No. _____

In The
Supreme Court of the United States

JOSEPH ARPAIO, SHERIFF,
MARICOPA COUNTY, ARIZONA,

Petitioner,

v.

BARACK OBAMA, JEH JOHNSON,
LEON RODRIQUEZ, & LORETTA LYNCH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") erred, and created a circuit split, where its analysis of standing is in conflict and inconsistent with the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") deciding a virtually identical challenge to Respondents' same "deferred action" amnesty programs by executive action.

2. Whether the Respondents' deferred action programs are an unconstitutional usurpation of legislative authority vested in the Congress and an attempt by the executive branch to repeal legislation enacted by Congress.

3. Whether the D.C. Circuit erred by not requiring the Respondents to comply with the Administrative Procedures Act ("APA") before granting benefits and amnesty to roughly 6 million illegal aliens.

4. Whether – as suggested by the concurring opinion of The Honorable Janice Rogers Brown in the D.C. Circuit – prior precedents concerning judicially-invented "standing" are bad law in light of this Court's earlier decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 516-26 (2007).

5. Where the Petitioner documented with an unrebutted affidavit $9,293,619.96 in the costs for holding illegal aliens in Sheriff Joe Arpaio's jails from February 1, 2014, through December 17, 2014, caused by the Respondents' June 15, 2012, Deferred Action for Childhood Arrivals ("DACA")

QUESTIONS PRESENTED FOR REVIEW –
Continued

amnesty program, has the Petitioner shown financial impact suffered in 2014 sufficient to have standing to challenge the 2012 DACA program?

6. Where the Petitioner documented by unrebutted affidavit $9,293,619.96 in the costs of holding illegal aliens in 2014 from the Defendants-Respondents' June 15, 2012, DACA amnesty program, does Petitioner's prediction from empirical experience of similar harm that will occur from the November 2014 deferred action amnesty establish standing?

7. When a government defendant offers no evidence in rebuttal to the factual allegations of the complaint and uncontroverted sworn affidavits, but offers only sophistry of counsel, must the federal courts strictly conform to a "facial attack" standing analysis by accepting the factual allegations of the complaint as true along with all reasonable inferences in support thereof?

8. Is the D.C. Circuit in error that a federal court may entertain speculation about offsetting factors that could potentially diminish or cancel out the harm claimed as standing by a plaintiff, and the Fifth Circuit correct that it may not?

9. Is the D.C. Circuit in error by analyzing the factual bases for Petitioner's standing by not accepting Sheriff Arpaio's allegations of past harm as an empirical basis for predicting increased or new harm in the future, when conversely the

QUESTIONS PRESENTED FOR REVIEW –
Continued

Fifth Circuit credited reasonable factual bases from sworn empirical information?

10. Is the D.C. Circuit in error by rejecting Petitioner's standing under the "redressability" of actions by third-parties, whereas the Fifth Circuit found there was standing under the same circumstances.

PARTIES TO THE PROCEEDING

1. Plaintiff Sheriff Joseph Arpaio

Sheriff Joseph Arpaio ("Sheriff Arpaio") is the elected Sheriff of Maricopa County, Arizona. He sues as the head of the Maricopa County Sheriff's Office ("MCSO") and for himself. Maricopa County is the most populated County in the State and reportedly the fourth largest in the nation with 4,009,412 citizens. The County holds more than sixty percent (60%) of all the population of the State, thus representing most of Arizona's law enforcement. The County is larger by population than twenty-four (24)[1] States.

2. Defendant Barack Obama

Defendant Barack Obama currently holds the position of and serves as President of the United States of America, and has personally ordered the changes to law and government regulations, over-riding law, at issue herein.

3. Defendant Jeh Johnson

Defendant Jeh Johnson currently holds the position of and serves as the Secretary of the Department of Homeland Security and issued the orders on Defendant Obama's orders

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

PARTIES TO THE PROCEEDING – Continued

implementing the changes to government regulations, over-riding law, at issue herein.

4. Defendant Leon Rodriquez

Defendant Leon Rodriquez is Director of the United States Citizenship and Immigration Services, U.S. Department of Homeland Security, implementing the changes herein.

5. Defendant Eric Holder/Loretta Lynch

Defendant Eric Holder held the position of the Attorney General of the United States of America and head of the United States Department of Justice. Eric Holder has been succeeded during this case by Loretta Lynch.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS ENTERED BELOW

On August 14, 2015, in Appeal No. 14-5325, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued its Opinion for the Court (App. 1) affirming the dismissal for lack of standing by the U.S. District Court for the District of Columbia ("District Court"). The D.C. Circuit issued its mandate September 3, 2015. This was in conflict with the recent conflicting Opinion of the U.S. Court of Appeals for the Fifth Circuit issued on November 9, 2015 upholding the preliminary injunction and its Opinion on May 26, 2015, denying a stay of the preliminary injunction.

JURISDICTION

This Petition for Writ of Certiorari asserts violations of the Constitution and the Administrative Procedures Act, 5 U.S.C. § 553, *et seq*. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c). This petition was timely filed on November 12, 2015, after the September 3, 2015 mandate.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 as there is a controversy arising under federal law and the Constitution. The D.C. Circuit had jurisdiction 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. This

appeal is from a final order that disposed of all claims and terminated the case.

STATUTES (PROVISIONS) INVOLVED

The relevant provisions involved are reproduced in the appendix at App. 97.

STATEMENT OF THE CASE

Defendants' New Programs

The executive branch Respondents seek to nullify and/or repeal statutes enacted by Congress – sections of the Immigration and Naturalization Act of 1952 (as amended) ("INA") – by executive memoranda issued by the Secretary of Homeland Security on orders of President Obama. The *gravamen* of these programs is to cancel through unilateral executive memoranda statutes passed by the legislative branch.

On June 15, 2012, on President Obama's orders, Secretary of Homeland Security Janet Napolitano created a new Deferred Action for Childhood Arrivals ("DACA") – challenged herein. (Cir.Ct.JA 100-103).

On November 20, 2014, on Defendant Obama's orders, Defendant Johnson created a number of new deferred action programs through various Memoranda. (Cir.Ct.JA 100, 106, 112, 115). These give amnesty to an estimated 4.7 to 5 million illegal aliens, after the estimated 1 to 1.5 million granted amnesty by the

2012, DACA executive action – or roughly 53% of the estimated 11.3 million whom Congress has commanded Respondents to deport.

"Deferred action" has no statutory basis. (Cir.Ct.JA 66). The D.C. Circuit explained on page 6 of its Opinion for the Court, August 14, 2015. (App. 7).

> One form of discretion the Secretary of Homeland Security exercises is "deferred action," which entails temporarily postponing the removal of individuals unlawfully present in the United States. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). Immigration authorities have made decisions to defer action or take similar measures since the early 1960s.

Nature of Case

Joseph Arpaio, elected Sheriff of Maricopa County, Arizona ("Sheriff Arpaio"), filed this case on November 20, 2014, as Civil Case No. 1:14-cv-01966.

Suing as head of the Maricopa County Sheriff's Office ("MCSO"), Sheriff Arpaio seeks declaratory judgment that the Respondents' 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 a president under the Constitution.

Petitioner also challenged both programs as *ultra vires* actions in violation of the Administrative

Procedures Act, 5 U.S.C. §§ 702 through 706, both for failure to follow procedures required by the APA and as unlawful for not being in accordance with law, and as violating the "Non-Delegation Doctrine."

Course of Proceedings

No evidentiary hearing, decision, or presentation of facts took place. The case was dismissed purely on standing grounds prior to any discovery. The case was decided on the pleadings.

The Respondents offered no evidence or declarations whatsoever. The Petitioner, however, supported the factual allegations of his complaint with sworn affidavits. (Cir.Ct.JA 122, 494, 151, 183).

On December 4, 2014, Petitioner filed a Motion for Preliminary Injunction to stay Respondents' programs. (Cir.Ct.JA 61-99).

On December 15, 2014, the Respondents filed their Opposition incorporating a Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1) Motion to Dismiss for lack of standing. (Cir.Ct.JA 225-280).

On December 17, 2014, Petitioner requested to present live testimony pursuant to Rule 65(1)(d) of the Local Rules of the District Court. (Dkt # 18) The District Court denied the motion.

On December 18, 2014, the Petitioner filed a reply. (Cir.Ct.JA 541-577).

The District Court Decision Below

On December 22, 2014, the District Court heard the Petitioner's Motion for Preliminary Injunction and the Respondents' Motion to Dismiss.

On December 23, 2014, the District Court issued a Memorandum Opinion and Order ("Mem.Op.") dismissing Petitioner's case exclusively for lack of standing as to both programs. (Cir.Ct.JA 633).

The Decision of the D.C. Circuit Below

On August 14, 2015, the D.C. Circuit issued its Opinion for the Court affirming the dismissal of the case for lack of standing by the District Court and its mandate on September 3, 2015.

REASONS FOR GRANTING THE WRIT

I. Conflicts on the Analysis of Standing Exist Among the Circuits

Two different cases challenged the same amnesty programs of the Respondents on the same legal grounds. Yet the Fifth Circuit and the D.C. Circuit have come to opposite conclusions on standing.

In the U.S. District Court for the Southern District of Texas, in *State of Texas v. United States of America*, 86 F. Supp. 3d 591 (S.D. Tex. Feb. 16, 2015) (Case No. B-14-254, Order of Temporary Injunction), the Honorable Andrew Hanen found that twenty-six

plaintiff states have standing to challenge the Respondents' amnesty programs.

In denying a motion to stay that injunction, the Fifth Circuit found standing in *Texas v. United States of America*, 787 F.3d 733, 743 (5th Cir. May 26, 2015). The Fifth Circuit undertook an extensive analysis, dissecting every step in *Massachusetts v. Environmental Protection Agency* ("EPA") 549 U.S. 497, 516-26 (2007).

Then on November 9, 2015, the Fifth Circuit (a different panel) upheld Judge Hanen's Temporary Injunction outright, in Opinion, *Texas v. United States of America*, Appeal No. 15-40238.

One of many key circuit splits emerged. The Fifth Circuit requires that an injury must be "*fairly traceable to the Government conduct"* while the D.C. Circuit requires "*substantial evidence* of a causal relationship between a government policy and third-party conduct, ***leaving little doubt*** *as to causation.*"

The District Court below cited:

> We have required "substantial evidence of a causal relationship between the government policy and the third-party conduct, *leaving little doubt as to causation* and the likelihood of redress." *Nat'l Wrestling Coaches Ass'n v.*

> *Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004).[2]

Mem.Op. at 23 (emphasis added) (Cir.Ct.JA 655).

But that standard of "substantial evidence" "leaving little doubt as to causation" is essentially ***"beyond a reasonable doubt"*** for criminal conviction.

By contrast, in its May 26, 2015, Opinion, the Fifth Circuit presented the correct rule of law of injury "fairly traceable" to government action, citing to *Massachusetts v. EPA*. The Fifth Circuit has generally adopted the standard of this Court:

> The Supreme Court has held that a plaintiff has standing if the injury alleged is both "*fairly traceable to the Government conduct* . . . challenge[d] as unlawful," and redressable, in that the plaintiff will likely "obtain[ ] relief from the injury as a result of a favorable ruling." *Allen v. Wright*, 468 U.S. 737, 752, 757, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984). . . .

Duarte v. City of Lewisville, 759 F.3d 514 (5th Cir. 2014) (emphasis added).

But the D.C. Circuit's standard of "substantial evidence . . . leaving ***little doubt*** as to causation" is

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[2] *Nat'l Wrestling Coaches* adds: "The cases on which appellants rely require '*formidable evidence*' of *causation, see Freedom Republicans*, 13 F.3d at 418 (distinguishing *Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C.Cir.1989))." (Emphasis added.)

in conflict with the Fifth Circuit's "fairly traceable" standard taught by this Supreme Court in *Allen v. Wright* and *Massachusetts v. EPA*. Roughly as daunting as a criminal conviction, that formula explains some of the widely divergent treatment of standing among various courts.

Similarly, the D.C. Circuit found a lack of standing by speculating about possible offsetting savings, in conflict with the Fifth Circuit analysis:

> Instead of disputing those figures, the United States claims that the costs would be offset by other benefits to the state. It theorizes that, because DAPA beneficiaries would be eligible for licenses, they would register their vehicles, generating income for the state, and buy auto insurance, reducing the expenses associated with uninsured motorists. . . .
>
> " . . . Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that some particular aspect of the relationship is unlawful and has caused injury." "Our standing analysis is not an accounting exercise. . . ."

