No. 15-674

IN THE

Morris Tyler Moot Court of Appeals at Yale

UNITED STATES ET AL.,

Petitioners,

v.

STATE OF TEXAS ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

On November 20, 2014, the Secretary of Homeland Security (Secretary) issued a Memorandum providing guidance on implementing the Secretary's immigration policies and priorities. The Secretary's Memorandum instructs the Secretary's subordinates to exercise discretion, on a case-by-case basis, in deciding whether to defer removal of certain categories of unauthorized immigrants. The Fifth Circuit upheld a preliminary injunction against the Memorandum's implementation. The questions presented are:

1. Whether a State that voluntarily provides benefits to all unauthorized immigrants with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (1946), to challenge the Secretary's Memorandum because the Memorandum's implementation might increase the number of individuals eligible for those benefits.

2. Whether the Secretary should have followed the APA's notice-and-comment procedures in issuing that Memorandum, despite its lack of legal effect.

LIST OF ALL PARTIES

Petitioners are the United States of America; Jeh Charles Johnson, Secretary, Department of Homeland Security; R. Gil Kerlikowske, Commissioner of U.S. Customs and Border Protection; Ronald D. Vitiello, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection; Sarah R. Saldana, Director of U.S. Immigration and Customs Enforcement; and Leon Rodriguez, Director of U. S. Citizenship and Immigration Services.

Respondents are the State of Texas; the State of Alabama; the State of Georgia; the State of Idaho; the State of Indiana; the State of Kansas; the State of Louisiana; the State of Montana; the State of Nebraska; the State of South Carolina; the State of South Dakota; the State of Utah; the State of West Virginia; the State of Wisconsin; Paul R. Lepage, Governor, the State of Maine; Patrick L. McCrory, Governor, the State of North Carolina; C.L. “Butch” Otter, Governor, the State of Idaho; Phil Bryant, Governor, the State of Mississippi; the State of North Dakota; the State of Ohio; the State of Oklahoma; the State of Florida; the State of Arizona; the State of Arkansas; Attorney General Bill Schuette; the State of Nevada; and the State of Tennessee.

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STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on November 9, 2015, and issued a revised opinion on November 25, 2015. The United States petitioned this Court for a writ of certiorari on November 20, 2015. This Court granted that petition on January 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, Section 3 of the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Article III, Section 2 of the Constitution provides, in relevant part, "The judicial Power shall extend to all Cases," and "to Controversies . . . ." U.S. Const. art. III, § 2.

Section 701(a) of the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), provides that the APA's judicial review provisions shall not apply "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

Section 553(b)(3) of the APA provides that the APA's notice-and-comment requirements shall not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3).

Other pertinent statutory provisions and legal materials, including the Secretary's Memoranda, are reproduced in the Petition Appendix. *See* Pet. App. 411-75a.

STATEMENT OF FACTS

More than 11 million unauthorized immigrants live in the United States. Under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101-1778, the Secretary of Homeland Security (Secretary) has the authority to remove these individuals from the country. *See* 8 U.S.C. §§ 1227(a)(1)(A)-(B), 1182(a)(6)(A)(i). Complete enforcement, however, would be impossible given resource constraints and would tear apart families and communities. As this Court has recognized, a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). Federal law empowers the Secretary to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "establish such regulations" and "issue such instructions . . . as he deems necessary," 8 U.S.C. § 1103(a)(3). Pursuant to this authority, the Secretary has chosen to defer removal of parents of U.S. citizens and legal permanent residents.

A. Deferred Action

Deferred action, like a prosecutor's decision not to charge a suspected criminal, is an "act of administrative convenience to the government which gives some cases lower priority" by temporarily deferring removal of a particular individual. 8 C.F.R. § 274a.12(c)(14). "A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (quoting 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03 [2][h] (1998)). The Secretary "may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *Id.* Nevertheless, the Secretary's decision to defer action is not binding. The Secretary may revoke

deferred action at any time and for any reason. Accordingly, federal courts do not have jurisdiction to hear any claim brought by or on behalf of an alien based on the Secretary's decision to "commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g); *see also Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471.

Like other agency nonenforcement decisions, the Secretary's decision to defer action requires the Secretary to balance competing policy considerations, including "immediate human concerns." *Arizona*, 132 S. Ct. at 2499. Deferred action may be especially appropriate if an "alien has children born in the United States, long ties to the community, or a record of distinguished military service." *Id.* Conversely, removing "an alien to his own country may be deemed inappropriate" if that country is "mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return." *Id.*

The Secretary's authority to defer action on a class-wide basis is well established. In 1987, for example, the Immigration and Naturalization Services (INS), the Department of Homeland Security's (DHS) predecessor, granted "indefinite voluntary departure" to children under the age of eighteen whose parents were legalized under the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. Legalization and Family Fairness—An Analysis, 64 Interpreter Releases 1190, 1200-04 (Oct. 26, 1987).[1] The Bush Administration expanded this "Family Fairness" policy to spouses of those legalized under the IRCA. *See* Memorandum from Gene McNary, Comm'r, Immigration & Naturalization Serv., to Reg'l Comm'rs (Feb. 2, 1990). Family Fairness deferred removal of, and provided work

[1] Like deferred action, voluntary departure as "relief" from removal is grounded in—but not explicitly authorized by—statute. *See* 8 U.S.C. § 1229c(a)(1) ("The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense . . . .").

authorization for, approximately 1.5 million children and spouses. *Id.* Similarly, in 2009, U.S. Citizenship and Immigration Services (USCIS) issued a memorandum permitting certain "surviving spouses of U.S. citizens" to request deferred action. *See* Memorandum from Donald Neufeld, Acting Assoc. Dir., USCIS, to Field Leadership, Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Sept. 4, 2009).

Congress has consistently affirmed the Secretary's authority to defer action. For example, in 2000, Congress codified and expanded INS's policy of deferring action on Violence Against Women Act (VAWA) self-petitioners. *See* Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)). Similarly, in 2008, Congress codified INS's (and later DHS's) policy deferring action on (T) and (U) visa applicants, who include victims of human trafficking and other crimes. Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any individual who could make a prima facie showing of eligibility for a (T) or (U) visa and clarified that denial of such a stay would not "preclude" the applicant from applying for "deferred action." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Likewise, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, authorized participating States to issue driver's licenses to aliens with "approved deferred action status." 49 U.S.C. § 30301 note.

Furthermore, Congress has specified that several classes of unauthorized immigrants shall be eligible for deferred action, including family members of aliens killed in combat or by terrorism. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694; USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b),

115 Stat. 272, 351. However, neither statute limits the Secretary's discretion to defer action based on individual circumstances or to expand deferred action beyond the specified categories.

Deferred action recipients may be eligible for various federal benefits. First, recipients may apply for Social Security and Medicare. Although deferred action does not create legal *status*, *see* 8 U.S.C. § 1255, it constitutes legal *presence*, *see* 8 U.S.C. § 1182(a)(9)(B)(ii). And recipients may participate in these programs if they fulfill their other requirements. *See* 8 U.S.C. § 1611(b)(2)-(3). Second, deferred action recipients may apply for work authorization, *see* 8 C.F.R. § 274a.12(c)(14), which the Secretary may grant based on independent, discretionary authority, *see* 8 U.S.C. § 1324a(a)(1)(A), (h)(3). As with Social Security and Medicare benefits, deferred action recipients are not automatically eligible for work authorization and must also "establish[] an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14).

Additionally, deferred action recipients may be eligible for State benefits. Federal law does not require States to provide benefits to unauthorized immigrants. *See* 8 U.S.C. § 1621. However, some States do so voluntarily. For example, Texas issues driver's licenses based on work eligibility. *See* Tex. Transp. Code § 521.142(a). Thus, deferred action recipients may become eligible for State benefits where State law ties eligibility to federal immigration policy.

B. Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, Secretary Janet Napolitano issued the Deferred Action for Childhood Arrivals (DACA) Memorandum. The DACA Memorandum instructed the Secretary's subordinates to defer action on unauthorized immigrants who unlawfully entered the United States as children. *See* Memorandum from the Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (DACA Memorandum). To be eligible, an individual must (1) have entered the United

States under the age of sixteen; (2) have "continuously resided in the United States for [at] least five years" and currently reside there; (3) satisfy certain education or military service requirements; (4) have not been convicted of a serious crime or pose "a threat to national security or public safety; and (5) not be "above the age of thirty." *Id.* at 1. DHS officers evaluate requests "on a case by case basis." *Id.* at 2.

DACA recipients are not removed for a renewable—but revocable—period of two years. *Id.* at 2-3. Recipients may also request work authorization. *Id.* at 3. However, DACA "confers no substantive right, immigration status or pathway to citizenship." *Id.* Between 2012 and 2014, DHS approved about 636,000 applications for deferred action under DACA. Pet. App. 4a. Of the 723,000 applications the agency received, 6% were rejected for technical errors and 4% were denied. Pet. App. 56a & n.130.

C. The Challenged Memorandum

On November 20, 2014, Secretary Jeh Johnson released two memoranda. The Prioritization Memorandum, not challenged here, established three priorities for removal: (1) noncitizens who constitute "threats to national security, border security, and public safety," including most convicted felons; (2) "misdemeanants and new immigration violators"; and (3) other noncitizens "who have been issued a final order of removal on or after January 1, 2014," Pet. App. 423-24a, 426a.

The Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Memorandum instructed DHS officers to defer action, on a "case-by-case" basis, for two classes of removable immigrants. Pet. App. 414a. First, the DAPA Memorandum expanded DACA by eliminating the age cap and extending the requisite date of entry to January 1, 2010. Pet. App. 415-16a. The DAPA Memorandum also extended the period of deferred action and work

authorization under DACA from two to three years. Pet. App. 416a. Second, the DAPA Memorandum "direct[ed] USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to noncitizens who:

> have, on [November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident; have continuously resided in the United States since before January 1, 2010; are physically present in the United States on [November 20, 2014], *and* at the time of making a request for consideration of deferred action with USCIS; have no lawful status on the date of this memorandum; are not an enforcement priority . . . ; and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Pet. App. 417a.

Under DAPA, eligible noncitizens could apply for deferred action and work authorization. Pet. App. 417a. Applicants would undergo a background check and pay a fee of $465. Pet. App. 418a. Although the DAPA Memorandum guides DHS personnel in the exercise of their discretion, "the ultimate judgment as to whether an immigrant is granted deferred action [would] be determined on a case-by-case basis." Pet. App. 419a. Like DACA, DAPA "confers no substantive right, immigration status or pathway to citizenship." Pet. App. 419a.

D. The District Court and Fifth Circuit Decisions

On December 3, 2014, Respondents filed this action in the Southern District of Texas, seeking to enjoin the Secretary from implementing the policy described in the DAPA Memorandum. Respondents alleged three claims: (1) the Secretary's Memorandum violated the Take Care Clause, U.S. Const. art. II, § 3; (2) the Memorandum was unlawful under the Administrative Procedure Act (APA) because the Secretary did not have the authority to issue it, 5 U.S.C. § 706(2); and (3) the Secretary should have promulgated the Memorandum pursuant to the APA's notice-and-comment requirements, 5 U.S.C. § 553. On February 15, 2015, the District

Court granted a preliminary injunction, based only on the third claim. Pet. App. 244-406a. While appeal was pending, the court denied the United States' motion to stay the injunction. *See Texas v. United States*, No. B-14-254, 2015 WL 1540022 (S.D. Tex. Apr. 7, 2015). The Fifth Circuit affirmed the denial of a stay by a divided vote. Pet. App. 156-210a. Judge Higginson dissented, arguing that Respondents' challenge was non-justiciable. Pet. App. 211-43a.

On May 26, 2015, the Fifth Circuit affirmed the preliminary injunction, again by a divided vote. Pet. App. 1a. The majority's ruling rested on five conclusions. First, relying heavily on *Massachusetts v. EPA*, 549 U.S. 497 (2007), the majority found that at least one of the Respondents satisfied the requirements for Article III standing. Pet. App. 12-20a. Second, the majority held that Respondents had a justiciable cause of action under the APA because they were within the zone of interests of the INA and APA. Pet. App. 36-38a. Third, the majority rejected the United States' argument that Respondents' challenge was non-justiciable because the Secretary's authority to defer action is committed to his discretion by law. Pet. App. 38-42a. Fourth, the majority found that the DAPA Memorandum was subject to the APA's notice-and-comment requirements because it was a legislative rule, not a general policy statement, procedural rule, or public-benefits rule. Pet. App. 64-68a. Fifth, the majority held that the Secretary did not have authority to adopt the DAPA Memorandum, even though the District Court had not yet ruled on this issue. Pet. App. 81a.

Judge King dissented. Pet. App. 91-155a. She argued that none of the States had standing to challenge the DAPA Memorandum. In her view, the majority's contrary conclusion misconstrued this Court's precedents and was inconsistent with the constitutional separation of powers. Pet. App. 101-06a. Additionally, she agreed with Judge Higginson that the DAPA Memorandum was non-justiciable because the Secretary's deferred action policies, like other

nonenforcement decisions, are committed to his discretion. Pet. App. 107-19a. Finally, she argued that the DAPA Memorandum was neither procedurally nor substantively unlawful. Rather, the rule was consistent with the Secretary's authority to establish discretionary immigration policies and priorities. Pet. App. 120-55a.

On January 16, 2016, this Court granted the United States' petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. This case involves an unprecedented attempt by Texas and other States to interfere with the Secretary's authority to establish national immigration policy. The challenged Memorandum recognizes the need to balance enforcement with human concerns and resource constraints by establishing guidelines that prioritize the removal of certain individuals. Although Respondents may disagree with the Secretary's policy choices, Article III requires those disagreements to be resolved through the political process. To invoke the power of the federal courts, a plaintiff must allege an injury that is concrete and fairly traceable to the challenged action. Respondents meet neither requirement.

A. First, Respondents' alleged injuries are too hypothetical and too conjectural to create standing. Respondents contend that the Secretary's Memorandum affects them by increasing the number of individuals eligible to apply for work authorization and, consequently, the number of individuals eligible for driver's licenses and other benefits. But such injuries, which rely entirely on the actions of regulated third parties, cannot create a justiciable case or controversy. Indeed, as this Court has explained, the principle that third-party actions cannot create standing is at its height where a plaintiff attempts to challenge an agency's nonenforcement decision.

B. Second, Respondents' alleged injuries are not fairly traceable to the Secretary's Memorandum. Instead, those injuries result entirely from Respondents' own choices or other

federal laws not challenged here. Texas's driver's license expenses, for example, are entirely self-inflicted. Although no federal law required Texas to tie its driver's license laws to federal immigration policy, Texas voluntarily chose to do so. Texas cannot now invoke the power of the federal courts to remedy an injury of its own making.

Alternatively, to the extent that Respondents' injuries are not self-inflicted, they result from other federal laws outside the scope of this litigation. Deferred action does not automatically grant recipients work authorization or any other benefit. Instead, recipients become eligible to apply. The Secretary's Memorandum did not modify these longstanding relationships between deferred action and other federal programs.

C. *Massachusetts v. EPA*, 549 U.S. 497 (2007), provides no support for the Fifth Circuit's standing analysis. The lower court held that *Massachusetts* implied that Respondents were entitled to "special solicitude" in its standing inquiry. However, nothing in that case suggests that this Court intended to relax the ordinary requirements for concreteness and causation. That case did not involve, much less change, any of the principles discussed above. In any event, *Massachusetts* is inapposite because Respondents' alleged procedural interests in notice and comment are wholly unlike the quasi-sovereign interest in territory asserted in that case.

