No. 15-674

The Morris Tyler Moot Court of Appeals at Yale

UNITED STATES OF AMERICA, 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 RESPONDENTS

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QUESTIONS PRESENTED

In November 2014, the Secretary of the Department of Homeland Security established a program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), that would grant "deferred action" for three-year periods to unauthorized aliens who meet certain specified criteria. The memorandum classifies individuals who receive deferred action as "lawfully present in the United States." J.A. 413a.

The questions presented are:

1. Whether a state that would suffer financial injury in processing licenses for deferred action recipients has Article III standing and a justiciable cause of action under the Administrative Procedure Act ("APA") to challenge the lawfulness of the Secretary of Homeland Security's policy expanding deferred action eligibility and reclassifying DAPA deferred action recipients as "lawfully present" in the United States.

2. Whether the Secretary of Homeland Security must submit DAPA for notice and comment in accordance with the APA.

LIST OF ALL PARTIES

Petitioners, who were Defendants-Appellants in the court below, are: 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; Leon Rodriguez, Director of U.S. Citizenship and Immigration Services.

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

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 9, 2015. A petition for a writ of certiorari was timely filed on November 20, 2015. This Court granted certiorari on January 19, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

Pertinent portions of APA § 553(b) provide:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .

5 U.S.C. § 553(b) (2012).

APA § 701(a) provides: "(a) This chapter applies, according to the provisions thereof, except 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) (2012).

Pertinent portions of APA § 702 provide: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2012).

Other pertinent sections of the U.S. Code are set out in the Joint Appendix to this brief. *See* J.A. 430a-75a.

STATEMENT OF FACTS

I. The DACA and DAPA Memoranda

U.S. immigration law creates a highly structured system for the admission and removal of foreign nationals. Congress has carefully defined classes of aliens who may be lawfully present in the United States, including Lawful Permanent Residents, 8 U.S.C. § 1101(a)(20) (2012); nonimmigrant visa holders, *id.* § 1184; refugees, *id.* § 1157; and asylum-seekers, *id.* § 1158. Aliens who fall outside congressionally defined categories are not lawfully present in the country, and are subject to removal. *See, e.g.*, *id.* § 1182 (defining inadmissible aliens); *id.* § 1226 (prescribing the process for apprehension and detention of aliens); *id.* § 1227 (classifying deportable aliens); *id.* §§ 1229, 1229a (governing the initiation and conduct of removal proceedings).

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum establishing a program known as Deferred Action for Childhood Arrivals ("DACA"). Memorandum from Janet Napolitano, Sec'y of Homeland Sec., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) ("DACA Memo"). The DACA Memo instructs Department of Homeland Security ("DHS") agents to grant two-year periods of deferred action to unauthorized aliens who satisfy specific criteria.[1] *Id.* at 1. At least 1.2 million removable aliens qualify for DACA. J.A. 4a. Between June 2012 and the end of 2014, DHS approved approximately 636,000 applications—a rate of more than 21,000 applicants per month. J.A. 255a. Accompanying DACA was a 150-page manual with detailed instructions to DHS agents for how to process applications. J.A. 386a-87a.

On November 20, 2014, DHS issued two memoranda: one setting enforcement priorities, and the other creating a new program known as Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). The first, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* ("Prioritization Memo"), establishes three-tiers of removable aliens. J.A. 421a. The Priority 1 category includes aliens who pose "threats to national security, border security, and public safety," Priority 2 includes "misdemeanants and new immigration violators," and Priority 3 includes all "other immigration violat[or]s." J.A. 423a-26a. The Prioritization Memo encourages officers to marshal enforcement resources "commensurate with the level of prioritization identified." J.A. 426a. The Memo does not, however, "prohibit or discourage the

[1] Under the DACA Memo, applicants are eligible to receive deferred action if they (1) came to the United States under the age of sixteen; (2) have continuously resided in the United States for at least five years preceding June 15, 2012; (3) are currently in school, have graduated high school, have obtained a general education development certificate, or have been honorably discharged from the Coast Guard or Armed Forces of the United States; (4) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or do not otherwise pose a threat to national security or public safety; and (5) are not above the age of thirty. DACA Memo at 1.

apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." J.A. 426a. Respondents have not challenged this memorandum.

By contrast, the second memo, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* ("DAPA Memo"), established a new set of criteria for deeming undocumented aliens "lawfully present." J.A. 413a. First, the Memo expanded DACA by eliminating the age cap on applicants and extending the period of deferred action status from two to three years. J.A. 415a-16a. Second, the memo established DAPA. J.A. 416a-19a. The Memo made clear that DAPA would be "similar to DACA." J.A. 416a.

DAPA marks a major change in immigration law. Deferred action under DAPA is available to unauthorized aliens who as of November 2014 had "a son or daughter who is a U.S. citizen or lawful permanent resident" and who had resided continuously in the United States since before January 1, 2010. J.A. 417a. The memo states that DAPA deferred action "does not confer any form of legal status," but it also provides that DAPA recipients would be "*lawfully present* in the United States." J.A. 413a (emphasis added). By conferring "lawful presence," DAPA makes beneficiaries eligible to apply for a number of public benefits, including Social Security, 42 U.S.C. § 405(c)(2)(B) (2012); Medicare, 8 U.S.C. § 1611(b)(2) (2012); the Earned Income Tax Credit, 26 U.S.C. § 32(c)(1)(A) (2012); and various state and local public benefits, 8 U.S.C. § 1621 (2012). DAPA recipients would also be eligible to receive work authorization. J.A. 417a. Roughly 4.3 million unauthorized aliens—approximately forty percent of all unauthorized aliens in the country—would be eligible to apply for deferred action under DAPA. J.A. 161a.

II. DAPA's Impact on Texas

DAPA would obligate Texas to process and issue thousands of new driver's licenses to DAPA beneficiaries. Texas law provides that the Department of Public Safety "shall issue" a license to "each qualifying applicant." Tex. Transp. Code Ann. § 521.181 (West 2015). Under Texas law, non-citizens establish eligibility for licenses upon submission of documentation "that authorizes the applicant to be in the United States." Tex. Transp. Code Ann. § 521.142 (West 2015). The DAPA Memo establishes this lawful presence. J.A. 413a. At least 500,000 individuals currently residing in Texas would be eligible for deferred action under DAPA. J.A. 299a.

DAPA will cost the state of Texas millions of dollars. Texas law caps the driver's license application fee at $24, Tex. Transp. Code Ann. § 521.421 (West 2015), leaving the state to subsidize all additional costs. If only five percent of DAPA-eligible Texas residents apply for a driver's license, Texas will incur a net loss of $130.89 per license, totaling to $3 million in costs. J.A. 272a. If a majority of DAPA-eligible residents apply for licenses, Texas will lose $174.73 per license, J.A. 279a, summing to a liability in excess of $40 million. Additionally, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, requires Texas to remit some of these costs directly to Petitioners, for which Texas pays a fee between $0.50 and $1.50 per applicant. J.A. 273a.

III. Procedural Background

Respondents, plaintiffs below, filed suit in the United States District Court for the Southern District of Texas to enjoin DAPA's implementation. Respondents—twenty-six states or their representatives—moved for a preliminary injunction on the grounds that, at a minimum, DAPA is a substantive rule that was unlawfully promulgated in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553(b)-(c). The district court agreed. On February 16, 2015, the district court enjoined DAPA's implementation on the grounds that, *inter alia*, Respondents had standing and

were likely to succeed on the merits of their claim that DAPA unlawfully failed to undergo APA notice and comment. In arriving at its decision, the district court made findings of fact, reviewable for clear error, that "[n]othing about DAPA 'genuinely leaves the agency and its [employees] free to exercise discretion.'" J.A. 389a. (second alteration in original) (quoting *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995)). The district court denied Petitioners' motion to stay the preliminary injunction on April 7, 2015.

