**ORAL ARGUMENT NOT YET SCHEDULED**

**Court of Appeals No. 14-5325**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOSEPH M. ARPAIO,
Plaintiff-Appellant,

v.

BARACK OBAMA, ET AL.,
Defendants-Appellees.

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APPEAL FROM A FINAL ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
IN CIVIL CASE NO. 1:14-cv-01966-BAH

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# BRIEF OF PLAINTIFF-APPELLANT FOR REVERSAL OF THE DISTRICT COURT'S ORDER AND REQUEST FOR ORAL ARGUMENT

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-Appellant Sheriff Joseph M. Arpaio hereby certifies pursuant to Circuit Rule 28(a)(1) that:

**A. Parties and Amici**

The parties that appeared in the U.S. District Court for the District of Columbia ("District Court") are Plaintiff-Appellant Joseph M. Arpaio, elected Sheriff of Maricopa County, Arizona ("Sheriff Arpaio").

Defendants-Appellees (1) Mr. Barack Hussein Obama, President of the United States of America ("President Obama"), (2) Mr. Jeh Johnson, Secretary of the U.S. Department of Homeland Security ("DHS"), and (3) Mr. Leon Rodriguez, Director of U.S. Citizenship and Immigration Services ("USCIS").

No Amici Curiae participated at the District Court level.

**B. Rulings Under Review**

The rulings under review are the Honorable Beryl A. Howell's ("Judge Howell") December 23, 2014 Memorandum Opinion and [Final] Order in the District Court granting Defendants' motion to dismiss for lack of standing under Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1), which dismissed all claims and entered judgment for Defendants. Judge Howell's final order terminated the case in the District Court. It was not, however, a substantive ruling

on the merits but a ruling on standing solely on the pleadings.

**C. Related Cases**

Within this Circuit, Sheriff Arpaio is not a party to any related litigation. Appellant is not aware of any other litigation concerning exactly the same issues with regard to the Executive Branch's deferred action programs in this Circuit.

However, the case of *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, Civil Action No. 14-529 (ESH), in the District Court raises similar challenges to *other* aspects of the Appellees' immigration programs. Moreover, in the U.S. District Court for the Southern District of Texas (Brownsville Division), the Honorable Andrew S. Hanen is deciding a nearly identical case, *State of Texas, et. al. v. United States of America*, Civil Case No. 1:14-cv-254. The briefing schedule calls for the last filing on January 29, 2015.

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## GLOSSARY

"FRAP" refers to the Federal Rules of Appellate Procedure

"FRCP" refers to the Federal Rules of Civil Procedure

"APA" refers to the Administrative Procedures Act

"INA" refers to the Immigration and Naturalization Act, as amended

"DHS" refers to the Department of Homeland Security

"USCIS" refers to the U.S. Citizenship and Immigration Service, a component within the U.S. Department of Homeland Security

"ICE" refers to the Immigration and Customs Enforcement [Service], a component within the U.S. Department of Homeland Security

"Alien" is the legally correct term referring to a citizen of a country other than the U.S.A., when used in relation to the U.S.A. However, a citizen of the U.S.A. is an Alien when present in other countries, with regard to that other country

"Illegal Alien" refers to an Alien who entered the United States in violation of U.S. law or remained in the country after lawful status expired. The status implies that no lawful category for legal presence is applicable or available to such person

"Undocumented Immigrant" (if used correctly) refers to an Alien who is entitled to a lawful immigration status, but whose application is still being processed

"DACA" refers to a regulatory program created by President Barack Obama and his Administration on June 15, 2012, called Deferred Action for Childhood Arrivals, granting amnesty, immunity from prosecution or deportation, and affirmative benefits to adult Illegal Aliens who originally entered the U.S.A. as children

"DAPA" is a term sometimes used to refer to some portions of the Appellees' November 20, 2014, amnesty programs, apparently meaning Deferred Action for Parents of Americans. Appellees did not originally designate their new

programs with a project name, but have begun to use the name DAPA
Deferred action refers to a practice invented by the offices of the Executive Branch responsible for enforcement of immigration laws to decline to pursue deportation of illegal aliens in certain situations, originally for such purposes as bridging a time gap in lawful status while an application is being processed

"Enforcement Discretion" appears to be a concept used by the Executive Branch referring to the allocation of enforcement resources to search for violations of the law (in contrast to prosecutorial discretion dealing with an actual case of alleged violation by a specifically-identified individual)

"Executive Branch" refers to the branch of the U.S. Government established under Article II of the U.S. Constitution, including the President and the Federal Departments and Agencies under the President's supervision

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §1331 as there is a controversy arising under Federal law and/or the U.S. Constitution. This U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has jurisdiction over this appeal from the District Court pursuant to 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to 28 U.S.C. § 2107 and Federal Rules of Appellate Procedure Rule 4(a)(1)(A) on December 23, 2014 from an order of the District Court entered December 23, 2014. This appeal is from a final order that disposed of all Plaintiff-Appellant's claims and terminated the case in the District Court

## ISSUES PRESENTED

1. Whether the District Court erred by construing Plaintiff's case and analyzing Plaintiff's standing in relation to claims different from the actual lawsuit that Plaintiff brought, purely as a policy dispute.
2. Whether the District Court should have ruled the Executive Branch's grant of amnesty to approximately half of all illegal aliens present in the nation as an unconstitutional usurpation of legislative authority from Congress on the motion for preliminary injunction.
3. Whether the District Court erred by not requiring the Appellees to comply with the Administrative Procedures Act (APA) in granting benefits and amnesty to approximately 6 million illegal aliens on considering the motion for preliminary injunction.
4. Whether the District Court erred in considering the merits by misconstruing what the Plaintiff is challenging and arguing as challenging only the U.S. Government's internal planning of its work and priorities and/or national policy disputes.
5. Whether the District Court erred in considering the merits by concluding that Congress has endorsed the use of "deferred action" extending to the circumstances at issue in the Defendants' programs here.

6. Whether the District Court erred in considering the merits by concluding that the use of "deferred action" programs by the Executive Branch in the past provides legal authority or justification for the current deferred action.
7. Whether the District Court erred in considering the merits by concluding that granting a preliminary injunction could not redress the Plaintiff's injury.
8. Whether the District Court erred in analyzing the factual bases for Plaintiff's standing by disbelieving Petitioner's allegations in the complaint rather than taking as true all allegations of fact and all inferences.
9. Whether the District Court erred in analyzing Plaintiff's standing by concluding that the Sheriff's office suffered no injury-in-fact or interference with his official duties as Sheriff.
10. Whether the District Court erred in analyzing the factual bases for Plaintiff's standing by not crediting Sheriff Arpaio's allegations of past harm as an empirical basis for predicting increased or new harm in the future.
11. Whether the District Court erred in analyzing Plaintiff's standing in terms of "redressability" of actions by third-party actors by concluding that Plaintiff's injury could not be redressed through favorable court action.

## STATUTES AND CONSTITUTIONAL PROVISIONS

1. Article III, Section 2, of the U.S. Constitution (*"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…."*) as modified by the Eleventh Amendment to the U.S. Constitution.
2. Administrative Procedures Act, 5 U.S.C. § 553, *et seq.*
3. The Immigration and Naturalization Act of 1952, as amended. 8 U.S.C. §1101, *et seq.*

## STATEMENT OF THE CASE

### Nature of Case

Joseph Arpaio, elected Sheriff of Maricopa County, Arizona, filed this case seeking declaratory judgment that the Appellees' Deferred Action for Childhood Arrivals (DACA) from June 15, 2012 and new November 20, 2014, amnesty programs are unconstitutional abuses of the President's role in our nation's Constitutional architecture and exceed the powers of the U.S. President within the U.S. Constitution. Appellant also challenged these programs as *ultra vires* actions in violation of the Administrative Procedures Act, 5 U.S.C. §§ 702 through 706, both for failure to follow the procedures of the APA and as unlawful and invalid

for being arbitrary, capricious, an abuse of discretion, unreasonable, and/or otherwise not in accordance with law, by conflicting with authorizing statutes. Appellant also challenged the programs as violating this Circuit's recognition of the "Non-Delegation Doctrine" under *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g by* 195 F.3d 4 (D.C. Cir. 1999), *modified by Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *modified by Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et. al.*, 531 U.S. 457, 484-86, 121 S. Ct. 903 (February 27, 2001) (appeals leaving the point unchanged, addressing other deficiencies).

Course of Proceedings

No evidentiary hearing, decision, or presentation of facts took place. The case was decided on the pleadings. The case was dismissed prior to any discovery. Accordingly, the case is presented in the Court of Appeals on the pleadings alone.

Plaintiff-Appellant filed his Complaint on November 20, 2014.

On December 4, 2014, Plaintiff-Appellant filed a Motion for Preliminary Injunction to stay implementation and further implementation of the Defendants-Appellees' challenged programs. (JA 61-99)

On December 16, 2014, the District Court inquired whether the Defendants-

Appellees elected to treat part of their opposition to the Motion for Preliminary Injunction as a Federal Rules of Civil Procedure Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction based upon standing.