Texas v. USA, Appeal No. 15-40238, Opinion (5th Cir. November 9, 2015) at 17-18.

> In the instant case, the states have alleged an injury, and the government predicts that the later decisions of DAPA beneficiaries would produce offsetting benefits. Weighing

> those costs and benefits is precisely the type of "accounting exercise," *id.* at 223, in which we cannot engage. Texas has shown injury.

Id. at 19.

Furthermore, the probable behavior of third parties based on common sense realities is sufficient to demonstrate that the injury is fairly traceable to a defendant's actions or omissions:

> Texas has satisfied the second standing requirement by establishing that its injury is "fairly traceable" to DAPA. It is undisputed that DAPA would enable beneficiaries to apply for driver's licenses, and there is little doubt that many would do so because driving is a practical necessity in most of the state.

Id. at 19.

Texas did not need to prove that people apply for driver's licenses, as common sense.

> Texas has satisfied the third standing requirement, redressability. Enjoining DAPA based on the procedural APA claim could prompt DHS to reconsider the program, which is all a plaintiff must show when asserting a procedural right. *See id.* at 518. And enjoining DAPA based on the substantive APA claim would prevent Texas's injury altogether.

Id. at 26.

The D.C. Circuit rejected standing because Sheriff Arpaio faces a ***higher burden*** than the typical plaintiff. Yet the Fifth Circuit applied a ***lower burden***:

> "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Id. at 9.

The Circuits are in dispute between a ***higher or lower*** standard.

Although both cases challenge nearly identical programs, the D.C. Circuit imposed a ***higher*** burden:

> His injury rests on the behavior of third parties, undocumented immigrants who chose to commit crime. "[I]t is ordinarily substantially more difficult to establish" standing based on the actions of third parties. *Lujan*, 504 U.S. at 562 (internal quotations omitted). The Sheriff has not met *that higher burden.*

D.C. Circuit Opinion, concurrence (App. 34-35) (emphasis added). The Circuits are applying conflicting standards to the same situation.

This Court should correct a split among the circuits and correct "the consequences of our modern obsession with a myopic and constrained notion of standing," as explained by the Honorable Janice

Rogers Brown of the D.C. Circuit panel in her concurring opinion below.

Compared with the $9,293,619.96 of increased costs in MCSO's jails that Sheriff Arapio documented,

> At least one state – Texas – has satisfied the first standing requirement by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries. * * * Even a modest estimate would put the loss at "several million dollars." Dist. Ct. Op., 86 F. Supp. 3d at 617.

Texas v. USA, Appeal No. 15-40238, Opinion, (5th Cir. November 9, 2015), pages 16-17.

The Circuits are in conflict overall: A hospice had standing to challenge a regulation that would increase its liability although the regulation may have saved it money. *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 656-59 (9th Cir. 2011). *See also*, *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570-75 (6th Cir. 2005); *Ross v. Bank of Am., N.A.(USA)*, 524 F.3d 217, 222 (2d Cir. 2008).

Sports leagues had standing to challenge a New Jersey plan to license sports betting even though the supposed damage could have been outweighed by increased attendance. *NCAA v. Christie*, 730 F.3d 208, 222-23 (3d Cir. 2013).

II. Concurring Opinion by The Honorable Janice Rogers Brown, U.S. Court of Appeals, to Clarify and Modify Precedents on Standing

The writ of certiorari needs to be issued, the law clarified, and the D.C. Circuit reversed with that clarification, for the reasons forcefully presented by Judge Brown on the D.C. Circuit panel.

> Moreover, the generalized grievance theory and related principles of contemporary standing doctrine effectively insulate immense swaths of executive action from legal challenge. Our relentless emphasis on the need to show a concrete injury caused by executive action and redressable by judicial relief makes it virtually impossible to challenge many decisions made in the modern regulatory state.

Concurring Opinion, D.C. Circuit. (App. 33-34). Starting on App. 28, Judge Brown explained (emphasis added):

> BROWN, *Circuit Judge*, concurring: Today we hold that the elected Sheriff of the nation's fourth largest county, located mere miles from our border with Mexico, cannot challenge the federal government's deliberate nonenforcement of the immigration laws. I agree with my colleagues that the state of the law on standing "requires, or at least counsels, the result here reached." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 798 (D.C. Cir. 1987). But, recognizing that Sheriff

> Arpaio's claims reflect the widespread perception that the administration's prosecutorial discretion meme is constitutionally problematic, I write separately to emphasize the narrowness of today's ruling, and note the consequences of our modern obsession with a myopic and constrained notion of standing.

Judge Brown summarizes some of the factual bases for how standing is factually established for Sheriff Arpaio at App. 30:

> Sheriff Arpaio's problems with the challenged policies run deeper than a difference in philosophy or politics. He claims DACA and DAPA impose clear and "severe[ ]" harms on his ability to protect the people of Maricopa County. Compl. ¶ 27. In particular, he argues that deferring removal proceedings and providing work authorizations to undocumented immigrants "harmed. . . . his office's finances, workload, and interfere[d] with the conduct of his duties. . . ." *Id.* He attributes an influx of undocumented immigrants to the Department's non-enforcement policies, and claims it corresponded with a rise in crime. Increased crime means increased costs for the Sheriff, who must run the jails and provide deputies to police the streets.

Judge Brown then articulates how the current state of the law on standing is clearly a problem at App. 30-31:

> Some may find today's outcome perplexing. Certainly Sheriff Arpaio cannot be blamed

for believing he had standing. The relevant judicial guide-posts do not exactly "define[ ]" standing "with complete consistency." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). And some cases suggest standing can be satisfied based on fairly ephemeral injuries and attenuated theories of causation. *See e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516-26 (2007).

Indeed, at first blush, Sheriff Arpaio's allegations appear somewhat similar to those the Supreme Court found sufficient to secure standing in *Massachusetts v. EPA*. That case revolved around EPA's decision not to regulate green-house gas emissions in new vehicles. Then, as now, standing consisted of a tripartite test. Plaintiffs must show they were or will be concretely injured by an action fairly traceable to the defendant and redressable by the court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998). The rules are somewhat relaxed for plaintiffs who, like Massachusetts and Sheriff Arpaio, seek to vindicate a procedural right, including "the right to challenge agency action unlawfully withheld." *Massachusetts*, 549 U.S. at 517.

Procedural rights claims can proceed "without meeting all the normal standards for redressability and immediacy." *Id.* at 517-18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Massachusetts received a further benefit. As a sovereign state,

it was "entitled to special solicitude in [the] standing analysis." *Id.* at 520.

Massachusetts, like Sheriff Arpaio, believed the federal government had "abdicated its [statutory] responsibility" to protect the State's interests. *Id.* at 505. The State, like the Sheriff, asked the Court to construe the meaning of a federal statute, "a question eminently suitable to resolution in federal court." *Id.* at 516. And Congress had authorized challenges to the EPA, *id.*, just as Congress has generally authorized the type of challenge Sheriff Arpaio now pursues, *see* 5 U.S.C. § 704; *see also Texas v. United States*, 787 F.3d 733, 751-52 (5th Cir. 2015).

The Supreme Court ultimately found that Massachusetts' injury lay in the potential loss of coastal land caused by the threat of rising seas. The Court said "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts." *Massachusetts*, 549 U.S. at 526.

Scientific evidence suggested a causal relationship between greenhouse gases and atmospheric warming. The Court brushed aside EPA's argument that Massachusetts had only a generalized grievance widely shared by others. The global nature of global warming did not negate the state's claimed concrete injury. *See id.* at 522-23.

Just as EPA's inaction harmed Massachusetts' shores, inaction on immigration is said to harm Sheriff Arpaio's streets. Immigration,

> like global warming, affects the entire nation. But that does not mean no one has standing to challenge the concrete effects of the federal government's immigration policies. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.' *FEC v. Akins*, 524 U.S. 11, 24 (1998)."
>
> Based on these facial similarities, some-one in Sheriff Arpaio's shoes may well believe he has standing. After all, *Massachusetts* sets out a "loosened standard" under which "*any* contribution of *any* size to a cognizable injury" seems to be "sufficient for causation, and *any* step, no matter how small," seems to be "sufficient to provide the necessary redress." Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1078 (2009). Under that elastic framework, the *risk* of harm, however tenuously linked to the challenged government action, appears to suffice to show standing.

For the reasons stated by Judge Brown, this Court should reverse the lower courts' decision and acknowledge that *Massachusetts v. EPA* not only controls this case but over-ruled prior precedents on standing.

III. Importance of Reaching the Merits to Preserve the Constitutional Republic

Judge Brown of the D.C. Circuit explained the importance of reaching the merits and the issues at stake in her concurrence (App. 39): "But hidden within these factors, and the surrounding case law, is

a surprising hostility to suits seeking to redress executive branch wrongdoing."

In her concurrence (App. 41-42), Judge Brown explains:

> Consider this case. The Sheriff's claims on the merits may well raise a constitutionally cogent point. Despite the dazzling spin DHS puts on the DACA and DAPA programs, a categorical suspension of existing law – distinct from the case-by-case deferrals or targeted humanitarian exemptions cited as past precedent – complete with a broad-based work authorization, arguably crosses the line between implementing the law and making it. *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 759-61 (2014). * * * Neither the aggressive entrepreneurship of the executive nor the pusillanimity of the legislative branch can alter the fundamental constraints of the Constitution. *See e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 850-56 (2013); Price, *supra*, at 759-61. * * *
>
> Separation of powers concerns surely cannot justify every application of the generalized grievance doctrine. By prohibiting abstract, general claims, the doctrine aims to ensure that the President's "most important constitutional duty, to 'take Care that the Laws be faithfully executed'" is not transferred to the

> courts. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).
>
> But what if the Chief Executive decides *not* to faithfully execute the laws? In that case our doctrine falls silent. * * *

Meanwhile, the D.C. Circuit majority openly rejects the constitutional role of federal courts and argued for courts to evade their duties (App. 27-28):

> We have observed that the "complexity and interdependence of our society and governmental policies" enable prospective plaintiffs to allege theories of causation that, though severely attenuated, carry with them "some plausibility." *NW. Airlines*, 795 F.2d at 203 n.2. "*If such allegations were routinely accepted as sufficient to confer standing, courts would be thrust into a far larger role of judging governmental policies than is presently the case*, or than seems desirable." *Id. We must rigorously review allegations by plaintiffs who seek to invoke the subject matter jurisdiction of the federal courts* based on the projected response of independent third parties to a challenged government action. In this case, Sheriff Arpaio's standing allegations fall short. For these reasons, we hold Sheriff Arpaio lacks standing to challenge DACA and DAPA.

So the D.C. Circuit majority declared *a results-oriented analysis* aimed at *avoiding* consequential litigation about federal law and the Constitution. Their analysis is what is *expedient*, not what is right.

Judge Brown addressed this serious concern in her concurrence (App. 45):

> No doubt the modern approach to standing serves to reduce our caseload. But there are much more important matters at stake. * * * Our approach to standing, I fear, too often stifles constitutional challenges, ultimately elevating the courts' convenience over constitutional efficacy and the needs of our citizenry.

She further explained (App. 44):

> More broadly, our obsession with standing "present[s] courts with an opportunity to avoid the vindication of unpopular rights, or even worse to disguise decision on the merits in the opaque standing terminology of injury, causation, remedial benefit, and separation of powers." 13A Charles Alan Right, et al., Federal Practice and Procedure § 3531.3 (3d ed. 1998).

IV. Merits of the Cases Should Also be Decided

It is axiomatic that if Congress left a gap in a statute, the implementing agency may fill in that gap. But Respondents do not point to anything ambiguous or missing in the INA. They just do not like the statute.

The D.C. Circuit explained the merits of the case being challenged in its Opinion, page 13 (App. 16):

> Under the challenged policies, the Secretary of Homeland Security will refrain from removing DACA and DAPA beneficiaries. Foreign citizens outside of the United States and ineligible for either DACA or DAPA will learn of those policies. Those people will either mistakenly believe that they are eligible to benefit from them, or conjecture that the policies make it likely that the federal government will adopt a future, similar policy of deferred action for which they would be eligible. Relying on such surmise, those individuals will decide to enter the United States unlawfully, stimulated by the hope of obtaining relief from deportation.

