No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Department of Homeland Security has long engaged in "a regular practice * * * known as 'deferred action,'" in which the Secretary "exercis[es] [his] discretion" to forbear, "for humanitarian reasons or simply for [his] own convenience," from removing particular aliens from the United States. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999). On November 20, 2014, the Secretary issued a memorandum (Guidance) directing his subordinates to establish a process for considering deferred action for certain aliens who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents.

The questions presented are:

1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, to challenge the Guidance because it will lead to more aliens having deferred action.

2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law.

3. Whether the Guidance was subject to the APA's notice-and-comment procedures.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals. They are: the United States of America; Jeh Charles Johnson, in his official capacity as Secretary of Homeland Security; R. Gil Kerlikowske, in his official capacity as Commissioner of U.S. Customs and Border Protection; Ronald D. Vitiello, in his official capacity as Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection; Sarah R. Saldaña, in her official capacity as Director of U.S. Immigration and Customs Enforcement; and León Rodríguez, in his official capacity as Director of U.S. Citizenship and Immigration Services.

Respondents were appellees in the court of appeals. They are: The State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Bill Schuette, Attorney General, State of Michigan; State of Nevada; and the State of Tennessee.[*]

[*] Several putative beneficiaries of the Guidance moved to intervene as defendants in the district court. The court denied the motion, but the court of appeals reversed that order. See 2015 WL 6876054.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. (App.) 1a-155a) is not yet published but is available at 2015 WL 6873190. The opinion of the court of appeals denying a stay pending appeal (App. 156a-243a) is reported at 787 F.3d 733. The opinion of the district court (App. 244a-406a) is reported at 86 F. Supp. 3d 591.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 430a-475a.

STATEMENT

A. Legal Framework

1. The "authority to control immigration * * * is vested solely in the Federal Government." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). Pursuant to that authority, Congress enacted the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. The INA charges the Secretary of Homeland Security "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1).[1]

Congress has expressly assigned the Secretary the responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5). One of the enforcement matters over which the Secretary has authority is the removal of aliens if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012); see 8 U.S.C. 1182(a), 1227(a). In this and other matters, the Secretary is vested with the authority to "establish such regulations; * * * issue such instructions; and perform

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[1] Congress has transferred to the Department of Homeland Security (DHS) most of the functions of the former Immigration and Naturalization Service (INS). *E.g.*, 6 U.S.C. 202(3), 271(b), 557. Unless otherwise indicated, references to the actions of DHS and the Secretary include actions by their predecessors.

such other acts as he deems necessary," and to have "control, direction, and supervision" of all DHS employees. 8 U.S.C. 1103(a)(2) and (3).

2. "A principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. When they encounter a removable alien, immigration officials, "as an initial matter, must decide whether it makes sense to pursue removal at all." *Ibid.* They decide whether to "[f]ocus[] investigative resources on particular offenses or conduct"; "to issue, serve, or file a Notice to Appear"; to oppose a request for relief; to settle or dismiss a proceeding; to appeal an adverse ruling; and to execute a removal order. Memorandum from Doris Meissner, INS Comm'r, *Exercising Prosecutorial Discretion* 2, *reprinted as* 77 No. 46 Interpreter Releases 1661, App. I (Nov. 17, 2000). "At each stage the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*).

Like other agencies exercising enforcement discretion, DHS balances "a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Those factors include "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all," *ibid.*, as well as "immediate human concerns," such as "whether the alien has children born in the United States [or] long ties to the community," *Arizona*, 132 S. Ct. at 2499.

The Secretary faces resource constraints that require the exercise of enforcement discretion. More than 11 million removable aliens are estimated to live

in the United States. App. 5a. But Congress has appropriated the funds to remove only a fraction of that population in any given year. The number of removals has varied depending on circumstances, but DHS has not been able to remove more than four percent of the estimated removable population in any year. See DHS, *Yearbook of Immigration Statistics: 2013 Enforcement Actions, Tbl. 39, Aliens Removed or Returned: Fiscal Years 1892 to 2013* (2014). And more aliens enter unlawfully or otherwise become removable each year.

Recognizing that DHS cannot actually remove the vast majority of removable aliens, Congress has directed U.S. Immigration and Customs Enforcement (ICE), the relevant DHS component, to use at least $1.6 billion to identify and remove aliens convicted of crimes, and to prioritize removals of criminal aliens "by the severity of th[e] crime." DHS Appropriations Act, 2015 (Appropriations Act), Pub. L. No. 114-4, Tit. II, 129 Stat. 43. But as relevant here, Congress has otherwise committed to DHS's discretion the choice of how to allocate its lump-sum appropriation for "necessary expenses for enforcement of immigration and customs laws, detention and removals, and investigations." *Id.* at 42; see Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. F, Tit. II, 128 Stat. 250 (same); *Lincoln* v. *Vigil*, 508 U.S. 182, 191-194 (1993).

3. For decades, DHS has engaged in "a regular practice * * * known as 'deferred action,'" in which the Secretary "exercis[es] [his] discretion" to forbear, "for humanitarian reasons or simply for [his] own convenience," from removing particular aliens from the United States for a designated period of time. *AADC*, 525 U.S. at 483-484. Deferred action thus

memorializes a decision "[t]o ameliorate a harsh and unjust outcome" through forbearance. *Id.* at 484 (quoting 6 Charles Gordon et al. *Immigration Law and Procedure* § 72.03[2][h] (1998)). Through "[t]his commendable exercise in administrative discretion, developed without express statutory authorization," *ibid.* (citation omitted), a removable alien is able to remain in the country for the duration of the agency's forbearance. That person's continued presence does not violate any criminal law, because "[r]emoval is a civil, not criminal, matter," and "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 132 S. Ct. at 2499, 2505; see 8 U.S.C. 1227(a). But deferred action provides no defense to the civil consequence of continued presence: The alien remains removable, and DHS has discretion to revoke deferred action at any time. See *AADC*, 525 U.S. at 484-485.