D. Allowing Respondents to challenge the Secretary's Memorandum would undermine the separation of powers by permitting plaintiffs to challenge any federal nonenforcement decision that does not affect them directly, but does so because of the actions of regulated third parties. Plaintiffs could, for example, challenge the Secretary's decisions regarding any of the 41 different categories of aliens entitled to work authorization. They could also challenge prosecutor's decisions to place individuals in pretrial diversion programs that provide drug treatment or other benefits. Such an outcome would usurp the Executive's constitutional duty to

enforce the laws.

II. A. Furthermore, Respondents do not have a justiciable cause of action under the APA. First, the APA only creates a cause of action for plaintiffs within the zone of interests of some other relevant statute or guarantee. Respondents do not meet that test. The INA establishes a comprehensive scheme for regulating immigration that channels State participation in immigration law through the political system, not the courts. State benefits are not protected under this scheme. The INA mentions State benefits once, and that provision does not even cover the benefits at issue here. Absent this, Respondents' challenge is non-justiciable.

B. Second, the APA precludes judicial review of the Secretary's Memorandum because the Secretary's authority to defer action is committed to his discretion by law. Despite Respondents' attempts to characterize the Memorandum as conferring legal status or benefits, the Secretary's decision is purely prosecutorial in nature. Any benefits related to deferred action derive from other statutes and regulations, not affected by the Memorandum.

Moreover, Congress has shown no intent to circumscribe the Secretary's discretion to defer action or provide meaningful standards to define its limits. Instead, Congress has consistently endorsed the Secretary's policies. Even when Congress has legislated, it has chosen to preserve the Secretary's discretion. Statutes extending eligibility are permissive, not prohibitive, and do not prevent the Secretary from expanding eligibility further.

Incredibly, Respondents argue that the Secretary's Memorandum is reviewable because it amounts to an abdication of his statutory responsibilities. Despite resource constraints, the Secretary has vigorously enforced the immigration laws, removing unauthorized immigrants at a faster rate than any of his predecessors. The Memorandum appropriately balances enforcement with competing policy considerations, recognizing the need to prioritize certain individuals for

removal.

C. Third, Respondents' claims are not justiciable because the Secretary's Memorandum is not a final agency action. The Secretary may revoke the Memorandum at any time, and the Memorandum does not create rights or obligations.

III. A. Finally, Respondents' challenge fails on the merits. The APA's notice-and-comment requirements do not apply to the Secretary's Memorandum because it is a nonbinding statement of policy. Unlike legislative rules, policy statements lack the force of law. The Memorandum meets none of the factors used to determine whether a policy statement should have been promulgated as a legislative rule. Consequently, the Secretary's decision to issue the Memorandum without notice and comment was entirely proper.

B. First, the Secretary's Memorandum confers no legal rights or obligations. The Secretary's deferred action policies do not expand the range of benefits available to recipients of deferred action. Nor do they entitle any unauthorized immigrant to those benefits. Deferred action under DACA and DAPA is revocable, and deferred action recipients remain removable.

C. Second, the Secretary's Memorandum does not force unauthorized immigrants to comply with any substantive standard. Neither its text nor its application commands private parties to behave in a certain way. Further, the Memorandum has no legal effect on Respondents, or anyone else; it certainly does not force Respondents to comply with their own laws.

D. Third, the Secretary's Memorandum does not bind DHS itself. The agency retains discretion to revoke DAPA, defer action on those who are not eligible under DAPA, and deny deferred action based on factors not described in the Memorandum.

E. Fourth, subjecting policies like DAPA to notice and comment would undermine the purposes of the APA. Policies governing prosecutorial discretion are ill-suited for notice and

comment because they are not judicially manageable and review would undermine agency efforts to ensure uniform enforcement. Further, the values of notice and comment—public participation and deliberation—are not as important where coercive action is not at issue. Given these concerns, the political process, not the courts, provides the appropriate avenue for resolving Respondents' disagreement.

ARGUMENT

I. Respondents Do Not Have Article III Standing To Challenge the Secretary's Memorandum.

Article III limits the "judicial Power" to "Cases" and "Controversies." U.S. Const. art. III, § 2. Standing is an "essential and unchanging part" of this limitation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, a plaintiff must allege an "injury" that is (1) "concrete," "particularized" and "actual or imminent"; (2) "fairly" "trace[able]" to "the challenged action of the defendant"; and (3) "redress[able] by a favorable ruling." *Id.* at 560-61. Further, where "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control," the injury must possess "a high degree of immediacy." *Id.* at 565 n.2 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 156-60 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-06 (1983)). Respondents do not satisfy the first and second of these requirements.

A. Respondents' Alleged Injuries Are Conjectural and Hypothetical, Not Actual or Imminent.

Respondents' alleged injuries are purely speculative and fail to consider offsetting benefits. Respondents argue that deferred action recipients will be eligible to apply for work authorization and, as a result, will be able to apply for State-subsidized driver's licenses and other State benefits. Pet. App. 9a, 271-73a. Providing these benefits, they contend, will cost "millions of dollars." Pet. App. 16a. However, none of these allegations are sufficiently concrete

to meet the heightened burden in challenging an agency's nonenforcement decisions.

Allegations of future expenses based on the actions of third parties subject to federal regulation cannot create standing. In *Florida v. Mellon*, 237 U.S. 12 (1927), this Court held that a State does not have standing to challenge a federal law based on the anticipated effects of that law on its revenues. There, Florida challenged a federal inheritance tax law, arguing that the law would "have the result of inducing potential taxpayers to withdraw property from the state, thereby diminishing the subjects upon which the state power of taxation may operate." *Id.* at 18. This Court explained that "the anticipated result" was "purely speculative, and, at most, only remote and indirect." *Id.* The same analysis applies here. Like Florida, Respondents allege "purely speculative" estimates of DAPA's economic effects on their revenues. *Id.* And as in *Florida*, that is not enough to create standing.

The presence of offsetting benefits further demonstrates that Respondents' injuries are "conjectural" and "hypothetical." *Lujan*, 504 U.S. at 560. Respondents' one-sided discussion of DAPA's effects "is just the beginning of the analysis." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136-37 (2011). Economists predict that DAPA and DACA will increase the size and productivity of the country's labor force, raising gross domestic product (GDP) by $230 billion over 10 years. *See* Silva Mathema, *State-By-State Analysis of the Economic Impact of DACA, DAPA, and DACA Expansion* (June 15, 2015).

Respondents and other States with large undocumented populations will realize many of these gains. For example, DAPA and DACA would likely increase Texas's GDP by $38 billion over 10 years and create 48,000 jobs during that period. *Id.* Respondents cannot claim injury without also considering these benefits. *See Winn*, 563 U.S. at 136-37 (denying standing, in part, because the challenged program might result in "an immediate and permanent cost savings for

the State").

Moreover, some of Respondents' alleged expenses are actually sources of State income. Texas's driver's license program, which Texas claims to be the source of its injury, is profitable for the State. By Texas's own estimation, vehicle registration fees exceeded expenditures by $104 million in 2015. *See* Tex. Dep't of Motor Vehicles, *Operating Budget for Fiscal Year 2016*, at 37 (2015). Texas's allegation that the Secretary's Memorandum will cause "losses in excess of several million dollars," Pet. App. 272a, contradicts its own budgetary analysis.

Ironically, the Fifth Circuit held that "none of the[se] benefits" were "sufficiently connected to the costs to qualify as an offset." Pet. App. 23a. Instead, the court believed, the "only benefits that are conceivably relevant are the increase in vehicle registration and the decrease in uninsured motorists, but even those are based on the independent decisions of DAPA beneficiaries and are not a direct result of the issuance." Pet. App. 23a. The same analysis applies to Respondents' alleged injuries. Like increased tax and registration revenues, Respondents' hypothesized expenses are "based on the independent decisions of DAPA beneficiaries," Pet. App. 23a, who do not automatically receive State benefits because of deferred action.