Respondents have been commanded by statutes enacted by Congress under the INA, 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.

The D.C. Circuit further set forth the issues on page 5 (App. 6):

> The nation's immigration laws provide for the removal from the United States of people who were "inadmissible at the time of entry," or who commit certain offenses or meet other criteria for removal. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). The Secretary of Homeland Security is "charged with the administration and enforcement" of the immigration laws. 8 U.S.C. § 1103(a)(1). With enforcement responsibility comes the latitude that all executive branch agencies

> enjoy to exercise enforcement discretion – discretion necessitated by the practical fact that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

However, that recitation is false, because statutes passed by Congress are the exclusive authority. 8 U.S.C. § 1229a(a)(3) provides (emphasis added):

> 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 Constitution invests the power to regulate immigration ***exclusively*** in Congress, ***not*** in the executive branch: U.S. Const., Art. I, § 8, cl. 4. Congressional enactments – not Presidential policy – are the supreme law of the land. U.S. Const., Art. VI, cl. 4. The President must "take Care that the Laws be faithfully executed. . . ." U.S. Const., Art. II, § 3. He may not repeal statutes. *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. ___, 134 S. Ct. 2427, 2446 (2014).

To provide legal justification for Respondents' deferred action programs, the U.S. Department of Justice released a 33 page legal Memorandum [3]

[3] *"The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the*

(Continued on following page)

presenting the legal analysis and advice of the Office of Legal Counsel (OLC). (Cir.Ct.JA 105-137). On page 6, the OLC Memorandum admits on behalf of Respondents:

> 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 admits on behalf of Respondents that:

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

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United States and to Defer Removal of Others" November 19, 2014. (Cir.Ct.JA 66).

> 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.*. . . . 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 admits on behalf of Respondents 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).

On the merits, also, the Fifth Circuit found in its November 9, 2015 Opinion that the Respondents' regulatory amnesty programs are illegal under the Administrative Procedures Act and/or unconstitutional and likely to be struck down at trial.

Whereas Judge Hanen issued his injunction in the lower court in the Southern District of Texas solely on the basis of the Respondent's failure to comply with the procedural requirements of the APA (notice and comment), the Fifth Circuit also found that the Respondents' programs violate the APA on substantive grounds:

> DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly." But assuming *arguendo* that *Chevron* applies and that Congress has not directly addressed the precise question at hand, *we would still strike down DAPA as an unreasonable interpretation that is "manifestly contrary" to the INA. See Mayo Found.*, 562 U.S. at 53.

Texas v. USA, Appeal No. 15-40238, Opinion (5th Cir. November 9, 2015), pages 59-60 (emphasis added).

Thus, the Fifth Circuit found that Respondents' programs violate the procedural requirements of the APA:

> In summary, the states have established a substantial likelihood of success on the merits of their procedural claim.

Id. at 54.

> The government advances the notion that DAPA is exempt from notice and comment as a policy statement. * * *

> Although the DAPA Memo facially purports to confer discretion, the district court determined that "[n]othing about DAPA '*genuinely* leaves the agency and its [employees] free to exercise discretion,'" a factual finding that we review for clear error.

Id. at 43-44.

> Reviewing for clear error, we conclude that the states have established a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion.

Id. at 50.

> "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." DAPA undoubtedly meets that test – conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes.

Id. at 50-51.

President Obama argues that his executive action was necessary because of Congress's failure to pass legislation, acceptable to him. Compl. ¶¶ 23-24. (Cir.Ct.JA 7-60). 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).

The Respondents' deferred action programs threaten the very existence of our constitutional republic, the rule of law, and constitutional government. Respondents are refusing to "take Care that the Laws be faithfully executed." Article II, Section 3 of the Constitution.

When the courts no longer fulfill their role of safeguarding the constitutional system, peaceful avenues are closed. The Honorable John Roberts, Chief Justice, warned in *Riley v. California*, 573 U.S. 1, 27-28 (2014) that failing to respect the rule of law led to revolution from which a new country was born.

In fact, Respondents have consistently sought to evade the injunction issued by Judge Hanen in *Texas v. USA*, on February 16, 2015, Plans by DHS to grant amnesty to illegal aliens in a form that technically side-step's Judge Hanen's injunction were leaked. It is clear that these Respondents have no intention of following either the Constitution or judicial decisions.[4]

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[4] Ian M. Smith, "Leaked DHS memo shows Obama might circumvent DAPA injunction," November 2, 2015, accessible at

(Continued on following page)

V. Court Must Apply 'Facial Attack' Standard, Taking All Factual Allegations as True Along with Reasonable Inferences

The D.C. Circuit flagrantly disregarded the analysis required, which the Fifth Circuit followed: "The court's analysis also depends on whether the challenging party has made a 'facial' or 'factual' attack on jurisdiction." *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

In considering the issue of standing, a court must presume all factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

The factual allegations of Petitioner's Complaint must be analyzed under a "facial attack" analysis because the factual allegations are uncontroverted. Respondents offered no evidence whatsoever to meet the factual allegations, but have relied only upon their unfounded, willful disbelief.

The Fifth Circuit understood – while the D.C. Circuit openly defied in this particular case – that "We accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor, as we do in reviewing dismissals for failure to state a claim." *Macharia*

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http://thehill.com/blogs/congress-blog/the-administration/258689-leaked-dhs-memo-shows-obama-might-circumvent-dapa.

v. U.S., 334 F.3d 61, 67-68, 357 U.S. App. D.C. 223 (D.C. Cir. 2003). *Accord, Gould Electronics Inc. v. U.S.*, 220 F.3d 169, 176-178 (3d Cir. 2000); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

Where Petitioner's allegations and supporting, uncontroverted sworn affidavits stand unrebutted, uncontroverted allegations must prevail as true:

> We note that the district court's resolution of this award is not affected by our instruction to the court on remand to apply the correct burden of proof as to class membership, since the complete absence of evidence supporting Brown's position entitled the unions to prevail even under the more stringent standard.

Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 335 U.S. App. D.C. 179 (D.C. Cir. 1999).

VI. "I Don't Believe You" is Not a Valid Response to Standing

Contrary to the conflicting Fifth Circuit's Opinion in *Texas v. USA*, November 9, 2015, sophistry of counsel is not evidence and must be diligently ignored. Yet the courts below substituted their own opinions in place of the allegations. The District Court acknowledged:

> 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 policies of offering amnesty." Compl. ¶ 27.

Mem.Op. at 19 (Cir.Ct.JA 651). And:

> 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.

Id.

Added costs of $9,293,619.96 during 2014 from the 2012 DACA program are sufficient for standing.

> 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.

Id.

The Petitioner alleged, documented, and swore in his declaration that 31.2% of the illegal aliens in his jails are repeat offenders, who have had prior bookings with immigration enforcement detainers placed on them. At one point, two illegal aliens had been booked into Arpaio's jail 19 times each, one of whom had 11 prior detainers from Immigration and Customs Enforcement (ICE). (Cir.Ct.JA 122, 494).

Yet the District Court chose to disregard and disbelieve those very allegations as to both the 2012 and 2014 programs. The D.C. Circuit affirmed.

VII. Precedents on Standing Were Modified by U.S. Supreme Court's Recent Decision *Massachusetts v. EPA*, 549 U.S. 497 (2007)

This Court has clearly rendered prior, modern precedents on standing untenable and unsustainable in light of *Massachusetts v. EPA*. This Court logically must declare inconsistent precedents bad law and clarify and cut back the unbridled growth of the standing concept.

A) Intangible Harm from Non-Enforcement

Here, the Petitioner clearly has standing because the Respondents' illegal amnesty programs are a refusal to enforce current law. As this Court found in *Massachusetts*, 549 U.S. at 509-14:

> EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent," *Lujan*, 504 U.S., at 560, and there is a "substantial likelihood that the judicial relief requested" will prompt EPA to take steps to reduce that risk, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79. Pp. 12-17.

B) Reasonable Prediction of Future Harm from Empirical Evidence and Experience Creates Standing

A probability of future harm from regulations or laws that have not yet gone into effect is routinely sufficient to establish standing. Where, in the past, an event or regulated activity increased costs, caused disruption, or imposed other burdens, one may reasonably project that the same experience will once again cause similar or increased harm.

Here, Sheriff Arpaio documented $9,293,619.96 in increased costs during 2014 from jailing illegal aliens after the Respondents' 2012 DACA amnesty. It is a reasonable projection sufficient for standing that the Respondents' November 2014 amnesty will produce a similar, increased injury.

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, predicting that third-party actors would switch to less-expensive, hazardous-waste-derived fuels.

In *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), SCRAP's members' use of forests, rivers, streams, etc., could theoretically be adversely affected by the Interstate Commerce Commission's ("ICC") modified rate structure for freight. SCRAP's members alleged increased air pollution. Those predictions from probabilities were sufficient to confer standing. Moreover, the change in ICC's rate structure was not the exclusive factor in 1973 causing air pollution.

Similarly, in *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009), the D.C. Circuit found standing even though it was unknowable if – and extraordinarily improbable that – those particular plaintiffs would ever be stopped again in random traffic stops on D.C. streets challenged as lacking in probable cause. It was unknown if the suspended traffic stops would resume. It could not be known if the individual plaintiffs would ever be stopped again. Yet that slim possibility conferred standing.

C) Offsetting Factors are Not Permitted in Standing Analysis

As touched on in Section I, *supra*, concerning the split among the circuits, the District Court and D.C. Circuit below questioned Petitioner's standing because the harm experienced might be offset, mitigated, or cancelled out by other factors, discussed in more detail here:

> 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 (Cir.Ct.JA 654) (emphases added).

The sophistry of government counsel suggests that the Respondents' amnesty programs might – by some mechanism never explained – reduce the crimes committed by illegal aliens. But there are no declarations in the record nor any empirical evidence to

support the idea that flooding the country with illegal aliens, often with forged papers, who broke our nation's laws to get and/or stay here, will result in Immigration and Customs Enforcement ("ICE") deporting more illegal aliens with criminal records that ICE claims it cannot find anyway.

On the contrary, Petitioner's sworn evidence establishes in the record that even when ICE has illegal aliens with criminal records in ICE custody,[5] ICE does not deport them. As a result, the only evidence in the record demonstrates that the Respondents have absolutely no interest in or competence at deporting illegal aliens who commit crimes in this country. Nothing in the record supports Respondent's argument by counsel that the programs might reduce crime.

Even if a court believes that the alleged harm might be reduced by offsetting factors, standing clearly exists. The extent of any offset is a question of fact to be explored in discovery and at trial.

> Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that some particular aspect of the relationship is unlawful and has caused *injury*.

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[5] Because Sheriff Arpaio handed them to ICE.

13A Charles Alan Wright, *et al.*, Federal Practice and Procedure § 3531.4 (3d ed. 2015); *Markva v. Haveman*, 317 F.3d 547, 557-558 (6th Cir. 2003); *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013).

For example, this Court found that laws like SB1070 passed by the State of Arizona might potentially hinder governmental operations of the federal Government in *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012),[6] in exactly the same way that here the operations of Sheriff Arpaio's MCSO are interfered with by the Respondents' amnesty programs.

In *Arizona*, under SB1070, local law enforcement was doing ICE's work for them, handing over illegal aliens to ICE. Yet, this Court did not invalidate standing on the grounds that Arizona might actually save ICE money overall by apprehending illegal aliens for ICE to deport.

An inventive judicial speculation that offsetting factors might diminish or cancel out actual harm is not a relevant part of any standing analysis. If it were, clearly there was no standing in *Arizona* where the law enforcement of that State would be doing ICE's work for it, thus saving DHS money.

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[6] Standing detailed in 641 F.3d 339 (9th Cir. 2011).

D) Contribution to Harm Establishes Standing

Of course, it is sufficient for standing that a regulation would ***increase or add to*** a harm, even if alongside other contributing causes. Yet the courts below sought to impose an all-or-nothing light switch.

As noted above, in *Natural Res. Def. Council v. Envtl. Prot. Agency* (D.C. Cir. Case Nos. 98-1379, 98-1429, 98-1431, June 27, 2014), the NRDC claimed that a new regulation might allow increased air pollution from power plants changing fuels. Yet only a contribution to air pollution is sufficient for standing. There are many other sources of air pollution. The regulation in question need not be the only cause for standing. A change in the regulation increasing the harm is sufficient for standing.

