Security and Medicare and bars on readmission under the INA. DACA recipients' eligibility under those INA provisions is not at issue in this case.

D. Finally, the district court's remedy enjoining DACA is overbroad. At a minimum, if this Court considers any particular aspect of DACA to be unlawful, it should so hold without invalidating the entire policy. Any injunction should also be limited to only those plaintiff States that can establish standing.

STANDARD OF REVIEW

This Court reviews "a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013) (quotation omitted). This Court reviews a permanent injunction for abuse of discretion, assessing "findings of fact under the clearly erroneous standard, and the conclusions of law under the *de novo* standard." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (quotation omitted).

ARGUMENT

I. PLAINTIFFS LACK STANDING

A. Plaintiff States Failed To Establish Standing To Sue The Federal Government For Unproven, Incidental Healthcare And Education Costs

To establish Article III standing, plaintiffs must demonstrate an injury that is (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged conduct; and (3) redressable. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs failed to meet these requirements.

The DACA memorandum has no direct application to plaintiffs as States, and "when [a] plaintiff is not himself the object of the government action or inaction he challenges," standing is ordinarily substantially more difficult to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation omitted). Moreover, a plaintiff has "no judicially cognizable interest in procuring enforcement of the

immigration laws" against someone else. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). And a plaintiff generally lacks standing to challenge the government's provision or denial of benefits to a third party. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-46 (2006).

Faithful adherence to these jurisdictional requirements is particularly important where States challenge federal immigration policy, because immigration policy is a national matter that the Constitution entrusts to "one national sovereign, not the 50 separate States." *Arizona v. United States*, 567 U.S. 387, 395 (2012). Turning the federal courts into an arena for what are ultimately policy disagreements between particular States and the national government is inconsistent with that constitutional design.

Here, the district court incorrectly ruled that Texas has Article III standing because it allegedly incurs incidental costs from providing emergency healthcare services and public education to DACA recipients. If individual States could challenge federal immigration policy based on such incidental costs, then States could routinely call on the federal courts to resolve complex debates over immigration policy, upending the constitutional design by enmeshing the courts in all matters of disputes between the federal government and any given State. *See Arizona*, 567 U.S. at 395 ("Immigration policy can affect trade, investment, tourism, and diplomatic relation for the entire Nation[.]"). That approach would radically alter the balance between the States and the federal government.

The district court's theory could enable a State to assert standing every time the federal government makes any decision concerning asylum, advance parole, work authorization, or the myriad other subjects that affect whether any noncitizen would enter or remain in the country. Nor would the court's logic be confined to the immigration realm. Its rationale could suggest that States are free to second-guess in court any federal policy that has some downstream and incidental effect on state population levels or the budget of state-funded social services, including, for example, federal prosecution policies or economic programs. Such a boundless theory of standing transgresses Article III's "fundamental" limitations on "the judiciary's proper role in our system of government." *Cuno*, 547 U.S. at 341.

In any event, the district court's Article III holding fails on its own terms. Texas's asserted fiscal injury is not fairly traceable to DHS's grants of deferred action, and a successful challenge to the DACA memorandum would not redress that injury. That is because, as the court itself recognized, federal law requires that Texas provide emergency medical services and public education to any undocumented immigrant, whether covered by DACA or not. ROA.25191; *see* 42 C.F.R. §§ 435.406(b), 435.139, 440.255(c) (requiring States to pay for emergency medical services); *Plyler v. Doe*, 457 U.S. 202 (1982) (requiring States to provide public education).

The district court erroneously reasoned that DACA nevertheless increases Texas's costs by "incentivizing otherwise unlawfully present aliens to remain" in the State rather than leaving the country. ROA.25191. Plaintiffs provided no evidence

that there is a net increase in the number of undocumented individuals in Texas who need social services just because DHS focuses its enforcement efforts on higher-priority noncitizens rather than the DACA population. In any case, plaintiffs failed to prove the factual assertion that DACA recipients would leave absent the policy.

The DACA memorandum is directed toward immigrants who would be highly unlikely to leave the country even without deferred action. Immigrants are eligible for deferred action under DACA only if they had continuously resided in the United States since June 15, 2007, ROA.18741—five years before the DACA policy was even announced. There is no reason to think that persons who entered the United States as children nearly fifteen years ago and resided here for years without any protection against removal under DACA would leave now without deferred action. ROA.18741. Countless DACA recipients know only the United States as home, and many live with family members who are U.S. citizens or lawful permanent residents. ROA.17968, ¶44, 18076, ¶36. Overwhelmingly, DACA recipients grew up speaking fluent English, attending U.S. schools, and consuming American culture. ROA.18177-78, ¶18. They are highly integrated into their present communities. DACA recipients would predictably face severe social, legal, economic, and linguistic barriers—and in many cases would need to abandon family members or children—if they were to return to their countries of birth, making voluntary emigration highly improbable. ROA.18073-75, ¶¶23-32, 18177-78, ¶18; *see* ROA.18075-76, ¶35 (empirical studies confirming that

DACA-eligible immigrants "overwhelmingly would not return" to their birth countries).

The district court's contrary conclusion rests on conjecture. The court cited the testimony of a Texas state demographer, but as even the court recognized, the demographer "had not thought through all the implications of DACA recipients losing status." ROA.25193 n.25. Indeed, he admittedly had never researched the reasons that undocumented immigrants might come to or leave the United States, ROA.18421, and was unfamiliar with any research on the return migration of DACA recipients, ROA.18449. The court also cited a survey of DACA recipients, ROA.25193, but the record evidence shows that the survey suffered from methodological errors in posing "complex, difficult, hypothetical" questions that called for respondents to speculate about future plans they might not have considered, ROA.18061-62, ¶¶15-16.

The district court acknowledged some of those evidentiary deficiencies, and conceded that "there is contrary evidence in the record" and "factual disputes" regarding whether DACA recipients are likely to remain in the United States if DACA is terminated, but nonetheless entered relief for plaintiffs. ROA.25194. That was error. The elements of standing are "an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. A court

may not award summary judgment to plaintiffs on the basis of disputed facts concerning their standing. *Id.; see Shah v. VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 453 (5th Cir. 2021).

Moreover, even assuming some individuals stay in Texas on account of DACA, the assertion that DACA leads to increased emergency Medicaid or public-education costs is still unfounded. Other courts have concluded that DACA in fact *reduces* the States' healthcare costs. *Regents of the Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018), *rev'd in part and vacated in part*, 140 S. Ct. 1891 (2020); *see* ROA.17994, ¶35, 17999, ¶43, 18048-49, ¶51 (employment authorization increases private health-insurance coverage); ROA.18005-06, ¶56 ($17.9 million in emergency Medicaid savings). And plaintiffs' declaration on the current costs of unaccompanied children in Texas public schools (ROA.23020-22, ¶¶3-8) addresses children who were born too recently to qualify for DACA. ROA.17948-49, ¶11.