Under other longstanding federal law, according aliens deferred action has several consequences. First, aliens with deferred action—like many other aliens whose presence is temporarily countenanced—become eligible for work authorization. 8 C.F.R. 274a.12(a), (b), (c), and (14). As amended by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, the INA makes it unlawful to knowingly hire an "unauthorized alien." 8 U.S.C. 1324a(a)(1). Aliens are "unauthorized" to be hired if they are not permanent residents or not "authorized to be so employed by [the INA] or by the [Secretary]." 8 U.S.C. 1324a(h)(3). Pursuant to a regulation in place when Congress enacted IRCA, aliens with deferred action and economic need may apply for work authorization. 8 C.F.R. 274a.12(c)(14);

see 46 Fed. Reg. 25,080 (May 5, 1981). Otherwise, during the period the government has countenanced an alien's presence, that person would have no lawful way to make ends meet and would be vulnerable to exploitation by unscrupulous employers.

Second, like many other aliens, aliens accorded deferred action cease accruing time for purposes of the admissibility bars in 8 U.S.C. 1182(a)(9)(B). That provision makes an alien inadmissible for three or ten years if she departs the United States after being "unlawfully present" for six months or a year. 8 U.S.C. 1182(a)(9)(B)(i). "For purposes of this paragraph," an alien is "unlawfully present" if she is present "after the expiration of the period of stay authorized by the [Secretary]." 8 U.S.C. 1182(a)(9)(B)(ii). The Secretary has long considered deferred action to toll accrual of time for purposes of that calculation. See Memorandum from Donald Neufeld, Acting Assoc. Dir., *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* 42 (May 6, 2009).

Third, aliens with deferred action become potentially eligible for certain federal public benefits. For most such benefits, only "qualified alien[s]" are eligible, and aliens with deferred action are not "qualified." 8 U.S.C. 1611(a); see 8 U.S.C. 1641(b) (defining "qualified alien"). But that limitation does not apply to some Social Security, Medicare, and railroad-retirement benefits when a non-qualified alien is "lawfully present in the United States as determined by the [Secretary]." 8 U.S.C. 1611(b)(2)-(4). Under long-standing regulations, deferred action makes an alien eligible for some Social Security benefits under this

provision. 8 C.F.R. 1.3(a)(4)(vi); 61 Fed. Reg. 47,041 (Sept. 6, 1996).

As a matter of federal law, deferred action has no impact on whether an alien is eligible for any state public benefit. States may provide certain minimal benefits to all aliens. See 8 U.S.C. 1621(b). But non-"qualified" aliens (who are also not parolees or nonimmigrants) are prohibited from receiving any additional state public benefits, unless the State has affirmatively chosen after August 22, 1996 to provide them. 8 U.S.C. 1621(a) and (d). Deferred action does not make an alien "qualified" (or a parolee or nonimmigrant). See 8 U.S.C. 1641(b). Deferred action thus does not trigger eligibility for any state public benefit, unless a State voluntarily chooses to provide such a benefit on that basis.

4. DHS has repeatedly accorded deferred action and exercised similar forms of discretion on the basis of the Secretary's general authority to administer the immigration laws. *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*, 38 Op. O.L.C. ___, *14-*20 (Nov. 19, 2014) (OLC Op.) (collecting examples). For example, in 1990, INS expanded a "Family Fairness" policy to provide extended voluntary departure to spouses or children of aliens with legalized status, and some estimates were that 1.5 million people—about 40% of the total removable population at the time—could be eligible. *Id.* at *31. In 2005, DHS implemented a policy of according deferred action to foreign students affected by Hurricane Katrina. *Id.* at *16-*17. And in 2012, DHS implemented the Deferred Action for Childhood Arrivals (DACA) policy

for certain aliens who were brought or came to this country as children and have lived here for years. *Id.* at *17-*18. More than 600,000 people have been accorded deferred action via that policy. App. 4a.

Congress has repeatedly recognized in legislation that DHS has inherent authority to defer action. For example, without defining or codifying the term, Congress has made aliens who petition for relief under the Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit. V, 108 Stat. 1092, eligible to request "deferred action." 8 U.S.C. 1154(a)(1)(D)(i)(II) and (IV). Similarly, certain family members of lawful permanent residents killed on September 11, 2001, or of citizens killed in combat, are "eligible for deferred action." USA PATRIOT Act, Pub. L. No. 107-56, § 423(b), 115 Stat. 361; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1694-1695. Congress has also provided that, if a State participates in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, it may issue compliant driver's licenses to aliens with "approved deferred action status." 49 U.S.C. 30301 note. And 8 U.S.C. 1252(g) bars judicial review of "no deferred action" decisions. *AADC*, 525 U.S. at 485.

B. Factual And Procedural Background

1. On November 20, 2014, the Secretary issued two memoranda relevant here. The first directs DHS to focus "to the greatest degree possible" on removing serious criminals, terrorists, aliens who recently crossed the border, and aliens who have abused the immigration system. App. 426a; see App. 420a-429a.

The second announces "new policies for the use of deferred action." App. 412a (Guidance); see App. 411a-419a. The Guidance directs U.S. Citizenship and

Immigration Services (USCIS) to expand eligibility under the 2012 DACA policy to aliens with a wider range of ages and arrival dates, and extends the period of deferred action from two years to three. App. 415a-416a. The Guidance also directs 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 certain aliens who have "a son or daughter who is a U.S. citizen or lawful permanent resident." App. 416a-417a. This process is known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). App. 2a. To request consideration for deferred action via DAPA, an applicant must: (1) as of November 20, 2014, be the parent of a son or daughter who is a U.S. citizen or permanent resident; (2) have continuously resided here since before January 1, 2010; (3) have been physically present here on November 20, 2014, and when applying for relief; (4) have no lawful immigration status on that date; (5) not fall within the Secretary's enforcement priorities; and (6) "present no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." App. 417a.