E) Redressability by Court Action and Effect of Third Party Actors

In *Massachusetts v. EPA*, the plaintiffs did not sue those who emit carbon dioxide. The EPA did not deprive Massachusetts of coastline. The claim establishing standing was that EPA's regulations failed to prohibit third parties from emitting too much carbon dioxide. The EPA's failure to engage in rule-making supposedly allowed third parties and private-sector actors to emit excessive carbon dioxide. Clearly, this is sufficient for standing.

But this Court never speculated about whether a regulation of carbon dioxide emissions might be

disobeyed by the third parties or whether the EPA would defy this Court's orders. Here, the "deferred action" programs are elaborate fig leaves, because fig leaves are needed to legitimize a violation of current law. An order of this Court would be obeyed.

If, instead of granting amnesty, Respondents are ordered to enforce current law, then millions of illegal aliens will be deported. By contrast, under Respondents' amnesty programs, those millions will not be deported and some will commit crimes in Arizona.

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.

Here, illegal aliens who are completely absent from U.S. territory cannot impose costs upon Sheriff Arpaio's MCSO. Current law mandates removal of illegal aliens. 8 U.S.C. §§ 1227, 1229a, 1231. Respondents' "deferred action" programs illegally and unconstitutionally depart from current law. Petitioner would restore current immigration law.

Contrary to the conflicting Fifth Circuit Opinion, *Texas v. USA*, November 9, 2015, the courts below speculated about the Respondents' abilities to enforce current law in light of 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 (Cir.Ct.JA 660). However, as Petitioner's 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.

Congress routinely appropriates more money for immigration enforcement than requested (Cir.Ct.JA 151), and Respondents have never asked for more resources (in relevant periods). *Id.* Respondents may not justify rewriting laws due to a lack of resources they never requested.

Yet this Court did not speculate for redressability in *Massachusetts v. EPA*, about whether EPA had any appropriated funds available to regulate carbon dioxide or speculate whether Congress would appropriate the funds needed. This Court assumed that if it issued an order, the EPA would find the funding to comply.

F) Speculation About Alternate Causes of Harm is Not Permitted

This Court credits plausible factual allegations of harm by a defendant as sufficient, regardless of competing theories.

In *Massachusetts v. EPA*, New England coastline could be lost either by the known fact of that tectonic plate sinking [7] or by sea levels rising. But this Court did not struggle over whether the cause of harm might be the coastline sinking or the planet warming. Under competing theories, global warming could lower the oceans as evaporating water precipitates at the frozen poles.[8]

A plaintiff's factual allegations are sufficient that defendants are causing him harm. This Court does not evade standing by speculating about potential alternatives. Yet, contrary to the conflicting Fifth Circuit Opinions, *Texas v. U.S.A.*, of May 26, 2015 and November 9, 2015, the courts below struck down allegations of one theory of harm.

G) Petitioner Has Standing Although the Injury Suffered is Shared by Others

In the wake of *Massachusetts v. EPA*, it is no longer possible to claim that one plaintiff does not have standing to address widespread harm: "That these changes are widely shared does not minimize Massachusetts' interest in the outcome of this litigation.

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[7] Gary Borg, "East Coast Is Sinking, Albeit Slowly," *Chicago Tribune*, January 25, 1996.

[8] "*[R]educing global sea-level rise by 0.23 mm* a^{-1}.", Zwally, "Mass gains of the Antarctic Ice Sheet Exceed Losses," *Journal of Glaciology*, October 30, 2015.

See Federal Election Comm'n v. Akins, 524 U.S. 11, 24." *Massachusetts*, 549 U.S. at 515.

If carbon dioxide from human activity is causing the planet to warm, all human beings will experience it. Yet as Judge Brown explained:

> The [Supreme] Court brushed aside EPA's argument that Massachusetts had only a generalized grievance widely shared by others. The global nature of global warming did not negate the state's claimed concrete injury. *See id.* at 522-23.

D.C. Circuit Opinion, pages 26-27 (App. 33).

Massachusetts v. EPA clearly made prior precedents bad law that had asserted that standing is unavailable for "an injury the plaintiff suffers in some indefinite way in common with people generally . . . " *Mass. v. Mellon*, 262 U.S. 447, 488 (1923).

H) Standing is Not Limited by Magnitude

This Court has refused to limit standing to only those "significantly" affected. *An "identifiable trifle" is enough. United States v. SCRAP*, 412 U.S. 669, 412 U.S. at 689 n. 14, 93 S. Ct. at 2417 n. 14 *(*1973), quoting Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613 (1968).

VIII. Factual Allegations Establish Standing

In this case, contrary to the conflicting Fifth Circuit's decisions, the District Court and D.C. Circuit erroneously ruled insufficient as injury for standing that the Petitioner's $9,293,619.96 in increased costs to MCSO from illegal aliens arrested for committing Arizona State law crimes housed in his jails, including significant recidivism, the diversion of law enforcement resources, increased workload, and increased risks of dangerous calls from more reports of crime.

Initially, the D.C. Circuit erred in misapprehending Petitioner's allegations. Sheriff Arpaio's first sworn Declaration was incorporated as Exhibit G to the Complaint. (Cir.Ct.JA 122). Yet the D.C. Circuit misunderstood this:

> He argues that we may extrapolate from that experience that the revised DACA and new DAPA policies will cause increased unlawful immigration in the future. Even if we could credit an assertion in a brief as if it were alleged in a pleading, *see Runnemede Owners, Inc. v. Crest Mortg. Corp.*, 861 F.2d 1053, 1057 (7th Cir. 1988) ("[A]ssertions contained only in the briefs may not be used to expand the allegations of the complaint."), * * *

D.C. Court Opinion, pages 15-16 (emphases added). (App. 20). The D.C. Circuit failed to notice that the Declaration was attached to the Complaint.

The Petitioner's allegations, however, are clearly sufficient for standing. In his uncontroverted sworn declaration attached to the Complaint, (Cir.Ct.JA 122) Petitioner avers (emphases added):

> 18) I found out that over 4,000 illegal aliens were in our jails over the last 8 months [during 2014], 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.
>
> 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.*
>
> 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.
>
> 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.

Petitioner alleged in his Complaint:

> ¶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. (emphases added)

IX. Standing is a Judicial Invention, and this Court Must Clarify it and Restrain Abuses of the Doctrine

The judicial invention of standing must never become an excuse for the courts to evade their responsibilities under Article III of the Constitution to enforce federal law and uphold the Constitution.

Standing is not mentioned in the Constitution nor in any legislation governing the federal courts. The Constitution authorizes federal courts to decide "***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." Article III, Section 2, of the Constitution (emphasis added). Article III, Section 2 refers to "controversies" only for non-federal diversity cases.

As Justice Brown explained in her Concurring Opinion below (App. 37-38).

> Academic accounts suggest that, from the time of the founding until the early twentieth century, "there was no separate standing doctrine at all." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992); *accord* Joseph Vining, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55 (1978) ("The word 's*tanding*' . . . does not appear to have been commonly used until the middle of . . . [the twentieth] century."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988) ("[N]o general doctrine of standing existed.") (emphasis added).

As this Court explained in *Massachusetts*, 549 U.S. at 512-513:

> *At bottom, "the gist of the question of standing" is whether petitioners have "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." Baker v. Carr*, 369 U.S. 186, 204 (1962).

Similarly, federal courts are courts of limited jurisdiction only ***in deference to state courts*** under the Tenth Amendment to the Constitution. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

CONCLUSION

The petition for a writ of certiorari should be granted and this Court should correct confusion and conflict among the circuits on standing and fulfill its sworn duty to protect and defend the Constitution against lawless disregard in this case by the executive branch.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 4, 2015 Decided August 14, 2015

No. 14-5325

JOSEPH M. ARPAIO,
APPELLANT

v.

BARACK OBAMA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01966)

Larry Klayman argued the cause and filed the briefs for appellant.

Beth S. Brinkmann, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney at the time the brief was filed, and *Scott R. McIntosh*, *Jeffrey Clair*, and *William E. Havemann*, Attorneys.

Before: BROWN, SRINIVASAN and PILLARD, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* PILLARD.

Concurring opinion filed by *Circuit Judge* BROWN.

PILLARD, *Circuit Judge*: The Secretary of the Department of Homeland Security, facing what he perceives to be enormous practical obstacles to removing from the United States the eleven million people unlawfully present here, has sought to set enforcement priorities. He accordingly directed relevant agencies temporarily to defer low-priority removals of non-dangerous individuals so that the agencies can focus their resources on removing dangerous criminals and strengthening security at the border. People whose removal has been deferred are generally eligible to apply for authorization to work, and to reside in the United States for up to three years.

Joseph Arpaio, the Sheriff of Maricopa County, Arizona, sued to enjoin the Secretary's deferred action policies. He asserts that they are unconstitutional, arbitrary and capricious, and invalid under the Administrative Procedure Act as, in effect, regulations that have been promulgated without the requisite opportunity for public notice and comment. We cannot resolve those claims unless Sheriff Arpaio has Article III standing to raise them. To have standing, a plaintiff must have suffered or be about to suffer a concrete injury fairly traceable to the policies he challenges and redressable by the relief he seeks.

Sheriff Arpaio's standing arguments rest on the premise that more people causing more crimes harm

him because, as Sheriff, he will be forced to spend more money policing the county and running its jails. He alleges two ways in which he believes that the population of undocumented aliens committing crimes will increase as a result of deferred action. First, he contends that deferred action will act as a magnet drawing more undocumented aliens than would otherwise come across the Mexican border into Maricopa County, where they will commit crimes. Second, he alleges that the challenged policies will decrease total deportations by deferring action against approximately six million undocumented aliens, so that more individuals will remain unlawfully in Maricopa County and commit crimes than would be the case without deferred action.

We conclude that Sheriff Arpaio has failed to allege an injury that is both fairly traceable to the deferred action policies and redressable by enjoining them, as our standing precedents require. His allegations that the policies will cause more crime in Maricopa County are unduly speculative. Projected increases he anticipates in the county's policing burden and jail population rest on chains of supposition and contradict acknowledged realities.

Sheriff Arpaio recognizes that the deferred action policies he challenges apply only to people who are already present in the United States and who either arrived as children or are parents of children who are United States citizens or lawful permanent residents. His magnet theory nonetheless assumes that the policies will cause non-citizens outside of the United

States to cross the border in the mistaken hope of benefitting from the current policies. Alternatively, Sheriff Arpaio posits that foreign citizens will view the current policies as a sign of things to come, and will therefore cross the border in the hope of benefitting from hypothesized future, similar policies that are not the subject of Sheriff Arpaio's challenge. Our precedents establish that standing based on third-party conduct – such as the anticipated reactions of undocumented aliens abroad – is significantly harder to show than standing based on harm imposed by one's litigation adversary. That difficulty is compounded here because the third-party conduct the complaint forecasts depends on large numbers of people having the same unlikely experiences and behaviors: For the harms Sheriff Arpaio alleges to occur and be redressable by the injunction he seeks, aliens abroad would have to learn about the deferred action policies, mistakenly think that they were eligible to benefit from them, or harbor a hope of becoming eligible for future, similar policies as yet unannounced, actually leave their homes and enter the United States illegally based on that false assumption, commit crime in Maricopa County, become involved in – and costly to – the criminal justice system there, and be less likely under deferred action to be removed from the United States than they would have been without those policies in place.

Sheriff Arpaio's second standing theory is no less tenuous. Sheriff Arpaio recognizes that only non-dangerous immigrants are eligible for deferred action,

but he nonetheless contends that those deferrals will mean that crime by undocumented aliens will be higher than it would be without them. This second theory rests on the mistaken premise that the challenged policies decrease the number of removals below what would have been accomplished had the policies not been adopted. Accurately read, however, the policies seek not to decrease the total number of removals but to prioritize removal of individuals who pose a threat to public safety over removal of those who do not. The policy is designed to make the Department of Homeland Security's expenditure of resources more efficient and effective. Even if it were plausibly alleged (and it is not) that the challenged policies would mean more undocumented aliens remain in the county, the reduced-removals theory also depends on unsupported speculation that these policies, expressly confined to individuals who do not pose threats to public safety, will increase the number of crimes in Maricopa County above what could reasonably be anticipated in the absence of any such policies.