On December 15, 2014, the Defendants-Appellees filed their Opposition to the Motion for Preliminary Injunction incorporating a FRCP Rule 12(b)(1) Motion to Dismiss for lack of standing, pursuant to the court's invitation. (JA 225-280)

On December 17, 2014, Plaintiff-Appellant requested leave to present live testimony in the hearing to present facts in support of standing pursuant to Rule 65(1)(d) of the Local Rules of the District Court. (Dkt # 18) The District Court denied the motion but granted leave for the Plaintiff-Appellant to file a supplemental affidavit instead.

On December 18, 2014, the Plaintiff-Appellant filed a Reply to the FRCP Rule 12(b)(1) Motion to Dismiss and presenting other clarification. (JA 541-577).

Disposition Below

The District Court held a hearing on December 22, 2014, on the Plaintiff-Appellant's Motion for Preliminary Injunction and the Defendants-Appellees Motion to Dismiss under FRCP Rule 12(b)(1) for lack of standing.

The District Court issued a Memorandum Opinion and Order dismissing Appellant's case for lack of standing on December 23, 2014. (JA 765-799)

## STATEMENT OF FACTS

### I. The Plaintiff

Sheriff Arpaio is the elected Sheriff of Maricopa County, Arizona, one of the largest Sheriff's offices in the United States. Maricopa County is the most populated County in the State of Arizona with 4,009,412 citizens.[1] The County holds more than sixty percent (60%) of all of the population of the entire State of Arizona. Sheriff Arpaio's office effectively is nearly all of the State of Arizona in terms of law enforcement. Maricopa County is the fourth most populated County in the United States by most reports. If Maricopa County by itself were a State, the County would be larger by population than twenty-four (24)[2] of the States within the United States of America and larger than Puerto Rico and more than five times larger than the entire District of Columbia.

### II. Defendants' New Programs

On June 15, 2012, on President Obama's orders, Secretary of Homeland Security Janet Napolitano created a new "deferred action" program called DACA. (JA 100-103) Appellants use "deferred action" to mean the Executive Branch on

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1 "State & County Quick Facts," Maricopa County, Arizona, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/04/04013.html

2 "State Population by Rank, 2013", InfoPlease, http://www.infoplease.com/us/states/population-by-rank.html

its own authority and in its own discretion declines to enforce laws enacted by Congress on immigration. But "deferred action" arose as a temporary deferment during the time from the expiration of one lawful status while a proper application is pending for another lawful status or as an accommodation inherently necessary to carrying out a Congressional enactment.

By their 2012 and 2014 programs, Appellants now vastly expand "deferred action" in both nature and breadth, to grant amnesty to approximately 6 million [3] of the estimated total of 11.3 million deportable illegal aliens [4] (53% of all persons Congress commanded to be deported), while in conflict with the intent of Congress' enactments and will. Also, Appellants now transform deferred action into a vast benefits program and a guarantee of immunity from deportation and prosecution, in reality if not in rhetoric, very different from past deferred action.

On November 20, 2014, on President Obama's orders, successor Secretary

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[3] An estimated 1 million from the 2012 DACA and 5 million from the new 2014 programs.

[4] It should be remembered that, in the INA, Congress has provided numerous alternative grounds for relief for aliens in specific circumstances. Some of those explicitly vest in the DHS fact-finding duties and powers and/or discretion, but only if DHS acts within the bounds of each Congressional prescription. Here, Appellant addresses as "illegal aliens" only those who do *not* qualify for *any* basis for lawful presence in the country. By definition, in Appellant's under-standing, a foreigner who qualifies for some lawful presence explicitly granted by Congressional enactment in the INA is *not* included among the category of illegal aliens being addressed here.

of Homeland Security Jeh Johnson created a number of similar new amnesty or deferred action programs through several Memoranda, as well as simultaneously issuing other related Memoranda, such as establishing priorities for enforcement of high-priority deportations (JA 154-159) (which prioritization is *not* being challenged here). The 2014 deferred action programs being challenged here are:

First, expanding DACA by changing eligibility dates to include more recent arrivals and extending DACA to parents of U.S. citizens and legal immigrants. (JA 144-149) When Appellant Obama created DACA in 2012, he assured the country that the lure of more immigration would be minimal because only childhood arrivals who entered the country before June 5, 2007, would be eligible. Largely non-English-speaking foreigners of limited education would surely understand the nuances of DACA as a U.S. government program and realize they don't qualify. Critics responded that foreigners would be shrewd enough to realize that granting amnesty now would make future rounds of amnesty highly likely. Then, on November 20, 2014, the Defendants changed the date to include more-recent childhood arrivals entering on or before January 1, 2010, and relax the age limitations. As a result, new floods of millions of illegal aliens will understand that Appellees keep changing the date and new, recent arrivals will probably also receive amnesty if they can just plant "dry feet" on U.S. soil and wait long enough.

Second, on November 20, 2014, Appellees extended DACA to illegal aliens who are parents of U.S. citizens or legal immigrants. *Id.* Generally speaking, parents of U.S. citizens are already eligible for lawful status. So these candidates have been rendered inadmissible usually by breaking immigration or other laws.

The November 20, 2014, amnesty programs apply to an estimated 4.7 to 5 million illegal aliens, in addition to an estimated 1 to 1.5 million illegal aliens eligible for the June 15, 2012, DACA Executive Action, for a total of roughly 6 million. All of these programs confer affirmative benefits, including:

- A grant of immunity from deportation, detention, or prosecution.
- A written certificate of immunity, apparently through use of USCIS Form I-797C "Notice of Action" (also used for other purposes).
- The right to keep the fruits of the crime committed, by being allowed to stay in the United States, which is fundamentally different from not being prosecuted and punished for violating the law *per se*. The Defendants' program qualify as amnesty because violators keep everything they sought to obtain by breaking the law.
- A work permit in the form of an "Employment Authorization Card"
- The right to get a driver's license using the "Employment Authorization Card" (which will not identify immigration status).

- Although voting is not authorized by law, an official invitation and opportunity to register to vote under the companion "Motor Voter" law. *See* 42 U.S.C. § 1973c, "The National Voter Registration Act." The amnesty documents will not reveal one's citizenship status.

Therefore, while claiming they do not have the resources to obey the Congressional command to deport approximately 11.3 million citizens of other countries, Appellees' instead want to process, prepare, and mail to approximately 6 million illegal aliens a certificate assuring those 6 million people that they are immune from deportation or prosecution. To do this, they will have to conduct 6 million criminal and risk assessment background checks. Furthermore, this workload will need to be repeated every three years, because status is subject to renewal in three years. And Defendants justify all this massive undertaking on the basis that they do not have enough resources to do what the law commands instead.

## STANDARD OF REVIEW

A court of appeals reviews *de novo* matters of law including a district court's dismissal for lack of standing , *Am. Fed'n of Gov't Emps., AFL–CIO, Local 446 v. Nicholson*, 475 F.3d 341, 347 (D.C. Cir. 2007). Moreover, "We review a district court decision regarding a preliminary injunction for abuse of discretion, and any

underlying legal conclusions de novo." *City Fed. Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995).

The U.S. Supreme Court has held that "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The court's "general power to adjudicate in specific areas of substantive law . . . is properly raised by a 12(b)(1) motion," *Palmer v. United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999), and the burden of establishing the court's subject matter jurisdiction resides with the party seeking to invoke it. See *McNutt v. Gen. Motors Acceptance Corp. of Ind*., 298 U.S. 178, 189 (1936).

In general, the Appellant will have "standing" to bring these claims if only one of numerous possible grounds applies. All potential grounds for standing would have to be eliminated one by one for a court to dismiss the case under Rule 12(b)(1). The District Court could have upheld standing under several different theories based on various different types and examples of injuries.

When considering whether to dismiss an action for lack of subject matter jurisdiction (standing), the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke* v. *United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). On a motion to dismiss under Rule

12(b)(1), a federal court must accept as true all material factual allegations contained in the complaint and "'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the acts alleged' and upon such facts determine jurisdictional questions." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004))).

The relevant issue presented by a motion to dismiss under FRCP Rule 12(b)(1) challenging standing "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). In considering the issue of standing, this court must presume all factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. *Scheuer*, 416 U.S. at 236; *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

Moreover, in evaluating subject matter jurisdiction, the court, when necessary, may "undertake an independent investigation to assure itself of its own subject matter jurisdiction," *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107-1108 (D.C. Cir. 2005) (quoting *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir.

1987), and consider facts developed in the record beyond the complaint, *id. See also, Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992) (in disposing of motion to dismiss for lack of subject matter jurisdiction, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."); *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 142 (D.D.C. 2005). Here, the District Court declined the Appellant's request for live testimony to develop the record further.

The burden of establishing any jurisdictional facts to support the exercise of the subject matter jurisdiction rests on the plaintiff. *See Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010); *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007).

## SUMMARY OF ARGUMENT

Respectfully, this Court must reverse the decision of the District Court which denied a motion for preliminary injunction and granted the Appellees' motion to dismiss for lack of jurisdiction as lack of standing pursuant to FRCP Rule 12(b)(1). Appellant asks this Court to order a preliminary injunction directly.

Throughout the District Court's opinion, (JA 765-799), Judge Howell strongly appears to have been influenced more by the politics of the topic than by

the legal analysis. For example, Judge Howell concluded that the litigation was only a dispute over national policies and repeatedly analyzed the case in terms of national policies rather than the governing statutes, U.S. Constitution, and legal requirements. Judge Howell analyzed the issues as only a dispute between the political branches and Sheriff Arpaio seeking to intervene in that national policy "conversation." As a result of the opinion's fixation on national policies, Judge Howell concluded that the case is not a justiciable case which the District Court could adjudicate, but a dispute between the Congress and White House.