Furthermore, Respondents' allegations do not meet the heightened burden that applies to plaintiffs who challenge an agency's nonenforcement decisions. *See Lujan*, 504 U.S. at 561-62. Where standing "depends on the unfettered choices made by independent actors not before the courts . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made." *Id.* at 562. Respondents' "mere allegations" of future expenses do not suffice. *Id.* Respondents offer no evidence that DAPA recipients actually intend to apply for driver's licenses or work eligibility. Nor do they offer evidence that DAPA recipients will be able to overcome the *other* legal requirements that govern these programs. *See, e.g.*, 8 C.F.R. §

274a.12(c)(14) (requiring work eligibility applicants to establish "economic necessity"); Tex. Transp. Code § 521.143 (requiring driver's license applicants to establish "financial responsibility"). Instead, they simply allege hypothetical injuries, calculated by multiplying the number of individuals eligible for deferred action by the cost of issuing each driver's license. *See* Pet. App. 272a. That is not enough. Where the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed." *Lujan*, 504 U.S. at 562.[2]

B. Respondents' Alleged Injuries Are Not Fairly Traceable to the Secretary's Deferred Action Policy.

Additionally, Respondents' allegations cannot satisfy causation because their injuries are not "fairly traceable" to DAPA. *See Lujan*, 504 U.S. at 560. Rather, those injuries result from Respondents' own actions and other federal statutes and regulations not challenged here.

1. Respondents' Alleged Injuries Are Self-Inflicted.

Causation, like other standing requirements, ensures that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). That rationale is utterly absent where the plaintiff's injury is "self-inflicted." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). In this case, Respondents chose to grant benefits based on federal immigration policy. They cannot now ask the federal courts to interfere with the

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[2] This analysis applies even more forcefully to Respondents' alternative standing theories. In the District Court, Respondents argued that DAPA would lead to a future "wave" of unauthorized immigration, causing a "humanitarian crisis" along their borders and forcing them to spend "millions of dollars" in "uncompensated healthcare." Pet. App. 393-94a. The District Court correctly concluded that these injuries were neither "immediate" nor "direct." Pet. App. 394a (citing *Lyons*, 461 U.S. at 102).

Secretary's discretionary formulation of that policy.

This Court has repeatedly instructed that self-inflicted injuries cannot create standing. In *Pennsylvania v. New Jersey*, this Court held that a State that chooses to tie its laws to those of another sovereign does not have standing to challenge that sovereign's laws, even if it suffers financial loss because of changes in those laws. 426 U.S. at 662-64. In that case, Pennsylvania provided a tax credit to Pennsylvania residents for income taxes paid to other states. *Id.* at 663. Pennsylvania challenged a New Jersey tax law on the grounds that it unconstitutionally discriminated against non-residents. *Id.* at 662-63. To support standing, Pennsylvania alleged that the law "diverted" revenues from Pennsylvania's treasury. *Id.* at 662-64. The Court explained that Pennsylvania's injury was "self-inflicted" because "nothing prevent[ed] Pennsylvania from withdrawing [the] credit." *Id.* at 664.

Subsequently, in *Clapper v. Amnesty International, Inc.*, 133 S. Ct. 1138 (2013), this Court reaffirmed the principle that self-inflicted injuries cannot create standing. There, a coalition of public interest organizations challenged the constitutionality of a federal surveillance program. *Id.* at 1145-46. The plaintiffs alleged that they had suffered a legally cognizable injury because the program's existence "require[d] them to take costly and burdensome measures to protect the confidentiality of their communications." *Id.* at 1151. The Court rejected that argument. Instead, the Court explained that a plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm." *Id.* (citing *Pennsylvania*, 426 U.S. at 664). Indeed, such an injury is not "fairly traceable" to the defendant's conduct. *Id.*

Pennsylvania and *Clapper* are not meaningfully distinguishable from this case. Like Pennsylvania, Respondents' choices to grant benefits based on federal immigration policy, such as Texas's choice to issue driver's licenses to recipients of deferred action, are entirely self-

inflicted. *See* Tex. Transp. Code § 521.142(a). Further, as the Fifth Circuit acknowledged, Texas can take actions to weaken the connection between its laws and federal immigration policy. For example, "Texas could avoid financial loss by increasing fees, not subsidizing its licenses, or perhaps not issuing licenses to lawfully present aliens." Pet. App. 28a n.65.[3] Texas cannot now challenge federal immigration policy to prevent an injury of its own making. *See Pennsylvania*, 426 U.S. at 664 ("No State can be heard to complain about damage inflicted by its own hand.").

The REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (codified in scattered sections of 8 and 49 U.S.C.), does not change this analysis. Under the Act, Respondents and other participating States pay fees to DHS to use USCIS's Systematic Alien Verification for Entitlements (SAVE) system. *See* 6 C.F.R. § 37.13. The Fifth Circuit and District Court mistakenly concluded that Respondents' payments under the Act were traceable to the United States. *See* Pet. App. 21a n.58, 273a. Like Texas's choice to issue driver's licenses based on federal policy, its participation in the REAL ID Act is entirely voluntary. *See* 49 U.S.C. § 30301 note.

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[3] Indeed, other States have or have considered weakening the connection between their laws and federal immigration policy. Between 2012 and 2015, Nebraska maintained a policy of denying licenses to DACA recipients by issuing licenses to persons with "lawful status" only. Nebraska voluntarily ended that policy, by reinterpreting the meaning of "lawful status." *See* Neb. Rev. Stat. § 60-484.04 (2012); 2015 Neb. Laws L.B. 623. Similarly, Georgia legislators are considering a compromise bill that would authorize driver's licenses for persons "having lawful status to be present in the United States" rather than persons "with legal authorization from the U.S. Immigration and Naturalization Service." *See* S.B. 6, 153d Gen. Assemb., Reg. Sess. § 1 (Ga. 2016). The bill authorizes special cards for DACA recipients. *See id.* § 2.

The District Court questioned whether Texas could legally refuse to issue driver's licenses to deferred action recipients based on the Ninth Circuit's decision in *Arizona DREAM Act Coalition v. Brewer*, 757 F.3d 1053 (2014), which held that DACA recipients were likely to succeed in their equal protection challenge to Arizona's policy of denying driver's licenses to them, but not other legally present immigrants. *See* Pet. App. 274-77a. Even if that decision were binding on Texas, the State could still adopt any of the options described above. Indeed, Texas could justify its decision to discriminate by appealing to financial insolvency, the argument it raises here.

Relying upon *Wyoming v. Oklahoma*, 503 U.S. 437 (1992), the Fifth Circuit concluded that Respondents' injuries were "not self-inflicted." Pet. App. 27a. However, *Wyoming* is distinguishable. There, the State's injury resulted solely because of another State's discriminatory tax laws. Specifically, Wyoming challenged an Oklahoma law that required Oklahoma power plants to burn a minimum percentage of Oklahoma-mined coal. *Id.* at 447. This Court held that Wyoming had suffered a "direct injury in the form of a loss of specific tax revenues" caused by the decrease in demand for Wyoming-mined coal. *Id.* at 448. Here, however, Respondents' injuries result from their choices to tie their laws to those of the United States, not another sovereign's choice to discriminate against its citizens. *See* Pet. App. 105-06a n.16 (King, J., dissenting). Thus, the Fifth Circuit's reliance on *Wyoming* is entirely misplaced.

Finally, the principle that self-inflicted injuries cannot confer standing does not mean that "federal preemption of state law could never be an injury," as the Fifth Circuit concluded. Pet. App. 25a. States suffer self-inflicted injuries when they choose to conform their laws to those of another sovereign. Preemption involves precisely the opposite situation, where federal law completely "preclude[s] enforcement" of the State laws or when State laws "conflict with federal law." *Arizona*, 132 S. Ct. at 2501. The distinction between self- and non-self-inflicted injuries does not prevent States from properly defending their laws.