On May 26, 2015, a motions panel for the Fifth Circuit denied Petitioners' motion to stay the preliminary injunction or narrow its scope. The panel agreed with the district court that Respondents had standing and were likely to prevail on their claim that DAPA was unlawful for failure to satisfy notice-and-comment requirements. Judge Higginson dissented.

After regular briefing, the Fifth Circuit again rejected the Petitioners' arguments. On November 9, 2015, the court affirmed the preliminary injunction. First, the Fifth Circuit determined that Petitioners had brought a justiciable claim. The court found that Texas has established an injury in fact that is fairly traceable to the DAPA Memo and redressable by the courts. The court also held that the APA affords Respondents a cause of action to challenge DAPA's lawfulness. Second, the Fifth Circuit determined that Respondents are likely to prevail on their claim that DAPA is a "substantive" or "legislative" rule and therefore must comply with the APA's notice-and-comment rulemaking procedures. Judge King dissented.

SUMMARY OF ARGUMENT

Texas has Article III standing and a justiciable cause of action to challenge DAPA's lawfulness, and DAPA is unlawful because it failed to undergo APA notice-and-comment procedures. The Fifth Circuit's decision should be affirmed.

I. Respondents have Article III standing and a cause of action to invoke federal jurisdiction.

First, Texas would suffer substantial injury if DAPA goes into effect. DAPA would confer "lawful presence" and driver's license eligibility on half a million Texas residents, costing the state millions of dollars. Pecuniary harm is a quintessential injury in fact; it ensures Texas has a personal stake in the outcome, creates concrete adverseness between the parties, and provides this Court with a factual context within which to adjudicate legal issues.

Furthermore, Texas's harm is fairly traceable to DAPA and redressable by this Court. When agency actions alter market conditions to the detriment of an aggrieved individual, Article III confers standing on that individual to bring suit. Additionally, Texas cannot simply change its laws to avoid DAPA's injury. Not only would altering Texas's driver's license statute raise Equal Protection concerns, but demanding such a change would harm Texas's sovereign interests and undermine the courts' ability to hear genuine cases and controversies. A favorable ruling by this Court would redress the injury to Texas's procedural right.

Second, the APA affords Respondents a broad cause of action to challenge DAPA's lawfulness. Immigration statutes clearly contemplate their potential effect on states, and thus place Texas squarely within their "zone of interests." None of these statutes could be fairly read to preclude judicial review under 5 U.S.C. § 701(a)(1).

Because DAPA is not committed to agency discretion by law, the narrow exemption in 5 U.S.C. § 701(a)(2) does not foreclose judicial review of the DAPA Memo. First, reviewing courts can successfully locate "law to apply" in the immigration statutes and the APA itself. Second, the presumption against judicial review of non-enforcement decisions, as articulated in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), does not apply to DAPA. As an affirmative grant of

"lawful presence" and other benefits, DAPA deferred action is nothing like prosecutorial discretion. Additionally, the DAPA Memo established a forward-looking, programmatic enforcement policy. This policy is qualitatively different than the case-by-case non-enforcement decisions considered in *Heckler*. Courts have ample expertise to review agency policy decisions, DAPA provides a concrete focus for judicial review, and the APA strongly discourages unfettered agency action.

II. DAPA is unlawful because it did not follow the APA's notice-and-comment rulemaking requirements. The APA creates mandatory procedures that agencies must follow before promulgating new regulations. As a "legislative" rule, DAPA is not exempt from these procedures.

First, DAPA is a legislative rule because it establishes criteria that "grant rights, impose obligations, or produce other significant effects on private interests." *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (quoting *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980)). Specifically, the program affirmatively deems unauthorized aliens "lawfully present." This classification has legal consequences: it makes aliens eligible to receive an array of public benefits, and stops them from accruing time towards re-entry bars under 8 U.S.C. § 1182(a)(9)(B) (2012). DAPA's affirmative grant of lawful status goes far beyond traditional prosecutorial forbearance. Because these benefits "affect individual rights and obligations," *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979), DAPA is a legislative rule.

Second, DAPA is a legislative rule because it is binding and would not leave "the agency and its decisionmakers free to exercise discretion." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). On its face, DAPA contains numerous instances of mandatory language that eliminate officers' discretion. The district court also made a factual finding that, in practice, DHS

would implement DAPA in such a way that precluded the exercise of true discretion. It is therefore a legislative rule, and must be subject to notice-and-comment procedures.

ARGUMENT

I. RESPONDENTS HAVE BROUGHT A JUSTICIABLE CLAIM.

A. Texas Has Demonstrated the Injury, Causation, and Redressability Necessary to Establish Article III Standing.

Article III of the U.S. Constitution grants federal courts jurisdiction to hear "cases" and "controversies." U.S. Const. art. III, § 2. Standing is one element of the case-or-controversy requirement. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). Because federal courts have a "virtually unflagging" obligation to adjudicate cases within their jurisdiction, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014), this Court has labored to articulate the "constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

To invoke federal jurisdiction, a litigant must establish three elements: injury, causation, and redressability. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). First, the litigant must demonstrate that she has suffered an injury in fact, defined as the "invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). Second, she must demonstrate that her injury shares a "causal connection" with the allegedly unlawful conduct, such that her injury is "fairly traceable" to the defendant's actions. *Lujan*, 504 U.S. at 560. Third, the litigant must show a "'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134

S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 561). Respondents satisfy each of these requirements.

1. By imposing multimillion dollar costs on Texas, DAPA creates a substantial injury in fact.

DAPA's multimillion dollar injury to Texas plainly demonstrates an injury in fact.[2] DAPA increases the license-eligible population of Texas by over half a million people, J.A. 299a, and will easily impose several millions of dollars in costs on Texas's public fisc, J.A. 272a. Given these undisputed costs, Texas has manifestly established an injury in fact and a "substantial risk that the harm will occur." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013) (internal quotation marks omitted).

First, Texas unmistakably "seek[s] a remedy for a personal and tangible harm" and "posses[se]s a 'direct stake in the outcome" of the case.'" *Hollingsworth*, 133 S. Ct. at 2661-62. Millions of dollars hinge on the result of this litigation. DAPA's financial cost to Texas is both "concrete and particularized" and "imminent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, (2000).

Second, DAPA's direct and negative effect on Texas's bottom line clearly establishes "concrete adverseness" between the parties. *Baker v. Carr*, 369 U.S. 186, 204 (1962). While many members of the public disagree with the DAPA program, Texas can show direct pecuniary harm. This distinction ensures that Texas does not ask the Court to "pass upon abstract, intellectual problems," but rather to resolve a "concrete, living contest[] between adversaries." *FEC v. Akins*, 524

[2] Although representatives from twenty-five other states join Texas's challenge to the DAPA Memo, respondents need only establish the standing of one member. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

U.S. 11, 20 (1998) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

Third, Texas's financial injury supplies this Court with a stable factual context within which to resolve the dispute. The existence of a factual record "sharpens the presentation of issues upon which the court . . . depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker*, 369 U.S. at 204). It further ensures that "the legal questions presented . . . will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment)).

Fourth, well-established case law recognizes pecuniary harm as the classic case of injury. As the Court observed in *Sierra Club v. Morton*, "palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." 405 U.S. 727, 733-34 (1972) (citing *Hardin v. Ky. Utilities Co.*, 390 U.S. 1, 7 (1968); *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83 (1958); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940)). DAPA's threat to Texas's budget is a paradigmatic example of a "dollars-and-cents injury," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 478 (1982). Furthermore, litigants suffering pecuniary harm serve as particularly effective plaintiffs in cases brought under the APA. As the Court explained in *Data Processing*, "Certainly he who is likely to be financially injured . . . may be a reliable private attorney general to litigate the issues of the public interest." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (internal quotation marks omitted) (internal citation omitted).