However, the case does present justiciable issues. The District Court should have applied the U.S. Constitution and/or the Administrative Procedures Act ("APA"), to the programs as is a typical exercise for the Judiciary. Congress has provided for judicial review in the APA.

The President's actions are unconstitutional. Appellees' announced the legal grounds for their programs as their claim to have inherent legislative authority to disregard wholesale the laws passed by Congress. The Office of Legal Counsel made explicitly clear in its legal opinion (JA 105-137) that the Executive Branch does not have the authority to disregard or rewrite the laws. Yet that is exactly what Appellees' have done.

Appellant challenges the constitutionality and/or legal validity of ***both*** the

Appellees' June 15, 2012, DACA program as well as Appellant's battery of more-recent deferred action programs ordered on November 20, 2014. (JA 100-149, 323-356) Appellant challenges those programs granting amnesty as unconstitutional abuses of authority and/or as violating the APA.

Although the Appellees' portray their programs as merely internally organizing their work, that is not what the programs actually do. Appellees' legally justify what they are not doing but offer no defense to what they are actually doing. Appellees claim discretion to organize their work internally, such as deciding where best to focus resources. But Sheriff Arpaio is contesting the creation of regulatory programs that grant amnesty and confer affirmative benefits.

To illustrate, current law commands that if government at any level encounters a deportable illegal alien, Appellees' must deport them, whether or not Appellants would have sought them out. For example, if Sheriff Arpaio's office hands an illegal alien over to the U.S. Department of Homeland Security ("DHS"), DHS is commanded by Congress to deport them, whether a high priority or low priority enforcement target, just because they were apprehended (regardless of priority). But under Appellees' new programs, amnesty beneficiaries carry immunity from deportation. Therefore, what Congress commands, Appellees will not do. They will use their new deferred action programs as reasons for not

enforcing current governing law.

However, this case was dismissed on the basis of standing.

The District Court analyzed the case for standing as only an abstract policy dispute between Sheriff Arpaio and the Executive Branch rather than the Executive Branch violating the laws enacted by the U.S. Congress.

Throughout, the District Court relied upon assumptions, inferences and unproven assertions of fact in conflict with the obligation to take as true all allegations of fact and inferences drawn from them on a Rule 12(b)(1) motion.

Appellant has already suffered financial harm and burdens from the 2012 DACA in 2013 and 2014, including from the flood of unaccompanied minors in the Summer of 2014 crossing the Mexican border as a result of the Appellees' June 15, 2012, promise of amnesty for young foreigners. As but one example of harm, from February 1, 2014, through December 17, 2014, the costs of holding inmates flagged with INS "detainers" in the Sheriff's jails was $9,293,619.96. Note that Maricopa County includes 60% of the population of the State of Arizona.

The District Court also ruled that the court did not have the power to redress Sheriff Arpaio's injury. The District Court concluded that the injury was caused by the independent actions of third parties.

On the contrary, if the Executive Branch obeys Congressional enactments

and deports from U.S. soil some or all of the estimated 11.3 million illegal aliens will not be in the United States to cause any harm or burden. Current, governing law mandates that the Defendants deport those third party actors entirely.

But, to evade enforcement of those existing immigration laws, the Defendant-Appellees have created these "deferred action" programs to grant amnesty to 6 million illegal aliens. Therefore, "*but for*" the Appellees' deferred action programs, current governing law would apply. If only some of those 6 million were absent from U.S. soil, there would be a significant decrease in the financial costs, harm, and burdens to the Sheriff's Office.

Furthermore, real-world, empirical experience demonstrates that – just as the June 2012 DACA caused a Summer 2014 flood across the border – millions more illegal aliens will be attracted by the lure and hope of future amnesty as a direct consequence of Appellees' granting amnesty to 6 million existing illegal aliens.

The District Court rejected real-world experience of past harm as an empirical basis for predicting increased, future harm. Rather than crediting the Appellant's actual experiences as a sound basis for projecting increased harm, the District Court concluded that any harm was exclusively a result of Appellee's past acts or omissions and not traceable to the new programs.

## ARGUMENT

I. President's Programs are Unconstitutional Usurpation of Legislative Power

A. President does not share Legislative Power with Congress

The unconstitutionality of the Appellees' deferred action programs is clear. Appellants cannot rewrite the laws enacted by Congress. Appellees are refusing to "take Care that the Laws be faithfully executed." Article II, Section 3 of the U.S. Constitution. Meanwhile, the Executive Branch has no legislative authority except authority delegated from Congress (sometimes referred to as "quasi-legislative authority"). In *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405–06 (1928), Chief Justice Taft explained:

> "The Federal Constitution . . . divide[s] the governmental power into three branches.... [I]n carrying out that constitutional division . . . it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power."

Here, Appellees claim they are exercising the Executive Branch's inherent authority. But "Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, its power '[t]o regulate Commerce with foreign Nations,' id. cl. 3, and its broad authority over

foreign affairs, see *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 299 U. S. 318 (1936); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952)." *Toll* v. *Moreno*, 458 U. S. 1, 10 (1982).

Statutes passed by Congress, not administrative policy, are the exclusive authority on these questions: 8 U.S.C. § 1229a (a)(3) provides:

> "**Exclusive procedures: Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.**"

The Executive Branch has been commanded by statutes enacted by Congress, primarily the Immigration and Naturalization Act of 1952 (as amended), to deport to their own countries of citizenship an estimated 11.3 million citizens of foreign countries in the United States. *See, e.g.*, 8 U.S.C. §§ 1227, 1229a, 1231.

Thus, while the INA does charge DHS with developing national policy, as Appellees argue, the statute also restrains DHS in the procedures to be used for enforcing deportation (removal) of illegal aliens.

While "the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," it does not include unilateral implementation of legislative policies. *Utility Air Regulatory Group v. E.P.A.*,134 S.Ct. 2427, 2446

(Jun. 23, 2014). The President must "take Care that the Laws be faithfully executed . . . "; he may not take executive action that creates laws. U.S. Const., Art. II, § 3.

To provide legal justification for Appellees' deferred action programs, U.S. Department of Justice released a 33 page legal Memorandum [5] revealing the legal analysis and advice of the Office of Legal Counsel (OLC). (JA 105-137) Appellees are doing what the OLC warned would be unconstitutional.

On Page 6, the OLC Memorandum on behalf of Appellants admits that:

> "Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id*. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007)."

On Page 7, the OLC Memorandum on behalf of Appellants admits that:

> "Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy'

[5] *"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"* dated November 19, 2014. A copy is attached as Exhibit B to the Complaint.

> that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law")."

On Page 24, the OLC Memorandum on behalf of Appellants admits that:

> "Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77). Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it."

Yet the Appellees' are doing exactly what OLC warned them not to do. Appellees' programs are not prosecutorial discretion but rewriting the statutes. Appellees seek to grant amnesty to an estimated 6 million (53%) of the estimated

11.3 million illegal aliens that Congressional enactments command them to deport.

President Obama argues that his executive action was necessary because of Congress's failure to pass legislation, acceptable to him. Compl. ¶¶ 23-24. (JA 7-60) Motion for Preliminary Injunction at pages 30-32. (JA 61-99) However,

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Congress's lawmaking power is not subject to Presidential supervision or control. *Id*.

Sometimes Congress delegates law-making authority to the Executive Branch explicitly or implicitly to "fill up the details." The U.S. Supreme Court in *Wayman v. Southard* 23 U.S. (10 Wheat.) 1 (1825) rejected the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice where another branch merely filled in details. So-called "gaps" or questions left unaddressed within Congressional enactments are inherent within the Congressional statute as being unavoidably necessary to implement the statute.

But strikingly absent here, Appellees do not point to any term of the Immigration and Naturalization Act (INA), *as amended*, which leaves the Executive Branch uncertain how to proceed. Appellees have made no showing of any "gap"

in the law that requires filling. On the contrary, Appellees just don't like the law that Congress passed. *See*, Motion for Preliminary Injunction at pages 30-32.

There is nothing lacking in the statute which requires Appellees to create vast regulatory benefits programs to suspend enforcement of the INA and grant amnesty and immunity from deportation to 53% of all the illegal aliens Congress has commanded Appellees to deport. *See, e.g.,* 8 U.S.C. §§ 1227, 1229a, 1231.

At most, the Executive Branch claims a lack of resources. But annual appropriation of funding by Congress is not a "gap" in the statute that requires filling. Moreover, the Executive Branch has an obvious remedy – to simply request more resources from Congress through the budgetary process. The Executive Branch has never requested the resources it now claims it lacks (within relevant, recent time periods) and Congress consistently appropriates more money than the Executive Branch requests for immigration enforcement. *See*, Declaration (JA 190-193); Compl. ¶¶ 42-26; Mot. Prelim. Injun. Pages 32-35. The Executive Branch may not rewrite the nation's immigration laws due to a lack of resources it never asked for.