The district court's standing ruling does not follow from *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). In *Texas*, this Court sustained Texas's standing to challenge DHS's DAPA policy based on the conclusion that the State would incur costs from subsidizing driver's licenses solely if DAPA were in place. *See id.* at 150, 155-60. The United States respectfully disagrees with that holding. But accepting it as the law of the Circuit, neither the plaintiffs nor the district court relied on such costs in this case. Instead, they relied on allegations of indirect healthcare and public-education costs that have a far more attenuated connection to DACA, and they failed

to prove that those alleged costs, which are the product of legal obligations other than DACA, would be diminished if DACA were terminated.

B. Plaintiff States Cannot Assert *Parens Patriae* Standing Against The Federal Government

Plaintiffs also claimed *parens patriae* standing to assert the interests of their citizens in avoiding labor-market competition from DACA recipients. But that assertion only underscores how the recognition of standing here would radically alter the constitutional design. A "State [does not] have standing as the parent of its citizens" to bring claims "against the Federal Government, the ultimate parens patriae of every American citizen." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *see Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *Brackeen v. Haaland*, 994 F.3d 249, 292 & n.13 (5th Cir. 2021) (en banc) (op. of Dennis, J.). The district court erred (ROA.25186-90) by relying on *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007), to find *parens patriae* standing. "Because Massachusetts [had] sued to remedy its own injury rather than that of its citizens, *Massachusetts v. EPA* is not a *parens patriae* case" and does not authorize any type of *parens patriae* lawsuit by a State against the federal government. *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 181-83 (D.C. Cir. 2019).

In any event, there is a genuine dispute of material fact as to whether deferred action and work authorization for DACA recipients harms the labor market. *See Shah*, 985 F.3d at 453. Despite the district court's speculation that some employers might

prefer DACA recipients over other applicants (ROA.25188), plaintiffs have not identified any employer who has done so. To the contrary, the record shows that DACA has not led to "any overall decline in employment for U.S. born workers" and has no negative effect on wages. ROA.10356, 17991-92, ¶30. That is because as more workers enter the labor force, they generate economic activity that creates new jobs. ROA.17988-89, ¶¶21, 23.

II. PLAINTIFFS ARE OUTSIDE THE ZONE OF INTERESTS OF THE INA

Plaintiffs have no right to review under the APA unless the interests they assert are "arguably within the zone of interests to be protected or regulated by the statute … in question." *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). The zone-of-interests inquiry asks whether Congress intended for a particular plaintiff to complain of the challenged agency action. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). The statute in question need not be specifically intended to benefit the plaintiff, but when a plaintiff is not itself the object of the challenged regulatory action, the plaintiff has no right of review if its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

Much as plaintiffs' injuries are not cognizable as a constitutional matter, their asserted interests are not protected by the INA, which governs the enforcement of immigration laws as to noncitizens. *See Linda R.S.*, 410 U.S. at 619 (finding no "cognizable interest in the prosecution or nonprosecution of another"). The INA

does not focus on the States. Nothing in the text, structure, or purpose of the INA suggests that Congress intended to permit States to invoke incidental and attenuated healthcare and public-education costs of the federal government's immigration enforcement policies in order to contest their procedural or substantive validity. And no relevant statutory provision protects a State from resident noncitizens obtaining deferred action, work authorization, or potential eligibility for federal benefits.

To the contrary, the INA throughout reflects the principle that immigration enforcement is exclusively the province of the Executive. *See Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 483-86 (1999); *accord DeCanas v. Bica*, 424 U.S. 351, 354 (1976). And the INA, in focusing on noncitizens, predictably provides only noncitizens an opportunity to challenge removal policies, as part of its detailed review scheme. *See* 8 U.S.C. § 1252(b)(9), (g) (providing that review is available only for an "alien"). The INA gives no indication that Congress intended to undermine the Executive's plenary authority over immigration simply because States disagree with how immigration laws are enforced as to those noncitizens.

In *Texas*, this Court held that Texas was within the zone of interests protected by the INA, for purposes of challenging the DAPA memorandum, because "Congress has explicitly allowed states to deny public benefits to illegal aliens." 809 F.3d at 163 (citing 8 U.S.C. § 1621(a)). While the government respectfully disagrees with the Court's reasoning, it is inapplicable in any event. Here, Texas is relying on

expenditures for public education and emergency medical services that are unconnected to any INA provision.

III. THE DACA MEMORANDUM IS EXEMPT FROM NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS

A. On the merits, the district court held that DHS violated the APA by adopting the DACA policy without notice-and-comment procedures. That was error. Notice-and-comment procedures are not required when an agency issues "general statements of policy," 5 U.S.C. § 553(b)(A), that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quotation omitted). In this circuit, whether agency action is a general statement of policy turns on whether the rule "impose[s] any rights and obligations" and whether the rule "genuinely leaves the agency and its decision-makers free to exercise discretion." *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quotation omitted). The DACA memorandum is such a general statement of policy.[1]

First, the memorandum does not have the force and effect of law and does not establish binding norms of conduct for the public. By its own terms, the

[1] Although the government respectfully disagrees with the district court's notice-and-comment holding, DHS in September 2021 issued a notice of proposed rulemaking soliciting public comment on a proposed rule. 86 Fed. Reg. 53,736. When DHS promulgates a final rule pursuant to these procedures, plaintiffs' notice-and-comment objection to DACA will become moot, and if this appeal is still pending, that claim will no longer provide an available basis to affirm. *See NRDC v. Nuclear Regulatory Comm'n*, 680 F.2d 810, 813-15 (D.C. Cir. 1982).

memorandum "confers no substantive right, immigration status or pathway to citizenship." ROA.18743. Rather, it sets out guidance to the agency's own employees to focus the agency's limited enforcement resources on higher-priority individuals. ROA.18743. Notably, immigrants remain "obliged to comply with all valid and applicable" immigration laws, *Aulenback, Inc. v. FHA*, 103 F.3d 156, 169 (D.C. Cir. 1997), notwithstanding DHS's policy decision not to remove certain individuals at the present time. The memorandum thus does not "impose new substantive burdens, in the sense that [it] either require[s] or prohibit[s] any particular actions" by undocumented immigrants. *Id.*

Second, the enforcement priorities outlined in the memorandum are applied "on a case by case basis," and the memorandum provides no "assurance that relief will be granted in all cases." ROA.18742. No undocumented immigrant has an enforceable right to obtain deferred action under the policy. *See* 8 U.S.C. § 1252(g); *AADC*, 525 U.S. at 485. DHS may also rescind or amend the DACA memorandum as warranted in light of changing circumstances, just as it may revoke (or establish) other deferred-action policies.

A quintessential use of policy statements is for an agency to announce how and when, in the exercise of its discretion, it will pursue (or forbear from) enforcement. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach."). That is what DHS has done here. Such enforcement

policies do not establish or alter any legally enforceable rights or obligations of third parties. *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1174-1175 (5th Cir. 1988). And such policies can be readily changed in response to changing circumstances, funding, and priorities, "because a change in [the agency's] policy does not affect the legal norm." *Syncor Int'l*, 127 F.3d at 94. Thus, courts have long held that agency documents guiding the use of enforcement resources, like the DACA memorandum, are not legislative rules subject to notice-and-comment procedures. *See American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1050 (D.C. Cir. 1987); *Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152, 1155 (5th Cir. 1984).