The Secretary explained that the new policy would reach "hard-working people who have become integrated members of American society," have not committed serious crimes, and "are extremely unlikely to be deported given * * * limited enforcement resources." App. 415a. Deferring action for these individuals, the Secretary continued, supports "this Nation's security and economic interests and make[s] common sense, because [it] encourage[s] these people to come out of the shadows, submit to background

checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted." *Ibid.* The Guidance emphasizes that it does not establish any right to deferred action, that deferred action "does not confer any form of legal status in this country," and that deferred action "may be terminated at any time at the agency's discretion." App. 413a.

Under the Guidance, DHS was to begin accepting requests under the expanded DACA criteria no later than February 18, 2015, and for DAPA no later than May 19, 2015. App. 416a, 418a.

2. On December 3, 2014, respondent States sued in district court, seeking declaratory and injunctive relief against implementing the Guidance. Respondents alleged that the Guidance violates the Take Care Clause, U.S. Const. Art. II, § 3, Cl. 5; is arbitrary and capricious, 5 U.S.C. 706; and could only be adopted through notice-and-comment procedures, 5 U.S.C. 553. App. 9a.

On February 16, 2015, the district court entered a nationwide preliminary injunction against implementing the Guidance. App. 407a-410a. The court held that respondents were likely to succeed in establishing that they had standing and a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, and that the Secretary was required to conduct notice-and-comment rulemaking before issuing the Guidance. App. 405a. The court did not reach respondents' substantive APA and constitutional claims. App. 403a-405a.

The government appealed, moved to expedite, and moved for a stay pending appeal. App. 2a. The court of appeals expedited the appeal. On May 26, 2015, a divided panel declined to stay the injunction pending

appeal. App. 156a-210a. Judge Higginson dissented. App. 211a-243a.

On November 9, 2015, a divided panel affirmed the preliminary injunction. App. 1a-90a. The majority, consisting of the same two judges who were in the stay-panel majority, held that "[a]t least one state"—Texas—had Article III standing and a justiciable cause of action under the APA, and that respondents were substantially likely to establish that notice-and-comment rulemaking was required. App. 20a; see App. 11a-69a. Although the district court had not addressed the issue, the majority further held that the Guidance is "manifestly contrary" to the INA. App. 76a; see App. 69a-86a.

The new panel member, Judge King, dissented. App. 91a-155a. Like Judge Higginson, she concluded that the Guidance involves non-reviewable matters that are committed to agency discretion by law, and that, if the Guidance "is implemented in the truly discretionary, case-by-case manner it contemplates, it is not subject to the APA's notice-and-comment requirements." App. 92a-93a. She also found it inappropriate to rule on the substantive validity of the Guidance but stated that, if she were to reach the question, she would not have found the Guidance unlawful. App. 146a-155a.

REASONS FOR GRANTING THE PETITION

A divided court of appeals has upheld an unprecedented nationwide injunction against implementing a federal immigration enforcement policy of great national importance, and has done so in violation of established limits on the judicial power. If left undisturbed, that ruling will allow States to frustrate the federal government's enforcement of the Nation's

immigration laws. It will force millions of people—who are not removal priorities under criteria the court conceded are valid, and who are parents of U.S. citizens and permanent residents—to continue to work off the books, without the option of lawful employment to provide for their families. And it will place a cloud over the lives of hundreds of thousands of people who came to the United States as children, have lived here for years, and been accorded deferred action under the 2012 DACA policy, which respondents have never challenged. The decision warrants immediate review.

The court of appeals' justiciability rulings threaten a vast expansion of the judicial power that would entangle federal courts in policy disputes that are properly resolved through the political process. The court erroneously permitted any State to create Article III standing to challenge a federal policy, based on the State's voluntary decision to provide a state subsidy to the aliens that policy would benefit. But the Guidance does not bar a State from eliminating that subsidy if it believes that federal policy choices no longer align with its interests. The court compounded that error by rewriting the established limits on APA review in disregard of this Court's admonition that an "agency is far better equipped than the courts to deal with the many variables involved" in setting enforcement policies. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985).

The court of appeals' merits rulings warrant review because they strip DHS of authority it has long exercised to provide deferred action to categories of aliens. The majority acknowledged that DHS could lawfully exercise enforcement discretion to forbear from removing the parents and children covered by the Guid-

ance, who have lived here for years. App. 44a. It nevertheless believed that the INA forbade the government from according those same parents and children deferred action. But "deferred action" itself is simply the name in immigration parlance for when DHS memorializes a decision to forbear from removing an alien, as a matter of enforcement discretion, for a designated time.

To be sure, deferred action has several other consequences for the alien under longstanding federal law, including eligibility to apply for work authorization. But the Secretary has discretion under the INA to grant that work authorization, which is closely bound up with his exercise of discretion over removals. Indeed, the INA for decades has made clear that the determination of which aliens are authorized to be hired lawfully may be made "by the [Secretary]." 8 U.S.C. 1324a(h)(3). The INA thus authorizes the Secretary to accord deferred action to the parents here—and to have them come forward, submit to a background check, and support their U.S.-citizen and permanent-resident children by working lawfully.

The court of appeals also fundamentally erred in holding that the Guidance was subject to the APA's notice-and-comment requirements. The Guidance is a classic example of a "general statement of policy" that is expressly exempt from those requirements. The court's contrary ruling threatens to deprive agencies throughout the government of the flexibility that is essential in fashioning and revising policies for enforcement and other discretionary practices.

The court of appeals thus committed manifold and significant errors in affirming the unprecedented nationwide injunction barring implementation of an

important federal policy affecting the parents and children here. This Court should grant certiorari and reverse.