Appellants will hire 1,000 new workers not to enforce current law but to process amnesty requests. Moreover, they will conduct 6 million background checks, including the renewals coming due for nearly 1 million previous DACA

beneficiaries from 2012, and issue and mail certificates of immunity to 6 million illegal aliens. This will be repeated every three years. And all of this because they say they do not have enough resources to enforce current law. Lack of funding is not a persuasive justification for these programs with their added expenditures.

B. The District Court reasoned that "deferred action" programs by the Executive Branch in the past provide legal authority now

The District Court reasoned that a history of the Executive Branch using much-more limited forms of deferred action in the past provides legal justification for these new deferred action programs now. See. Memorandum Opinion ("Mem. Op."), December 23, 2014, at 3-7.

But, on the contrary, Executive Branch actions have no precedential authority. Historically, courts have chosen as an inherent part of their functioning (to promote consistency) to adopt a system of binding precedents. But Executive Branch actions do not have precedential authority – except to the extent that the APA prohibits arbitrary or capricious decisions, which typically requires administrative decisions consistent with past practice. But Appellants here reject the proposition that their deferred action programs are governed by the APA.

Accordingly, the Appellants' program must stand or fall on original legal authority, not on past practices which are also challenged as legally invalid.

C. The District Court analyzed that Congress has endorsed the use of "deferred action" in certain circumstances, yet has not done so here.

The District Court was persuaded that Congress has endorsed the use of "deferred action" in general. *See*, Mem. Op. at 7, 32. However, Congressional authorization of deferred action in certain, very specific situations does not authorize deferred action for any and all purposes. Grants of delegated authority are construed narrowly, not broadly. *American Trucking Associations, Inc. supra* .

If Congress intended to authorize any and all deferred action the Executive Branch might wish to undertake, Congress knows how to say so. "Congress knows how to limit or expand fora for agency enforcement of subpoenas if it wishes to do so." *N.L.R.B. v. Cooper Tire & Rubber Co.*, 438 F.3d 1198 (D.C. Cir., 2006).

II. Appellees' Programs Must Comply with Administrative Procedures Act

Alternatively, to exercise authority delegated from Congress, the Executive Branch must act consistently with authorizing statutes and comply procedurally with the APA. S*ee American Trucking Ass'ns, Inc. v. EPA, supra.*

First, pursuant to 5 U.S.C. § 702, a person aggrieved or adversely affected by agency action is entitled to judicial review and a civil cause of action.

Second, pursuant to the APA, 5 U.S.C. § 706(2), this Court must hold unlawful and set aside any agency action that is

> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

In *Am. Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980), the D.C. Circuit found that 5 U.S.C. § 553 "was one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." 627 F.2d at 528.

*Nicholas v. INS*, 590 F.2d 802, 807-08 (9th Cir. 1979), held that the Immigration and Naturalization Service's [6] 1978 'instructions' regarding deferred action were a substantive rule requiring rule-making formalities under the APA.

The D.C. Circuit has rejected the proposition that an agency can escape judicial review under Section 704 by labeling its rule as 'guidance.' *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986); *see also Continental Airlines, Inc. v. CAB*, 173 U.S. App. D.C. 1, 522 F.2d 107, 124 (D.C. Cir. 1974) ("The label an agency attaches to its action is not determinative.").

[6] INS has since been re-organized into the United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE).

Further, in *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), the U.S. Supreme Court held that the Bureau of Indian Affairs could not create 'eligibility requirements' for allocating funds without complying with the APA requirements to establish the criteria by regulatory rule-making. *Id.* at 230 - 236.

Here, Appellees created eligibility criteria in a similar technique. DHS' criteria determine the right of millions of otherwise illegal aliens to remain in the U.S. The eligibility criteria triggers the APA here as it did under *Ruiz*.

Appellees' programs are also subject to the APA's rulemaking requirements because they are substantive rules. A rule is substantive "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). Similarly, *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) held that the primary distinction between a substantive rule and a general statement of policy turns on whether an agency intends to bind itself to a particular legal position. *Id.*

Here, Appellees ordered DHS personnel to immediately stop deportation of those who only might meet the criteria, even if they have not applied for deferred action status. See, Memorandum, Exhibit D to Mot. Prelim. Injunc. at 5. (JA 144-149) The Appellees' programs are binding upon deportation decisions by DHS.

Moreover, in *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980), the D.C. Circuit held that EPA's Administrator "erred in declining to adhere to the notice-and-comment requirements of section 553 of the APA." The D.C. Circuit emphasized "that judicial review of a rule promulgated under an exception to the APA's notice-and-comment requirement must be guided by Congress's expectation that such exceptions will be narrowly construed." *Id.*

Appellants' programs are legislative rules subject to the rulemaking requirements of the APA because each Memoranda "puts a stamp of agency approval or disapproval on a given type of behavior." *Chamber of Commerce v. DOL*, 174 F.3d 206, 212 (D.C. Cir. 1999). In *Chamber of Commerce*, the D.C. Circuit held that the U.S. Labor Department promulgated a substantive rule when it told employers that they could avoid 70-90% of workplace inspections if they participated in a new "Cooperative Compliance" [i.e., executive action] program. 174 F.3d at 208. Here, similarly, Appellants establish criteria so that those who participate are designated lower-risk and avoid enforcement and prosecution.

Congress passed the APA "to improve the administration of justice by prescribing fair administrative procedure." David B. Chaffin, Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of United States Steel and Western Oil & Gas*, 1982 Duke L.J. 461, 462

(1982). "When a court allows such a rule to remain in force, it extends the life of an illegitimate exercise of power and [ ] promotes abuses of [ ] power." *Id.* at 474.[7]

"Since the enactment of the APA, numerous rules have been challenged on the ground that the promulgating agency did not comply with the procedural requirements of section 553." *Id.* at 464. "Most courts sustaining such procedural challenges immediately invalidate the rule and remand the case to the agency with instructions to follow proper section 552 procedures. The [D.C. Circuit] followed this practice in *Tabor v. Joint Board for Enrollment of Actuaries* [, 566 F.2d 705 (D.C. Cir. 1977)]." *Id.* at 464-66.

The APA, 5 U.S.C. § 553(b), requires that "[g]eneral 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." "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for

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7 http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2809&context=dlj. (Citing Senate Comm. On The Judiciary, Administrative Procedure Act: Report Of The Committee On The Judiciary, S. Rep. No. 752,79th Cong., 1st Sess. 7 (1945), *reprinted in* Legislative History Of The Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 1, 187 (1946)).

oral presentation." 5 U.S.C. § 553(c). Finally, "the required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d).

As a result, Appellants' programs must comply with APA rule-making.

III. Appellant has shown valid grounds for a preliminary injunction

Appellant moved for a preliminary injunction. (JA 61-99) To obtain injunctive relief, a plaintiff must demonstrate (1) a substantial likelihood of success on the merits; (2) plaintiff will likely suffer "irreparable injury" without relief; (3) that an order would not substantially injure other interested parties; and (4) that the public interest would be furthered. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). No one factor is determinative. Rather, "[t]hese factors interrelate on a sliding scale and must be balanced against each other." *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C.Cir.1998); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C.Cir.1995) ("If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."). Where a party can demonstrate "probable success on the merits," the party need only establish a "possibility of irreparable injury." *Holiday Tours*, 559 F.2d at 841.

First, Appellant is likely to prevail on the merits. Appellees' programs are

unconstitutional, usurping the legislative role of Congress and refusing to "take Care that the Laws be faithfully executed." Article II, Section 3 of the U.S. Constitution. Appellees cannot simply refuse to enforce the law with regard to nearly 50% of the aliens the law commands them to deport or rewrite statutes.

Alternatively, Appellant is likely to prevail on Appellee's non-compliance with the APA. Appellees may prioritize their work internally, but cannot confer criteria-driven benefits upon 6 million people without regulatory rule-making.

Second, courts have consistently held that a colorable constitutional violation gives rise to a showing of irreparable harm. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 53 (D.D.C. 2002) (deprivation of constitutional protection "is an undeniably substantial and irreparable harm").

Appellant will also suffer irreparable injury because once the programs are in effect, they will be nearly impossible to unravel, practically. Roughly 6 million persons affected will have announced themselves as illegally in the country on a promise that they will receive immunity. Millions more will flood the border to

plant "dry feet" on U.S. soil to be part of the next predictable wave of amnesty.

Leon Rodriquez, Director of the United States Citizenship and Immigration Services, announced to his employees in a townhall meeting that: [8]

"If this program does what we want it to do, you will now have literally millions of people who will be working on the books, paying taxes, being productive. You cannot so easily by fiat now remove those people from the economy…"

The program ordered by President Barack Obama is intended to subvert Congress, by preventing Congress from legislating in ways Appellants disagree with. This is a knowing, deliberate usurpation of Congress' legislative role.

Third, "there is an overriding public interest… in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. V. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). The public has a substantial interest in Appellants following the law. *See, e.g., In re Medicare Reimbursement Litigation*, 414 F.3d 7, 12 (D.C. Cir. 2005) (Additional administrative burden "[would] not outweigh the public's substantial interest in the Secretary's following the law.")

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[8] "Obama immigration chief says amnesty designed to cement illegals place in society," Stephen Dinan, The Washington Times, December 9, 2014, http://www.washingtontimes.com/news/2014/dec/9/obama-amnesty-designed-cement-illegals-place-socie/

Since Appellees' programs would change the status quo, a preliminary injunction serves the public interest. *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) ("issuance of a preliminary injunction would serve the public's interest in maintaining a system of laws" free of constitutional violations). *See also N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("the general public interest served by agencies' compliance with the law"); *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002).