B. In *Texas*, this Court held that the DAPA memorandum was required to go through notice-and-comment procedures because the district court had not clearly erred in finding that DAPA had not "*genuinely* le[ft] the agency and its employees free to exercise discretion" in practice—regardless of what the DAPA memorandum on its face would permit. 809 F.3d at 172 (cleaned up). Critically, the district court declined to make any such factual finding in this case, recognizing that "there is a factual dispute concerning whether agents reviewing DACA applications exercise discretion as to whether an applicant satisfies the [DACA] criteria." ROA.25204. Instead, the court's holding rests on the conclusions that "the DACA Memorandum imposes rights and obligations," ROA.25201, and that the DACA memorandum itself contains

"fixed criteria" limiting the factors USCIS can consider in granting or denying deferred action, ROA.25204-05. Both of those conclusions are erroneous.

1. The district court first erred by concluding that the DACA memorandum establishes a new legal "right" to apply for work authorization, and to participate in Social Security and Medicare after paying associated taxes. ROA.25199-200. In fact, those benefits are collateral to the DACA memorandum because they flow from statutes or regulations (issued after notice-and-comment rulemaking) that existed prior to and independent of the DACA memorandum and apply to all immigrants who have been granted deferred action. *See* 8 U.S.C. § 1611(b)(2), (3) (providing eligibility for Social Security and Medicare coverage if a noncitizen "is lawfully present in the United States as determined by the Attorney General"); 8 C.F.R. §§ 1.3(a)(4)(vi) (deeming "[a]liens currently in deferred action status" lawfully present "[f]or the purposes of 8 U.S.C. 1611(b)(2)"), 274a.12(c)(14) (noncitizens granted deferred action are eligible to apply for work authorization). The DACA memorandum does not grant any new rights to those with deferred action.

The district court also reasoned that the DACA memorandum confers rights and obligations because it has a "present effect" rather than operating prospectively. ROA.25200. But the DACA memorandum did not by itself grant deferred action to anyone. ROA.18741. Its operation is purely prospective. Indeed, the memorandum expressly states that "[n]o individual should receive deferred action under this memorandum unless they *first* pass a background check[,] and requests for relief

pursuant to this memorandum are *to be* decided on a case by case basis." ROA.18742 (emphases added). The memorandum thus created a policy for DHS's consideration of *future* requests for deferred action, rather than conferring deferred action itself. *Cf. American Bus Ass'n v. United States*, 627 F.2d 525, 531 (D.C. Cir. 1980) (agency pronouncement had present effect because the statement, "without further action by the Commission and effective immediately," lifted "restrictions previously imposed").

2. The district court also erred in concluding that the DACA memorandum is a legislative rule because it establishes fixed criteria for when USCIS can grant deferred action under DACA. As an initial matter, the United States respectfully disagrees with the conclusion in *Texas* that a rule is legislative merely because it does not allow subordinate USCIS officials to ignore the policy judgment of the Secretary of Homeland Security regarding enforcement priorities. Congress has vested *the Secretary himself* with discretion to administer the INA, including its removal provisions, *see* 8 U.S.C. § 1103(a), and to set "national immigration enforcement policies," 6 U.S.C. § 202(5). Subordinate officials exercise only the authority the Secretary has delegated to them. *See* 8 U.S.C. § 1103(a)(2), (4), (5); 8 C.F.R. § 2.1. The Secretary's choice to define criteria for granting deferred action was thus a permissible exercise of her authority over the agency and reflects a permissible exercise of discretion, as contemplated by the INA.

In any event, the DACA memorandum permits rank-and-file adjudicators to deny deferred action for case-specific reasons, even if a requestor meets the specified

guidelines. Those guidelines are a necessary but not sufficient condition for granting deferred action. *See* ROA.18741. Indeed, USCIS explained that immigrants who meet the criteria set out in the DACA memorandum "are not automatically granted deferred action." ROA.18158-59. "Rather, each initial DACA request is individually considered," and an adjudicator determines "whether there are other factors that might adversely impact the favorable exercise of discretion." ROA.18159, ¶11; *see* ROA.18160, ¶15. Thus, the district court's unsupported assertion that USCIS may "use only those prescribed criteria" set out in the DACA memorandum when considering whether to grant deferred action, ROA.25202, is contrary to the record evidence. *See* ROA.18161-62, ¶18 (identifying examples when deferred action was denied for reasons not addressed by the memorandum).

IV. DACA IS CONSISTENT WITH THE INA

DACA is also a lawful exercise of the Secretary's expansive statutory authority to administer and enforce the Nation's immigration laws and responsibility to set national immigration-enforcement policies and priorities.

A. DACA Lawfully Creates Criteria For Certain Childhood Arrivals To Apply For Temporary Forbearance From Removal

1. Congress authorized DHS to use deferred action to implement enforcement priorities

a. Congress has given the Secretary broad authority to administer and enforce the Nation's immigration laws. The Secretary may "[e]stablish[] national immigration

enforcement policies and priorities," 6 U.S.C. § 202(5), including to carry out the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1). This power includes authority to "establish such regulations," "issue such instructions," and "perform such other acts as he deems necessary for carrying out his authority under the [INA]." *Id.* § 1103(a)(3); *see id.*. § 1103(a)(2) (giving the Secretary "control, direction, and supervision" of all DHS employees).

Congress authorized the Secretary to determine when—and whether—to initiate removal proceedings. When a statute like the INA gives an agency discretion "to decide how and when" its enforcement provisions "should be exercised," the statute generally empowers the agency not "to institute … enforcement proceedings." *Heckler v. Chaney*, 470 U.S. 821, 835, 838 (1985). Such prosecutorial discretion is the norm across law-enforcement agencies. It is also unavoidable here, where DHS has been allocated limited resources for immigration enforcement that make it impossible to remove everyone in the United States unlawfully. For example, in 2019, ICE had the resources to remove only about 2.4% of the estimated undocumented population. *See* 2019 ICE Report 19; DHS Estimates 1.

Deferred action falls comfortably within this express and implied authority to set enforcement priorities. DHS must distinguish between individuals who are and are not priorities for removal. For example, "alien smugglers or aliens who commit a serious crime" may be high priorities for removal, while individuals with "long ties to

the community" or other "equities" like "distinguished military service" may be low priorities for removal. *Arizona*, 567 U.S. at 396. Through deferred action, the Secretary sets criteria to identify low-priority individuals and grant them temporary forbearance from removal. Deferred action is thus "a form of prosecutorial discretion" that frees up agency resources to be spent on higher priorities. *See Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017).

The Supreme Court has long approved of the Secretary's use of deferred action. It has recognized the Secretary's "regular practice" of affording deferred action "for humanitarian reasons or simply for its own convenience," explaining that deferred action is part of the Secretary's "discretion to abandon the endeavor" of enforcement "[a]t each stage" of the process. *AADC*, 525 U.S. at 483-84. And it has approved of the "broad discretion" exercised by immigration officials, recognizing that they "must decide whether it makes sense to pursue removal at all," and acknowledging that "[r]eturning an alien to his own country may be deemed inappropriate even where he … fails to meet the criteria for admission." *Arizona*, 567 U.S. at 396.