Finally, Texas's specific and direct harm is not a "generalized grievance." *Lexmark*, 134 S. Ct. at 1387 n.3. Texas's injury extends beyond the "harm to . . . every citizen's interest in proper application of the . . . laws." *Hollingsworth*, 133 S. Ct. at 2662 (quoting *Lujan*, 504 U.S. at 573). Texas, which stands to lose millions of dollars by virtue of DAPA, cannot be accused of "seeking relief that no more directly and tangibly benefits [Texas] than it does the public at large." *Id.* (quoting *Lujan*, 504 U.S. at 573-74). The fact that others may have a justiciable case against Petitioner does not deny Texas standing. *See Clinton v. City of New York*, 524 U.S. 417, 434-36 (1998). To the contrary, the fact that DAPA will cause many individuals to suffer harm underscores the importance of adjudicating Texas's claim. *See United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.").

2. The harm to Texas is fairly traceable to DAPA.

Texas's injury is "fairly traceable" to Petitioners' unlawful conduct. *Allen v. Wright*, 468 U.S. 737, 757 (1984). Through federal fiat, DAPA makes 500,000 formerly ineligible individuals newly eligible to apply for a Texas driver's license. J.A. 299a. If not for DAPA, Texas law would bar these individuals' applications. Thus, the harms to Texas's public fisc "are readily attributable" to DHS's decision. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010).

When agency action alters the legal or economic market, harmed individuals have standing to challenge the agency action that caused their injuries. *See Sierra Club*, 405 U.S. at 733-34 (finding standing to challenge agency action that causes "harm to [plaintiffs'] competitive position"). The fact that third parties in the market may proximately deliver the injury by their behavior does not break the chain of causation; harm remains fairly traceable to the agency itself. A long line of

precedent supports this principle. *See, e.g.*, *Massachusetts*, 549 U.S. at 505 (holding that Massachusetts had standing to challenge the EPA's failure to promulgate regulations of greenhouse gas emissions by new motor vehicles whose pollution would negatively affect the state's environmental conditions); *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (holding that ranchers had standing to challenge an opinion by the Fish and Wildlife Service, even though their water access was regulated separately by the Bureau of Reclamation, because the opinion "alter[ed] the legal regime to which the [Bureau] [was] subject); *Barlow v. Collins*, 397 U.S. 159, 160-64 (1970) (holding that tenant farmers had standing to challenge a regulation that allowed their landlords to demand assignment of the farmers' statutory benefits as a condition of obtaining leases, thereby forcing farmers to obtain financing at high rates from landlords themselves); *Data Processing*, 397 U.S. at 151-56 (holding that a corporation had standing to challenge an agency decision to allow competitors to enter the market).

DAPA adversely changes the market for driver's licenses and thus damages Texas's financial well-being. By injecting half a million additional eligible applicants into the population, DAPA imposes a pecuniary burden on Texas's budget. Some eligible applicants must choose to apply for the injury to occur, but that fact does not change the traceability of the harm. In a country in which the vast majority of individuals commute to work in private vehicles, and in a state that lacks an extensive public transportation system, J.A. 286a-287a, it is beyond implausible to believe that none of the 500,000 newly-eligible applicants in Texas will take advantage of the opportunity to apply for a driver's license. For this reason, Texas has sufficiently "adduce[d] facts showing that those [third party] choices . . . will be made in such manner as to produce causation." *Lujan*, 504 U.S. at 562.

Texas's injury is not "self-inflicted." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Texas cannot change its laws to avoid injury, nor would Article III require it to do so.

First, courts have ruled that the Equal Protection Clause of the Fourteenth Amendment prohibits states from denying DAPA beneficiaries driver's licenses. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064-65 (9th Cir. 2014). The Ninth Circuit held that an Arizona law denying driver's license eligibility to DACA beneficiaries while granting eligibility to other deferred-action recipients was "likely to fail even rational basis review." *Id.* The court's holding, while not binding on Texas, forcefully articulates a persuasive interpretation of the constitutionally available responses for states injured by DAPA. A desire to comport with the Constitution does not make Texas's injury self-inflicted.

Second, the state of Texas has a legally cognizable interest in administering its laws. In *Alfred L. Snapp & Son*, this Court recognized that states have an interest in "the exercise of sovereign power over individuals and entities" within their jurisdiction, including "the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). The Court echoed this determination in *Massachusetts*, holding that states enjoy "special solicitude in . . . standing analysis" because of their "well-founded desire to preserve [their] sovereign territory." *Massachusetts*, 549 U.S. at 519-20. Texas, exercising its sovereign police powers, has chosen to promote its residents' welfare by subsidizing the cost of driver's licenses for those who may be lawfully present in the state. DAPA forces Texas to choose between two harms: injury to the public fisc, or injury to its sovereign lawmaking power. Such a forced choice is injury unto itself. *Cf. Wyoming v. Oklahoma*, 502 U.S. 437, 447-48 (1992) (holding that Wyoming had standing to sue Oklahoma for a change in Oklahoma law that produced a decrease in Wyoming's tax revenues).

Finally, Article III does not demand that litigants actively avoid injury by modifying their behavior. To the contrary, injury exists whenever a defendant "inva[des] . . . a legally protected interest" of another. *Ariz. State Legislature,* 135 S. Ct. at 2663 (quoting *Arizonans for Official English,* 520 U.S. at 64). If the Court accepted Petitioners' arguments, a whole range of litigants would lose standing to protect their interests. For example, "testers"—individuals who inquire about housing availability with no intent to rent or buy—would no longer have standing to sue landlords and other agents engaging in housing discrimination because the would-be plaintiffs could simply avoid the harm by refraining from making inquiries. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (holding that testers have standing even though they "may have approached the real estate agent . . . without any intention of buying or renting a home"). Similarly, consumers would no longer have standing to challenge business regulations when the market offers a substitute product. *See Consumer Fed'n of Am. v. FCC,* 348 F.3d 1009, 1012 (D.C. Cir. 2003) (holding that "the inability of consumers to buy a desired product may constitute injury-in-fact even if they could ameliorate the injury by purchasing some alternative product") (internal quotations omitted). For these reasons, "[t]he voluntary choice to suffer [an] injury that confer[s] standing" is sufficient to create a case or controversy under Article III. 13A *Fed. Prac. & Proc. Juris.* § 3531.5 (3d ed. 2015).

3. A favorable judicial determination will redress Texas's injury.

Respondents can show redressability because they seek to vindicate a procedural right: a right to lawful agency action. Texas need not establish that requiring DHS to follow a lawful APA process would result in a different policy. *See, e.g., Akins,* 524 U.S. at 25; *Massachusetts*, 549 U.S. at 517-18. Rather, when a plaintiff seeks to vindicate "a procedural right to protect his concrete

interests," the litigant "can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517-18 (quoting *Lujan*, 504 U.S. at 572 n.7). Instead, Texas need only demonstrate "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. An injunction against implementing the DAPA Memo would do just this. As the court below correctly noted, "Enjoining DAPA based on the procedural APA claim could prompt DHS to reconsider the program, which is all [the] plaintiff must show . . . ." J.A. 32a.

B. The APA Affords Texas a Cause of Action to Challenge DAPA's Unlawful Promulgation.

1. Because Texas's injury falls within the "zone of interests" protected by immigration statutes, DAPA is reviewable under the APA.

The APA ensures that courts have jurisdiction to provide relief to litigants harmed by unlawful agency action. The APA provides that any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . is entitled to judicial review," 5 U.S.C. § 702, once the agency's decision becomes "final agency action," 5 U.S.C. § 704 (2012).[3] The cause of action found in § 702 reaches all final agency actions[4] except when a "statute[] preclude[s] judicial review," 5 U.S.C. § 701(a)(1), or when the "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2). This Court instructs judges to construe the "generous review provisions" of the APA "not grudgingly but as serving a broadly remedial purpose." *Data Processing*, 397 U.S. at 156.