Fourth, Appellees cannot be "burdened" by a requirement to comply with existing law. While illegal aliens would be deported, they have no right to be on U.S. soil. Congress has determined that they should be reunited with their country of citizenship. Unless the Judiciary officially determines some countries to be inferior, returning to one's own country is not, without more, an injury. [9]

## IV. District Court Erred in Dismissing for Lack of Standing

### A. For standing, only one basis is sufficient.

Initially, it is sufficient for only one possible type of standing to apply with regard to any particular actual injury. By contrast, dismissing the case for lack of

[9] Of course Congress has also provided mechanisms for permanent or temporary lawful status in harmful situations, allowing for asylum, refugee status or the like when necessary.

standing requires demonstrating that no possible grounds for standing exist.

B. The District Court analyzed the factual bases for standing by disbelieving Appellant's allegations in the complaint rather than taking as true all allegations of fact and all inferences in support of standing

Crucial to the District Court's analysis dismissing for lack of standing was its disbelief of Sheriff Arpaio's allegations, which it was obligated to assume to be true. The District Court acknowledged the allegations:

> "The plaintiff alleges that he is "adversely affected and harmed in his office's finances, workload, and interference with the conduct of his duties" as a result of the "increases in the influx of illegal aliens motivated by [these] policies of offering amnesty." Compl. ¶ 27."

Mem. Op. at 19. Yet the District Court chose to disregard and disbelieve those very allegations, despite acknowledging Appellant's allegations:

> According to the plaintiff, the "financial impact of illegal aliens in Maricopa County, Arizona was at least $9,293,619.96 in the costs of holding illegal aliens in the Sheriff's jails from February 1, 2014, through December 17, 2014, for those inmates flagged with INS 'detainers.'" Pl.'s Reply Defs.' Opp. Pl.'s Mot. Prelim. Inj. at 7 ("Pl.'s Reply"), ECF No. 19.

Mem. Op. at 19. Those added costs during 2014 from the 2012 DACA program is alone sufficient to establish standing. Yet the District Court disbelieved it:

> As support for this allegation, he alleges that "experience has proven as an empirical fact that millions more illegal aliens will be attracted into the border states of the United States, regardless of the specific details" of the challenged policies. Compl. ¶ 30.

Mem. Op. at 19. The District Court rejected that empirical evidence from Sheriff

Arpaio's actual operations as predictive of future injury. The District Court merely disbelieved this, stating the exact opposite soon after:

> "Moreover, the plaintiff's alleged injury is largely speculative. The plaintiff argues that the challenged deferred action programs will create a "magnet" by attracting new undocumented immigrants into Maricopa County, some of whom may commit crimes under Arizona law. Pl.'s Mot. at 16–17; *see also* Pl.'s Mot., Ex. G, Decl. of Sheriff Joe Arpaio ¶¶ 7, 11–14, ECF No. 7-7. Yet, the decision for any individual to migrate is a complex decision with multiple factors, including factors entirely outside the United States' control, such as social, economic and political strife in a foreign country. The plaintiff reduces this complex process to a single factor: the challenged deferred action programs."

Mem. Op. at 21. Thus, rather than taking the allegations of the complaint as true, along with all inferences reasonably drawn therefrom, the District Court speculated as to how the allegations might not be true. Under a correct analysis of standing, if Appellants' programs cause even some third-party actors to be more likely to flood Maricopa County, Arizona, and cost Sheriff Arpaio's office financial and manpower resources, Appellant has standing. It is not required that one hundred percent (100%) of all illegal aliens be motivated solely by Appellant's new programs.

Moreover, the District Court speculated as to how Appellees' programs might not cause harm to the Appellant.

> Contrary to the plaintiff's assertion that a consequence of the challenged programs will be an increase in illegal conduct by

> undocumented immigrants and an increase in costs to the Maricopa County Sheriff's office, ***these programs may have the opposite effect.*** The deferred action programs are designed to incorporate DHS's enforcement priorities and better focus federal enforcement on removing undocumented immigrants committing felonies and serious misdemeanor crimes. Since the undocumented immigrants engaging in criminal activity are the cause of the injuries complained about by the plaintiff, the more focused federal effort to remove these individuals ***may end up helping, rather than exacerbating the harm to, the plaintiff.***

Mem.Op. at 24. *(Emphases added.)* But the court was obligated to take all inferences in Appellant's favor as true, not to imagine how the allegations might not be true. Also, the District Court disbelieved that more illegal aliens will follow:

> As noted, the plaintiff's briefing admits as much: "millions more illegal aliens will be attracted into the border states of the United States, *regardless of the specific details*" of the challenged deferred action programs. Compl. ¶ 30."

Mem.Op. at 27 *(emphasis in original*.) But the District Court took this passage out of context, that the new amnesty programs are irrelevant. Judge Howell ignored the prior statement in Complaint ¶ 29 that "…Defendant Obama's new amnesty program will greatly increase the burden and disruption of the Sheriff's duties."

Sheriff Arpaio obviously alleged from his real-world, empirical experience, that the Appellant's "new amnesty program" will cause millions more illegal aliens to enter or cross through Maricopa County "*regardless of the specific details*" of

those programs.

Similarly, on the question of whether the Appellant's injuries are redressable by court action favorable to the Appellant, the District Court reasoned from (*inter alia*) the Appellees' budgetary resources:

> Moreover, the plaintiff acknowledges that the defendants only have limited resources to facilitate removal, *see* Hrg. Tr. at 14.

Mem.Op. at 28. However, the allegations should have been taken as true, where the Complaint alleges:

> 44. The fatal defect with Defendant Obama's false excuse (pretext) is that the executive branch has not requested additional resources to secure the borders that Congress ever denied.

The District Court erred by not taking as true all factual allegations and inferences reasonably drawn therefrom as true for the purposes of the Rule 12(b)(1) motion to dismiss.

Moreover, the District Court failed to consider that the Appellants' allegations and sworn declarations stand uncontraverted. While Judge Howell insisted in oral argument that Appellant bears the burden of proof, she did not place this in the context that no evidence or declarations were proffered in reply.

C. Appellant alleged sufficient injuries to establish standing

It was not the role of the District Court to believe or disbelieve the

allegations. If the Appelees wished to contest the allegations, they could have done so by their own sworn declarations or other evidence. But they did not do so.

Sheriff Arpaio's allegations and sworn declarations allege sufficient harm to his Office to establish standing. The District Court was obligated – *see* "Standard of Review" above – to take as true all allegations of the Complaint along with all inferences that may be drawn from those allegations in favor of finding standing, for the purposes of a Rule 12(b)(1) motion to dismiss.

Appellant requested to present live testimony, but in a Minute Order on December 18, 2014, at 10:44 EDT, Judge Howell denied live testimony –

> **"at this stage of the proceedings, in opposition to the defendants' motion to dismiss, the Court need not make any credibility determinations and must accept as true the factual allegations made by the plaintiff."**

The District Court acknowledged Sheriff Arpaio's allegation that Appellees' programs "cause[s] his office to expend resources …." That harm "to expend resources" is sufficient for standing:

> "Ultimately, the plaintiff's standing argument reduces to a simple generalized grievance: A Federal policy ***causes his office to expend resources*** in a manner that he deems suboptimal. To accept such a broad interpretation of the injury requirement would permit nearly all state officials to challenge a host of Federal laws simply because they disagree with how many—or how few—Federal resources are brought to bear on local interests."

Mem. Op. at 20 *(emphasis added)*. Thus, the District Court acknowledges that

the Appellants' programs cause Sheriff Arpaio's office to expend resources but confused standing with the ultimate merits – whether the negative impact is justified. The District Court also misconstrues the issue as one of "A Federal policy." The District Court further acknowledged:

> "The plaintiff claims that the challenged deferred action programs, which provide guidance to Federal law enforcement regarding the removal or non-removal of undocumented immigrants, *inhibit his ability to perform his official functions as the Sheriff of Maricopa County."*

Mem. Op. at 19 *(emphasis added)*. That allegation alone is sufficient to establish standing. The District Court recited Appellant's allegation "that the challenged deferred action programs … *inhibit his ability to perform his official functions as the Sheriff of Maricopa County*."

In his first Declaration on December 1, 2014, (JA 159-189) Sheriff Joe Arpaio swore under oath that *(emphases added)*:

> 4) If President Obama's amnesty created by the President's executive order, which was announced on November 20, 2014, is allowed to go into effect, my Sheriff's office responsible for Maricopa County, Arizona, and the people of Maricopa County *will suffer significant harm.*
>
> 5) This unconstitutional act by the president *will have a serious detrimental impact on my carrying out the duties and responsibilities for which I am charged as sheriff.*

6) Specifically, Obama's amnesty program *will severely strain our resources, both in manpower and financially*, necessary to protect the citizens I was elected to serve.

7) For instance, among the many negative effects of this executive order, will be the increased release of criminal aliens back onto streets of Maricopa County, Arizona, and the rest of the nation.