Because Sheriff Arpaio's allegations of causation and redressability rest on speculation beyond that permitted by our standing decisions, we affirm the district court's dismissal of the complaint for want of Article III standing.

I.

A.

The nation's immigration laws provide for the removal from the United States of people who were "inadmissible at the time of entry," or who commit certain offenses or meet other criteria for removal. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). The Secretary of Homeland Security is "charged with the administration and enforcement" of the immigration laws. 8 U.S.C. § 1103(a)(1). With enforcement responsibility comes the latitude that all executive branch agencies enjoy to exercise enforcement discretion – discretion necessitated by the practical fact that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Supreme Court has particularly recognized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. Whether to initiate removal proceedings and whether to grant relief from deportation are among the discretionary decisions the immigration laws assign to the executive. *Id.*

In making immigration enforcement decisions, the executive considers a variety of factors such as the danger posed to the United States of an individual's unlawful presence, the impact of removal on the nation's international relations, and the "human concerns" of whether the individual "has children

born in the United States, long ties to the community, or a record of distinguished military service." *Id.* More generally, the Supreme Court has recognized that all agencies have discretion to prioritize in light of the Secretary's and, ultimately, the President's assessments "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831.

One form of discretion the Secretary of Homeland Security exercises is "deferred action," which entails temporarily postponing the removal of individuals unlawfully present in the United States. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). Immigration authorities have made decisions to defer action or take similar measures since the early 1960s. *See The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present* ("OLC Op."), 38 O.L.C. Op. ___, pp. 7-8, 12-13 (Nov. 19, 2014). For example, in 1990, the Immigration and Naturalization Service implemented a "Family Fairness" program that deferred removal of and provided work authorizations to approximately 1.5 million individuals whose spouses or parents had been granted legal status in the United States under the Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. OLC Op. at 14. Approximately forty percent of

individuals unlawfully present in the United States at that time were potentially eligible for the program. *Id.* at 31.

Today, the Department of Homeland Security estimates that there are approximately 11.3 million people in the United States who may be subject to removal under the immigration laws. *See id.* at 1. Of those, the Department estimates that it has the resources to remove fewer than 400,000 each year. *Id.* In an effort to allocate the Department's limited resources, Secretary Janet Napolitano in June 2012 directed relevant agencies "to ensure that our enforcement resources are not expended on . . . low priority cases but are instead appropriately focused on people who meet our enforcement priorities." Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1 (June 15, 2012), J.A. 101. In what became known as Deferred Action for Childhood Arrivals, or DACA, the Secretary outlined a policy to defer removal proceedings for two years, subject to renewal, of individuals who came to the United States as children, met certain eligibility criteria, and cleared a background check. *Id.* at 1-2. Those eligible for DACA could identify themselves to the Department for individualized review and, if eligible, receive temporary deferral and authorization, on a case-by-case basis, to work in the United States. *Id.* at 3. The memorandum emphasizes, however, that deferred action remains discretionary and reversible,

and "confers no substantive right, immigration status or pathway to citizenship." *Id.*

In November 2014, Jeh Johnson, Napolitano's successor as Secretary of Homeland Security, revised the DACA program by extending it to more childhood arrivals and extending to three years the deferred action and work authorization periods. Memorandum from Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents* 1 (Nov. 20, 2014), J.A. 145. In addition, the Secretary outlined a second deferred action policy for the parents of United States citizens and lawful permanent residents, which has become known as Deferred Action for Parents of Americans, or DAPA. *Id.* at 4-5. Parents seeking to take part in DAPA must meet similar eligibility requirements as DACA beneficiaries, and they, too, must clear a background check. *Id.* Neither DACA nor DAPA applies to individuals who arrived in the United States after January 1, 2010. *Id.* at 4.

The Secretary explained that DACA and DAPA apply to individuals who "are extremely unlikely to be deported given [the] Department's limited enforcement resources – which must continue to be focused on those who represent threats to national security, public safety, and border security." *Id.* at 3. In a separate memorandum issued on the same day, the Secretary revised the Department's enforcement priorities. Memorandum from Jeh Charles Johnson,

Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 1 (Nov. 20, 2014), J.A. 154. One of the eligibility requirements of DACA and DAPA is that individuals must not fall under any of three enforcement priority categories. The first applies to "threats to national security, border security, and public safety," i.e., those engaged in or suspected of terrorism or espionage, apprehended at the border or ports of entry attempting to enter the United States unlawfully, convicted of an offense involving participation in gangs or organized crime, or convicted of a felony or aggravated felony. *Id.* at 3. The second category applies to those convicted of three or more offenses (not including traffic- or immigration-related offenses), or of a single "significant misdemeanor," including crimes of violence, drug distribution or trafficking, driving under the influence of an impairing substance, and any other misdemeanor that resulted in more than ninety days' incarceration. *Id.* at 3-4. The third category applies to individuals who have been issued a final order of removal on or after January 1, 2014. *Id.* at 4.

DACA and DAPA therefore apply to the portion of the population that the Department considers not threatening to public safety and that has not had any involvement, or only minimal and minor involvement, with the criminal justice system. Although estimates of this kind are notoriously difficult to make, it appears that up to about six million of the 11.3 million

individuals subject to removal from the United States may be eligible either for DACA or DAPA.[1]

B.

On the same day that the President announced the revisions to DACA and the new DAPA policy, the elected Sheriff of Maricopa County, Arizona, Joseph Arpaio, sued the President and other federal officials seeking a declaration and preliminary injunction that DACA and DAPA violate the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and the non-delegation doctrine.

Maricopa County is the fourth most populous county in the nation, and the most populous by far in Arizona. It stands thirty miles from the United States' border with Mexico. Sheriff Arpaio alleges that he was "adversely affected and harmed in his office's finances, workload, and interference with the

[1] Sheriff Arpaio claims throughout his briefing, without citation, that the total number of DACA- and DAPA-eligible individuals is six million. The Department estimates that four million people may be eligible for DAPA, but acknowledges the difficulty of arriving at accurate estimates. *See* OLC Op. at 30. We have found no estimate of DACA eligibility in the record, but one court has noted that some observers expect the number of eligible individuals to reach 1.7 million, *Texas v. United States*, No. CIV. B-14-254, ___ F. Supp. 3d ___, ___, 2015 WL 648579, at *4 (S.D. Tex. Feb. 16, 2015), bringing the combined total to 5.7 million. The Sheriff's estimate thus appears reasonable.

conduct of his duties, by the failure of the executive branch to enforce existing immigration laws" through adoption of DACA in 2012. Compl. ¶ 27. He asserts that his office has been "severely affected" by increases in unlawful entries that he alleges were motivated by the President's "amnesty" policies, and he predicted further unlawful entries due to the policies announced in 2014. *Id.* In a declaration, Sheriff Arpaio avers that the increased number of unlawful arrivals in Maricopa County after DACA was first adopted in 2012 imposed costs on his office in terms of "manpower and financially" because some of those individuals who arrived without documentation ended up in the Sheriff's jails, and others committed offenses that required additional investigation on the part of the Sheriff's office. Supp'l Arpaio Decl., J.A. 656-58 ¶¶ 12, 18-20, 27.

The district court denied a preliminary injunction and dismissed the complaint for lack of subject matter jurisdiction because Sheriff Arpaio had failed to allege a cognizable injury in fact for purposes of Article III standing. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 192, 207 (D.D.C. 2014). The court held that Sheriff Arpaio presents a non-justiciable "generalized grievance," as opposed to a particularized injury. *Id.* at 202. If it recognized Sheriff Arpaio's standing to bring these claims, the court opined, it "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." *Id.* The district court also concluded

that Arpaio lacked standing because his claimed injury was "largely speculative." *Id.* at 203. The court found implausible the contention 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." *Id.* Sheriff Arpaio's theory treats as a certain and immediate effect of the challenged programs, the court held, migration decisions that are in reality "complex decision[s] with multiple factors, including factors entirely outside the United States' control, such as social, economic and political strife in a foreign country." *Id.* Sheriff Arpaio timely appealed.

II.

We review de novo the district court's dismissal for lack of standing. *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1273 (D.C. Cir. 2007). The plaintiff bears the burden of invoking the court's subject matter jurisdiction, including establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The "irreducible constitutional minimum of standing contains three elements": injury in fact, causation, and redressability. *Id.* at 560-61. Injury in fact is the "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted). The "causal connection between the injury and the conduct complained of" must be "fairly

traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* at 561 (internal quotation marks and alterations omitted). And it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted). Finally, because Sheriff Arpaio seeks prospective declaratory and injunctive relief, he must establish an ongoing or future injury that is "certainly impending"; he may not rest on past injury. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis omitted).

"[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Consequently, because the Department challenges the adequacy of Sheriff Arpaio's complaint and declarations to support his standing, we accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor, as we do in reviewing dismissals for failure to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nevertheless, "[t]hreadbare recitals of the elements of [standing], supported by mere conclusory statements, do not suffice." *Id.* We do not assume the truth of legal conclusions, *id.*, nor do we "accept inferences that are unsupported by the facts set out in the complaint," *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007). Thus,

"[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III.

The Sheriff's Office's expenditures of resources on criminal investigation, apprehension, and incarceration of criminals are indeed concrete, but Sheriff Arpaio lacks standing to challenge DACA and DAPA because any effects of the challenged policies on the county's crime rate are unduly speculative.

A.

Sheriff Arpaio's standing theory relies on a predicted chain of events, as follows: Under the challenged policies, the Secretary of Homeland Security will refrain from removing DACA and DAPA beneficiaries. Foreign citizens outside of the United States and ineligible for either DACA or DAPA will learn of those policies. Those people will either mistakenly believe that they are eligible to benefit from them, or conjecture that the policies make it likely that the federal government will adopt a future, similar policy of deferred action for which they would be eligible. Relying on such surmise, those individuals will decide to enter the United States unlawfully, stimulated by the hope of obtaining relief from deportation. Some of those new arrivals will settle in Maricopa County.

And some subset of those, contrary to their own plans to benefit from anticipated deferred action or removal opportunities restricted to non-criminal aliens, will commit crimes. The portion of those who are investigated, arrested, or jailed by the Sheriff's Office will cause an increased expenditure of resources. *See* Supp'l Arpaio Decl. ¶ 18. It is that predicted expenditure of resources that Sheriff Arpaio seeks to redress through this suit.

Any injury Sheriff Arpaio suffers from the financial burdens imposed by new arrivals would not be fairly traceable to DACA or DAPA. Neither DACA nor DAPA applies to people who entered the United States after January 1, 2010, and thus plainly neither applies to entrants arriving now or in the future. Sheriff Arpaio argues that foreign citizens will see DACA and DAPA as harbingers of the federal government's future immigration policies, and so be encouraged to enter the United States unlawfully. Even if the causal links in that attenuated chain were adequately alleged, the decisions of such individuals to enter the United States unlawfully lack any legitimate causal connection to the challenged policies. Just as the law does not impose liability for unreasonable reliance on a promise, *see* Restatement (Second) of Contracts § 90 (1981), it does not confer standing to complain of harms by third parties the plaintiff expects will act in unreasonable reliance on current governmental policies that concededly cannot benefit those third parties. We are aware of no decision recognizing such an attenuated basis for

standing. *See Mideast Sys. & China Civil Const. Saipan Joint Venture, Inc. v. Hodel*, 792 F.2d 1172, 1178 (D.C. Cir. 1986) ("[T]he mere possibility that causation is present is not enough; the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied.").

Even were we to ignore the disconnect between the challenged policies and the increased law enforcement expenditures that Sheriff Arpaio predicts, his reliance on the anticipated action of unrelated third parties makes it considerably harder to show the causation required to support standing. The injuries Sheriff Arpaio predicts would stem not from the government's DACA or DAPA programs, but from future unlawful entrants committing crimes in Maricopa County after their arrival. Although "standing is not precluded" in a case that turns on third-party conduct, "it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (internal quotation marks omitted). We have required "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004); *see also Renal Physicians*, 489 F.3d at 1275.