This Court similarly has recognized the Secretary's broad discretion to use deferred action to set enforcement priorities, concluding that "[t]he decision to grant or withhold non-priority status," an earlier name for deferred action, "lies within the particular discretion of [DHS]." *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (discussing "power to employ such a category for its own administrative

convenience"); *Johns v. DOJ*, 653 F.2d 884, 890 (5th Cir. 1981) (recognizing that the INA gives the agency "discretion" to defer deportation); *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (acknowledging that "a principal feature of the removal system is the broad discretion exercised by immigration officials" (quotation omitted)). This Court's more recent *Texas* decision does not call these cases into question, as it left "the Secretary's forbearance authority … unimpaired." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020) (citing *Texas*, 809 F.3d at 168-69). Other courts of appeals likewise have recognized the Secretary's "discretion to prioritize the removal of some and to deprioritize the removal of others." *Casa de Maryland v. DHS*, 924 F.3d 684, 691 (4th Cir. 2019); *see, e.g.*, *Arizona Dream Act Coal.*, 818 F.3d 901, 909 (9th Cir. 2016); *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015); *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999); *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983); *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977).

b. DACA is a straightforward exercise of the Secretary's authority to use deferred action to implement enforcement priorities. In *Regents*, the Supreme Court recognized that "[t]he defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision)." 140 S. Ct. at 1911. Like other deferred-action policies, DACA establishes guidelines to help agency employees identify individuals who may warrant temporary forbearance from removal because they are low priorities for enforcement. There is no dispute that the DACA guidelines serve to identify individuals who are among the lowest priorities for

removal: DACA recipients all have "long ties to the community" and other significant "equities." *Arizona*, 567 U.S. at 396. They all entered the United States "as children and know only this country as home," ROA.18741, and to qualify for consideration must have enrolled in school or enlisted in the military. Accordingly, *Regents* observed with respect to DACA that "forbearance remain[s] squarely within [DHS's] discretion," in light of the agency's responsibility to establish "'national immigration enforcement policies and priorities.'" 140 S. Ct. at 1911-12 (quoting 6 U.S.C. § 202(5)).

DACA supports immigration enforcement in tangible ways. For example, if an immigration officer encounters a DACA recipient, the officer can quickly verify that the agency already has determined that the individual is a low priority for removal. The officer can rely on that prior determination and focus their review of the individual's immigration and criminal history on relevant events occurring after the deferred-action grant. Similarly, ICE may rely on USCIS's review of a DACA recipient's immigration and criminal history to decide to continue, administratively close, or dismiss without prejudice removal proceedings, to allow higher-priority cases to progress more quickly through the immigration courts.

2. Historical practice confirms that DHS may use deferred action to implement enforcement priorities

Historical practice also supports DHS's forbearance policy. DHS has made a longstanding policy decision to focus its limited enforcement resources on criminals,

threats to national security, and recent border crossers. *See* 2019 ICE Report 21 (91% of removals based on criminal convictions or pending charges). Congress has endorsed those priorities, requiring ICE to spend at least $1.6 billion to remove criminals and to prioritize their removal according to "the severity of th[e] crime." 2016 Appropriations Act, div. F., tit. II, 129 Stat. at 2497.

For more than 60 years, the agency has used deferred action and related discretionary enforcement policies to better focus resources on those high-priority targets by diverting resources away from low-priority individuals, many of whom also present a strong case for the exercise of enforcement discretion on humanitarian grounds. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 193-94 (D.D.C. 2014). DHS and its predecessors have implemented more than twenty such policies to identify low-priority individuals based on membership in defined categories. *See* CRS Analysis 20-23. DHS's "longstanding" determination of its statutory authority to employ such policies is entitled to "particular deference." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (quotation omitted); *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.").

For example, from 1956 to 1990, the Immigration and Naturalization Service (INS)—DHS's predecessor—granted "extended voluntary departure" to certain professionals, those with exceptional ability in the arts or sciences, nurses, and nationals of at least fourteen countries. *See Hotel & Rest. Emps. Union v. Smith*, 846

F.2d 1499, 1510 (D.C. Cir. 1988) (en banc) (op. of Mikva, J.) (recognizing extended voluntary departure falls within the Attorney General's "broad latitude [under 8 U.S.C. § 1103(a)] in enforcing the immigration laws"); *see also* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 122-24 (2015); CRS Analysis 22-23. In 1987, INS instituted the "Family Fairness" policy to "indefinitely defer deportation" of certain spouses and children of immigrants whose status was legalized by IRCA. ROA.13516-17. INS expanded Family Fairness in 1990 to cover spouses and children originally left out of the policy, making an estimated 1.5 million people, about 40% of the estimated undocumented population at the time, eligible for protection. *See* ROA.6574-75, 6773, 6776, 7078-79; DHS, Office of Policy & Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, at 10 (2003), https://go.usa.gov/xFytW.

More recently, INS and then DHS have provided that certain potentially visa-eligible individuals may receive deferred action, including self-petitioners under the Violence Against Women Act of 1994 while they waited for a visa to become available, ROA.6579, and victims of certain crimes while they waited for their T or U nonimmigrant status applications or petitions to be adjudicated, ROA.6599; 8 C.F.R. §§ 214.11(j) (T nonimmigrant status applicants), 214.14(d)(2) (U nonimmigrant status petitioners); 28 C.F.R. § 1100.35(b) (certain trafficking victims). In 2005, DHS issued a policy to grant deferred action to foreign students who lost their lawful status by failing to pursue a "full course of study" following Hurricane Katrina. ROA.6588

(quoting 8 C.F.R. § 214.2(f)(6)). In 2009, DHS issued a policy to grant deferred action to certain surviving spouses and children of U.S. citizens, recognizing that "no avenue of immigration relief exists for the surviving spouse." ROA.6605, 6608. And in 2013 and 2014, DHS issued policies to grant deferred action and parole-in-place to certain family members of military, veterans, and individuals seeking to enlist in the U.S. military. *See* USCIS, *Adjudicator's Field Manual*, ch. 21.1(c), https://go.usa.gov/xefqv.

Against the backdrop of this pervasive administrative practice, Congress has never prohibited or restricted the Secretary's use of deferred action, despite passing major amendments to the INA in 1986, 1990, and 1996. At the time of those amendments, "INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience," *AADC*, 525 U.S. at 483-84, yet Congress left DHS's authority to use deferred action untouched. Under similar circumstances, the Supreme Court has found "congressional approval" of an agency's interpretation of its authority from statutory amendments that "left completely untouched the broad rule-making authority granted in the earlier Act." *Haig v. Agee*, 453 U.S. 280, 300-01 (1981) (quotation omitted); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one

intended by Congress." (quotation omitted)); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (similar).