8) In addition, the flood of illegal aliens into Arizona *will cost my Sheriff's office money and resources to handle.*

9) Attached to the Complaint in this case are several news releases from my office giving details of the impacts in my jurisdiction. I attach these news releases again as exhibits to this Declaration, and incorporate herein the statements from my office in the attached news releases. I affirm the accuracy of the news releases attached.

10) President Obama's June 15, 2012, amnesty for adults who arrived illegally as children, which Obama has called Deferred Action for Childhood Arrivals (DACA), *has already caused an increased flood of illegal aliens into Arizona in 2014.*

11) The increased flow of illegal aliens into U.S. border states has been stimulated by the hope of obtaining U.S. citizenship because of President Obama's six (6) years of promising amnesty to those who make it to the United States.

12) The increased flow of illegal aliens *has caused a significant increase in property damage, crime, and burdened resources in Maricopa County*, throughout Arizona, and across the border region.

13) Landowners report large-scale trespassing on their land by illegal aliens transiting from the border into the interior of the country, associated with destruction of property, theft, crimes of intimidation, trespassing, and disruption of using their land.

14) The Sheriff's office witnesses and experiences a noticeable increase in crime within my jurisdiction in Maricopa County,

> Arizona, resulting from illegal aliens crossing our Nation's border and entering and crossing through border States.
>
> 15) Within my jurisdiction, *my office must respond to all such reports and investigate.*
>
> 16) My deputies *must be out on the streets, risking their lives,* to police the County.

And:

> 18) I found out that over 4,000 illegal aliens were in our jails over the last 8 months, arrested for committing crimes in Maricopa County under Arizona law, such as child molestation, burglary, shoplifting, theft, etc.
>
> 19) I found that one third of the 4,000 illegal aliens arrested in Maricopa County had already been arrested previously for having committed different crimes earlier within Maricopa County under Arizona law.
>
> 20) These are criminals whom I turned over to ICE for deportation, yet they were obviously not deported or were deported and kept returning to the United States.

And:

> 23) I am aware that the President claims that he must grant amnesty to illegal aliens because of a lack of resources for enforcing the immigration laws.
>
> 24) However, from my perspective and experience, *the Federal government is simply shifting the burden and the expense* to the States and the Counties and *County offices such as mine.*

In his supplemental Declaration dated December 19, 2014, (JA 654-704)

Sheriff Joe Arpaio swore under oath *(emphasis added):*

41) Under current law, I turn over those committing crimes in Maricopa County who turn out to be citizens of foreign countries to DHS to be deported. But by contrast, under President Obama's new Executive Action, those illegal aliens will not be subject to deportation and will be forced to serve out their criminal sentences in my jails. *This costs an enormous amount of time and money.*

And:

16) With President Obama's Executive Actions, even if new illegal aliens coming into the country may not qualify under the Executive Actions, floods of new illegal aliens have and will swarm across the border because they are attracted to the idea of amnesty.

And:

21) *My deputies must be out on the streets, risking their lives, to police Maricopa County, Arizona.*

22) In October 2014, 307 illegal immigrants were arrested by my deputies and officers in Maricopa County and given detainers by ICE. Of that number, 96 are repeat offenders (31.2%), having had prior bookings with detainers placed on them. Among those include two illegal aliens who have been booked into my jail 19 times each, one of which had 11 prior detainers, and extraordinarily, within the last year. These statistics mirror what has happened every month of 2014.

And:

28) I performed a survey for the last 3 months.

29) I found out that over 1,200 illegal aliens were in our jails over the last three (3) months, arrested for committing crimes in Maricopa County under Arizona law, such as child molestation, burglary, shoplifting, theft, etc. These statistics do not include illegal aliens charged for violating immigration laws.

> 30) I found that over one-third (over 400) of these 1,200 illegal aliens arrested recently in Maricopa County had already [been] arrested by my Office in the past for committing different crimes earlier within Maricopa County under Arizona law.
>
> 31) These are criminals whom I turned over to ICE for deportation, yet they were not deported and still committing criminal acts in Maricopa County.

And:

> 33) I am aware that an Immigration Enforcement Report for the fiscal year of 2013, by ICE, indicates that ICE reported 722,000 encounters with illegal aliens, most of whom came to their attention after incarceration for a local arrest.
>
> 34) I am also aware that the ICE officials followed through with immigration charges for only 195,000 of these individuals. Among those released by ICE, 68,000 had criminal convictions, and 36,007 of the convicted illegal aliens freed from ICE custody, in many instances had multiple convictions, some of which included: homicide, sexual assault, kidnapping, aggravated assault, stolen vehicles, dangerous drugs, drunk or drugged driving, and flight/escape.
>
> 40) I am aware that Maricopa County incurred an additional $9,293,619.96 from February 1, 2014 through December 17, 2014 for inmates flagged with INS detainers. (Exhibit 3).

Also, the Appellant alleged originally in the Complaint: *(Emphases added)*

> ¶ 25: "President Obama grounds his argument for granting amnesty by Executive Order to illegal aliens on the federal government having insufficient resources to prosecute and deport all of the illegal aliens that the executive branch has allowed into the country. "

¶ 26: " In fact, Defendant Obama's amnesty programs merely shift the burden to the States and local governments, creating severe burdens and a crime wave in States along the border."

¶ 27: "Plaintiff Joe Arpaio is adversely affected and harmed in his office's finances, workload, and interference with the conduct of his duties, by the failure of the executive branch to enforce existing immigration laws, but has been severely affected by increases in the influx of illegal aliens motivated by Defendant Obama's policies of offering amnesty. In this regard, as detailed in Exhibits 1, 2 and 3 to this Complaint which is incorporated herein for reference, Plaintiff Arpaio has been severely affected and damaged by Defendant Obama's release of criminal aliens onto the streets of Maricopa County, Arizona. ***This prior damage will be severely increased by virtue of Defendant Obama's Executive Order of November 20, 2014, which is at issue.***"

¶ 28: "Thus, the Office of the Sheriff has been directly harmed and impacted adversely by Obama's DACA program ***and will be similarly harmed by his new Executive Order effectively granting amnesty to illegal aliens."***

¶ 29: "Defendant Obama's past promises of amnesty and his DACA amnesty have directly burdened and interfered with the operations of the Sheriff's Office, *and Defendant Obama's new amnesty program will greatly increase the burden and disruption of the Sheriff's duties*."

¶ 30: "First, experience has proven as an empirical fact that millions more illegal aliens will be attracted into the border states of the United States, regardless of the specific details.

¶ 31: "Second, the experiences and records of the Sheriff's office show that many illegal aliens – as distinct from law-abiding Hispanic Americans – are repeat offenders, such that Appellant Arpaio's deputies and other law enforcement officials have arrested the same illegal aliens for various different crimes."

> ¶ 32: "Plaintiff Arpaio has turned illegal aliens who have committed crimes over to ICE, totaling 4,000 criminals in his jails for state crimes in just an eight-month period. However, over 36 percent keep coming back."

Obviously, a tendency toward crime knows no nationality, race, ethnicity, etc. Yet, as an *inference* the Court must take as true, a demonstrated willingness to apply for legal immigration status, investing time and expense, is a sound predictor of a respect for the laws of the United States, a reluctance to put at risk what one has already invested, and a reverence for the United States as a new home possibly greater than that of native-born citizens.

By contrast, a demonstrated willingness to break this nation's laws to get what one wants but is not entitled to, experiencing a widespread outcry excusing their law-breaking, and suffering no consequences constitute valid grounds for predicting a lowered resistance to breaking more laws. The Judiciary is traditionally highly sensitive to discouraging repeat law-breaking.

### D. The District Court analyzed the factual bases for Appellant's standing by rejecting Sheriff Arpaio's prediction of future harm grounded in past empirical experience.

The District Court rejected harm from past actions as an empirical basis for predicting future or increased harm. *See*, Mem. Op. at 18-19, 21. If such an analysis were adopted, it would eradicate nearly all citizen challenges to environmental regulations, a rich field. But prediction of future injury from

empirical evidence of past harm is the mainstay of standing for environmental regulations. Without predictions from past experience, nearly all regulatory litigation would cease to exist.

A new environmental regulation allowed the Environmental Protection Agency ("EPA") the *option*, yet not the certainty, of approving alternative methods "not less stringent" than prior regulations:

> "According to NRDC, the Guidance exacerbates these injuries by delaying or suspending future air quality improvements. Any such effect, EPA counters, is purely hypothetical because it may never approve an alternative."

*Natural Resources Defense Council v. Environmental Protection Agency*, 643 F.3d 311 (D.C. Cir. July 1, 2011).

In that case, the plaintiff NRDC claimed that members living in air quality non-attainment areas *might* be harmed by air quality. The EPA objected that it was speculative to conclude that "Guidance" allowing a "not less stringent" alternative for attaining air quality could cause harm. Nevertheless, the D.C. Circuit found that the NRDC had standing to challenge the EPA's agency action. That regulation might allow third parties, acting independently from the EPA, to use environmental protection techniques "not less stringent" than before. Plaintiffs alleged that new techniques would be incrementally more polluting.

Further, according to the D.C. Circuit, only a partial contribution making a

problem worse is sufficient for standing. *Id.* Also, making an existing problem worse establishes standing. *Id.* "In any event, even assuming that a resulting program were perfectly equivalent, the delay in improving air quality would still injure NRDC members." *Id.* So delay in improvement is sufficient injury for standing if emitting facilities might or might not use the alternative techniques.