2. Respondents' Injuries Are at Best Traceable to Other, Unchallenged Federal Statutes and Regulations.

Assuming *arguendo* that Respondents' injuries are not self-inflicted, they result from other federal statutes and regulations not challenged here. By its own terms, the Secretary's Memorandum "confers no substantive right, immigration status or pathway to citizenship." Pet. App. 419a. While deferred action recipients are eligible for various benefits, that eligibility derives from statutes and substantive regulations promulgated through notice-and-comment

rulemaking. For example, the Secretary has independent authority to issue work authorization to unauthorized immigrants. *See* 8 U.S.C. § 1324a(a)(1)(A), (h)(3). Recipients of deferred action are not automatically entitled to work authorization; they must also show "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14). In addition, deferred action recipients are considered lawfully present, and therefore eligible for Social Security benefits, under 8 C.F.R. § 1.3(a)(4)(vi). The Memorandum did not modify these provisions in any way. *See* Pet. App. 407-20a. The REAL ID Act is no different. Like § 274a.12 and § 1.3, the Act pre-dates the Memorandum. *See* Pub. L. 109-13, 119 Stat. 302. And the Memorandum did not modify or reinterpret the Act. *See* Pet. App. 407-20a.

C. *Massachusetts v. EPA* Did Not Abandon Traditional Standing Principles.

Relying heavily on *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Fifth Circuit concluded that Respondents were entitled to "special solicitude" in its standing inquiry. Pet. App. 12-20a. *Massachusetts* provides no support for the Fifth Circuit's ruling. There, Massachusetts and its co-plaintiffs exercised their procedural right under the Clean Air Act (CAA), 42 U.S.C. § 7401-62, to challenge EPA's decision to deny their rulemaking petition. *Massachusetts*, 549 U.S. at 510-14. The States alleged that EPA's failure to regulate greenhouse gas emissions jeopardized their quasi-sovereign interests in territory. *Id.* at 522-23. Because of rising sea levels, they argued, "a significant fraction of coastal property" would be lost. *Id.* at 523.

Significantly, *Massachusetts* did not involve, much less change, any of the standing principles discussed above. Unlike this case, Massachusetts and its co-plaintiffs did not challenge the Government's decision to exercise enforcement discretion with respect to third parties. *See supra* pp. 15-16. Nor were the plaintiffs' injuries self-inflicted, *see supra* pp. 16-19, or traceable to other unchallenged statutes or regulations, *see supra* pp. 19-20. Accordingly, The Fifth Circuit erred in concluding that *Massachusetts* had any relevance with respect to the issues raised here.

Additionally, Massachusetts's "undoubted procedural right" to challenge the EPA's decision is fundamentally different from any right asserted here. *Id.* at 516, 527; *see also* 42 U.S.C. § 7607(b)(2). Unlike the CAA, neither the INA nor the APA creates a right to challenge the Secretary's decisions to defer action. Instead, both statutes expressly preclude judicial review of discretionary actions. *See* 5 U.S.C. §§ 702, 706; 8 U.S.C. § 1252(g); *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-84.[4]

Contrary to the Fifth Circuit's conclusion, the APA does not create a general right to enforce procedural requirements. *See Massachusetts*, 549 U.S. at 517-18; *Lujan*, 504 U.S. 571-78. Federal courts may not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *See Massachusetts*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)); *see also* John G. Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993). To assert a procedural right, "the party bringing suit must show that the action injures him in a concrete and personal way." *Id.* Indeed, if the APA did create a general right to enforce procedures, "*Massachusetts* would have also referenced the APA as conferring a procedural right." Pet. App. 102a n.13 (King, J., dissenting).

Finally, Massachusetts' "quasi-sovereign" interest in its territory is much greater than Respondents' interests in federal immigration policy. Although a State has an undisputed "quasi-sovereign" interest "in all the earth and air within its domain," *Massachusetts*, 549 U.S. at 518-19 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)), its interest in enforcing federal immigration law is limited. "The federal power to determine immigration policy is well settled," and the "the broad discretion exercised by immigration officials" is a "principle feature

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[4] Indeed, *Massachusetts* specifically distinguished denials of rulemaking petitions from nonenforcement decisions and explained that the former were uniquely "susceptible to judicial review." *See Massachusetts*, 549 U.S. at 527.

of this system." *Arizona*, 132 S. Ct. at 2498-99. Allowing States to challenge federal deferral decisions would "violate[] the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 2506 (citing *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-84).

D. Accepting Respondents' Novel Standing Theories Would Undermine the Constitutional Separation of Powers.

Accepting Respondents' standing theories would undermine this Court's efforts to preserve the judiciary's role within the constitutional system of separated powers. As this Court has explained, standing requirements are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468 US. 737, 750 (1984) (quoting *Warth*, 422 U.S. at 498). The Fifth Circuit's "breathtaking expansion of state standing" would "inject the courts into far more federal-state disputes and review of the political branches than is now the case." Pet. App. 103a (King, J., dissenting).

Federal regulations create 41 different categories of aliens eligible for work authorization. *See* 8 C.F.R. § 274a.12(a), (c). If Respondents have standing to challenge the Secretary's Memorandum, plaintiffs could challenge federal determinations under any one of these categories. *See* Pet. App. 117-19a (King, J., dissenting). More broadly, plaintiffs could challenge "any non-enforcement decision that triggers a collateral benefit somewhere within the background regulatory and statutory scheme." Pet. App. 117a. Those decisions include, for example, a prosecutor's decision to place an individual in a federal pretrial diversion program that provides drug treatment. *See* Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, Fed. Prob., Dec. 2002, at 30, 32. If accepted, Respondents' standing theories would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3, and would enable the courts

. . . to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'" *Lujan*, U.S. at 577 (quoting *Allen*, 468 U.S. at 760). Such an outcome is inimical to the judiciary's "properly limited" role. *Allen*, 468 US. at 750 (quoting *Warth*, 422 U.S. at 498).

II. Respondents Do Not Have a Justiciable Cause of Action Under the Administrative Procedure Act (APA).

Even if Respondents could satisfy the constitutional requirements for standing, they do not have a justiciable cause of action under the APA to challenge the Secretary's deferred action policy. Respondents are not within the zone of interests of any relevant statute or constitutional provision. Further, the Secretary's authority to defer action is committed to his discretion by law. Finally, the Secretary's Memorandum is not a final agency action.

A. Respondents Are Not Within the Zone of Interests Protected by Any Relevant Statute or Constitutional Guarantee.

The APA's judicial review provisions only apply to plaintiffs that are "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To have a justiciable cause of action, an "aggrieved" plaintiff must be "arguably within the zone of interests to be protected or regulated" by the "statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-90 (2015). "In cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone-of-interests] test denies a right of review if the plaintiff's 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." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Neither the INA nor the APA suggests that Congress intended for States to challenge federal immigration policies in court. The INA creates a comprehensive scheme for regulating immigration that entrusts enforcement to the United States, *see Arizona*, 132 S. Ct. at 2506. That

scheme grants the Secretary broad authority to establish "national immigration enforcement priorities and policies," 6 U.S.C. § 202(5), and to "issue such instructions" "as he deems necessary for carrying out his authority," 8 U.S.C. § 1103(a)(3). That scheme also restricts judicial review of the Secretary's enforcement decisions. *See* 8 U.S.C. § 1252(g). Collectively, these features suggest that Congress intended to exclude the States, and the courts, from the determination of immigration policy.

Nevertheless, the Fifth Circuit concluded that Respondents were within the INA's zone of interests because one section, 8 U.S.C. § 1621, makes unauthorized immigrants generally ineligible for "state and local public benefits unless the state otherwise provides." Pet. App. 38a. However, § 1621 does not even cover driver's licenses, the State benefits at issue here. *See* 8 U.S.C. § 1621(c)(1) (defining "public benefit" to include "any grant, contract, loan, professional license, or commercial license" and "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit"). Further, nothing in § 1621 suggests Congress intended to allow States to sue. Rather, § 1621 channels State participation through the political system, by allowing States to legislate whether to provide benefits to unauthorized immigrants.