It is thus significant that Congress chose not to curtail the Secretary's authority each time it amended the INA, despite a "longstanding and officially promulgated view that the Executive had the power" to issue deferred-action policies. *Haig*, 453 U.S. at 300-01. Instead, Congress repeatedly recognized the agency's authority to grant deferred action. For example, the REAL ID Act, § 202(c)(2)(B)(viii), 119 Stat. at 313, provides that States may issue driver's licenses to individuals with "approved deferred action status."

Furthermore, Congress expressly approved of some of the enforcement-discretion programs. In 1990, for example, Congress in IMMACT endorsed the Family Fairness policy by amending the INA to include an expanded version of the policy. While the statute did not take immediate effect, it provided that the "existing family fairness program should [not] be modified in any way" in the intervening period. IMMACT, § 301(g), 104 Stat. at 5030; *see* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (codifying deferred-action program for domestic-violence victims); 8 U.S.C. § 1227(d)(2) (T and U nonimmigrant status applicants and petitioners).

3. The district court's contrary reasoning is incorrect

a. The district court relied (ROA.25207-27) on this Court's opinion in *Texas* to hold that DACA unlawfully grants recipients temporary forbearance from removal. But as the Supreme Court recognized, *Texas* "underscored that nothing in its decision

or the preliminary injunction 'requires the Secretary to remove any alien or to alter' the Secretary's class-based 'enforcement priorities.'" *Regents*, 140 S. Ct. at 1911 (quoting *Texas*, 809 F.3d at 166, 169). The "'challenged portion of DAPA's deferred-action program' was the decision to make DAPA recipients eligible for benefits," while the "other '[p]art of DAPA … involve[d] the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens.'" *Id.* (quoting *Texas*, 809 F.3d at 166, 168 & n.108). Accordingly, *Texas* invalidated the benefits available under the DAPA memorandum, while leaving "the Secretary's forbearance authority … unimpaired." *Id.* ("The Fifth Circuit's focus on … benefits [rather than forbearance] was central to every stage of its analysis.").

The Supreme Court went on to observe that forbearance is both at the heart of DACA and "squarely within [DHS's] discretion." *Regents*, 140 U.S. at 1911-12. "The three-page memorandum that established DACA is devoted entirely to forbearance, save for one sentence directing USCIS to 'determine whether [DACA recipients] qualify for work authorization.'" *Id.* at 1912 n.6; *see id.* (recognizing that other "benefits associated with DACA flow from a separate regulation"). In this way, DACA aids DHS in identifying individuals who should receive temporary forbearance from removal because they are low enforcement priorities. The policy does not require the government to grant deferred action to any applicant. *See Dong Sik Kwon v. INS*, 646 F.2d 909, 918-19 (5th Cir. 1981) (INS operating instructions did "not have

the force of law" and conferred "no substantive rights"); *Pasquini*, 700 F.2d at 661-62 (same for deferred-action policy). It does not confer any "substantive right" or "immigration status" on any applicant who receives deferred action. ROA.18742. It does not prevent the government from initiating removal proceedings against any individual or give recipients any defense to removal. And it does not itself extend work authorization, Social Security coverage, or any other benefit to DACA recipients. There is thus no basis to depart from the Supreme Court's understanding that DACA lawfully permits the grant of temporary forbearance from removal.

Moreover, DACA's scope is meaningfully different from the policies at issue in *Texas*. In holding that the Secretary lacked the authority to adopt the DAPA policy, this Court emphasized that DAPA applied to 4.3 million people. *See Texas*, 809 F.3d at 181. In contrast, there are currently fewer than 600,000 DACA recipients. *See* USCIS Count. "If the point is that the 'economic and political magnitude' of allowing 4.3 million people to remain in the country … is such that Congress would have spoken to it directly, then surely it makes a difference that one policy has less than one-sixth the 'magnitude' of the other." *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 509 (9th Cir. 2018).

The district court noted (ROA.25208-09) that 1.5 million people may be eligible for deferred action under DACA, but even that figure is by no means novel in scope. As discussed, an estimated 1.5 million people were eligible to apply under the Family Fairness policy, and far from treating that exercise of discretion as inconsistent

with the INA, Congress codified the policy. *See* IMMACT, § 301(g), 104 Stat. at 5030. The court disregarded (ROA.25228-29) this precedent by characterizing Family Fairness as "interstitial," reasoning that it was put in place "to delay prosecution until Congress could enact legislation providing the same benefits." But by this logic, DACA is equally interstitial. While Family Fairness was in place, one house of Congress had passed a bill that addressed the covered population. *See* American Immigration Council, *Reagan-Bush Family Fairness: A Chronological History* 3-4 (2014), https://perma.cc/EG3G-Z7DA (Reagan-Bush Family Fairness). Similarly here, the House has passed the American Dream and Promise Act of 2021, which is currently under consideration in the Senate. *See* H.R. 6, 117th Cong. (Mar. 18, 2021), https://go.usa.gov/xFprQ.

The district court thought DACA might not be interstitial because Congress previously declined to enact similar statutes. But the same is again true of Family Fairness: when INS instituted the policy in 1987, it did so two weeks after Congress had rejected a legislative proposal to provide a pathway to lawful status for those covered by the policy. *See* Reagan-Bush Family Fairness 2 (describing proposal of Senator Chafee). And Congress had less than one year earlier enacted legislation (IRCA) with the apparent intent to exclude from the INA's protections the very individuals covered by Family Fairness. Then, when INS expanded the policy in 1990, the House had just failed to move forward a Senate proposal to protect covered

individuals from deportation. *Id.* at 3-4. Thus, regardless of whether Congress has failed to act here, DACA remains as "interstitial" as Family Fairness was.

Contrary to the district court's view (ROA.25209, 25225-26), upholding DACA would not mean that DHS could grant deferred action to every noncitizen unlawfully in the United States. The Supreme Court has recognized that an agency's discretion not to take enforcement action may not "disregard legislative direction in the statutory scheme" or constitute an "abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 & n.4. A refusal to institute *any* removal proceedings would both disregard contrary direction in the INA and abdicate DHS's enforcement responsibilities. And a policy of wholesale non-enforcement could not be justified as a tool to allocate limited enforcement resources. But here, where the agency is exhausting its enforcement resources, deferred action for the kinds of low-priority individuals covered by DACA is an appropriate measure to effectively carry out the Secretary's priorities that are themselves in line with broad congressional directions.

b. The district court also reasoned (ROA.25209-11) that DACA is unlawful because deferred action is not a "true form[] of prosecutorial discretion," a view wholly at odds with sixty years of agency practice, congressional approval, and judicial precedent. Every historical example of deferred action or similar enforcement-discretion policy set class-wide criteria by which individuals were temporarily granted forbearance from removal. The court commented (ROA.25227) that most policies were implemented "on a country-specific basis," but many were not. *See supra* pp.31-

35 (deferred action and similar policies for professionals; those with exceptional ability in arts and sciences; nurses; spouses and children under Family Fairness; domestic-violence victims; other crime victims; students after Hurricane Katrina; surviving spouses and children of U.S. citizens). Nor is there any basis for such a limit: the INA broadly authorizes the Secretary to set enforcement priorities without limiting consideration to an individual's nationality; Congress has approved enforcement discretion policies based on other considerations, *id.*; and courts have affirmed the Secretary's discretion to use deferred action, *see AADC*, 525 U.S. at 483-84 (approving deferred action "for humanitarian reasons or simply for [the agency's] own convenience"); *Johns*, 653 F.2d at 890 (the "reason" for staying deportation "lie[s] entirely within the discretion of the Attorney General").