[3] Because the DHS's DAPA Memo "marks the consummation of the agency's decisionmaking process . . . from which legal consequences flow," the DAPA Memo constitutes final agency action. *Bennett*, 520 U.S. at 177-78. The Government does not dispute DAPA's finality. J.A. 181a.

[4] "Agency action" includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13) (2012).

To avail herself of the APA's cause of action, a litigant need only show that her injury is "arguably within the zone of interests to be protected or regulated by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (quoting *Data Processing*, 397 U.S. at 153).[5] To comport with the purpose of the APA, courts apply the zone-of-interests test generously. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) ("We apply the test in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable." (internal quotations removed)). Thus, courts withhold the APA cause of action only if the litigant'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. Securities Industry Ass'n.*, 479 U.S. 388, 399 (1987).

Texas's injury clearly falls within the immigration statutes' zone of interests. As this Court has recognized, "The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). To the contrary, the thicket of federal immigration laws clearly demonstrates a concern for the adverse impact of unlawful immigration on the states. For example, with limited exceptions federal law denies unlawful immigrants eligibility for State and local public benefits. 8 U.S.C. § 1621. And federal statutes charge the Secretary of Homeland Security with "the power and duty to control . . . the boundaries . . . of the United States" and require the Attorney General to "allocate to each State not fewer than 10 full-time active duty agents of the Immigration and Naturalization Service

[5] Although the zone-of-interests inquiry is sometimes labeled an element of "prudential standing," *Lexmark* explained that the test is properly understood as a statutory interpretation of the APA's cause of action. *See Lexmark*, 134 S. Ct. at 1387.

. . . in order to ensure the effective enforcement" of the immigration laws. 8 U.S.C. §§ 1103(a)(5), (f) (2012).

2. Congress has not precluded review of the DAPA Memo.

Although APA § 701(a)(1) denies litigants a cause of action when "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), courts apply a "strong presumption" against preclusion. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). The drafters of the APA intended to make judicial review widely available. Because the legislative history of the APA "manifests a congressional intention that it cover a broad spectrum of administrative actions," courts may deny judicial review "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Therefore ambiguity resolves in favor of the putative plaintiff. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (explaining that "where substantial doubt about . . . congressional intent exists, the general presumption favoring judicial review of administrative action is controlling").

Congress has manifested no intention to preclude judicial review of the DAPA Memo. Petitioners rely on 8 U.S.C. § 1252(g) (2012), which denies federal jurisdiction "to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." This provision is inapplicable to DAPA. First, Texas does not bring its claim "on behalf of" an alien; Texas seeks judicial review in its own right for its own injury. Second, § 1252(g) was intended to shield case-by-case *denials* of deferred action from judicial review. *See Reno v. Am.-Arab Anti-Discrimination Comm.* (*AAADC*), 525 U.S. 471, 485 (1999) (noting that § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions"). DAPA does not "arise from" an affirmative decision to begin enforcement; to the contrary, Texas's

injury stems from the DHS's decision to grant lawful presence to DAPA beneficiaries. Third, this Court has already rejected the assertion that § 1252(g) "impose[s] a general jurisdictional limitation." *AADC*, 525 U.S. at 482. Rather, this Court decisively concluded that "[t]he provision applies only to three discrete actions that the Attorney General may take," excluding all of the "many other decisions or actions that may be part of the deportation process." *Id.* Simply put, § 1252(g) in no way offers clear and convincing evidence that Congress intended to preclude review of DAPA.

3. Congress has not committed the authority to promulgate DAPA to DHS's unreviewable discretion.

APA § 701(a)(2) makes a cause of action unavailable when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Understood as a protection of judicial competency, § 701(a)(2) shields agency action from review only "in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler*, 470 U.S. at 830). Therefore § 701(a)(2) is "a very narrow exception" that bars judicial review only when Congress supplies "no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752, at 26 (1945)). DAPA does not fall within this narrow exception.

a. *Federal courts have ample "law to apply" when reviewing DAPA.*

Agency action is rarely committed to agency discretion by law. In interpreting and applying the "no law to apply" exception, courts remain mindful that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651. Thus, the immigration statutes, paired with the DAPA Memo itself, offer courts a sufficient substrate for

judicial review. As the D.C. Circuit has explained, "Even when there are no clear statutory guidelines, courts often are still able to discern from the statutory scheme a congressional intention to pursue a general goal. . . . [T]he agency itself can often provide a basis for judicial review through the . . . announcement of policies." *Robbins v. Reagan,* 780 F.2d 37, 45-46 (D.C. Cir. 1985).

This Court need not struggle to locate "law to apply" in reviewing DAPA. The immigration statutes are full of directions that DHS must follow. For example, 8 U.S.C. § 1103(a)(1) charges the Secretary "with the administration and enforcement of . . . all . . . laws relating to the immigration and naturalization of aliens." The same statute gives the Secretary "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens," *id.* § 1103(a)(5), and mandates that 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," *id.* § 1103(a)(3). Elsewhere, the U.S. Code delineates additional "law to apply" in the admission, 8 U.S.C. § 1225 (2012), and removal of aliens, 8 U.S.C. §§ 1227, 1229a.

Finally, even if the Court can find no law to apply to determine DAPA's *substantive* lawfulness, the APA provides clear law with which to assess DAPA's *procedural* legality. The Court definitively separated these two lines of inquiry in *Lincoln*. It stated that "quite apart from the matter of substantive reviewability," the Court could assess a claim that an agency action "was required to abide by the familiar notice-and-comment rulemaking provisions of the APA." *Lincoln,* 508 U.S. at 195. Courts have rarely needed to apply this bifurcated analysis because the vast majority of rulemaking—quintessential agency action—cannot also claim to embody prosecutorial discretion—classic inaction. However, at least one lower court has found occasion to apply *Lin-*

coln's holding. As the D.C. Circuit explained, "[U]nder the APA the ultimate availability of substantive judicial review is *distinct* from the question of whether the basic rulemaking strictures of notice and comment and reasoned explanation apply. The APA's procedural requirements are enforceable apart from the reviewability of the underlying action . . . ." *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995) (emphasis in original). Therefore, this Court possesses jurisdiction to assess the legality of DHS's failure to adhere to notice-and-comment requirements.

b. *The* Heckler *non-enforcement presumption does not extend to DAPA because DAPA affirmatively grants benefits and establishes a programmatic policy.*

Petitioners rely on the Court's application of the narrow § 701(a)(2) exception to non-enforcement decisions in *Heckler*. This reliance is misguided. The *Heckler* Court articulated a rebuttable presumption against judicial review of agencies' "[r]efusals to take enforcement steps." *Heckler*, 470 U.S. at 831. This Court explained that, in contrast with "affirmative act[s] of approval," an agency's inaction in the face of pressure to enforce is "general[ly] unsuitab[le]" for judicial review. *Id*. Stressing, however, that "Congress did not set agencies free to disregard legislative direction," the Court emphasized that refusal to enforce "is only presumptively unreviewable." *Id.* at 832-33. The presumption is rebutted when the statute "has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.*

The rule announced in *Heckler* does not preclude judicial review of DAPA for two reasons.

First, the DAPA Memo is an affirmative grant of benefits, not a non-enforcement decision. The *Heckler* presumption is wholly irrelevant outside of non-enforcement contexts. *See, e.g.*, *Arent v. Shalala*, 70 F.3d 610, 614 (D.C. Cir. 1995) (finding the *Heckler* presumption inapplicable because the agency's "promulgation of a standard . . . does not represent an enforcement action"). DAPA makes available a host of benefits. DAPA grants eligible applicants "permi[ssion] to be lawfully present in the United States" for three years. J.A. 413a. Through DAPA's deferred action,

beneficiaries can obtain Social Security Numbers and work authorization, J.A. 355a, and would become eligible for Social Security benefits, Part A Medicare, earned income tax credits, and state and local public benefits, J.A. 7a-8a, 37a. The fact that other benefits hinge on lawful presence status proves that deferred action represents "an affirmative act of approval," not a "[r]efusal[] to take enforcement steps." *Heckler*, 470 U.S. at 831.