I. RESPONDENTS DO NOT HAVE ARTICLE III STANDING OR A COGNIZABLE CLAIM UNDER THE APA

A. A State's Voluntary Decision To Extend A Subsidy To Aliens Accorded Deferred Action Does Not Give It Standing To Challenge Federal Deferred-Action Policies

1. Like a member of the public, a State generally lacks standing to challenge the Executive's policy choices about how to enforce federal laws, including the immigration laws. In the context of criminal proceedings, "a citizen lacks standing to contest the policies of [a] prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Private parties similarly "have no judicially cognizable interest in procuring enforcement of the immigration laws" against someone else. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984). And because "the removal process is entrusted to the discretion of the Federal Government" to the exclusion of the States, *Arizona* v. *United States*, 132 S. Ct. 2492, 2506 (2012), it is not a process in which a State inherently has a sovereign or quasi-sovereign interest.

Nor does a State obtain standing to challenge a federal immigration policy by virtue of the collateral consequences for aliens who are the policy's beneficiaries. See p. 7, *supra*. "[M]uch more is needed" to establish standing than a mere assertion of "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan* v. *Defenders*

of Wildlife, 504 U.S. 555, 562 (1992); see, *e.g.*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 346 (2006). Indeed, the Constitution's assignment of immigration responsibilities exclusively to the national government renders States particularly unlikely candidates for invoking the jurisdiction of federal courts to interfere with the relationship between the national government and aliens.

2. If a State could ever have standing to challenge a federal deferred-action policy despite these structural bars, at a minimum it would have to show a cognizable injury that affects it in an "*individual* way" that is "fairly . . . traceable" to the policy. *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (emphasis added; brackets and citations omitted). Respondents cannot make that showing because the Guidance does not regulate States or require States to do (or not do) anything.

The court of appeals nonetheless held that Texas had standing by extending *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). App. 12a. According Texas "special solicitude," *ibid.*, the majority found standing based on an injury that results from Texas's own decisions (1) to subsidize the costs of its alien "temporary visitor" driver's licenses; and (2) to allow aliens with deferred action to apply for those subsidized licenses. See App. 11a-36a; App. 105a (King, J., dissenting) (dissent); see also Tex. Transp. Code Ann. § 521.421(a-3) (West 2013). By increasing the number of aliens in Texas with deferred action, the majority reasoned, the Guidance will increase the subsidy's overall cost. See App. 20a-21a. The majority recognized that "Texas could avoid financial loss by requiring applicants to pay the full costs of [those] licenses."

App. 24a. But in the majority's view, Texas still suffered an actionable harm because the Guidance imposed "substantial pressure" on Texas to change its state laws. App. 16a, 20a. Ultimately, therefore, it was not the prospect of increased costs that provided standing; it was the prospect that Texas might want to change its laws to avoid those costs. *Ibid.*

Unlike in *Massachusetts*, however, the INA does not grant Texas any special "procedural right" to challenge federal immigration policy. 549 U.S. at 517. And the interest Texas asserts is nothing like the sovereign interest in *Massachusetts.* There, the State was threatened with a loss of sovereign territory—a literal loss of sovereignty—it could not unilaterally avoid. See *id.* at 519-520. Here, the Guidance causes no loss of sovereignty. Texas has chosen to link the availability of state-subsidized licenses to a federal immigration category that the State believed suited its sovereign interests. Nothing in the Guidance affects Texas's freedom to alter or eliminate its subsidy at any time. Any "pressure" here is thus self-created and fundamentally unlike preemption, where a federal law overrides a duly-enacted state law.

The decision below is therefore at odds with *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976). That decision holds that a State's choice to extend a subsidy on the basis of another sovereign's actions is not a proper basis for standing when the other sovereign's policies change and thus increase the cost of the subsidy. In *Pennsylvania*, the Court concluded that Pennsylvania lacked standing to challenge a New Jersey tax that triggered a tax credit under Pennsylvania law and thereby reduced Pennsylvania's tax revenue. *Id.* at 662-664. The Court explained that

"[n]o State can be heard to complain about damage inflicted by its own hand" and that "nothing prevents Pennsylvania from withdrawing [the] credit." *Id.* at 664; cf. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1152-1153 (2013). So too here.

The panel majority instead relied on *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), but that case is inapposite. It held that Wyoming had standing to challenge a discriminatory Oklahoma law targeted at reducing sales of Wyoming coal in Oklahoma, when the effect was to reduce Wyoming's revenues from its neutral tax on coal extraction. *Id.* at 442-446, 454. Wyoming, however, did not "tie[] its law to that of another sovereign." App. 106a n.16 (dissent). Wyoming's tax depended solely on activity in Wyoming. It was the defendant (Oklahoma) that reached out to connect the two sovereigns' policies by targeting Wyoming coal for particular burdens. Here, as in *Pennsylvania* but unlike in *Wyoming*, the link has been created by the plaintiff State. But to the extent *Pennsylvania* and *Wyoming* can be read to point in different directions, that only underscores the need for this Court's review.

3. As the dissent recognized, "[t]he majority'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." App. 103a. For example, Texas provides the same subsidy to myriad other aliens, including those with parole, asylum, temporary protected status, deferred enforced departure, and extended voluntary departure. See Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* 1-5 (July 2013). Under the majority's reasoning, Texas could claim standing to sue the govern-

ment for making an individual decision to grant asylum—and would clearly have standing to sue the government any time it adopted immigration policies providing relief to a substantial number of aliens in Texas in any of these categories.

The harms of the majority's theory also could extend well beyond immigration. For example, a State that voluntarily incorporates the federal definition of "adjusted gross income" in computing state income taxes—as many States do, see, *e.g.*, Ariz. Rev. Stat. Ann. § 43-1001(2) (2013)—could have standing to challenge an IRS revenue ruling that lowered adjusted gross income under federal law, and thereby incidentally decreased state revenues. But the consequences of the majority's theory are particularly acute in a case, like this one, where a State seeks to leverage its own policy choices to insert itself—and the federal courts—into discretionary immigration policy decisions that Congress and the Constitution have committed exclusively to the national government.