Additionally, the Fifth Circuit erred in concluding that Respondents were within the APA's zone of interests. *See* Pet. App. 36-38a. Standing alone, an APA claim cannot satisfy the zone-of-interests test. Instead, procedural interests, such as those in notice-and-comment requirements, are purely "derivative." *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994). Although "a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement," the opposite is not true. *Id.* A plaintiff only has a cause of action to "assert violations of any

procedures 'designed to protect [the] threatened concrete interest of his that is the basis of his standing.'" *Id.* at 1483 (quoting *Lujan*, 504 U.S. at 573 n.8). Simply put, to have a cause of action under the APA, the plaintiff must be within the zone of interests of some other "relevant statute or constitutional guarantee." *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153.

B. The Secretary's Authority To Defer Action Is Committed to Agency Discretion by Law.

Furthermore, Respondents' challenge is non-justiciable because the Secretary's authority to defer action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This "Court has recognized on several occasions over many years, that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). That presumption may be overcome if "Congress has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion." *Chaney*, 470 U.S. at 838. Congress has not circumscribed the Secretary's discretion in this case.

1. The Secretary's Memorandum Is a Valid Exercise of His Enforcement Discretion.

The Secretary's Memorandum is indistinguishable from any other action taken in valid exercise of his authority to establish "national immigration enforcement priorities and policies," 6 U.S.C. § 202(5), and "issue such instructions" "as he deems necessary for carrying out his authority," 8 U.S.C. § 1103(a)(3). Consistent with that authority, the Secretary's Memorandum establishes priorities "for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," which recognize the need to concentrate "limited enforcement resources . . . on those who represent threats to national security, public safety, and border security." Pet. App. 260a.

The Fifth Circuit concluded that enforcement discretion is distinct from deferred action.

See Pet. App. 44-48a. That distinction is meritless. As the Secretary's Memorandum makes clear, deferred action "does not confer any form of legal status" and "may be terminated at any time at the agency's discretion." Pet. App. 413a. That describes enforcement discretion. Indeed, as this Court has explained, "deferred action status" merely means that "no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 484 (quoting 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03 [2][h] (1998)).

Similarly, the Secretary's Memorandum does not "affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens," as the Fifth Circuit mistakenly believed. Pet. App. 44a. "Lawful presence" in this case is a synonym for deferred action. *See* Pet. App. 413a ("Deferred action . . . simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States."). The Fifth Circuit's confusion results from its conflation of "lawful presence" with "legal status." Congress narrowly defined "legal status," *see* 8 U.S.C. § 1255, but authorized the Executive to determine "legal presence," *see* 8 U.S.C. § 1182(a)(9)(B)(ii); Pet. App. 222a (Higginson, J., dissenting) (citing *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013)); *see also Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013).

Furthermore, any benefits derive from other statutes and substantive regulations. Like work authorization, discussed above, *see supra* pp. 19-20, each of the benefits attributed to the Secretary's Memorandum by the Fifth Circuit is actually conferred by some other legal authority. *See* Pet. App. 110-13a & nn.23-25 (King, J., dissenting). Federal laws have allowed deferred action recipients to apply for Social Security and Medicare benefits since 2001, *see* 8 C.F.R. § 1.3(a)(4)(vi), and have suspended illegal reentry bars for recipients since 1997, *see* 8 U.S.C. §

1182(a)(9)(B)(ii). The Memorandum changed none of those laws.

2. Congress Has Endorsed, Not Circumscribed, the Secretary's Authority To Establish Deferred Action Policy.

Furthermore, nothing suggests Congress intended to "circumscribe" the Secretary's discretion to defer action or provide "meaningful standards for defining the limits of that discretion." *Chaney*, 470 U.S. at 838. Instead, Congress has consistently endorsed the Secretary's deferred action policies while preserving the Secretary's authority to further expand eligibility.

Despite Congress's awareness of the Secretary's policies, Congress has demonstrated no intent to prevent the Secretary from continuing to defer action. On two occasions, Congress has chosen to codify the Secretary's policies. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)); Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV))). And on a third, Congress has acknowledged the Secretary's policies without making changes. *See* 49 U.S.C. § 30301 note (authorizing participating States to issue driver's licenses to aliens with "approved deferred action status"); *supra* p. 4.

Furthermore, when Congress has specified that certain classes of aliens shall be eligible for deferred action, it has done so permissively, rather than prohibitively. For example, Congress has authorized, but did not require, DHS to defer action on family members of aliens killed in combat or by terrorism. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694; USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 351. Subsequent proposals adopt similar approaches. *See, e.g.*, Immigration Relief for Hurricane Katrina Victims Act of 2005, H.R. 3827, 109th Cong. § 4(b)(1)-(2) (2005). Each of these statutes and proposals conferred eligibility on a class-wide

basis, but did not circumscribe the Secretary's authority to further expand eligibility.

3. The Secretary's Memorandum Is Not an Abdication of His Statutory Responsibilities.

Respondents contend that § 701(a)(2) does not preclude review of the Secretary's Memorandum because it is "so extreme as to amount to an abdication of [the Secretary's] statutory responsibilities." *Chaney*, 470 U.S. at 833 n.4. They are wrong. This Court has never held that § 701(a)(2) contains an abdication exception, much less that the Memorandum would qualify. Instead, this Court has discussed "abdication" once, in a footnote, and even then merely allowed that in such "situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'" *Id.*

Furthermore, even if § 701(a)(2) did contain an "abdication" exception, the Secretary's Memorandum falls well short of the mark. There are more than 11 million unauthorized immigrants in the United States. Pet. App. 91a (King, J., dissenting). Despite resource constraints, the Secretary and his predecessors have overseen more than 2.4 million removals since 2009. U.S. Customs & Immigration Enforcement, *ICE Removal and Operations Report, Fiscal Year 2015*, at 8 (2015). The Memorandum recognizes that resources should be employed prudently, to target those who pose the greatest threat to national security and safety. *See* Pet. App. 260a. Although Respondents may disagree with the Secretary's priorities, they cannot credibly maintain that the Memorandum amounts to abdication. *See Chaney*, 470 U.S. at 834 ("The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance."); Pet. App. 116-17a (King, J., dissenting); *id.* at 224-25a

(Higginson, J., dissenting).[5]

4. Structural Principles Support Reaffirming the Secretary's Discretion To Defer Action.

Sound principles underlie the presumption against judicial review of agency nonenforcement decisions. Deciding which of the 11 million unauthorized immigrants in the United States to remove involves "a complicated balancing of a number of factors which are peculiarly within its expertise." *Lincoln v. Vigil*, 508 U.S. 182 (1993) (quoting *Chaney*, 470 U.S. at 831). The Secretary must determine "whether agency resources are best spent on this violation or another," "whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831. Such decisions "turn on many factors, including whether the alien has children born in the United States" or "long ties to the community" and may "involve policy choices that bear on this Nation's international relations." *Arizona*, 132 S. Ct. at 2499.

Additionally, the principle that courts should generally avoid cases not involving the "coercive power over an individual's liberty or property rights," *Chaney*, 470 U.S. at 832, applies even more forcefully to immigration law. As this Court has recognized, even individuals subject to the Secretary's deferred action determinations may not challenge the Secretary's discretion. *See Am.-Arab Anti-Discrimination Comm.*, 119 U.S. 936. Second-guessing the Secretary's decisions raises the precise concerns this Court has warned against. *See Chaney*, 470

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[5] The District Court erroneously conflated *Chaney*'s discussion of "abdication" with standing. The court concluded that Respondents had standing "because of the DHS' abdication of its statutory duties to enforce the immigration laws." Pet. App. 327a. That conclusion is legally baseless. *Chaney*, which interpreted a statutory preclusion provision, has no bearing on standing, a constitutional requirement. Further, even if this Court were to recognize the District Court's novel standing theory, the Secretary's actions do not amount to abdication.

U.S. at 831-32.[6]

C. The Secretary's Memorandum Is Not a Final Agency Action.

Finally, Respondents' claims are not justiciable because the Secretary's Memorandum is not a "final agency action" subject to judicial review. 5 U.S.C. § 704. For agency action to be final, it must both (1) "mark the consummation of the agency's decisionmaking process" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations and internal quotation marks omitted). The "principal purpose" of this "limitation" "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglements in abstract policy disagreements." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 68 (2004).