Likewise, in *Natural Res. Def. Council v. Envtl. Prot. Agency* (D.C. Cir., Case Nos. 98–1379, 98–1429, 98–1431, June 27, 2014), NRDC's plaintiff members lived near third-party, independent actor power plants that might conceivably switch to new fuels:

> "Once EPA promulgated the Comparable Fuels Exclusion, it was "'a hardly-speculative exercise in naked capitalism' " to predict that facilities would take advantage of it to burn hazardous-waste-derived fuels rather than more expensive fossil fuels. *Id.* (inferring that "motor carriers would respond to the hours-increasing provisions by requiring their drivers to use them and work longer days" (quoting *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach,* 469 F.3d 129, 135 (D.C. Cir. 2006))).

An inference predicting harm from agency action was sufficient to constitute standing. Standing existed from a prediction about "a hardly-speculative exercise in naked capitalism" that third-party, private actors in the energy industry, acting independently, would switch to less-expensive hazardous-waste-derived fuels. The regulation did not mandate that any private company switch fuels. The regulation

had not yet gone into effect, so only prediction was possible.

Further, the D.C. Circuit considered whether anyone else would have standing: "Were EPA to prevail, although NRDC might well have standing to bring an as-applied challenge to any particular 'not less stringent' determination, no one would have standing to challenge EPA's authority to allow alternatives in the first place. Especially given that Congress enacted Subpart 2 for the very purpose of curtailing EPA discretion, *see Am. Trucking*, 531 U.S. at 484-86, 121 S.Ct. 903, it would be ironic indeed if the application of standing doctrine allowed EPA to effectively maintain that very discretion. Neither precedent nor logic requires us to adopt such a counterintuitive approach to standing." *Id.*

An injury constituting standing need not be an all-or-nothing effect. Allegations that even just one citizen's vote might be diluted is sufficient. Dilution can never be known for certain. *Baker v. Carr*, 369 U.S. 186, 205, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962) explained:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.
>
> ***
>
> The complaint was filed by residents of Davidson, Hamilton,

> Knox, Montgomery, and Shelby Counties. Each is a person allegedly qualified to vote for members of the General Assembly representing his county.23
>
> ***

*Id.*

E. The District Court analyzed Appellant's standing in terms of "redressability" from favorable court action although current governing law requires all illegal aliens to be deported

The U.S. District concluded that Appellant does not have standing in terms of "redressability." Mem. Op. at 25-29. That is, if the Court granted Plaintiffs' Motion for Preliminary Injunction and/or granted judgment on the Complaint, the Court's action favorable to Appellant would not reduce Appellant's injury.

But *Mendoza v. Perez* (D.C. Cir., Record No. 13-5118, Page 9, June 13, 2014) explains:

> "The requirements for standing differ where, as here, plaintiffs seek to enforce procedural (rather than substantive) rights. When plaintiffs challenge an action taken without required procedural safeguards, they must establish the agency action threatens their concrete interest. *Fla. Audubon Soc'y*, 94 F.3d at 664. It is not enough to assert "a mere general interest in the alleged procedural violation common to all members of the public." *Id.*"
>
> ***Once that threshold is satisfied, the normal standards for immediacy and redressability are relaxed.*** *Lujan*, 504 U.S. at 572 n.7. Plaintiffs need not demonstrate that but for the procedural violation the agency action would have been different. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005). Nor need they establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the

> plaintiffs' interest. *Id.* Rather, if the plaintiffs can "demonstrate a causal relationship between the final agency action and the alleged injuries," the court will "assume[] the causal relationship between the procedural defect and the final agency action." *Id.*

*(Emphasis added.)*

The objections on redressability boils down to this: An order of this Court would not remedy the harm if Appellees refuse to deport illegal aliens under existing law, defying a court order.

In fact, if the Court granted Appellant's Motion for Preliminary Injunction, current law would continue to govern. Current law mandates that the Executive Branch remove (deport) 100% of all illegal aliens. *See, e.g.*, 8 U.S.C. §§ 1227, 1229a, 1231. If Defendants deported the illegal aliens, they would not be in the country to cause any injury to Appellant. Therefore, the Court has the power to redress Appellant's injuries. If Appellees' amnesty for 6 million illegal aliens is ruled invalid on the merits, then Appellees would remain obligated to deport them. Their absence from U.S. soil would eliminate the possibility of financial burden.

In this, the Court must analyze current law, not unsubstantiated speculation. Appellants are claiming something like a defense of impossibility. But, at a minimum, Appellants would need to demonstrate that the Executive Branch's budget request to Congress asked for additional funding which Congress denied.

F. The District Court analyzed Appellant's standing as being caused by third-party actors whose acts not credited to Government

The District Court extensively discussed precedents on whether harm caused more directly by third-party actors can be credited to government defendants (Appellants here) with regard to standing. Mem. Op. at 22-25. Yet some or all of the third party actors here – illegal aliens – would be physically removed from U.S. territory *but for* Defendants' unlawful attempts to repeal current, governing law.

Appellees' programs set aside current law. Thus, Defendants' "deferred action" programs are the direct and proximate cause of harm to Appellant. If Defendants enforced the law Congress enacted, the third party actors would be incapable of causing financial harm or burdens to Sheriff Arpaio's office as a result of their total absence from U.S. soil. If any significant slice of the estimated 6 million illegal aliens in question were deported instead of being granted amnesty under Appellees' programs, hundreds of thousands if not millions of illegal aliens would not be on U.S. soil to be able to cause any impact to Sheriff Arpaio's office.

*Lujan v. Defenders of Wildlife*,, 504 U.S. 555, 562, 112 S.Ct. 2130 (1992) explains that where a plaintiff's asserted injury arises from the government's allegedly unlawful regulation [of a third party]" the critical question is how the third party would respond to an order declaring the government's action illegal.

G. Standing analysis is not as hostile as the District Court's analysis

The entire approach of the District Court assumed an inappropriate hostility in the law to avoid finding standing. But such a searching hostility is not the law:

> "As stated in *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942 1953, 20 L.Ed.2d 947, 'in terms of Article III limitations on federal court jurisdiction, ***the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context*** and in a form historically viewed as capable of judicial resolution.' Or, as we put it in *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 the gist of the standing issue is ***whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues*** upon which the court so largely depends for illumination of difficult constitutional questions.'"

*Laird v. Tatum*, 408 U.S. 1, 26, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) *(Emphases added.)* Thus, the gravamen of standing analysis is to ensure a genuine dispute, not to duck challenges to government over-reach.

The District Court by the Honorable Ellen Huvelle recently upheld standing in a challenge to a different component of the Appellants' executive action immigration programs in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, (Civil Action No. 14-529, Memorandum Order, November 21, 2014). As here, DHS in WATW asserted the same very high standard of precision and certainty for standing as in this case:

> "DHS argues that plaintiff has failed to provide sufficient detail of the three named members' training and employment circumstances to establish an injury-in-fact arising from competition. (Mot. at 13.) In particular, plaintiff did not enumerate the specific positions to which its named members applied or planned to apply in the future, their qualifications for the job, or whether the position applied for was filled by an OPT student on a seventeen-month STEM extension.

*Id.* However, such a rigid showing is simply not required for standing. As Judge Huvelle replied:

> "These omissions are not, however, fatal to plaintiff's standing, ***for such a close nexus is not required***. *See Honeywell Intern Inc. v. EPA*, 374 F.3d 1363, 1368 (D.C. Cir. 2004) (chemical manufacturer had standing because the challenged regulation ***could*** lead customers to seek out the manufacturer's competitors in the future); *Int'l Union of Bricklayers and Allied Craftsmen*, 761 F.2d at 802 (D.C. Cir. 1985) (standing found ***despite lack of details regarding specific future jobs*** as to which U.S. bricklayers would compete with foreign laborers); *Int'l Longshoremen's and Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989) (union had standing to challenge Immigration and Naturalization Service regulation ***without pleading specific job opportunities lost*** to Canadian longshoremen). *Cf. Sierra Club v. Jewell*, 764 F.3d 1, at *6 (D.C. Cir. 2014) (plaintiff's members need not set foot on disputed property to have interest in enjoying it for the purpose of establishing injury)."
>
> "In *Mendoza*, for example, the Court held that plaintiffs had standing, but were not required to show that they applied for and were denied a specific position that was filled by a competitor. 754 F.3d 1002. …."

*(Emphases added.)* Standing simply does not require the very high burden of

precision and certainty which the District Court applied in this case.

H. The District Court ignored the "procedural injury" and infringement of the operations of Sheriff Arpaio's office, similar to *Arizona v. United States of America*, 132 S. Ct. 2492 (2012).

One may well ask: How did the U.S. government have standing to contest Arizona's SB1070 law in *Arizona v. United States*, 132 S. Ct. 2492 (2012)? Standing was addressed in the Court of Appeals at 641 F. 3d 339 (9th Cir. 2011).

SB1070 did not prohibit the U.S. Government from taking any action nor require it to do anything. SB1070 merely identified illegal aliens and handed them over to the U.S. Government for whatever action it might decide to take, including none. While State officials were required to inquire about immigration status, a state's law could not obligate the U.S. Government to respond.