Likewise, because Sheriff Arpaio must rest his claims for declaratory and injunctive relief on predicted future injury, *see Clapper*, 133 S. Ct. at 1147,

he bears a "more rigorous burden" to establish standing, *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989). We must take the complaint's allegations "of facts, historical or otherwise demonstrable," as true. *Id.* at 912. But we treat "allegations that are really predictions" differently. *Id.* "When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)," as well as predictions of future injury that are "not normally susceptible of labelling as 'true' or 'false.'" *Id.* at 913. In order to establish standing premised on future injury, Sheriff Arpaio "must demonstrate a realistic danger of sustaining a direct injury." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Sheriff Arpaio asserts that he is entitled to proceed based on a lenient assessment of his alleged concrete injury, because his complaint includes a claim of procedural injury from violation of the Administrative Procedure Act. That contention mischaracterizes our procedural injury cases. "[T]hough the plaintiff in a procedural-injury case is relieved of having to show that proper procedures would have caused the agency to take a different substantive action, the plaintiff must still show that the agency action was the cause of some redressable injury to the plaintiff." *Renal Physicians*, 489 F.3d at 1279.

Here, Sheriff Arpaio's allegations that DACA and DAPA will cause unlawful immigration to increase are conjectural and conclusory. *See, e.g.*, Suppl.

Arpaio Decl. ¶¶ 16-17. The only relevant specifics appear not in his pleadings, but in his brief, where he points to the "flood of unaccompanied minors in the Summer of 2014 crossing the Mexican border" – an increase that he attributes to Secretary Napolitano's June 2012 DACA memorandum. Arpaio Br. 17. He argues that we may extrapolate from that experience that the revised DACA and new DAPA policies will cause increased unlawful immigration in the future. Even if we could credit an assertion in a brief as if it were alleged in a pleading, *see Runnemede Owners, Inc. v. Crest Mortg. Corp.*, 861 F.2d 1053, 1057 (7th Cir. 1988) ("[A]ssertions contained only in the briefs may not be used to expand the allegations of the complaint."), Sheriff Arpaio's argument nonetheless suffers from the logical fallacy *post hoc ergo propter hoc* (after this, therefore because of this). Just as we do not infer that the rooster's crow triggers the sunrise, we cannot infer based on chronology alone that DACA triggered the migrations that occurred two years later.

Sheriff Arpaio provides no factual allegations to link the 2014 "flood" of minors to DACA. The record reveals only speculation about the complex decisions made by non-citizens of the United States before they risked life and limb to come here. While immigration policies might have played into that calculus, so, too, might the myriad economic, social, and political realities in the United States and in foreign nations. Even assuming that it is conceivable that inaccurate knowledge of DACA could have provided some

encouragement to those who crossed the southern border, the Supreme Court's precedent requires more than illogic or "unadorned speculation" before a court may draw the inference Sheriff Arpaio seeks. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

Moreover, even if we were to assume DACA and DAPA increase unlawful immigration, we cannot further infer that they increase crime. At base, Sheriff Arpaio's contention is that more immigrants mean more crime. There is simple appeal to the notion that, all else being equal, more people will commit more crime. But the reality is that crime is notoriously difficult to predict. Explaining its causes, even after the fact, is rife with uncertainty. Crime rates are affected by numerous factors, such as the local economy, population density, access to jobs, education, and housing, and public policies that directly and indirectly affect the crime rate. Even if it were possible to do so, Sheriff Arpaio does not explain how increased migration would interact with those and other factors affecting the crime rate. On this record, it is pure speculation whether an increase in unlawful immigration would result in an increase, rather than a decrease or no change, in the number of crimes committed in Maricopa County. Where predictions are so uncertain, we are prohibited from finding standing. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (holding that a class of African Americans and civil rights activists lacked standing to challenge an alleged pattern and practice of selective and discriminatory criminal law enforcement because "attempting

to anticipate whether and when these respondents will be charged with crime . . . takes us into the area of speculation and conjecture").

We faced one example of the obstacles to standing based on predicted harms flowing from third-party conduct in *Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). Northwest Airlines sought to challenge the FAA's decision to certify a pilot to continue flying after the airline discharged him for flying while intoxicated. The airline argued that "allowing unfit pilots in the skies endangers all others who fly and confers upon [the endangered parties] standing to challenge any . . . certification decision." *Id.* at 201. We reiterated that the standing requirements "will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury." *Id.* Consequently, we held that the airline lacked standing because the "possibility" that the pilot would be hired by another airline, fly in the same region as the plaintiff airline, and actually cause injury to the plaintiff's passengers and crew was "too remote and speculative to constitute injury." *Id.* Just as the airline's challenge to the FAA's decision to treat an alcoholic pilot leniently was premised on the airline's hypothesis that the decision created a "marginally increased possibility" that the pilot would engage in unlawful behavior, *id.* at 202, Sheriff Arpaio's challenge to the Department of Homeland Security's deferred action policies rests on his hypothesis that they will lead to increased unlawful behavior. Both

theories suffer from the same weakness: "the likelihood of any injury actually being inflicted [is] too remote to warrant the invocation of judicial power." *Id.*[2]

Sheriff Arpaio contends that cases recognizing competitor standing support his reliance on anticipated future harm. In certain circumstances, we have found standing premised on the federal government's favorable regulatory treatment of a plaintiff's competitor. Plaintiffs may claim predictable economic harms from the lifting of a regulatory restriction on a "direct and current competitor," *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (internal quotation marks and emphasis omitted), or regulatory

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[2] Sheriff Arpaio also argues that we are required to draw the inference that "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." Arpaio Br. 46. Not so. Sheriff Arpaio has made no factual allegations that might support his asserted connection between the decision to enter the United States unlawfully and the propensity to commit other crimes. *See Islamic Am. Relief Agency*, 477 F.3d at 732 ("This Court need not . . . accept inferences that are unsupported by the facts set out in the complaint."). Even if he had, he has not contended with the legal hurdle posed by courts' general reluctance to predict propensities to commit crime in the future. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) ("[I]t is surely no more than speculation to assert either that Lyons himself will again be" arrested and subjected to a chokehold by resisting arrest.); *O'Shea v. Littleton*, 414 U.S. at 497; *cf. Nw. Airlines*, 795 F.2d at 201.

action that enlarges the pool of competitors, which will "almost certainly cause an injury in fact" to participants in the same market, *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). But we have not hesitated to find competitor standing lacking where the plaintiff's factual allegations raised only "'some vague probability'" that increased competition would occur. *Id.* at 74 (quoting *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (2001)). Because of the generally contingent nature of predictions of future third-party action, we have remained sparing in crediting claims of anticipated injury by market actors and other parties alike. *See United Transp. Union*, 891 F.2d at 912 n.7 (distinguishing "allegations of future injury that are firmly rooted in the basic laws of economics" from other allegations of future injury). Sheriff Arpaio's theory that more immigrants mean more crime is not sufficiently analogous to the basic laws of economics for our competitor standing cases to apply.

Finally, we note that the Fifth Circuit's recent decision in *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), does not support Sheriff Arpaio's standing. That court found that the State of Texas had standing to challenge DAPA because it would be required to issue driver's licenses to DAPA beneficiaries. *Id.* at 748-54. Texas offers driver's licenses at a substantially subsidized price; it loses $130.89 on each license it issues. *Id.* at 748. DAPA renders the approximately 500,000 of its beneficiaries who reside in Texas eligible to obtain Texas driver's licenses. *Id.* at 752. Texas alleged that anyone who qualifies under DAPA also

by the same token qualifies for a Texas license. Such an increase in the numbers of persons eligible for Texas driver's licenses, the Fifth Circuit reasoned, has the "direct and predictable effect" of imposing costs on the state. *Id.* Assuming arguendo the correctness of that conclusion, here, by contrast, the record reveals nothing from which we may draw the inference that the "direct and predictable effect" of the challenged policies will be an increase in the costs to Sheriff Arpaio's office of responding to crime. Sheriff Arpaio's contention is, at bottom, premised on the speculative prediction that DACA and DAPA will create incentives on third parties to behave in misinformed or irrational ways that would harm him. The claim in *Texas*, by contrast, was that undocumented aliens immediately become eligible for the license benefit by dint of becoming DAPA beneficiaries. Insofar as those circumstances pose "actual and imminent" concrete harm to Texas, we face a significantly different situation here. *See id.* at 744-45, 751.

B.

Sheriff Arpaio's argument in the district court focused on the harms he anticipates from an increased number of people unlawfully crossing the border. On appeal, his standing theory focuses more on a separate prediction that fewer of the undocumented aliens *already* in the United States will be removed under the new policies than would have been removed without them. *See* Oral Arg. Tr. 15:6-10. Under this second theory, Sheriff Arpaio argues

that he will be injured because some portion of the six million people who might benefit from deferred action will remain in Maricopa County rather than being removed, and some portion of those will commit crimes. This theory rests on the unsupported assumption that the total removals will drop due to DACA and DAPA, plus the speculation that those programs' beneficiaries will increase the crime rate.

A crucial assumption behind this standing claim is that, but for the challenged policies, the government would be able promptly to remove individuals eligible for DACA or DAPA. But Sheriff Arpaio does not dispute that the Department of Homeland Security has the resources only to remove fewer than 400,000 undocumented aliens per year. *See* Hrg. Tr., J.A. 718-19. Indeed, he repeatedly alleges that, before DACA and DAPA, the government was removing far fewer undocumented aliens from Maricopa County than he thought was appropriate. But Sheriff Arpaio does not generally challenge what he calls the executive's failure to enforce the immigration laws; his claims are directed only to DACA and DAPA. Neither those policies, nor the Department of Homeland Security that administers them, contemplates the net removal of fewer individuals under the policies than under the status quo ante.

The relevant question, then, is not whether the government will remove fewer undocumented aliens under the challenged policies than without them, but whether the shift in removal priorities that DACA and DAPA reflect will cause an increase in crime in

Maricopa County. Sheriff Arpaio's prediction of an increase in undocumented aliens committing crime runs contrary to the thrust of those policies. DACA and DAPA apply only to non-dangerous immigrants. They are designed to allow the Department to focus its resources on removing those undocumented aliens most disruptive to the public safety and national security of the United States. To qualify for DAPA or DACA, individuals must pass a background check, have long-term ties to the United States, and submit to individualized assessments for compatibility with the Secretary's priorities in removing criminals. Even after they are approved for deferred action, DAPA and DACA beneficiaries are subject to the Department's overall enforcement priorities. They get no free pass to commit offenses, whether dangerous or otherwise serious; those types of offenders remain high priorities for removal from the United States.

The flaw in Sheriff Arpaio's logic is fatal to his claim. *See Renal Physicians*, 489 F.3d at 1278. The challenged policies seek to increase the proportion of removal proceedings and deportations of those who pose a threat to public safety or national security. The policies are designed to remove *more* criminals in lieu of removals of undocumented aliens who commit no offenses or only minor violations while here. To the extent that such predictions are possible, if the programs are successful by their own terms, the number of crimes committed by undocumented aliens in Maricopa County should drop. Sheriff Arpaio has not explained how making the removal of criminals a

priority over the removal of non-dangerous individuals will instead result in an increase in crime.[3] This is thus not a case in which the plaintiff and defendant each present plausible explanations for the facts alleged. *See Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011). Dismissal is required because the "plausible alternative explanation" that DACA and DAPA will result in fewer crimes in Maricopa County, not more, "is so convincing that [the] plaintiff's explanation is *im*plausible." *Id.*; *see also Renal Physicians*, 489 F.3d at 1277.

* * *

We have observed that the "complexity and interdependence of our society and governmental policies" enable prospective plaintiffs to allege theories of causation that, though severely attenuated, carry with them "some plausibility." *Nw. Airlines*, 795 F.2d at 203 n.2. "If such allegations were routinely

[3] The Fifth Circuit recently acknowledged a similar flaw in Mississippi's challenge to DACA. Mississippi's claim of injury was not supported by facts showing that DACA-eligible undocumented aliens would impose increased costs on the state. *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015). The Fifth Circuit observed that it could instead be the case, as the Department of Homeland Security argued and contrary to Mississippi's contentions, "that the reallocation of DHS's assets is resulting in the removal of immigrants that impose a greater financial burden on the state," and, if so, DACA's "net effect would be a reduction in the fiscal burden on the state." *Id.* The court affirmed dismissal of the case for want of "a sufficiently concrete and particularized injury that would give Plaintiffs standing to challenge DACA." *Id.* at 255.

accepted as sufficient to confer standing, courts would be thrust into a far larger role of judging governmental policies than is presently the case, or than seems desirable." *Id.* We must rigorously review allegations by plaintiffs who seek to invoke the subject matter jurisdiction of the federal courts based on the projected response of independent third parties to a challenged government action. In this case, Sheriff Arpaio's standing allegations fall short. For these reasons, we hold Sheriff Arpaio lacks standing to challenge DACA and DAPA.