The Secretary's Memorandum meets neither of these requirements. The Secretary retains complete discretion to revoke any decision to defer action—or even the Memorandum itself. *See Dalton v. Specter*, 511 U.S. 462 (1994) (holding that the agency's action was not final because the President retained discretion to revoke it). Further, as shown below, the Memorandum is a nonbinding statement of policy, determining no rights or obligations. *See infra* pp. 33-34. In effect, Respondents seek to have the courts "supervise the manner and pace of agency compliance." *S. Utah Wilderness Alliance*, 542 U.S. at 68. But that prospect "is not contemplated by the APA." *Id.*; *see also Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

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[6] Applying similar principles, lower courts have dismissed State suits challenging the Secretary's discretion to defer action on political question grounds. Though decided under a different doctrine, those decisions, which ask whether the Secretary's discretion derives from a demonstrable constitutional commitment and whether there are judicially manageable standards for resolving the issues raised, are analogous. *See Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).

III. The Secretary's Memorandum Is Not Subject to Notice-and-Comment Procedures Because It Is a Nonbinding Policy Statement.

Even if Respondents' challenge is otherwise justiciable, Respondents' procedural APA claim fails on the merits. Far from creating legally binding norms, the Secretary's Memorandum merely describes how DHS intends to exercise its discretion in evaluating applications for deferred action. Treating the Memorandum as a legislative rule, as the Fifth Circuit did, has no support in precedent and would undermine the purposes of the APA. Thus, the Secretary's decision to issue the Memorandum without following the APA's notice-and-comment requirements was entirely proper.

A. Only Binding Legislative Rules Are Subject to the APA's Notice-and-Comment Provisions.

Under the APA, an agency promulgating a legislative rule must provide "notice of proposed rule making" and "an opportunity" for "interested persons . . . to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553 (b)-(c). These requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553 (b)(3)(A). General policy statements include "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Vigil*, 508 U.S. at 197 (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.30 (1947)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

"As an informational device, the general statement of policy" provides notice of the agency's views "well in advance of their actual application." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). Because they are not promulgated with notice and comment, however, general policy statements lack the "force and effect of law" enjoyed by legislative rules. *Nat'l Min. Ass'n*, 758 F.3d at 250 (quoting *INS v. Chadha*, 462 U.S. 919, 986

n.19 (1983)). For this reason, "[w]hen the agency applies a general statement of policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* at 253 (quoting *Pac. Gas & Elec. Co.*, 506 F.2d at 38); *see also Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (requiring the agency to "first promulgate eligibility requirements according to established procedures" before denying benefits).

Courts use various tests[7] to determine whether a policy statement is a binding legislative rule in disguise. Generally, courts rely on four factors. First, "[t]he most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Min. Ass'n*, 758 F.3d at 252 (citations omitted); *see also Chrysler Corp.*, 441 U.S. at 302 (stating that whether agency action "'affect[s] individual rights and obligations' . . . is an important touchstone" in this inquiry (quoting *Morton*, 415 U.S. at 232)). Second, even if the policy statement has no immediate legal effect, it may bind regulated entities as a practical matter if it forces them to comply with a substantive standard. Third, a policy statement may impermissibly bind the agency itself if it "prevents future exercises of discretion on the part of agency decisionmakers." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1053 (D.C. Cir. 1987). Finally, courts assess whether "the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978). Each of these four factors weighs in favor of finding that the Secretary's Memorandum is a nonbinding policy statement.

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[7] For example, the Fifth Circuit considered "whether the rule (1) 'impose[s] any rights and obligations' and (2) 'genuinely leaves the agency and its decisionmakers free to exercise discretion.'" Pet. App. 54a (quoting *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995)) (alterations in original). As discussed below, the Fifth Circuit ignored the first prong of this test and misapplied the second.

B. The Secretary's Memorandum Confers No Legal Rights or Obligations.

As the Secretary's Memorandum makes clear, deferred action "confers no substantive right [or] immigration status." Pet. App. 419a. That characterization is, by itself, entitled to some deference. *See, e.g.*, *CNI v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). Further, nothing suggests the Secretary will implement the Memorandum in a manner inconsistent with that characterization or that the Memorandum will confer other legal rights or obligations.

Contrary to the Fifth Circuit's conclusion, the Secretary's deferred action policy does not expand the range of regulatory benefits for which unauthorized immigrants are potentially eligible. DHS need not rely on the Secretary's Memorandum to grant deferred action and work authorization in individual cases—the agency has independent authority to do so. *See Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 484-85; 8 C.F.R. § 274a.12(c)(14). While deferred action recipients become eligible to apply for work authorization and other benefits, *see, e.g.*, 8 C.F.R. § 1.3(a)(4)(vi); Tex. Transp. Code § 521.142(a), those benefits derive from unchallenged laws and regulations. *See supra* pp. 19-20. The Memorandum merely "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp.*, 441 U.S. at 302 n.31.

Additionally, the Secretary's Memorandum does not give eligible applicants any enforceable right to deferred action. On its face, the Memorandum expressly preserves "prosecutorial discretion . . . on a case-by-case basis." Pet. App. 416-17a. All potential recipients of deferred action under DAPA, like those under DACA, remain removable. Even if DHS chose to remove an individual who may be eligible for deferred action under either DACA or DAPA, this "decision . . . to commence [removal] proceedings" would not be judicially reviewable. 8 U.S.C. § 1252(g); *see also Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471; *Vasquez v. Aviles*, No. 15-2214, 2016 WL 732118, at *2 (3d Cir. Feb. 24, 2016) (holding that § 1252(g)

"deprives all courts of jurisdiction to review a denial of DACA relief because that decision involves the exercise of prosecutorial discretion"). Indeed, deferred action itself does not even rise to the level of a protectable liberty interest. *See, e.g.*, *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 798 (10th Cir. 1984); *accord. Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000) (finding "no constitutionally-protected liberty interest in obtaining discretionary relief from deportation"); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1147 (11th Cir. 1999) (noting that "'suspension of deportation' is an 'act of grace' committed to the 'unfettered discretion' of the Attorney General" (quoting *Jay v. Boyd*, 351 U.S. 345, 354 (1956))).

Furthermore, the discretionary nature of deferred action distinguishes the Secretary's Memorandum from other statements found to be legislative rules. Unlike the Memorandum, those statements bound the agency to a particular course of action. *See, e.g.*, *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) (finding that EPA legally bound itself by stating its intent to accept a specific toxicity factor in assessing risks of PCB disposal); *CNI*, 818 F.2d at 945 (finding that FDA's toxicity rules were legislative because "it would be daunting indeed to try to convince a court that the agency could appropriately prosecute a producer for shipping corn" below a certain toxin's action level). By contrast, the Secretary's deferred action policy provides no legal defense to removal and does not require the agency to defer action in any particular case. *See Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) ("INS operations instructions fall within section 553(b)(A)'s exception because the instructions are internal directives not having the force and effect of law.").

C. The Secretary's Memorandum Does Not, in Practice, Force Private Parties To Comply with any Substantive Standard.

Moreover, the Secretary's Memorandum is not a legislative rule because it does not force private parties to comply with any substantive standard. If an agency statement "reads like a

ukase": "[i]t commands, it requires, it orders, it dictates," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000), that statement "will be considered binding as a practical matter," *Gen. Elec. Co.*, 290 F.3d at 383. Similarly, a statement may be a legislative rule if "the agency has applied the guidance as if it were binding on regulated parties." *Nat'l Min. Ass'n*, 758 F.3d at 253; *see also McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). Neither of those factors applies here.

The Secretary's Memorandum does not bind unauthorized immigrants or any other private party. The Memorandum sets forth substantive criteria for DHS officers to consider on a case-by-case basis, but does not command applicants to change their behavior. Indeed, its only commands are procedural. *See* Pet. App. 417a (requiring applicants to "file the requisite applications for deferred action" and "submit biometrics for USCIS to conduct background checks"); *see also* 5 U.S.C. § 553(b)(3)(A) (excepting "rules of . . . procedure" from notice and comment). Moreover, the Memorandum does not compel States to comply with their own laws. *See supra* pp. 16-19.