DAPA is not non-enforcement; the status quo is non-enforcement. Under the Prioritization Memo, the vast majority of the 500,000 DAPA-eligible individuals currently living in Texas will likely remain in Texas even if DAPA remains enjoined. *Cf.* J.A. 426a. However, the difference between Priority 3 status and DAPA deferred action—and thus the difference between the Prioritization Memo and the DAPA Memo—turns on the grant of "lawful presence." Because DAPA beneficiaries possess "lawful presence," they enjoy benefits that individuals in the Priority 3 category do not—including, *inter alia*, eligibility to apply for a Texas driver's license. *See* J.A. 46a (explaining that "[d]eclining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits").

Second, even if DAPA could be properly characterized as only non-enforcement, the *Heckler* presumption would not apply because DAPA lays out a forward-looking, systematic policy of non-enforcement. DAPA is qualitatively different than the prosecutorial discretion at issue in *Heckler*. In *Heckler*, the Court reviewed the FDA's refusal to institute an enforcement action against the allegedly unlawful use of a particular set of drugs. *Heckler*, 470 U.S. at 823. In contrast, the DAPA Memo does not simply suggest that immigration officers stay their prosecutorial hands when they happen to encounter DAPA-eligible immigrants. Instead, the memo directs U.S. Citizenship and Immigration Services ("USCIS") "to establish a process" for reviewing and granting deferred action; it imposes a 180-day deadline on USCIS to implement the process; and it dictates

that all deferred action grants under DAPA "shall be for a period of three years." J.A. 416a-18a. DHS created a "hotline" for the benefit of DAPA-eligible individuals and began "obtaining facilities, assigning officers, and contracting employees to process DAPA applications." J.A. 341a-42a. These actions are not the markers of prosecutorial discretion, but rather indicia of a concerted and prospective change in regulatory policy.

The *Heckler* Court's reasoning does not extend to a programmatic non-enforcement policy. First, courts possess ample expertise to review prospective agency policies such as DAPA. *Heckler* recognized that agencies "generally cannot act against each technical violation of the statute," and courts are ill-equipped to determine "whether agency resources are best spent on [one] violation or another." *Heckler*, 470 U.S. at 831. But the DAPA program does not involve nuanced comparisons of individual cases. Instead, DAPA is fundamentally an immigration policy choice—the kind of choice that courts are highly competent to review. *See, e.g.*, *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994) (noting that "general enforcement polic[ies] may be reviewable" because they are less likely to involve "the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as [*Heckler*] recognizes, peculiarly within the agency's expertise and discretion"); *see also Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (limiting the *Heckler* presumption to "individual, case-by-case determinations of when to enforce existing regulations").

Additionally, prospective enforcement policies "provide[] a focus for judicial review," *Heckler*, 470 U.S. at 832, not otherwise present in ad hoc failures to enforce. As the D.C. Circuit noted, "[A]n agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad

hoc, or post hoc." *Crowley Caribbean Transp.*, 37 F.3d at 677. The DAPA Memo itself offers a clear explanation of the reasoning behind the DAPA program; these reasons provide easy fodder for judicial review.

Finally, the decision to commit programmatic policy choices to absolute agency discretion poses a much higher risk of abuse than the exercise of case-by-case prosecutorial discretion. In *Heckler*, Justice Marshall highlighted the threat posed by unreviewable agencies and emphasized the important purpose of APA review. He wrote:

> [T]he *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power . . . . [T]he presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion. . . . Judicial review is available under the APA . . . precisely so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness.

Heckler, 470 U.S. at 848 (1985) (Marshall, J., concurring in the judgment) (internal citations omitted) (internal quotation marks omitted). The *Heckler* majority understood this threat as well. The Court explained that when an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities, . . . the statute conferring authority on the agency might indicate that such decisions were not committed to agency discretion." *Id.* at 833 n.4 (internal quotations and citation omitted).

This Court insists that "the agency bears a 'heavy burden' in attempting to show that Congress 'prohibited all judicial review'" of the agency's actions. *Mach Mining*, 135 S. Ct. at 1651 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). Petitioners cannot meet this burden. Because DAPA confers affirmative benefits and establishes a programmatic, prospective enforcement policy, the *Heckler* non-enforcement presumption is inapplicable. This Court can exercise its jurisdiction under APA § 702 and assess the lawfulness of the DAPA Memo.

II. DAPA IS UNLAWFUL BECAUSE IT WAS PROMULGATED WITHOUT FOLLOWING THE APA'S NOTICE-AND-COMMENT REQUIREMENTS.

The APA requires agencies to submit rules for notice and comment whenever they create a substantial change in the law. As a legislative rule that significantly affects immigration law, DAPA is not exempt from these requirements. Because DHS failed to adhere to the APA's procedural requirements, DAPA is unlawful.

A. The APA Requires Agencies to Submit Substantive Rules for Notice and Comment.

When an agency promulgates a rule, generally it must provide notice of the proposed rule and "give interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(c). These rules are not mere formalities. Instead, they "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759, 764 (1969).

Notice-and-comment requirements reflect two fundamental policies. First, they give members of the public an opportunity to contribute to the rulemaking process. The D.C. Circuit has explained, "The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after government authority has been delegated to unrepresentative agencies." *Batterton*, 648 F.2d at 704. Parties therefore have "an opportunity to marshall [sic] what may be persuasive arguments before the agency." *Am. Med. Ass'n*, 57 F.3d at 1134. While the agency may not accept a party's argument, the party is nonetheless entitled to be heard.

Second, the notice-and-comment procedures benefit the agency itself. By adhering to the APA's requirements, an agency can better "educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." *Batterton*, 648 F.2d at 704 (quoting *Texaco, Inc. v. Fed. Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)). By mandating that an

agency consider many different voices, the APA "promotes thought by the decision-maker and compels him to cover the relevant points and eschew irrelevances." *Iowa State Commerce Comm. v. Office of the Fed. Inspector*, 730 F.2d 1566, 1577 (D.C. Cir. 1984) (internal citations omitted); *see also Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 920 (D.C. Cir. 1982) (noting that "preparation of a statement of basis and purpose" in response to public comment "should play an integral part in the decisionmaking process").

Because the policies underlying notice-and-comment procedures are so significant, courts have clearly stated that exemptions must be "narrowly construed." *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) ("In light of the importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in section 553 to swallow the APA's well-intentioned directive.").

B. Because It Is a Legislative Rule, DAPA Is Not Exempt from Notice and Comment.

Petitioners do not contest that DAPA is a rule within the meaning of the APA. J.A. 377a. Instead, they assert that DAPA falls into one of the APA's narrow statutory exceptions to the notice-and-comment requirement because the DAPA Memo is a "general statement[] of policy." 5 U.S.C § 553(b)(3)(A). This argument lacks merit.

In determining whether agency action is a general statement of policy, courts consider two questions: whether the action (1) imposes "any rights and obligations"; or (2) "genuinely leaves the agency and its decisionmakers free to exercise discretion." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (quoting *Cmty. Nutrition Inst.*, 818 F.2d at 946). As the Fifth Circuit recognized, "[t]here is some overlap in the analysis of those prongs" because "if a statement denies

the decisionmaker discretion in the area of its coverage . . . then the statement is binding, and creates rights or obligations." J.A. 54a. (internal quotations removed).

Under either inquiry, DAPA is not a general policy statement. DAPA modifies the rights of beneficiary aliens by classifying them as "lawfully present." And DAPA would be implemented in a way that binds agency officials and restricts their discretion when making eligibility decisions. It is therefore a legislative rule that must be submitted to the public for comment.