Accordingly, we affirm the judgment of the district court.

So ordered.

BROWN, Circuit Judge, concurring: Today we hold that the elected Sheriff of the nation's fourth largest county, located mere miles from our border with Mexico, cannot challenge the federal government's deliberate nonenforcement of the immigration laws. I agree with my colleagues that the state of the law on standing "requires, or at least counsels, the result here reached." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 798 (D.C. Cir. 1987). But, recognizing that Sheriff Arpaio's claims reflect the widespread perception that the administration's prosecutorial discretion meme is constitutionally problematic, I write separately to emphasize the narrowness of today's ruling,

and note the consequences of our modern obsession with a myopic and constrained notion of standing.

* * *

Sheriff Joseph Arpaio of Maricopa County, Arizona, filed suit to prevent the President from implementing programs deferring the removal of certain undocumented immigrants from the United States. These programs, referred to as Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), generally delay removal proceedings for undocumented immigrants who pass a background check and satisfy specified eligibility criteria. *See* Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1 (June 15, 2012), J.A. 101; Memorandum from Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents* 1 (Nov. 20, 2014), J.A. 145. Those who qualify receive authorization to work and reside in the United States for renewable periods.

What the government views as permissible prosecutorial discretion, Sheriff Arpaio views as a violation of the President's duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and the non-delegation doctrine. Sheriff Arpaio also identifies potential procedural violations, contending the orders fail to comply with notice-and-comment

procedures required by the Administrative Procedure Act.

Sheriff Arpaio's problems with the challenged policies run deeper than a difference in philosophy or politics. He claims DACA and DAPA impose clear and "severe[ ]" harms on his ability to protect the people of Maricopa County. Compl. ¶ 27. In particular, he argues that deferring removal proceedings and providing work authorizations to undocumented immigrants "harmed . . . his office's finances, workload, and interfere[d] with the conduct of his duties. . . ." *Id.* He attributes an influx of undocumented immigrants to the Department's non-enforcement policies, and claims it corresponded with a rise in crime. Increased crime means increased costs for the Sheriff, who must run the jails and provide deputies to police the streets.

* * *

Sheriff Arpaio's concerns are no doubt sincere. But, as the court concludes, we cannot hear his claims because he lacks standing to proceed. Under our standing jurisprudence, the injuries he claims resulted from DACA and DAPA are simply too inexact and speculative. Consequently, we must affirm the district court's dismissal of the complaint.

Some may find today's outcome perplexing. Certainly Sheriff Arpaio cannot be blamed for believing he had standing. The relevant judicial guideposts do not exactly "define[ ]" standing "with complete consistency." *Valley Forge Christian Coll. v. Ams. United*

for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982). And some cases suggest standing can be satisfied based on fairly ephemeral injuries and attenuated theories of causation. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516-26 (2007).

Indeed, at first blush, Sheriff Arpaio's allegations appear somewhat similar to those the Supreme Court found sufficient to secure standing in *Massachusetts v. EPA*. That case revolved around EPA's decision not to regulate greenhouse gas emissions in new vehicles. Then, as now, standing consisted of a tripartite test. Plaintiffs must show they were or will be concretely injured by an action fairly traceable to the defendant and redressable by the court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998). The rules are somewhat relaxed for plaintiffs who, like Massachusetts and Sheriff Arpaio, seek to vindicate a procedural right, including "the right to challenge agency action unlawfully withheld." *Massachusetts*, 549 U.S. at 517. Procedural rights claims can proceed "without meeting all the normal standards for redressability and immediacy." *Id.* at 517-18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Massachusetts received a further benefit. As a sovereign state, it was "entitled to special solicitude in [the] standing analysis." *Id.* at 520.

Massachusetts, like Sheriff Arpaio, believed the federal government had "abdicated its [statutory] responsibility" to protect the State's interests. *Id.* at 505. The State, like the Sheriff, asked the Court to construe the meaning of a federal statute, "a question

eminently suitable to resolution in federal court." *Id.* at 516. And Congress had authorized challenges to the EPA, *id.*, just as Congress has generally authorized the type of challenge Sheriff Arpaio now pursues, *see* 5 U.S.C. § 704; *see also Texas v. United States*, 787 F.3d 733, 751-52 (5th Cir. 2015).

The Supreme Court ultimately found that Massachusetts' injury lay in the potential loss of coastal land caused by the threat of rising seas. The Court said "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts." *Massachusetts*, 549 U.S. at 526. Scientific evidence suggested a causal relationship between greenhouse gases and atmospheric warming. The Court brushed aside EPA's argument that Massachusetts had only a generalized grievance widely shared by others. The global nature of global warming did not negate the state's claimed concrete injury. *See id.* at 522-23.

Just as EPA's inaction harmed Massachusetts' shores, inaction on immigration is said to harm Sheriff Arpaio's streets. Immigration, like global warming, affects the entire nation. But that does not mean no one has standing to challenge the concrete effects of the federal government's immigration policies. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *FEC v. Akins*, 524 U.S. 11, 24 (1998).

Based on these facial similarities, someone in Sheriff Arpaio's shoes may well believe he has standing. After all, *Massachusetts* sets out a "loosened

standard" under which "*any* contribution of *any* size to a cognizable injury" seems to be "sufficient for causation, and *any* step, no matter how small," seems to be "sufficient to provide the necessary redress." Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1078 (2009). Under that elastic framework, the *risk* of harm, however tenuously linked to the challenged government action, appears to suffice to show standing.

Despite initial appearances, *Massachusetts* does not support the Sheriff's standing. Preliminarily, perhaps sensing that Massachusetts' broad-based claim could not satisfy the ordinary rules of standing, the Court lowered the bar, ruling that state litigants were "entitled to special solicitude" in the standing calculus. *Massachusetts*, 549 U.S. at 520. In addition to being special, the solicitude the *Massachusetts'* Court manufactured was highly selective: cast in concerns over state sovereignty, *see id.* at 518-20, this bit of doctrinal favoritism likely does not extend to non-state litigants like the Sheriff, who must clear the ordinary hurdles to standing. The Sheriff falls short, largely for the reasons addressed below.

Without the laxity afforded to state litigants, Sheriff Arpaio's arguments for causation are overly speculative. At bottom, Sheriff Arpaio avers that DACA and DAPA inspired a flood of immigration which led, in turn, to increased crime. His injury rests on the behavior of third parties, undocumented immigrants who chose to commit crime. "[I]t is ordinarily substantially more difficult to establish"

standing based on the actions of third parties. *Lujan*, 504 U.S. at 562 (internal quotations omitted). The Sheriff has not met that higher burden. The link between DACA and DAPA – programs designed for non-criminals – and crimes committed by undocumented immigrants is too attenuated and susceptible to intervening factors.[1] *See, e.g.*, *Mideast Sys. & China Civil Const. Saipan Joint Venture, Inc. v. Hodel*, 792 F.2d 1172, 1178 (D.C. Cir. 1986) ("[T]he presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied."). Lacking grounds for special treatment under *Massachusetts*, Sheriff Arpaio has not satisfied the demands of our standing doctrine.

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[1] Of course, in reality, the link may be no more attenuated than that connecting a potential twenty-centimeter rise in sea level with greenhouse gas emissions from new vehicles. *See Massachusetts*, 549 U.S. at 522; *see also* Adler, *supra*, at 1074 n.91 ("[T]he amount of sea-level rise that constitute[d] Massachusetts's actual, present injury is less than 0.1cm-0.2cm per year, and the amount of projected sea-level rise that could be redressed by regulation of greenhouse gas emissions from new motor vehicles under [EPA's regulatory authority] is even less, as U.S. motor vehicles only represent a fraction of [greenhouse gas] emissions."). Even so, Sheriff Arpaio has not shown that link with the particularity our precedents demand. *See, e.g.*, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004) (requiring "substantial evidence" in the record "of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress").

Finally, the central difference between this case and *Massachusetts* may be much more practical in nature: Massachusetts, unlike Sheriff Arpaio, did its homework. The State hired experts and introduced detailed information suggesting a causal relationship between certain gases, atmospheric warming and a rise in sea levels. *See Massachusetts*, 549 U.S. at 521-238. Sheriff Arpaio instead can show potential costs but not causation, owing largely to the difficulty of showing causation in cases dependent on third-party behavior. Without more, his claim cannot survive the scrutiny of our modern, formalistic approach to standing.

* * *

Today's holding puts the consequences of our standing jurisprudence in stark relief. If an elected Sheriff responsible for the security of a county with a population larger than twenty-one states[2] cannot bring suit, individual litigants will find it even more difficult to bring similar challenges. But today's decision, however broad it may seem, is actually quite narrow in two respects.

First, our decision holds only that Sheriff Arpaio lacks standing to challenge DACA and DAPA, not that those programs are categorically shielded from suit. Indeed, those programs are currently subject to

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[2] *Maricopa County Profile*, MARICOPA COUNTY OPEN BOOKS, http://www.maricopa.gov/OpenBooks/profile.aspx (last visited July 28, 2015).

challenge in a number of other circuits. *See Texas*, 787 F.3d at 747-55 (upholding Texas' standing to challenge DAPA based on the costs of providing drivers licenses to DAPA beneficiaries); *Ariz. DREAM Act Coal. v. Brewer*, No. 15-15307, 81 F.3d 795, 2015 WL 300376 (9th Cir. 2015) (ordering the parties, and inviting the federal government, to file briefs discussing whether DACA violates the separation of powers or the Take Care Clause of the Constitution); *cf. Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015) (holding Mississippi lacked standing to challenge DACA because the state failed to "submit[ ] . . . evidence that any DACA eligible immigrants resided in the state" or "produce evidence of costs it would incur if some DACA-approved immigrants came to the state").

Second, today's decision does not take issue with the claim that unlawful immigration carries consequences. Indeed, the Supreme Court has previously made clear that Sheriff Arpaio's home state of Arizona "bears many of the consequences of unlawful immigration." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). "Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population." *Id.* In the county the petitioner is charged with policing, "these aliens are reported to be responsible for a disproportionate share of serious crime." *Id.* Nothing in today's opinion casts doubt on these conditions. The court holds only that these

general conditions, without more, do not afford the right to challenge the specific federal deferred action programs at issue.

* * *

Our jurisprudence on standing has many shortcomings. As today's decision demonstrates, standing doctrines often immunize government officials from challenges to allegedly *ultra vires* conduct. To understand how this deferential attitude came to pass, we must briefly consider how the standing doctrine evolved over the decades.

Academic accounts suggest that, from the time of the founding until the early twentieth century, "there was no separate standing doctrine at all." Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992); *accord* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55 (1978) ("The word '*standing*' . . . does not appear to have been commonly used until the middle of . . . [the twentieth] century."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988) ("[N]o general doctrine of standing existed."). "In early practice in England and in the United States, moreover, certain forms of action, or writs, were available to all citizens without any showing of a 'personal stake' or an 'injury in fact.' " Alex Hemmer, Note, *Civil Servant Suits*, 124 YALE L.J. 758, 764 (2014). There were limits. Namely, plaintiffs could only proceed based on a cause of action rooted in common law or

statute. *See* Sunstein, *supra*, at 169-70; Fletcher, *supra*, at 224. The absence of a free-standing, self-conscious doctrinal approach left room to challenge the government's failure to meet its obligations. That type of claim, "the public action – an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations – has long been a feature of our English and American law." Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

If public actions ever were a feature of our law, that is true no longer. Soon after the turn of the twentieth century, as the administrative state materialized, the Supreme Court began focusing on standing as a critical component of justiciability. *See* Sunstein, *supra*, at 179-81. In a significant 1923 case, the Court dismissed a taxpayer's constitutional challenge to the Maternity Act of 1921, finding the taxpayer's pecuniary interest in the Act to be "minute and indeterminable" and noting this scant interest was "shared with millions of other[ ]" citizens. *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923). In a sign of things to come, the opinion emphasized the "inconveniences" inherent in permitting challenges to widely shared grievances. *Id.* Emboldened justiciability doctrines along these lines served to "insulate progressive and New Deal legislation" from a variety of challenges. Sunstein, *supra*, at 179.