Furthermore, there is no evidence—not even "an early snapshot," *Nat'l Min. Ass'n*, 758 F.3d at 253—of how DHS will apply the Secretary's Memorandum in individual cases. Thus, "there is no basis here for any claim that the [agency] has actually treated the policy with the de facto inflexibility of a binding norm." *Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002). Even assuming that DAPA would be applied in the same way as DACA (as the Fifth Circuit unjustifiably did, *see* Pet. App. 56a), it still would not bind *regulated parties* in any way. DACA is completely voluntary.[8] Unauthorized immigrants who do not apply are not

[8] For this reason, as Judge King's dissent noted, "[i]t should be expected that only those highly likely to receive deferred action will apply," lest they unnecessarily reveal themselves to

prejudiced in any way. Thus, neither the language of the guidance nor its projected application suggests that the Secretary's deferred action policy would impermissibly bind regulated parties.

General Electric Co. v. EPA is not to the contrary. Unlike the EPA guidance at issue in *General Electric*, the Secretary's Memorandum will not force regulated entities to behave in a certain way to comply with any substantive standard. In that case, mandatory language in the challenged guidance reasonably led "the affected private parties . . . to believe that failure to conform will bring adverse consequences." *Gen. Elec. Co.*, 290 F.3d at 383 (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 Duke L.J. 1311, 1355 (1992)). The Memorandum contains no such language.

D. In Concluding that the Secretary's Memorandum Creates a Binding Rule, the Fifth Circuit Erred by Focusing Narrowly on the Discretion Exercised by DHS Officers.

Rather than examining the agency's discretion within the regulatory regime, the Fifth Circuit erroneously focused on the extent to which DAPA leaves DHS "*employees* free to exercise discretion." Pet. App. 64a (emphasis added). A policy statement, however, is not an impermissible legislative rule "as long as it leaves the *administrator* free to exercise his informed discretion." *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987) (quoting *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) (Scalia, J.)) (emphasis added).

Applying the Fifth Circuit's reasoning would subject valid attempts by agency administrators to control their subordinates to notice-and-comment procedures. Agency policies

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DHS. Pet. App. 136a (King, J., dissenting). The fact that only 4% of DACA applicants are denied deferred action, *see* Pet. App. 57a n.130, is therefore unsurprising.

are no less discretionary because they govern the actions of officials on an agency-wide basis. *See Nat'l Roofing Contractors Ass'n v. U.S. Dep't of Labor*, 639 F.3d 339, 342 (7th Cir. 2011) (citing *Lopez v. Davis*, 531 U.S. 230 (2001)) ("Administrative discretion may be exercised by formal policies as well as one case at a time."). Rather, those policies are an "essential" step in ensuring that the agency's discretion is exercised uniformly, in accordance with the administrator's directions. *Id.* at 341-42 ("The Secretary committed to paper the criteria for allowing regulatory violations to exist without redress, a step essential to control her many subordinates. This does not make the exercise less discretionary."). As the Fifth Circuit has itself explained, "all statements of policy channel discretion to some degree—indeed, that is their purpose." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 600 (5th Cir. 1995).

The Secretary's Memorandum clearly preserves the agency's discretion. While the Memorandum channels the discretion of DHS officers, the agency as a whole retains discretion to: (1) revoke DAPA; (2) defer action on an individual not covered by the policy; and (3) deny deferred action based on "factors that . . . make[] the grant of deferred action inappropriate" in an individual case, Pet. App. 417a. Indeed, as Judge King's dissent noted, this "channeling of agency enforcement discretion—through the use of non-exhaustive, flexible criteria—is entirely consistent with a non-substantive rule." Pet. App. 128a.

Pickus v. U.S. Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974), provides no support for the Fifth Circuit's restrictive interpretation of agency policy statements. There, the court found that a formula that calculated an inmate's parole time based on "rigid criteria" constituted a legislative rule because it "define[d] a fairly tight framework to circumscribe the Board's statutorily broad power." *Id.* at 1113. Here, by contrast, DACA and DAPA do not cover the universe of regulated entities, and discretionary criteria are baked into the policy. The challenged

policy simply channels the agency's prosecutorial discretion. As discussed below in further detail, this is a common and entirely appropriate use of nonbinding policy statements.

E. Subjecting the Secretary's Memorandum to Notice-and-Comment Procedures Would Undermine the Purposes of the APA.

Finally, subjecting the Secretary's Memorandum to notice and comment would undermine the values of agency transparency and public participation. The Memorandum, like other policies governing prosecutorial discretion, is a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Attorney General's Manual on the Administrative Procedure Act*, *supra*, at 30 n.30. Guidance on enforcement discretion is "ordinarily issued nonlegislatively,"[9] Anthony, *supra*, at 1338, because notice and comment is counterproductive for managing prosecutorial discretion.

Notice and comment is ill-suited for policies governing prosecutorial discretion for two reasons. First, subjecting such policies to notice and comment would require reviewing courts "to assess degrees of precision or discretion for which no principled metric exists." John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 897 (2004). This Court has repeatedly instructed that courts should avoid making judgments without such metrics. *See, e.g.*, *Vigil*, 508 U.S. 182 (holding an agency's decision to discontinue a discretionary allocation of unrestricted funds need not satisfy the APA's notice-and-comment requirements and comparing that decision to an agency's decision not to prosecute); *supra* pp. 29-30. This instruction applies even more forcefully to removal, where concerns about judicial supervision "are greatly magnified." *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 490. Second, imposing

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[9] For example, the Department of Justice's Petite Policy "establishes guidelines for the exercise of discretion by" prosecutors in deciding whether to bring a federal prosecution for substantially the same acts involved in a prior state proceeding. U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-2.031 (2015).

procedural requirements on prosecutorial discretion "will likely lead to perverse results, particularly the curtailment of agencies' own voluntary efforts to rationalize and regularize their enforcement practices and policies." Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 Admin. L. Rev. 131, 134 (1992).

Moreover, subjecting policies governing prosecutorial discretion to notice and comment would undermine the APA's broader purposes. Section 553's notice-and-comment requirements ensure that "agency 'rules' are . . . carefully crafted (with democratic values served by public participation) and developed only after assessment of relevant considerations." *CNI*, 818 F.2d at 951 (Starr, J., concurring in part and dissenting in part). These procedural protections are most important when agencies exercise "coercive state power." *Id.* That does not apply to deferred action, where the agency *refrains* from exercising coercive power. *See supra* pp. 29-30.

Consistent with these principles, lower courts have generally declined to subject exercises of enforcement discretion to notice and comment. For example, in *Cathedral Bluffs*, then-Judge Scalia emphasized that the policy statement in question "pertain[ed] to an agency's exercise of its enforcement discretion—an area in which the courts have traditionally been most reluctant to interfere." 796 F.2d at 538. Similarly, in *Guardian Federal Savings & Loan*, the D.C. Circuit held that guidance "specifying the criteria that audits and auditors must fulfill in order to produce an audit report" were not subject to notice-and-comment requirements because "compulsory notice and comment procedures for all such matters would have the potential to mire the agency in fruitless delay, expense, and inefficiency." 589 F.2d at 666-68.

Of course, exempting the Secretary's Memorandum from notice-and-comment requirements would not prevent States from participating in the formulation of immigration policy. Rather, it would ensure that participation occurs within the political system, where

complaints may be heard and addressed more effectively than in the courts. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 552 (1954). Indeed, Respondents are uniquely situated—as States—to push Congress to constrain the Executive's prosecutorial discretion, as it has done before. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 502-05 (2009) (explaining that Congress has responded to the President's exercise of the parole power to admit large refugee populations). Respondents should direct their concerns, which are ultimately political, accordingly.

Because the Secretary's Memorandum "merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion," *Nat'l Min. Ass'n*, 758 F.3d at 252—it is a general policy statement.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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