1. DAPA significantly modifies individual rights.

DAPA is a substantive rule because it "affect[s] individual rights and obligations." *Chrysler Corp.*, 441 U.S. at 301. DHS has the authority to defer removal proceedings against an unauthorized alien. But DAPA goes far beyond the exercise of prosecutorial discretion. Instead, it effects a legal change: it allows DHS to deem DAPA beneficiaries "lawfully present." J.A. 413a. This classification has important legal consequences. It makes aliens eligible to receive an array of valuable public benefits, and it stops the clock on a re-entry bar imposed by Congress against aliens who unlawfully stay in the country for a given period of time. Because DAPA significantly impacts private interests, it must undergo notice and comment.

By its plain language, DAPA states that illegally present aliens who receive deferred action would henceforth be considered "lawfully present in the United States." *Id*. This pronouncement converts an unlawful action—illegally entering into and residing in the country—into a lawful one. While DHS could revoke the grant of lawful presence unilaterally, the grant is nonetheless legally consequential. Unlawfully present aliens are categorically barred from receiving federal benefits. 8 U.S.C. § 1611(a). But Congress has explicitly carved out an exception for "lawfully present" aliens. *Id*. § 1611(b). Scattered throughout the U.S. Code are scores of provisions distinguishing between lawful and unlawful presence; these provisions typically make lawfully present aliens

eligible for a wide range of benefits. Of particular note, if an alien is lawfully present he may be eligible for Social Security benefits, 42 U.S.C. § 405(c)(2)(B); Medicare benefits, 8 U.S.C. § 1611(b)(2); and the Earned Income Tax Credit, 26 U.S.C. § 32(c)(1)(A).[6]

Likewise, DAPA would stop the clock on 8 U.S.C. § 1182(a)(9)(B). Under this statute, aliens are barred from re-entering the United States for three years if they are "unlawfully present . . . for a period of more than 180 days but less than 1 year," or for ten years if "unlawfully present . . . for one year or more." *Id.* By decreeing that unauthorized aliens are in fact lawfully present, DAPA decreases the likelihood that an individual will trigger the re-entry bar. DAPA therefore has an "actual legal effect . . . on regulated entities"—here, unauthorized aliens. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

On November 19, 2014—the day before DHS announced DAPA—4.3 million undocumented aliens were not eligible to avail themselves of myriad public benefits. They were accruing time under 8 U.S.C. § 1182(a)(9)(B). DAPA would change that in a single stroke.

Petitioners contend that "lawful presence" simply describes a revocable and discretionary decision not to seek removal against qualifying aliens. DHS certainly has the authority to decline to initiate removal proceedings, and Respondents do not contest that power. But Petitioners mischaracterize the deferral program at issue in DAPA. Where non-enforcement passively forebears, DAPA affirmatively acts: it changes an unlawful presence into a lawful one, and in doing so it modifies individual rights. Prosecutorial discretion alone, however, does not empower DHS to

[6] *See also, e.g.*, 8 U.S.C. § 1621(a) (prohibiting unlawfully present aliens from receiving state benefits unless states affirmatively provide such eligibility); *id.* § 1623(a) (barring unlawfully present aliens from receiving certain postsecondary education benefits); 26 U.S.C. § 36B(e) (2012) (denying specific tax credits to aliens not lawfully present); 42 U.S.C. § 4605 (2012) (prohibiting unlawfully present aliens from receiving relocation assistance benefits); *id.* §18071(e) (denying healthcare cost sharing for aliens not lawfully present); *id.* § 18082(d) (prohibiting unlawfully present aliens from receiving credits or payments under the Affordable Care Act).

convert an ongoing legal violation into a lawful act. As this Court has made clear, "deportation is necessary in order to bring to an end *an ongoing violation* of United States law." *AAADC*, 525 U.S. at 491 (emphasis in original). Congress itself recognizes this distinction. By making lawful presence a necessary criterion for federal and state benefits, Congress signals statutory disapproval of Petitioners' claim that "lawful presence" merely describes a decision not to remove.

Prosecutorial discretion tolerates past transgressions, but it cannot authorize illegal conduct or future law breaking. By analogy, a prosecutor may exercise her discretion and decline to prosecute a minor drug conspiracy ring. But that exercise of discretion would not empower her to declare the conspirators' prior or ongoing conduct "lawful." Only a legislative act could accomplish that end. Nor could the prosecutor give the would-be defendants a license to "lawfully" continue their conspiratorial conduct for the next three years (as DAPA's three-year deferral periods would). This would be especially true if, in deeming the conspirators' indisputably illegal actions "lawful," the prosecutor made them eligible for a host of public benefits. Yet this is precisely what DAPA does.

The United States offers three additional counterarguments. None are persuasive.

First, to support the claim that DAPA is exempt from notice and comment, the United States points to previous instances where DHS made use of deferred action without adhering to notice-and-comment requirements.[7] This argument is unavailing. As an initial matter, the mere fact that the agency has previously ignored 5 U.S.C. § 553(c) is not dispositive. Courts have not

[7] In a memorandum assessing DAPA, the Office of Legal Counsel identified four instances—other than DACA—where DHS has made deferred action available to a class of individuals. DHS has offered deferred action to (1) battered aliens under the Violence Against Women Act in 1997; (2) victims of human trafficking and certain other crimes; (3) foreign students affected by Hurricane Katrina; and (4) widows and widowers of U.S. citizens who were married for fewer than two years and whose visa petitions had not been adjudicated by USCIS at the time of their spouses' deaths. Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* 15-17 (2014), *available at* https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

addressed DHS's prior grants of deferred action, and "[p]ast practice does not, by itself, create power.'" *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). To conclude otherwise would endorse "an adverse-possession theory of executive authority" and "systematically favor the expansion of executive power" unconstrained by Congress's commands. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578, 2606 (2014) (Scalia, J., concurring in the judgment).

In any case, DAPA is qualitatively different from the programs the Petitioners cite. In most of these past uses of deferred action, DHS did not confer "lawful presence"; it merely abstained from initiating removal proceedings. The programs simply bridged one form of lawful status to another.[8] Moreover, "[i]n many of these instances, Congress was considering legislative remedies for the affected groups." Andorra Bruno et al., 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* 9 (July 13, 2012). Previous deferred action programs acted as temporary gap-fillers, usually in response to a crisis, while Congress fashioned a more permanent form of relief. *Id.* But it is very unlikely that congressional action will be forthcoming for DAPA beneficiaries: DHS released DAPA only *after* it became clear that Congress was unwilling to act on various immigration reform proposals. J.A. 83a-84a. Indeed, the President has candidly

[8] Previous memoranda establishing deferred action programs did not purport to confer lawful presence. The Violence Against Women Act permitted battered aliens to self-petition for lawful status without relying on their abusive family members to petition on their behalf. Deferred action merely bridged the gap between the period when the alien petitioned for the visa and when the alien received the visa. 8 U.S.C. § 1154(a)(1)(A)(iii) (2012). The deferred action program for human trafficking victims was similar. Congress had established specialized visas for effected aliens. 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i). The Immigration and Naturalization Service declined to remove eligible individuals while their applications for visas were processed. Likewise, foreign students affected by Hurricane Katrina had been lawfully present by virtue of their F-1 student status. 8 C.F.R. § 214.2(f)(6) (2015). Their inability to maintain that status was interrupted by a natural disaster, and DHS used deferred action until the students could regain their status. Widows and widowers of U.S. citizens were lawfully present as "immediate relatives" of citizens under 8 U.S.C. § 1151(b)(2)(A)(i) (2012). Deferred action was used until Congress acted to eliminate the eligibility requirement that a couple be married for two years before the alien spouse could obtain Lawful Permanent Resident status.

acknowledged that "it was the failure of Congress to enact such a program" that prompted him to "change the law" and issue the DAPA Memo. J.A. 84a.