B. Respondents Lack A Cognizable APA Claim

The court of appeals' decision also warrants review because it vastly expands what qualifies as a cognizable cause of action under the APA and impermissibly subjects the federal government's exercise of enforcement discretion to judicial oversight.

1. The APA does not "allow suit by every person suffering injury in fact." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). It limits the right of judicial review to a plaintiff "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. That provision requires that "the interest sought to be protected by the complainant be arguably within the zone of interests

to be protected or regulated by the statute * * * in question." *Clarke*, 479 U.S. at 396 (brackets and citation omitted). Here, Texas's asserted interest in avoiding costs flowing from a voluntary state-law subsidy falls far outside the zone of interests of the INA's removal provisions. The INA "regulat[es] the relationship between the United States and our alien visitors," *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976), not between aliens and third-party States.

Relying on 8 U.S.C. 1621, the court of appeals concluded that the INA protected Texas's interest in "participat[ing] in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes." App. 37a-38a. Section 1621 is part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, § 411, 110 Stat. 2268, not the INA, and it does not cover Texas's driver's-license subsidy, which is not a state "public benefit." See 8 U.S.C. 1621(c). Under PRWORA, deferred action does not trigger eligibility for any state public benefit, unless a State voluntarily chooses after PRWORA's effective date to confer such benefits on that basis. See 8 U.S.C. 1621(a), (b), and (d); 8 U.S.C. 1641(b). It thus is up to each State—and each State alone—to *protect itself* from the costs of providing such benefits to aliens with deferred action.[2]

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[2] The majority also erred in assuming (App. 8a-9a, 44a-45a) that deferred action makes aliens eligible for Texas unemployment compensation. That is a state public benefit, so aliens with deferred action cannot receive it unless Texas affirmatively opted to extend that benefit after PRWORA became effective. See 8 U.S.C.

The INA also contains no notice-and-comment provision or other procedure granting States a special right to "participate" before the Secretary changes immigration policies that may have incidental consequences for a State, including on any voluntary state-law subsidies. App. 37a-38a. Rather, the INA gives the Secretary authority to set immigration enforcement policies himself. *Arizona*, 132 S. Ct. at 2506; see 8 U.S.C. 1103(a)(1) and (3); see also 6 U.S.C. 202(5).

2. The APA also bars respondents' suit because, as both dissents concluded, App. 93a; App. 213a-214a, it challenges actions that are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). That exception "preclude[s] judicial review of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" and decisions under statutes that furnish "no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993) (citations omitted). In *Heckler*, this Court held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." 470 U.S. at 832; accord *Vigil*, 508 U.S. at 191. That principle applies to deferred-action policies because they involve nonbinding and revocable determinations to forbear from removing particular aliens for a period of time. See *AADC*, 525 U.S. at 484-485; cf. *Johns* v. *Department of Justice*,

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1621(a), (c)(1)(B), and (d). Texas has not done so. Texas's alleged injury is also neither fairly traceable to nor within the zone of interests of Section 1611, under which deferred-action recipients may become eligible for some *federal* benefits. 8 U.S.C. 1611(b) and (c); 8 C.F.R. 1.3(a).

653 F.2d 884, 893 (5th Cir. 1981) ("Th[e] discretion [to commence deportation proceedings] is, like prosecutorial discretion, immune from review.").

The majority nonetheless concluded that deferred-action policies are reviewable under the APA because "[d]eferred action" is "much more than nonenforcement: It would affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens." App. 44a. But insofar as deferred action itself is concerned, "lawful presence" is simply the label for the consequence of memorializing a decision to forbear from enforcement action for a designated time: A decision to forbear from removing a person results in "lawful presence" in the sense that DHS has decided to countenance that person's continued presence in the United States so long as DHS continues to forbear. See App. 113a-114a (dissent). Under *Heckler*, a deferred-action policy is presumptively unreviewable, whether a litigant chooses to focus on the choice itself (to forbear from enforcement) or its effect (to countenance the activity that could be the subject of enforcement). Either way, the discretion is the same.

Deferred action also has several consequences under different provisions of federal law, but they do not make a deferred-action policy reviewable. Those consequences "are not new"; they "are a function of statutes and regulations that were enacted by Congresses and administrations long past." App. 109a-110a (dissent). "That a prior statute or regulation ties a benefit to the exercise of prosecutorial discretion does not make that ordinarily unreviewable exercise of prosecutorial discretion reviewable." App. 115a. Indeed, many exercises of discretion have collateral

benefits, such as drug treatment following pretrial diversion. App. 117a.

In any event, Congress also has committed to the Secretary's discretion each of the consequences that result from deferred action under federal law. In PRWORA, Congress gave the Secretary discretion to decide which non-qualified aliens are eligible for Social Security and certain other federal benefits. 8 U.S.C. 1611(b)(2) and (3) ("as determined by the [Secretary]"). In the INA, Congress similarly specified that the Secretary has discretion to decide whether aliens with deferred action accrue time for purposes of the three- and ten-year bars, see 8 U.S.C. 1182(a)(9)(B)(ii) (after "period of stay authorized by the [Secretary]"), and whether to authorize aliens to be lawfully hired, 8 U.S.C. 1324a(h)(3) ("authorized to be so employed * * * by the [Secretary]"). No statute contains a relevant justiciable limit on the Secretary's ability to do so for the parents and children covered by the Guidance.[3] Moreover, the INA expressly prohibits review of any "decision or action of the [Secretary]" "the authority for which is specified under [INA subchapter II] to be in the discretion of the [Secretary]." 8 U.S.C. 1252(a)(2)(B)(ii). Sections 1182 and 1324a are both in that Subchapter. This statutory shield from judicial interference underscores that the Secretary's exercise of discretion re-

[3] Congress has prohibited the Secretary from giving work authorization on the basis that an alien has been released on bond during removal proceedings, 8 U.S.C. 1226(a)(3), and has limited work authorization for aliens released on orders of supervision following entry of a final order of removal, 8 U.S.C. 1231(a)(7). The Guidance implicates neither limitation.

lating to these benefits—including work authorization—is not reviewable in a suit by third-party States.