Relatedly, the district court attempted (ROA.25210-11) to draw a line between "prosecutorial discretion" and "adjudicative discretion," placing decisions to grant affirmative benefits beyond the agency's authority. But as discussed, temporary forbearance from removal is not itself a benefit, and DACA recipients do not receive any defense to removal based on the DACA policy itself. Nor is there anything wrong with establishing guidelines that allow individuals to affirmatively request temporary forbearance. It is well established that the Secretary may establish clear criteria for the exercise of his discretion under the INA. *See Akhtar v. Gonzales*, 450 F.3d 587, 593-94 (5th Cir. 2006); *e.g.*, *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001); *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970). Nothing in the INA prohibits the

Secretary from issuing such guidance to ensure appropriate, consistent, and efficient consideration of the agency's enforcement priorities. *See* 8 U.S.C. § 1103(a)(2) (giving the Secretary "control, direction, and supervision" of all DHS employees).

The district court also concluded (ROA.25224-25) that DACA is unreasonable because Congress "intended to completely preempt further regulation in the area of immigration." Congress's intention to preempt state immigration laws is irrelevant. Rather than prohibit further federal regulation, Congress authorized the Secretary to "establish such regulations," "issue such instructions," and "perform such other acts as he deems necessary for carrying out his authority under the [INA]." 8 U.S.C. § 1103(a)(3). The Secretary's regulations are an integral part of the "extensive and complex" system of "[f]ederal governance of immigration" that Congress authorized. *Arizona*, 567 U.S. at 395-96.

c. Finally, the district court found it significant (ROA.25212) that Congress has not passed a statute to protect the DACA population. But "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (quotation omitted). It is immaterial to the Secretary's authority that Congress failed to act either before or after DACA was established. These legislative failures occurred after the INA was enacted in 1952 and substantively amended in 1986, 1990, and 1996, and they do not alter those statutes. "The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier

one." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) (cleaned up). That is why "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation" in discerning the Secretary's authority. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). Significantly, legislative proposals cited by the court would have been far more dramatic in effect than DACA: they proposed granting lawful immigration status, while DACA simply identifies guidelines for case-by-case, temporary forbearance from removal. *E.g.*, DREAM Act, S. 1291, 107th Cong. (2001).

B. The INA Permits DHS To Grant Work Authorization To DACA Recipients

1. Congress authorized DHS to grant work authorization to deferred-action recipients

Congress's broad grant of authority to the Secretary to administer the Nation's immigration laws includes the power to grant work authorization to DACA recipients. Specifically, the INA permits the employment of noncitizens who are "authorized to be so employed … by the Attorney General" (now, the Secretary). 8 U.S.C. § 1324a(h)(3). Under regulations in place for forty years, deferred-action recipients may receive work authorization if they show economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); 86 Fed. Reg. at 53,756-60. These regulations apply equally to DACA recipients and those with deferred action under other policies, and granting work authorization to DACA recipients is a straightforward application of these longstanding regulations.

Work authorization is a permissible tool for administering the INA because it is "reasonably related to the duties imposed upon" the Secretary. *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979); *see Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir. 1970). Work authorization supports the Secretary's use of deferred action as a measure to implement enforcement prioritization: if the Secretary could not permit recipients of deferred action to obtain work authorization, that would prevent recipients from being able to support themselves and their families and could increase their perception that they have no choice but to work without authorization. Instead, work authorization ensures that individuals who likely will remain in the United States for an extended period can fully contribute to society and that employers can lawfully hire them; it allows individuals to provide for their families and reduces exploitation and distortion in the labor market. *See DeCanas*, 424 U.S. at 364 (recognizing that some individuals without lawful residence "may under federal law be permitted to work here"); *Perales v. Casillas*, 903 F.2d 1043, 1045-46 (5th Cir. 1990) (holding that the agency's decision to grant work authorization to voluntary-departure recipients, individuals with "no legal status," "has been committed to agency discretion by law"); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) (recognizing Secretary's "broad discretion to determine when noncitizens may work in the United States").

2. Historical practice confirms that DHS may grant work authorization to deferred-action recipients

Historical practice also supports work authorization for DACA recipients. *See* 86 Fed. Reg. at 53,756-60 (describing history). For decades, INS and later DHS have interpreted the INA to authorize the agency to grant work authorization to deferred-action recipients. 17 Fed. Reg. 11,469, 11,489 (Dec. 19, 1952) (regulation permitting nonimmigrants to be employed if so "authorized" by the relevant agency official). In 1981, INS promulgated a regulation to make deferred-action recipients eligible for work authorization if they could demonstrate an economic need, invoking the agency's general authority to administer the INA under 8 U.S.C. § 1103(a). *See* 46 Fed. Reg. 25,079, 25,080-81 (May 5, 1981) (now codified at 8 C.F.R. § 274a.12(c)(14)). These "longstanding" interpretations of DHS's statutory authority are entitled to "particular deference." *Barnhart*, 535 U.S. at 220 (quotation omitted).

DHS and its predecessor exercised this authority to grant work authorization under every deferred-action or similar policy since at least the 1970s, including under Family Fairness. *See, e.g.*, ROA.7634-35 (summarizing agency practice to grant work authorization when INS did "not intend" or was "unable to enforce the alien's departure"); *Recent Developments*, 64 No. 41 Interpreter Releases 1190, App. II, at 1206 (Oct. 26, 1987) (Family Fairness); ROA.7079 (same); ROA.6579 (self-petitioners under VAWA); 8 C.F.R. § 245.24(a)(3) (U nonimmigrant status petitioners); ROA.6588 (foreign students affected by Hurricane Katrina); ROA.6609 (surviving

spouses); 8 C.F.R. § 274a.12(a)(11), (c)(9), (c)(10) (noncitizens with deferred enforced departure, applicants for adjustment of status, and certain individuals subject to removal proceedings). Congress approved many of these specific policies, including the agency's decision to make an estimated 1.5 million people eligible for work authorization under Family Fairness, *see supra* pp.5, 33, 35, 37-39, as well as policies concerning domestic violence victims, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV).

Congress more broadly approved the agency's interpretation of its statutory authority to grant work authorization when it enacted IRCA. IRCA made it unlawful for employers to hire "an unauthorized alien (as defined in subsection (h)(3))" for employment. 8 U.S.C. § 1324a(a)(1); *see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 & n.3 (2002). Subsection (h)(3) defines "unauthorized alien" to exclude an individual who is "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by [the INA] *or by the Attorney General*" (now, the Secretary). 8 U.S.C. § 1324a(h)(3) (emphasis added). Congress thus made explicit that work authorization can come from the Secretary, consistent with the agency's longstanding position.