Second, Petitioners assert that any benefits available to DAPA beneficiaries "are not conferred by the DAPA Memorandum" but instead are tied to "preexisting statutes and notice-and-comment regulations." J.A. 92a. But this argument ignores DAPA's critical role in connecting those benefits to the affected unauthorized aliens. DAPA's grant of "lawful presence" makes unauthorized aliens eligible for the benefits contained in those preexisting statutes or rules. Without DAPA, there would be no other legal basis for those aliens to claim eligibility. And DAPA—by its own terms, without reference to other regulations—also stops the clock on the INA's re-entry bars. 8 U.S.C. § 1182(a)(9)(B). By triggering these consequential legal changes, DAPA "affect[s] individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

Third, DAPA is not exempt from notice and comment as "a matter relating to . . . public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). As the Fifth Circuit rightly noted, courts construe § 553(a)(2)'s exception very narrowly to "avoid 'carv[ing] the heart out of the [APA's] notice provisions.'" J.A. 67a (quoting *Hous. Auth. of Omaha v. U.S. Hous. Auth.*, 468 F.2d 1, 9 (8th Cir. 1972)). DAPA does not "clearly and directly relate[] to 'benefits' as the word is used in section 553(a)(3)." *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1061 (5th Cir. 1985). DAPA *does* grant a legally-consequential benefit in the form of "lawful presence" status; this classification in turn makes previously unlawful aliens eligible for public benefits. But DAPA does not itself provide public benefits. Furthermore, § 553(a)(2) is inapplicable because USCIS, which implements DAPA, is not an agency that manages benefits programs. *Cf., e.g., id.* at 1059 (holding that Medicare reimbursements from the Department of Health and Human Services were exempt under § 553(a)(2)).

2. DAPA does not leave decision-makers genuinely free to exercise discretion.

DAPA represents a sweeping change to immigration policy. DHS insists, as it must, that DAPA is discretionary guidance. But this label is inaccurate. DAPA would not leave "the agency and its decisionmakers free to exercise discretion," *Cmty. Nutrition Inst.*, 818 F.2d at 946, because—by the memo's own language and in practice—DAPA does not permit agents to deviate from or decline to apply its criteria. It therefore functions as a binding rule that must be submitted for notice and comment. *See, e.g., Gen. Elec. Co.*, 290 F.3d at 384-85 (holding that an alleged policy statement was in practice a legislative rule and had to undergo notice and comment); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (same).

a. *The Government's own characterization of DAPA indicates that DAPA is binding.*

While DAPA purports to offer non-binding "guidance," mandatory language throughout the DAPA Memo belies putative grants of discretion. An agency's decision to use such language indicates the agency's action is a binding rule. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) ("We have . . . given decisive weight to the agency's choice between the words 'may' and 'will.'"); *McLouth*, 838 F.2d at 1320-21 ("The use of the word 'will' suggests the rigor of a rule, not the pliancy of policy.").

DAPA establishes several substantive criteria from which agents may not deviate. For instance, they may not approve an applicant who entered the country after January 1, 2010. J.A. 417a. Nor may they grant deferred action unless an applicant is the parent of a U.S. citizen or lawful permanent resident. *Id.* Thus, an agent may not discretionarily approve an applicant who arrived in February 2010, nor an applicant who is the caregiver but not parent of a U.S. citizen. DAPA further "direct[s] USCIS to establish a process, similar to DACA" and to "immediately begin identifying persons" eligible for deferred action. J.A. 416a, 418a. In structuring this process

and expanding DACA, DAPA mandates that deferred action "shall be for a period of three years." J.A. 418a. To be considered, applicants "must file the requisite applications" pursuant to the newly-promulgated criteria. J.A. 417a. They "must also submit biometrics" for background checks. *Id*. They "will pay the work authorizations and biometrics fees" of $465 and "[t]here will be no fee waivers." J.A. 418a. "The USCIS process shall also be available" even to individuals subject to final orders of removal. J.A. 419a.

These statements are "couched in terms of command." *Pac. Gas & Elec. Co. v. FEC*, 506 F.2d 33, 42 (D.C. Cir. 1974). Under well-settled law, the use of mandatory language such as "shall," "must," and "will" provides strong evidence that discretion is precluded. *See, e.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion."); *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

Of particular relevance, DAPA also commands private parties—the alien applicants themselves. To be eligible, they must meet DAPA's specific criteria. And DAPA provides, in compulsory terms, that applicants "*must* file the requisite applications for deferred action," they "*must* also submit biometrics," and they "*will* pay" associated fees. J.A. 417a-418a (emphasis added). Courts have often found that agency action is binding when it makes such demands of applicants. *Linoz v. Heckler*, 800 F.2d 871, 876-78 (9th Cir. 1986) (deeming a Medicare manual a substantive rule when an individual's claim was rejected for failing to satisfy the manual's requirements); *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) (holding that agency action was a legislative rule because it "purports on its face to notify applicants . . . precisely what showings the Commission will or will not require of them."). The same is true here.

The conclusion that DAPA precludes discretion comports with the President's own remarks describing the program. The President—the Chief Executive—characterized DAPA as a "change in the law." *Press Release, Remarks by the President on Immigration—Chicago, IL*, The White House Office of the Press Secretary (Nov. 25, 2014). Speaking in unconditional terms, President Obama promised potential applicants that they are "not going to be deported. . . . If you meet the criteria, you can come out of the shadows." President Obama, *Remarks in Nevada on Immigration* (Nov. 20, 2014). Further demonstrating the illusoriness of DAPA's discretion, the President stated that agents who "don't follow the policy" will face "consequences" and have "got a problem." J.A. 59a.

The President's categorical comments are sharply at odds with Petitioners' contention that DHS agents may deviate from DAPA's criteria in any meaningful way. Instead, the remarks suggest that DHS agents have received "their marching orders," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000), and will face penalties if they deviate. At the very least, the characterization of DAPA as a "change in the law" indicates that DHS agents will face strong pressure to approve DAPA applications as a matter of course.

b. *DAPA is binding in practice.*

Even if DAPA contained no mandatory language, "[i]t is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive" rule an interpretive rule or policy statement. *Id.* at 1024; *see also, e.g.*, *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) ("[T]he agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise."); *McLouth*, 838 F.2d at 1321 ("More critically than the EPA's language adopting the model, its later conduct applying it confirms its binding character."). Indeed, after a

hearing, the district court made factual findings—reviewed here for clear error—that in practice, DAPA would leave agency decision-makers no discretion. Because DAPA would be "applied by the agency in a way that indicates it is binding," *Gen. Elec. Co.*, 290 F.3d at 383, it is a legislative rule.

The district court's findings were based in part on its analysis of how DHS has implemented DACA—DAPA's immediate precursor. The DAPA Memo largely mirrors DACA's language about affording officers case-by-case discretion. But the record indicates that DACA's permissive language was pretextual. Of 723,000 DACA applicants, the vast majority was granted deferred action; only approximately four percent of applicants were denied.[9] J.A. 256a. The four percent figure encompasses all denials, discretionary and otherwise; it is unknown how many individuals in that four percent were rejected for simply failing to meet DACA's criteria. J.A. 56a-57a. The district court also relied on the declaration of Kenneth Palinkas, president of the USCIS employees' union, who informed the court that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria." J.A. 257a.

To support their claim that DACA affords DHS agents true discretion, Petitioners can only point to a few instances where applicants were denied on the grounds that they were threats to public safety. J.A. 387a-388a n.101. But this is not evidence of true discretion. DACA itself makes ineligible individuals who are an "enforcement priority," defined as, *inter alia*, a threat to public safety. J.A. 417a.

[9] An additional six percent of applicants were rejected for submitting applications with procedural defects. J.A. 56a-57a n.130.