Authorizing aliens to be hired is also closely bound up with the Secretary's discretion over removals. When DHS accords deferred action to an alien, that alien will continue living here, and "in ordinary cases [aliens] cannot live where they cannot work." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). Accordingly, authorizing aliens to be hired has long been considered a "necessary incident of [the Secretary's] authority to administer the [INA]." 44 Fed. Reg. 43,480 (July 25, 1979). And IRCA reinforces that point by confirming that "the [Secretary]" may decide whether an alien may be lawfully hired. 8 U.S.C. 1324a(h)(3).

The INA's text provides additional confirmation that the Guidance is not subject to review. The INA provides a cause of action solely to aliens to challenge individual orders of removal, 8 U.S.C. 1252—but no cause of action at all to third-parties, including States. If Congress had intended to allow suits based on the consequences of deferred action, one would expect that the most impacted parties—aliens denied deferred action—could sue. Instead, 8 U.S.C. 1252(g) squarely prohibits such suits. As this Court explained in *AADC*, Section 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." 525 U.S. at 486 n.9. That is just what respondents seek in this suit.[4]

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[4] The INA's provisions not only confirm that the Guidance involves actions that are committed to agency discretion by law, but also they are part of a broader statutory framework establishing that a challenge by third-party States to a deferred-action policy is precluded by the INA under 5 U.S.C. 701(a)(1). See *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("[T]he

II. THE SECRETARY HAD AMPLE STATUTORY AUTHORITY TO ISSUE THE GUIDANCE

The court of appeals' ruling that the Secretary lacked substantive authority to adopt the Guidance is wrong, unduly restricts DHS's enforcement discretion, precludes implementation of a national policy of great importance, and places a cloud over a longstanding DHS practice that affects hundreds of thousands of people.

"[D]eferred action—whether *ad hoc* or through DAPA—is not an effort by DHS to 'hide elephants in mouseholes.'" App. 153a (dissent) (quoting *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). To the contrary, it manifests the discretion that is "[a] principal feature of the removal system." *Ibid.* (quoting *Arizona*, 132 S. Ct. at 2499). As this Court recognized in *Arizona*, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." 132 S. Ct. at 2499. These officials exercise discretion knowing that "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Id.* at 2498.

Deferred action—which the Court described in *AADC* as a "regular practice" of forbearing, as a matter of discretion, from removing an alien, 525 U.S. at 483-484—is a decades-old species of this removal discretion. Like other forms of immigration discretion, it is grounded in expansive statutory authority,

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presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole.").

see 6 U.S.C. 202(5); 8 U.S.C. 1103(a)(1)-(3), and historical practice by both the Executive and Congress, see pp. 7-8, *supra*. It also reflects the reality that Congress has enacted laws under which a huge population of aliens is removable, but has appropriated the funds to remove only a small fraction of that population. See p. 3, *supra*. Congress has thus necessarily delegated to the Secretary "tremendous authority" to decide that large classes of aliens do not warrant immediate removal efforts. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463 (2009); see *id.* at 510–511. In particular instances, Congress has channeled the exercise of that discretion by directing the Secretary to prioritize the removal of serious criminals, see Appropriations Act, 129 Stat. 42-43, and by requiring DHS to apprehend and detain certain criminal and terrorist aliens pending their removal, 8 U.S.C. 1226(c). But Congress has not disturbed the broad discretion the Secretary otherwise exercises in this area—and in particular his ability to establish policies for deferring action for the parents and children here.

The court of appeals majority acknowledged that the Secretary has discretion to decide to forbear from removing every alien who could benefit under the Guidance. App. 44a. But the majority nonetheless concluded that the Guidance is unlawful, based on two inferences: (1) that the Secretary cannot defer action or confer work authorization, except to classes of aliens the INA itself identifies; and (2) that the INA implicitly precludes the Secretary from deferring action for parents under more forgiving standards than would apply if those parents were seeking to become permanent residents or to obtain cancellation

of removal. App. 85a-86a; see App. 71a-76a. The result is that the Secretary can forbear from removing each alien covered by the Guidance and thus enable them to remain present for a period of time—but is barred from enabling them to work lawfully to support themselves and their families while they are here. Congress did not constrain the Secretary's broad discretion to such half measures.

First, the Secretary may decide whether a class of aliens warrants deferred action. Congress has long been aware of DHS's "regular practice" of granting deferred action, *AADC*, 525 U.S. at 483-484, including for classes of aliens. But Congress has done nothing that would prevent the Secretary from deferring action for the class of parents and children here. App. 149a-150a (dissent). To the contrary, Congress has protected deferred-action decisions from judicial intervention, see 8 U.S.C. 1252(g); *AADC*, 525 U.S. at 485 & n.9, and repeatedly recognized that the Secretary has authority to defer action for classes of aliens by directing him to use that authority for additional classes of aliens, see p. 8, *supra*. Contrary to the majority's stilted inference, statutes encouraging the Secretary to use this preexisting authority in *more* circumstances do not prevent him from using it elsewhere.

The Secretary has similarly longstanding authority to decide whether a class of aliens should be eligible to be lawfully employed. See pp. 22-23, *supra*. In 1952, Congress authorized the Secretary to issue regulations for the administration of the INA. 8 U.S.C. 1103(a). And since 1981, regulations governing work authorization—including for deferred-action recipients—have been in place as a "necessary incident"

of that authority. 44 Fed. Reg. at 43,480; see 46 Fed. Reg. at 25,080. Otherwise, aliens whose presence DHS has officially countenanced would be unable to support themselves through lawful work.