When Congress enacted IRCA in 1986, it was aware of the longstanding agency practice of affording work authorization to undocumented immigrants and, in particular, to the Reagan Administration's 1981 regulation making deferred-action recipients eligible for work authorization. The enacting history includes discussion of INS's position that it already had "authority to define classes of aliens who may be

employed in the U.S." *Immigration Reform and Control Act of 1983: Hearings Before the Subcomm. on Immigration, Refugees and Int'l Law of the H. Comm. on the Judiciary*, 98th Cong. 1441, 1450 (1983) (DOJ Letter); *see INS Oversight and Budget Authorization for Fiscal Year 1985: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 98th Cong. 352, 357 (1984) (INS Letter) (explaining that INS regulations "set forth eligibility and criteria for employment authorization").

Additionally, INS was then considering a petition to rescind the 1981 regulation on the ground that work authorization conflicted with the INA. *See* 51 Fed. Reg. 39,385, 39,386-87 (Oct. 28, 1986). Congress enacted IRCA before INS could do so, thereby reiterating that work authorization for deferred-action recipients was available. As INS afterward explained, "the only logical way to interpret [IRCA] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority," chose to "exclude" from limitations on employment "aliens who have been authorized employment by the Attorney General through the regulatory process." 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987).

Congress also has recognized the Secretary's authority to grant work authorization in other statutes. For example, in the Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 11(a)(3), 88 Stat. at 1655, Congress made it unlawful for farm-labor contractors to employ any undocumented immigrant "who has not been authorized by the Attorney General to

accept employment." *See* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 6, 90 Stat. 2703, 2705-06 (codified as amended at 8 U.S.C. § 1255(c)) (amending the INA to bar adjustment of status for those in "unauthorized" employment). And Congress reiterated that authority in other contexts. *See* 8 U.S.C. § 1231(a)(7) (accepting agency practice of granting work authorization to some individuals subject to removal orders); 42 U.S.C. § 405(c)(2)(B)(i)(I) (requiring work authorization for social-security number); *see also* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (linking eligibility for deferred action and work authorization); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1694-95 (2003) (similar).

3. The district court's contrary reasoning is incorrect

The district court erred in holding that the Secretary exceeded his authority in granting work authorization to DACA recipients. The court relied (ROA.25218 n.50) on this Court's decision in *Texas* to hold that DHS lacked authority to grant work authorization "to any class of illegal aliens whom DHS declines to remove." 809 F.3d at 169. *Texas* is not controlling.

Texas reasoned that "DAPA would dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country." 809 F.3d at 181. Given that impact, the Court reasoned that if Congress had meant to empower DHS to provide work authorization on that scale, it would

have done so explicitly. *Id.* at 181-83. Compared to the DAPA policy, DACA is substantially more limited in scope. DACA recipients account for less than 0.4% of the 155 million persons currently employed in the civilian workforce. *See* Bureau of Labor Stats., *Table A-1: Employment status of the civilian population by sex and age* (Nov. 2021), https://go.usa.gov/xefgr. Providing work authorization on this significantly more limited scale finds direct historical precedent in prior policies, such as Family Fairness.

The district court also wrongly reasoned (ROA.25217) that work authorization undermines IRCA's prohibition on the employment of unauthorized workers. IRCA itself provides that individuals who are "authorized … by the Attorney General" to accept employment are not "unauthorized" workers. 8 U.S.C. § 1324a(h)(3). IRCA's history demonstrates that Congress "accepted and ratified" the agency's interpretation of its authority to grant work authorization, including under an enforcement-discretion policy for which an estimated 1.5 million people were eligible, thereby adopting that "background understanding in the legal and regulatory system." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536-37 (2015). It is immaterial that the DACA memorandum requires applicants to apply for work

authorization.[2] If their applications are granted, they are, by definition, lawfully able to work under IRCA.

The district court next concluded (ROA.25216) that, because Congress identified specific instances in which DHS must or may grant work authorization, it removed DHS's discretion to grant work authorization in any other circumstance. But Congress's decision to expressly permit work authorization for particular individuals without lawful status does not limit work authorization to only those circumstances, as historical precedent confirms. *See Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) ("The *expressio unius* canon is a feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." (quotation omitted)). Indeed, if the court were correct that the Secretary had no other authority to issue work authorizations, then 8 U.S.C. § 1226(a)(3) and other statutory provisions *prohibiting* the conferral of work authorization to certain noncitizens without lawful status, *e.g.*, 8 U.S.C. § 1231(a)(7), would be rendered superfluous.

Finally, the district court wrongly reasoned (ROA.25217) that some DACA recipients are in removal proceedings and thus ineligible for work authorization under § 1226(a)(3). That provision does not apply here. It expressly exempts individuals

[2] The proposed rule now under consideration would permit, but not require, DACA applicants to apply for work authorization. *See* 86 Fed. Reg. at 53,763 & n.255.

who "otherwise would (without regard to removal proceedings) be provided [work] authorization." *Id.* The provision (added in 1996) thereby preserves the Secretary's power to grant work authorization pursuant to preexisting regulations, as in 8 C.F.R. § 274a.12(c)(14). *See* Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-585. And that provision only demonstrates that Congress approved of the Secretary's "longstanding and officially promulgated view" of its authority. *Haig*, 453 U.S. at 300-01.

In any case, § 1226(a)(3) at most would bar work authorization for a small subset of DACA recipients. It does not apply to everyone in removal proceedings, but only to individuals "arrested and detained" "[o]n a warrant," either held in detention or released on bond or parole, and otherwise ineligible to work. *See* 8 U.S.C. § 1226(a)(1)-(2); *INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183, 195-96 (1991) (discussing precursor regulation). It would not apply to the vast majority of DACA recipients, who are not in removal proceedings, or bear on DACA's overall legality.

C. DACA Recipients' "Lawful Presence" For Limited Purposes And Individual Grants Of Advance Parole Provide No Basis To Hold DACA Unlawful

1. DACA recipients, like other deferred-action recipients, remain removable notwithstanding being "lawfully present" for other purposes

The district court reasoned (ROA.25213-16) that DACA conflicts with the INA because, even though DACA recipients are removable under the INA, DACA

prevents their removal by treating them as "lawfully present." But that is inconsistent with the meaning of "lawful presence" and its significance for removal. Removability depends on the individual's immigration status. "Lawful presence" does not effect a change in that immigration status; it is simply a determination that an individual's presence in the United States is tolerated for the time being and for certain purposes, notwithstanding his or her removability. *See Dhuka v. Holder*, 716 F.3d 149, 154, 156 (5th Cir. 2013) (contrasting "lawful status," which "implies a right [to be in the United States] protected by law," with a "period of stay authorized by the Attorney General," which "describes an exercise of discretion by a public official" (quotation omitted)); *Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013) (similar). DACA does not prevent recipients' removal. Whether or not recipients are treated as "lawfully present" has no effect on their removability.