Here, as alleged in the Complaint and sworn to in declarations, Sheriff Arpaio – responsible for 60% of Arizona's population – must deploy additional resources and risk his deputies answering increased calls from affected citizens. The number of repeat offenders he must transport and house in his jails is affected. Those allegations and uncontraverted evidence must be taken as true.

In *Arizona*, President Obama (Appellee here) feared that Arizona's state law SB1070 might potentially restrain the U.S. government's free range of options, decisions, and operations. Here, in precisely the same way, Appellees' 2012 and

2014 deferred action programs infringe upon the operations of Sheriff Arpaio's office and create an obstacle to the conduct of his duties and obligations.

The District Court acknowledged at Mem. Op. at 19 that:

> The plaintiff is correct that the regulation and impairment of a state officer's official functions may be sufficient to confer standing, but only in certain limited circumstances. *See, e.g.*, *Lomont v. O'Neil*, 285 F.3d 9, 13–14 (D.C. Cir. 2002) (holding that a state Sheriff and Police Chief had standing to challenge federal law permitting state police officials to provide certifications relating to the transfer of certain firearms); *Fraternal Order of the Police v. United States*, 152 F.3d 998, 1001–02 (D.C. Cir. 1998).

However, the District Court misread those precedents, claiming:

> Yet, neither *Lomont* nor *Fraternal Order of the Police* support the plaintiff's argument here, as both cases concerned the *direct regulation* of a state officer's official duties.

Mem. Op. at 19-20. In fact, however, those precedents did not involve "***direct regulation***" of law enforcement. The *Lomont* court explained, at 285 F.3d at 14:

> "Unlike the Brady Act, the certification regulations do not 'command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.' *Printz v. United States*, 521 U.S. at 935, 117 S.Ct. at 2384. Local and state officials have the option of participating or not. *See* 53 Fed.Reg. 10,480, 10,488 (Mar. 31, 1988). There is no federal carrot to encourage participation, and no federal stick to discourage nonparticipation."

In *Fraternal Order of Police* 152 F.3d at 1001, *modified on other grounds* by 173 F.3d 898 (D.C. Cir., 1999), the interference of the Federal regulations with

State law enforcement was slightly more significant, but still little different from the interference with Sheriff Arpaio's office here:

> "Several CLEOs allege that enforcement of the 1996 amendments conflicts with their obligations under state law. Although there is no indication that this is true in the hard core sense of federal law requiring any CLEO to do something state law forbids (or vice versa), it seems true in the broader practical sense that if a CLEO complies with the domestic violence misdemeanor provisions, he will find himself, in any enforcement activity requiring firearms, unable to use officers who fall under the federal ban, even where in his judgment it is highly desirable or even critical to use such officers."

Accordingly, if Sheriff Arpaio does not have standing, then neither did the U.S. Government have standing to bring *Arizona v. United States*. Here, Sheriff Arpaio has the same standing, at least, as the Plaintiff in *Arizona v. United States*, 132 S. Ct. 2492 (2012).

I. The District Court construed Appellant's case and analyzed standing only in relation to "policymaking better left to the political branches" and "generalized grievances which are not proper for the Judiciary to address."

The District Court failed to analyze or rule upon the Appellant's standing to bring the actual case and controversy that the Appellant in fact filed. The District Court analyzed and ruled upon standing only with regard to claims that the Appellant did not bring. As a result, rather than viewing these events as a choice between following Congress' commands on immigration enforcement (*See, e.g.,* 8

U.S.C. §§ 1227, 1229a, 1231) or defying Congress, the District Court viewed every aspect of the case as a choice between Sheriff Arpaio's own, independent preferred policy on immigration enforcement versus President Obama's preferred immigration enforcement policies.

The District Court explained its dismissal, in part, as:

> "The plaintiff's inability to enforce federal immigration law is integrally related to the central question in this case: ***Whether the plaintiff has standing to demand changes to the "broad discretion" granted federal officials regarding removal***. Despite the consequences of unlawful immigration in Maricopa County, the plaintiff cannot meet the requirements for standing to bring this suit."

Mem. Op. at 15 *(emphasis added).* Thus the Court viewed the case as Sheriff Arpaio's attempt "***to demand changes"*** preferred by Arpaio. But quite obviously, the Appellant's Complaint demands that governing law be obeyed:

> ... *see also* Pl.'s Supp. Decl. ¶ 3 ("By this lawsuit, I am seeking to have the President and other Defendants obey the U.S. Constitution and the immigration laws . . . . ").

Mem. Op. at 21. Similarly, the District Court indicated awareness that enforcing existing, governing law is the central point in dispute, while stating:

> "Indeed, it is not apparent exactly what cognizable interest and injury the plaintiff can assert since, as the plaintiff's Complaint recognizes, the plaintiff has no legal authority to enforce the immigration laws of the United States. *See* Compl. at 19."

Mem. Op. at 20.

So the District Court analyzed the complaint for standing purposes purely as Sheriff Arpaio seeking to impose his own ideas about immigration on the U.S. Government. The District Court further elaborated:

> "The role of the Judiciary is to resolve cases and controversies properly brought by parties with a concrete and particularized injury— *not to engage in policymaking better left to the political branches*. The plaintiff's case raises important questions regarding the impact of illegal immigration on this Nation, *but the questions amount to generalized grievances which are not proper for the Judiciary to address*. For the reasons explained in more detail below, the plaintiff lacks standing *to bring this challenge to the constitutionality and legality of the immigration policies at issue.*"

Mem. Op. at 2-3 *(emphases added.)* The challenge the District Court considered was only to "policymaking better left to the political branches. And:

> "The key question in this case, however, concerns the appropriate forum for *where* this national conversation should occur. The doctrine of standing, in both its constitutional and prudential formulations, concerns itself with "'the proper—and properly limited—role of the courts in a democratic society.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Standing "ensures that [courts] act as judges, and do not engage in policy-making properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013)."

Mem. Op. at 1 *(emphasis in original)*. The Court construed the case as a policy dispute with Sheriff Arpaio – a "national conversation" --

> Concerns over the judicial role are heightened when the issue before the court involves, as here, enforcement of the immigration

> laws. This subject raises the stakes of, among other factors, "immediate human concerns" and "policy choices that bear on this Nation's international relations." *Arizona v. United States*, 132 S.Ct. at 2499. "[O]ur Constitution places such sensitive immigration and economic judgments squarely in the hands of the Political Branches, not the courts." *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1151 n.10 (D.C. Cir. 2014); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.")."

Mem. Op. at 2-3. It remains unclear how or why compliance with the APA should depend upon what topic is involved. The APA governs the same regardless.

Appellant does have standing to challenge the Executive Branch's non-compliance with the APA and existing immigration laws and usurpation of the legislative role of the U.S. Congress because Sheriff Arpaio's office is harmed.

J. The District Court analyzed Appellant's standing in relation to Defendants internally prioritizing and planning enforcement actions

Similarly, the District Court also adopted the Appellees' arguments that their programs are merely internal organization, planning, and prioritization of their work. The District Court concluded that Sheriff Arpaio did not have standing to challenge that. But that is not the lawsuit that Sheriff Arpaio brings. Sheriff Arpaio does have standing to challenge the Appellees' creation of new regulatory programs, the wholesale of refusal to enforce Congressional enactments, the grant

of amnesty and immunity from prosecution and other benefits that do not comply with the APA or with the substance of the authorizing statutes.

However, because the District Court misconstrued the case in question:

> The plaintiff claims that the challenged deferred action programs, *which provide guidance to Federal law enforcement* regarding the removal or non-removal of undocumented immigrants, inhibit his ability to perform his official functions as the Sheriff of Maricopa County.

Mem. Op. at 19 *(emphasis added)*. And, moreover:

> Finally, the challenged deferred action programs *merely provide guidance to immigration officials in the exercise of their official duties*. This helps to ensure that the exercise of deferred action is *not* arbitrary and capricious, as might be the case if the executive branch offered no guidance to enforcement officials. It would make little sense for a Court to strike down as arbitrary and capricious *guidelines* that help ensure that the Nation's immigration enforcement is not arbitrary but rather reflective of congressionally-directed priorities.

Mem. Op. at 32 *(emphases added)*. And, similarly:

> The plaintiff's inability to enforce federal immigration law is integrally related to the central question in this case: Whether the plaintiff has *standing to demand changes to the "broad discretion" granted federal officials* regarding removal. Despite the consequences of unlawful immigration in Maricopa County, the plaintiff cannot meet the requirements for standing to bring this suit.

Mem. Op. at 15 *(emphasis added)*. And:

> In contrast, the challenged deferred action programs do not regulate the official conduct of the plaintiff *but merely regulate*

> *the conduct of federal immigration officials in the exercise of their official duties.*

Mem. Op. at 20 *(emphasis added)*. But Appellant is not seeking to impose changes but to maintain current law without interference.

## CONCLUSION

For the foregoing reasons, the decision of the District Court should respectfully be reversed and remanded with instructions to enter a preliminary injunction to prevent the on-going harm to Sheriff Arpaio's office

**Oral argument is respectfully requested.**

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Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2015, a true and correct copy of the foregoing Brief was submitted electronically to the U.S. Circuit Court for the District of Columbia Circuit and served via CM/ECF upon the following:

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