In IRCA, Congress imposed penalties on employers who knowingly employ an "unauthorized" alien. 8 U.S.C. 1324a(a). And in that same statute, Congress provided that this proscription does not apply to hiring aliens who are "authorized to be so employed by [the INA] *or* by the [Secretary]." 8 U.S.C. 1324a(h)(3) (emphasis added). The "or" confirms that work authorization is not conferred solely by the INA itself: "the [Secretary]" may also authorize categories of aliens to be lawfully hired. *Ibid.* This language thus signals that Congress "implicit[ly] approv[ed]" the "longstanding" work-authorization regulation. App. 152a (dissent). Since Congress enacted IRCA, DHS has repeatedly provided deferred action and other similar relief—as well as work authorization—to categories of aliens as a matter of discretion, including to substantial populations. See pp. 7-8, *supra* (collecting examples). And although Congress has amended Section 1324a six times, *e.g.*, Pub. L. No. 104-208, 110 Stat. 3009-3010, it has not limited the Secretary's authority in any way relevant here. Instead, it has further shielded the Secretary's discretion from judicial interference. See 8 U.S.C. 1252(a)(2)(B) and (g).

Second, according deferred action and work authorization for the parents here is consistent with the INA. The majority noted that parents who could obtain deferred action are not currently entitled to become lawful permanent residents or seek cancellation of removal under the INA. App. 71a-74a. But by definition, deferred action is relevant *only* when aliens

lack lawful status or are otherwise removable, and thus when the Secretary could exercise discretion to pursue removal. His choice instead to defer action is consistent with the INA both because that discretion is a "principal feature" of immigration enforcement, *Arizona*, 132 S. Ct. at 2499, and because deferred action provides lesser relief. *Permanent* residents and aliens who receive *cancellation* of removal under 8 U.S.C. 1229b are no longer removable and have legal rights to remain in the United States. Aliens with deferred action, by contrast, are removable and may remain present only so long as DHS continues to forbear. See App. 413a (Deferred action "does not confer any form of legal status.").

Granting deferred action and work authorization to the parents of children who are U.S. citizens or permanent residents is also consistent with the INA's longstanding aims of protecting family unity and self-reliance. Indeed, these parents must work to support themselves and their children—who are U.S. citizens and permanent residents. See *Arizona*, 132 S. Ct. at 2499 (enforcement discretion may "embrace[] immediate human concerns," including "whether the alien has children born in the United States"). And because the Guidance only covers parents and children who have "long ties to the community," *ibid.*, deferred action and work authorization will make these individuals more likely to be self-reliant and pay taxes, and less likely to harm American workers by working for below-market wages. See App. 96a (dissent); Wash. State et al. C.A. Amicus Br. 4-8 (anticipating that the Guidance will benefit States).

III. THE GUIDANCE IS EXEMPT FROM NOTICE-AND-COMMENT REQUIREMENTS

The court of appeals' notice-and-comment ruling warrants this Court's review because it threatens far-reaching consequences by constraining needed flexibility to adapt enforcement policies to changing circumstances and priorities. The APA exempts from notice-and-comment all "general statements of policy." 5 U.S.C. 553(b)(A). Those are "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 Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)). Enforcement policies lie at the heart of this exception, as they inform the public how an agency will exercise its discretion to enforce (or forbear from enforcing) the law. *E.g.*, App. 231a-232a (Higginson, J., dissenting). And the Guidance fits the bill: It embodies "the Secretary's tentative decision, based on an assessment of the best uses of DHS's limited resources and under his congressionally delegated authority to '[e]stablish[] national immigration enforcement policies and priorities,' not to remove qualifying applicants for a certain period of time." App. 108a (dissent) (citation omitted; brackets in original).

The majority nonetheless concluded that respondents were likely to establish that the Secretary could not issue the Guidance without notice-and-comment rulemaking, because the Guidance "would not genuinely leave the agency and its employees free to exercise discretion." App. 64a; see App. 54a-64a. But the majority's speculation about how individual DHS agents might act in the future overlooks that the dis-

cretion being exercised belongs in the first instance *to the Secretary*. See 6 U.S.C. 202(5); 8 U.S.C. 1103(a)(1)-(3). The Guidance reflects the Secretary's discretionary judgment that the stated threshold criteria describe individuals who, in his view, are likely to warrant deferred action as a matter of discretion. App. 414a-415a.

The APA does not require senior officials to use notice-and-comment procedures whenever their discretionary policies preclude subordinates from exercising their discretion in a different way. For example, the memorandum in *Vigil* announced a decision about resource allocation from which agency employees could not deviate. See 508 U.S. at 188. The "passive enforcement" policy in *Wayte* v. *United States*, 470 U.S. 598, 601 (1985), categorically exempted all but 286 of a possible 674,000 violators—99.96% of the total—from prosecution for the continuing offense of failing to register for the draft. *Id.* at 604 & n.3. And the expanded Family Fairness policy in 1990 directed that officials "will" grant relief when an applicant satisfied stated criteria, without mentioning case-by-case deviation. Memorandum from Gene McNary, Comm'r, *Family Fairness* 1-2, *reprinted as* 67 No. 6 Interpreter Releases 153, App. I (Feb. 2, 1990).

In any event, the Guidance expressly requires agents to make discretionary case-by-case decisions. "[A]pplying the[] threshold criteria itself involves an exercise of discretion." App. 124a (dissent). For example, USCIS must determine whether the applicant is an enforcement priority, App. 417a, which depends on whether the alien is "a threat to national security, border security, or public safety" or has "significantly abused" a visa program. App. 425a. Agents also must

exercise discretion whether to deny an application for deferred action even when those criteria are satisfied. App. 122a (dissent). Indeed, DAPA's stated criteria require agents to determine that a request "present[s] no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." App. 417a. The majority viewed all this discretion as "merely pretext." App. 56a. But as both dissenting judges concluded, it is plainly wrong to conclude that the discretion apparent on the Guidance's face is "pretextual" when, among other things, this is a facial challenge to a policy that "has yet to be implemented." App. 131a; see App. 234a-242a.