DACA was also accompanied by a detailed 150-page Operating Instructions manual. *See* U.S. Dep't of Homeland Sec., *National Standard Operating Procedures: DACA* 18 (2012) ("Operating Instructions"). The manual reads more like a statutory scheme than a series of guidelines. It is replete with instances of mandatory language.[10] In one telling instance, the Operating Instructions state that "[o]fficers will **NOT** deny a DACA request solely because the DACA requestor failed to submit sufficient evidence with the request." *Id.* at 45 (emphasis in original). It further directs that "[w]hen a DACA request is denied, the denial *shall* be issued using the Appendix F." *Id.* at 106 (emphasis added). Yet Appendix F consists of nothing more than a series of standardized templates containing boxes for agents to check. The Operating Instructions' rigid commands leave little room for the exercise of true discretion.

There is every reason to believe that DAPA will be implemented similarly to DACA. While DACA and DAPA are not identical, DACA is an "apt comparator to DAPA." J.A. 61a n.139. Indeed, DAPA explicitly states that its implementation should be patterned after DACA's. The DAPA Memo "directs USCIS to establish a process, *similar to DACA*" for granting deferred action. J.A. 416a (emphasis added). It instructs immigration agents to consider eligibility criteria "as with DACA" for all undocumented immigrants they encounter. J.A. 418a. It requires USCIS "to conduct background checks similar to the background check that is required for DACA applicants." J.A. 417a. And it patterns the fee waiver and exemption structure after DACA. J.A. 418a. DHS even promulgated DAPA in the very same memo that it expanded DACA. It is clear that in DHS's view, DAPA builds on the foundation laid by DACA. Petitioners would apparently have

[10] The Operating Instructions define the meaning of continuous residence: "An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence." Operating Instructions at 8. They regulate which misdemeanors an agent may consider: "A minor traffic offense will not be considered a misdemeanor." *Id.* at 64. And they specify how long agents must wait after issuing a Request for Evidence: "[T]he response time given shall be 87 days." *Id.* at 45.

the district court turn a blind eye to the obvious links between the two programs. But it is no error—let alone clear error—for a judge assessing DAPA's implementation to consider the reality of the program after which DAPA was explicitly patterned.[11]

The district court's findings were further supported by evidence of how DHS would implement DAPA itself. DHS would discourage the exercise of discretion by requiring agents to submit certain DAPA denials for a supervisor's approval. J.A. 387a. And the DAPA Memo creates a series of prerequisites; it provides no option for an agent to grant deferred action to an individual who did not meet DAPA's criteria. *Id.* Likewise, in his declaration Palinkas averred that DHS would process DAPA applications in a way that made it virtually impossible to exercise true discretion. Rather than routing applications through field offices, where trained agents could conduct "in-person investigatory interviews" and ferret out fraud, DHS would send "DAPA applications through service centers." J.A. 201a. This process "undermines officers' abilities to detect fraud and national-security risks," and ensures that applications will be rubber-stamped."[12] *Id.*

The record strongly corroborates the conclusion that DAPA applications will be evaluated mechanically. On November 20, 2014, DHS issued the memorandum creating DAPA and altering DACA's criteria. On February 16, 2015, the district court enjoined DAPA's implementation. In the period between those dates, DHS approved more than 100,000 applicants—more than 1,130

[11] Petitioners complain that the district court erred by issuing a preliminary injunction before it had "'an early snapshot' of the policy's implementation." J.A. 131a (King, J., dissenting) (quoting *Nat'l Mining Ass'n*, 758 F.3d at 253. However, a preliminary injunction exists to prevent an imminent harm. Petitioners' logic would prevent courts from issuing virtually any preliminary injunctions, since judges would have to wait for the harm to first produce a "snapshot" of its injurious effects.

[12] The United States offered a declaration from Donald Neufeld, Associate Director for Service Center Operation for USCIS, which insisted that DACA was a "case-specific process." J.A. 62a. Petitioners attached the Neufeld declaration to a filing submitted after the district court's preliminary injunction hearing. Respondents requested an evidentiary hearing in the event that the district court believed the declaration "create[d] a fact dispute of material consequence to the motion." J.A. 64a n. 142. By declining to hold a hearing, the district court implicitly found that the Neufeld declaration failed to create a material factual dispute. But the court did credit the Palinkas declaration by favorably citing it. *See* J.A. 387a-388a n.101.

applicants *per day*—under DACA's revised criteria. J.A. 63a n.141. The Government was unable to identify any applicants who were discretionarily rejected in this time. *Id*. Indeed, the sheer rate at which DHS processed hundreds of thousands of applications suggests that the sole issue before DHS agents was whether applicants "conform[ed] to the rule[s]" the DAPA Memo articulated. *Pac. Gas & Elec. Co.*, 506 F.2d at 38. This is the hallmark of a legislative rule. *See, e.g.*, *McLouth*, 838 F.2d at 1321 (determining that a rule was legislative when the agency only deviated in four of one hundred instances).

On the basis of this evidence, the district court correctly concluded that DAPA's criteria leave no room for genuine discretion. Accordingly, DAPA is a legislative rule, and must comply with the APA's notice-and-comment requirements.

c. *Agency instructions to subordinates may be binding legislative rules.*

Petitioners argue that even if DAPA binds agency discretion, "[a]gency instructions to agency officers" are not legislative rules. J.A. 129a. (King, J., dissenting) (internal quotations omitted). The Fifth Circuit correctly rejected this argument.

First, Petitioners' theory, if accepted, would work a transformation in administrative law. Courts have often noted that agency action is a legislative rule when it binds an agency *or* an "implementing official." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (quoting *Jean v. Nelson*, 711 F.2d 1455, 1481 (11th Cir. 1983)); *see also Gen. Elec. Co.*, 290 F.3d at 382 (noting that the relevant inquiry is whether the agency action "genuinely leaves the agency *and its decisionmakers* free to exercise discretion" (quoting *Cmty. Nutrition Inst.*, 818 F.2d at 946) (emphasis added)). To hold otherwise would fundamentally undermine the goals of democratic participation and improved decision-making enshrined in the APA. *See Batterton*, 648 F.2d at 703 (explaining that the purpose of notice and comment is to "reintroduce public participation and

fairness" into agency decision-making). As the D.C. Circuit explained in *Molycorp, Inc. v. EPA*, when courts determine the necessity of notice and comment, they ask "whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." 197 F.3d 543, 545 (D.C. Cir. 1999). But an agency head could enact any number of policies that have the "force of law" by giving orders to her subordinates. For instance, an agency official seeking to rescind a rule promulgated through notice and comment could simply order her subordinates to ignore the rule in all cases. This directive would effectively have "the force of law," *id.*, but circumvent notice-and-comment requirements.

Second, Petitioners' broad reinterpretation of the APA is unnecessary to ensure that agency officials can manage their employees without initiating rulemaking procedures. The APA exempts "rule[s] of agency organization, procedure, or practice" from notice and comment. 5 U.S.C. § 553(b)(A). So, contrary to Petitioners' claims, there is no danger that "each and every policy channeling prosecutorial discretion" will have to go through notice and comment. J.A. 129a.

The Fifth Circuit correctly explained that the APA § 553(b)(A) exception is not implicated here. J.A. 64a-67a. A rule does not fit "within this exemption" if it alters "rights or interests of parties." *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 349 (4th Cir. 2001) (internal quotations omitted). But that is precisely what DAPA does. It lays out criteria—most notably, an alien's familial relationship to a U.S. citizen or lawful permanent resident—and converts unauthorized aliens into aliens who are "lawfully present." DAPA thus establishes "'the *substantive standards* by which the [agency] evaluates' applications." *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 107 (D.C. Cir. 2013) (emphasis and alterations in original) (quoting *JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994)). It cannot be exempt under § 553(b)(A) as a mere procedural rule. It alters private interests by deeming unauthorized aliens "lawfully present in the United

States," J.A. 413a. This action affects "individual rights and obligations," *Chrysler Corp.*, 441 U.S. at 301, so notice and comment is required.

If DHS wishes to promulgate a program that has such a sweeping impact, it must follow the APA's procedures that enable interested parties to express their views in the rulemaking process. DHS cannot shut out the public's voice on such critical matters.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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