Whether a noncitizen is "lawfully present" for a particular purpose affects eligibility for a limited number of federal programs under separate regulations. *See Regents*, 140 S. Ct. at 1911 n.5; *e.g.*, 8 C.F.R. § 1.3(a)(4)(vi) (deeming deferred-action recipients "lawfully present" for Social Security coverage). And the period of unlawful presence affects, for a limited class of noncitizens, when they can again seek admission to the United States. *See* 8 U.S.C. § 1182(a)(9)(B)(i) ("[a]ny alien" who was "unlawfully present in the United States for one year or more" and "again seeks admission within 10 years of the date of such alien's departure" is "inadmissible"). But plaintiffs have not challenged the application of any of these statutes or

regulations to DACA recipients, either in their complaint or summary-judgment briefing. The district court also did not address the lawfulness of those authorities—it only mistakenly viewed lawful presence as affecting removal. There is therefore no basis to review the lawfulness of the agency's unchallenged lawful-presence designations or to invalidate DACA on those grounds. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

2. Advance parole has no bearing on DACA's legality

The district court concluded (ROA.25220) that DACA unlawfully makes "the entire DACA population eligible to apply for advance parole," in violation of the INA. This is incorrect. As a statutory matter, "*any* alien applying for admission to the United States" may be paroled into the country "temporarily … only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). Noncitizens currently in the United States may request parole in advance, which generally permits them to reenter after they have left the country (unless there is a subsequent determination against reentry). *See* 8 C.F.R. § 212.5(f). Advance parole is not specific to DACA recipients, and DACA alone does not guarantee any individual advance parole. *See* USCIS, Form I-131, *Instructions for Application for Travel Document* 4-5 (Apr. 24, 2019), https://go.usa.gov/xevHF. That statutory authority grounded in the INA has no bearing on DACA's legality.

The district court found problematic (ROA.25221-22) that, once paroled, noncitizens could apply to adjust their status if they satisfied the INA's requirements

for lawful permanent residency. But this is not a feature of DACA either. Congress has determined that the statutory bar preventing individuals in the United States from becoming lawful permanent residents only applies if they are "present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(6)(A)(i). And in practical reality, a limited segment of the noncitizen population, including DACA recipients, will one day meet the INA's requirements for lawful permanent residence. *See* ROA.18292 (DHS letter informing Congress that around 3,000 DACA recipients who were paroled back into the United States, and who were otherwise eligible for lawful permanent residence, adjusted status to obtain lawful permanent residence by 2015). Those noncitizens who have an independent, substantive basis for lawful permanent residence obtain adjustment of status following parole not because of any feature of DACA but because of preexisting statutory directives of the INA.

D. The District Court's Invalidation Of DACA Is Overbroad

At a minimum, the district court erred by invalidating DACA in its entirety. As discussed, the DACA memorandum "is devoted entirely to forbearance, save for one sentence directing USCIS to 'determine whether [DACA recipients] qualify for work authorization.'" *Regents*, 140 S. Ct. at 1912 n.6. To the extent that the receipt of deferred action under DACA makes recipients eligible for certain benefits, or removes a disqualification for benefits, the Supreme Court has recognized that those benefits do not "flow inexorably from forbearance," and the agency could "exclude DACA recipients" from those benefits "without rescinding the DACA Memorandum and the

forbearance policy it established." *Id.* at 1911-12 nn.5, 6. Thus, even if this Court were to conclude that it is not lawful for DACA recipients to be considered lawfully present, or eligible for advance parole or work authorization, the proper remedy would be to so hold without striking down the DACA memorandum in its entirety. *See Brackeen*, 994 F.3d at 431-32 (invalidating only "discrete parts" of regulation).

Similarly, the district court erred by issuing a nationwide injunction that applies beyond the plaintiff States. This Court has recognized that nationwide injunctions should only be issued in "appropriate circumstances." *Texas*, 809 F.3d at 188. Here, the district court abused its discretion by granting one without considering whether that remedy was appropriate when just ten States sought DACA's invalidation and only one sought to establish injury, and when other States have sought to have DACA remain in place. *See Landmark Land Co. v. Office of Thrift Supervision*, 990 F.2d 807, 811 (5th Cir. 1993) (abuse of discretion when court failed "to apply the proper criteria" and "set forth in specific terms its reasons"). Insofar as *Texas* suggests that nationwide relief would be appropriate, the government respectfully disagrees: that relief is not "necessary to remedy the wrong" that Texas, alone, has allegedly suffered, *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996), and contravenes principles of comity among courts, *see Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985).

CONCLUSION

The district court's judgment and permanent injunction should be reversed.

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DECEMBER 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2021, I electronically filed the foregoing record excerpts with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Joshua M. Koppel
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,991 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua M. Koppel
JOSHUA M. KOPPEL

ADDENDUM

TABLE OF CONTENTS

6 U.S.C. § 202

§ 202. Border, maritime, and transportation responsibilities

The Secretary shall be responsible for the following:

…

(5) Establishing national immigration enforcement policies and priorities.

…

8 U.S.C. § 1103

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

(4) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service.

(5) He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

…

8 U.S.C. § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

…

(6) Illegal entrants and immigration violators

(A)Aliens present without admission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

…

(9) Aliens previously removed

…

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) [3] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence

> For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

…

(d) Temporary admission of nonimmigrants

(5)

> (A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

…

8 U.S.C. § 1324a

§ 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

> (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, …

…

(h) Miscellaneous provisions

…

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either

(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

…

8 U.S.C. § 1611

§ 1611 - Aliens who are not qualified aliens ineligible for Federal public benefits

(a) In general

Notwithstanding any other provision of law and except as provided in subsection (b), an alien who is not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit (as defined in subsection (c)).

(b) Exceptions

…

(2) Subsection (a) shall not apply to any benefit payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General, to any benefit if nonpayment of such benefit would contravene an international agreement described in section 233 of the Social Security Act [42 U.S.C. 433], to any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act [42 U.S.C. 402(t)], or to any benefit payable under title II of the Social Security Act to which entitlement is based on an application filed in or before August 1996.

(3) Subsection (a) shall not apply to any benefit payable under title XVIII of the Social Security Act [42 U.S.C. 1395 et seq.] (relating to the medicare program) to an alien who is lawfully present in the United States as determined by the Attorney General and, with respect to benefits payable under part A of such title [42 U.S.C. 1395c et seq.], who was authorized to be employed with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits.

(4) Subsection (a) shall not apply to any benefit payable under the Railroad Retirement Act of 1974 [45 U.S.C. 231 et seq.] or the Railroad Unemployment Insurance Act [45 U.S.C. 351 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General or to an alien residing outside the United States.

…

8 C.F.R. § 1.3

§ 1.3 - Lawfully present aliens for purposes of applying for Social Security benefits.

(a) Definition of the term an "alien who is lawfully present in the United States." For the purposes of 8 U.S.C. 1611(b)(2) only, an "alien who is lawfully present in the United States" means:

(4) An alien who belongs to one of the following classes of aliens permitted to remain in the United States because DHS has decided for humanitarian or other public policy reasons not to initiate removal proceedings or enforce departure:

…

(vi) Aliens currently in deferred action status;

…

8 C.F.R. § 274a.12

§ 274a.12 - Classes of aliens authorized to accept employment.

…

(c) Aliens who must apply for employment authorization. An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending, unless otherwise provided in this chapter.

…

(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

…