It is also immaterial that, under preexisting law, deferred action triggers "eligibility for [certain] federal benefits—for example, under title II and XVIII of the Social Security Act." App. 44a. The APA does not impose procedural roadblocks before an agency can adopt policies that have this consequence. Indeed, it *exempts* from notice-and-comment requirements agency action on any "matter relating to * * * benefits." 5 U.S.C. 553(a)(2). Many agencies have waived the APA's benefits exception, but DHS has not. App. 68a & n.155. Accordingly, if the Guidance were reviewable because deferred action renders aliens eligible for benefits, see App. 44a-45a, it would be exempt from notice-and-comment because it would "relat[e] to" those same benefits.

Moreover, the consequences of deferred action result from pre-existing regulations that are independent of the Guidance and were adopted through notice-and-comment rulemaking. App. 111a-113a (dissent). DHS's predecessor followed notice-and-comment procedures when adopting the regulations providing

that aliens with deferred action may obtain work authorization, 8 C.F.R. 274a.12(c)(14); 46 Fed. Reg. at 25,080, and that they may become eligible for Social Security, 8 C.F.R. 1.3(4)(vi); 61 Fed. Reg. at 47,041.[5] Under the APA, once is enough. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978).

IV. THIS CASE WARRANTS IMMEDIATE REVIEW

The court of appeals' judgment enjoins nationwide a federal policy of great importance to federal law enforcement, to many States, and to millions of families with longstanding and close connections with this country. A twice-divided court of appeals should not have the last word on whether that policy can be implemented.

A. As set forth above, the majority has permitted some States (over the objection of others) and a federal court to interfere with the Secretary's exercise of discretion in establishing policies regarding enforcement of the federal immigration laws. That is unprecedented and momentous. Moreover, the majority's decision is "very damaging to DHS's immigration enforcement policy, which has operated, from time to time, on a class-wide basis." App. 111a (dissent).

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[5] DHS's policy that aliens with deferred action cease accruing time for the three- and ten-year bars, see p. 6, *supra*, was not adopted through notice-and-comment rulemaking. But that policy has no bearing on respondents' asserted injury. It is relevant only "[f]or purposes of" DHS's computation of a barrier to admissibility if aliens depart the country. 8 U.S.C. 1182(a)(9)(B)(ii). Tolling also will not help "[m]ost adult beneficiaries" of the Guidance because they already face the maximum barrier if they depart. App. 44a n.99.

The nationwide injunction also has far-reaching and irreparable humanitarian impact. It bars approximately 4 million parents—who have lived in this country for years, would pass a background check, are not priorities for removal, and have "a son or daughter who is a U.S. citizen or lawful permanent resident," App. 417a—from requesting deferred action under the Guidance and receiving authorization to work lawfully. See OLC Op. *30. In so doing, it has a profound effect not only on those parents but also on their children. One study estimated that "there are 6.3 million children who live in a household with a DAPA eligible mom or dad, and of that, 5.5 million are U.S. citizens." Manuel Pastor et al., *The Kids Aren't Alright – But They Could Be: The Impact of [DAPA] on Children* 1 (Mar. 2015). And although respondents have not challenged the Secretary's 2012 DACA memorandum for providing deferred action, the majority's expansive reasoning places a cloud over the deferred action accorded to more than 600,000 people under that policy, all of whom came here as children and many of whom have never known another home. App. 4a.

Most of the parents and children the Guidance would affect "are hard-working people who have become integrated members of American society," lived here for years, have not committed serious crimes, and "are extremely unlikely to be deported given * * * limited enforcement resources." App. 415a. Deferred action would give these parents and children the dignity of coming forward and "be[ing] counted." *Ibid.* Without work authorization, they are more likely to work for employers who will hire them illegally, often at below-market wages, thereby hurting

American workers and giving unscrupulous employers an unfair advantage.

The injunction also undermines the Secretary's efforts to "focus [DHS's] resources on removing those undocumented aliens most disruptive to the public safety and national security of the United States." *Arpaio* v. *Obama*, 797 F.3d 11, 24 (D.C. Cir. 2015), petition for cert. pending, No. 15-643 (filed Nov. 12, 2015). The Guidance would complement those priorities by having millions of low-priority aliens pay for and pass a background check. App. 417a. If law-enforcement officials later encountered such an individual, ICE could "quickly confirm the alien's identity through a biometric match" and confirm that he or she does not warrant the effort of removal. D. Ct. Doc. 150-1 ¶ 15 (Feb. 23, 2015); see id. ¶¶ 14-17. But without the Guidance, ICE would have to do the underlying legwork every time—and it would be ICE footing the bill, thus depleting its already-limited resources. See *id*. ¶¶ 14-17; D. Ct. Doc. 150-2 ¶¶ 7-13 (Feb. 23, 2015).

B. This Court's review is warranted now. Although the court of appeals ruled in the context of a preliminary injunction, this Court decided *Arizona* in the same posture. 132 S. Ct. at 2498. The court of appeals held that Texas's "standing is plain"; that Texas "satisfies the zone-of-interests test"; that the Guidance "is not an unreviewable agency action . . . committed to agency discretion by law"; that Texas is likely to establish that it must go through notice-and-comment; and that it is "manifestly contrary to the INA." App. 11a, 37a, 50a, 68a, 76a.

It is unlikely any other court of appeals will address the questions presented here. The injunction

has prevented DHS from putting the Guidance into operation anywhere in the country, including in States that have actively supported the Guidance in this litigation. The only other pre-enforcement challenge to the Guidance was brought by a county sheriff and was dismissed for his lack of standing, without reaching any question under the APA. See *Arpaio*, 797 F.3d at 15.

The great and immediate significance of the Secretary's Guidance, the irreparable injury to the many families affected by delay in its implementation, and the broad importance of the questions presented, counsel strongly in favor of certiorari now.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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NOVEMBER 2015