In the following decades, the standing doctrine secured its footing and coalesced around the three factors we know today: injury in fact, causation and

redressability. *See Lujan*, 504 U.S. at 560. But hidden within these factors, and the surrounding case law, is a surprising hostility to suits seeking to redress executive branch wrongdoing. That hostility is encapsulated in the generalized grievance doctrine, which the district court below emphasized in dismissing Sheriff Arpaio's suit. As the district court described the doctrine, "a plaintiff who seeks to vindicate only the general interest in the proper application of the Constitution and laws does not suffer the type of direct, concrete and tangible harm that confers standing and warrants the exercise of jurisdiction." *Arpaio v. Obama*, 27 F. Supp. 3d 185, 200 (D.D.C. 2014). Separation of powers concerns underlie this approach. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws)," we are reminded, "is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576.

Today's decision reaches the same conclusion as did the district court – Sheriff Arpaio lacks standing – but wisely rests on grounds other than the generalized grievance doctrine. Our antagonism to so-called generalized grievances, if unbounded, threatens multiple harms. For one thing, this doctrine gives public officials all the wrong incentives. The advice seems to be: "Never steal anything small." Focused acts of wrongdoing against particular persons or classes of persons will probably result in injury in fact, affording standing to challenge public officials. But the

larger the injury, and the more widespread the effects, the harder it becomes to show standing.

Moreover, the generalized grievance theory and related principles of contemporary standing doctrine effectively insulate immense swaths of executive action from legal challenge. Our relentless emphasis on the need to show a concrete injury caused by executive action and redressable by judicial relief makes it virtually impossible to challenge many decisions made in the modern regulatory state. Executive branch decisions crafting binding enforcement (or nonenforcement) policies, devoting resources here or there (at taxpayer expense), or creating generally applicable norms may well escape challenge. *See, e.g.*, Hemmer, *supra*, at 768-69; *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting the "general unsuitability for judicial review of agency decisions to refuse enforcement").

Consider this case. The Sheriff's claims on the merits may well raise a constitutionally cogent point. Despite the dazzling spin DHS puts on the DACA and DAPA programs, a categorical suspension of existing law – distinct from the case-by-case deferrals or targeted humanitarian exemptions cited as past precedent – complete with a broad-based work authorization, arguably crosses the line between implementing the law and making it. *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759-61 (2014). And this is true even if the legislature aids and abets the usurpation. *See generally* Department of Homeland Security

Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149 (2009); Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, div. F., Tit. II, 128 Stat. 5, 251 (2014) (directing the Secretary of Homeland Security to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime," but silent as to the propriety of categorically suspending existing removal laws). Neither the aggressive entrepreneurship of the executive nor the pusillanimity of the legislative branch can alter the fundamental constraints of the Constitution. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 850-56 (2013); Price, *supra*, at 759-61. However, although it is the denial of standing rather than its grant that undermines democratic accountability in such circumstances, concerns about the efficacy of separation of powers principles can be dismissed as "generalized grievances" no one has standing to challenge.

Separation of powers concerns surely cannot justify every application of the generalized grievance doctrine. By prohibiting abstract, general claims, the doctrine aims to ensure that the President's "most important constitutional duty, to 'take Care that the Laws be faithfully executed'" is not transferred to the courts. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3). But what if the Chief Executive decides *not* to faithfully execute the laws? In that case our doctrine falls silent. Paying a nominal filing fee

guarantees access to the federal courts, but challenge the executive's decision to undermine the rule of law and you will likely find your fee wasted.

This court has previously emphasized the need to approach the standing of challengers to *ultra vires* conduct with a measure of sensitivity. In a 1987 case, we held that a non-profit providing services to Haitian refugees lacked standing, under both constitutional and prudential rubrics, to challenge the executive's policy of interdicting Haitian refugees on the open ocean. *Haitian Refugee Ctr.*, 809 F.2d at 796. After concluding the challengers lacked standing under Article III, the court applied the prudential standing doctrine, which asks whether a plaintiff falls within the zone of interests protected under a particular statutory or Constitutional provision. Some flexibility was in order. The challengers did not have to satisfy the zone of interest test with respect to the

> constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires.* Otherwise, a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest.

Id. at 811 n.14. While the court's comments centered on prudential standing, they offer a useful reminder

that standing doctrines – both constitutional and prudential in nature – should not be construed so narrowly as to choke legitimate challenges to *ultra vires* conduct. Here, the lesson is clear. We should, at the very least, give careful thought before blindly applying the generalized grievance doctrine in cases challenging federal programs as *ultra vires*.

The second shortcoming of our standing doctrine is this: standing has become a "lawyer's game," as Chief Justice Roberts phrased it. *Massachusetts*, 549 U.S. at 548 (Roberts, J., dissenting). Sophisticated, well-resourced litigants can game the system, producing the types of proof that pass muster, while less sophisticated litigants may be left outside the courthouse doors. Our case law hardly provides clear guidance. Sometimes standing appears to rest on mere *ipse dixit*. "A litigant, it seems, will have standing if he is 'deemed' to have the requisite interest, and 'if you . . . have standing then you can be confident you are' suitably interested." *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting) (quoting Ernest J. Brown, *Quis Custodiet Ipsos Custodes? – The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 22).

More broadly, our obsession with standing "present[s] courts with an opportunity to avoid the vindication of unpopular rights, or even worse to disguise decision on the merits in the opaque standing terminology of injury, causation, remedial benefit, and separation of powers." 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.3 (3d ed.1998).

* * *

In the not-so-distant past, Judge (and later Chief Justice) Burger could safely conclude that "experience rather than logic or fixed rules" guided the search for standing. *Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994, 1004 (D.C. Cir. 1966) (Burger, J.) (upholding the standing of television viewers to intervene in broadcast license renewal proceedings as "private attorneys general"). Experience and logic no longer reign supreme. In place of "functional" tests "designed to insure [sic] that only those with a genuine and legitimate interest" may come into court, *id.* at 1002, we now employ formalistic tests that may tend to discourage certain constitutional challenges. Today's decision teaches a lesson: litigants bringing constitutional challenges must pay exceptionally close attention to standing requirements. The courts do – especially when litigants do not.

No doubt the modern approach to standing serves to reduce our caseload. But there are much more important matters at stake. "Some [litigants] need bread; others need Shakespeare; others need their rightful place in the national society – what they all need is processors of law who will consider the people's needs more significant than administrative convenience." *Id.* at 1005 (quoting Edmond Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 13 (1963)). Our approach to standing, I fear, too often stifles constitutional challenges, ultimately elevating the courts' convenience over constitutional efficacy and the needs of our citizenry.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5325 **September Term, 2014**
FILED ON: August 14, 2015

JOSEPH M. ARPAIO,

APPELLANT

v.

BARACK OBAMA, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01966)

Before: BROWN, SRINIVASAN and PILLARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is

hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken Meadows
Deputy Clerk

Date: August 14, 2015

Opinion for the court filed by Circuit Judge Pillard. Concurring opinion filed by Circuit Judge Brown.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH ARPAIO, Plaintiff, v. BARACK H. OBAMA, *President, United States in his official capacity, et al.*, Defendant.	Civil Action No. 14-01966 (BAH) Judge Beryl A. Howell

MEMORANDUM OPINION

The plaintiff, the elected Sheriff of Maricopa County, brings suit against the President of the United States, and other Federal officials, alleging that certain immigration policies announced by the President in a nationwide address on November 20, 2014 are unconstitutional, otherwise illegal, and should be stopped from going into effect. *See* Pl.'s Mot. Prelim. Inj. ("Pl.'s Mot."), ECF No. 7. The plaintiff's suit raises important questions regarding the nation's immigration policies, which affect the lives of millions of individuals and their families. The wisdom and legality of these policies deserve careful and reasoned consideration. As the Supreme Court recently explained: "[T]he sound exercise of national power over immigration depends on the [Nation] meeting its responsibility to base its law on a political will informed by searching, thoughtful, rational civic

discourse." *Arizona v. United States*, 132 S.Ct. 2492, 2510 (2012).

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 policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

The refusal to adjudicate a claim should not be confused with abdicating the responsibility of judicial review. "Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982). A court must refrain "'from passing upon the constitutionality of an act [of the representative branches], unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.'" *Id.* (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)) (alteration

in original). Ultimately, "[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

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.").

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. Accordingly, the plaintiff's motion for a preliminary injunction, ECF No. 7, is denied and the defendants' motion to dismiss for lack of subject matter jurisdiction, ECF Nos. 13, 15, is granted.[1]

I. BACKGROUND

A. Executive Enforcement of Immigration Laws

The Immigration and Nationality Act ("INA"), codified as amended at 8 U.S.C. § 1101 *et seq.*, establishes a comprehensive statutory scheme that governs immigration and naturalization. The INA establishes categories of immigrants who are inadmissible to the United States in the first instance, *see* 8 U.S.C. § 1182, and immigrants who are subject to removal from the United States once here, *see* 8 U.S.C. § 1227. Under the INA, "[a]liens may be removed if they were inadmissible at the time of entry, have been convicted

[1] The plaintiff filed a motion for preliminary injunction at ECF No. 6 and an amended, corrected motion for preliminary injunction at ECF No. 7. Plaintiff's counsel clarified at the motions hearing that the latter filed motion is the operative motion. *See* Rough Transcript of Preliminary Injunction Hearing (Dec. 22, 2014) ("Hrg.Tr.") at 3-4. Consequently, the plaintiff's motion for preliminary injunction docketed at ECF No. 6 is denied as moot.

of certain crimes, or meet other criteria set by federal law." *Arizona*, 132 S. Ct. at 2499 (citing 8 U.S.C. § 1227).

The Secretary of the Department of Homeland Security ("DHS") is "charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Although charged with enforcement of the statutory scheme, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), and indeed "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. Thus, to enable the "proper ordering of its priorities," *Heckler*, 470 U.S. at 832, and the marshalling of extant resources to address those priorities, the INA provides the Secretary of DHS with the authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under [the INA]." 8 U.S.C. § 1103(a)(3). Further, the Secretary of DHS is specifically charged with "establishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), to ensure that DHS's limited resources are expended in pursuit of its highest priorities in national security, border security, and public safety.

The context in which the immigration laws are enforced bears out the need for such prioritization. DHS estimates that approximately 11.3 million

undocumented immigrants residing in the United States are potentially eligible for removal. Pl.'s Mot., Ex. B (Karl Thompson, Memorandum Opinion for the Sec'y of Homeland Security and the Counsel to the President: *DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 1, (Nov. 19, 2014) ("OLC Opinion")) at 1, ECF No. 7-2. Of those, DHS estimates that the agency has the resources to remove fewer than 400,000 undocumented immigrants. *Id.* In addition, DHS faces additional challenges including: demographic shifts resulting in increased costs for managing and deterring unauthorized border crossings; increased complexity in removing aliens; congressional directives to prioritize recent border crossers and serious criminals; and the humanitarian and social consequences of separating families. *See* OLC Opinion at 11; Defs.' Mem. Opp. Pl.'s Mot. Prelim. Inj. ("Defs.' Mem."), Ex. 21 (*Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 113th Cong. (2014) (statement of Craig Fugate, Administrator, Federal Emergency Management Agency, et al.)), ECF No. 13-21; *see also* Defs.' Mem. at 1.

To confront these challenges, the executive branch has long used an enforcement tool known as "deferred action" to implement enforcement policies and priorities, as authorized by statute. *See* 6 U.S.C. § 202(5). Deferred action is simply a decision by an enforcement

agency not to seek enforcement of a given statutory or regulatory violation for a limited period of time. In the context of the immigration laws, deferred action represents a decision by DHS not to seek the removal of an alien for a set period of time. In this sense, eligibility for deferred action represents an acknowledgment that those qualifying individuals are the lowest priority for enforcement. Under long-existing regulations, undocumented immigrants granted deferred action may apply for authorization to work in the United States. *See* 8 C.F.R. § 274a.12(c)(14). These regulations were promulgated pursuant to the Immigration Reform and Control Act of 1986 and have been in effect, as amended, since 1987. *See* Control of Employment of Aliens, 52 Fed. Reg. 16216 (1987). Deferred action does not confer any immigration or citizenship status or establish any enforceable legal right to remain in the United States and, consequently, may be canceled at any time. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("At each stage, the Executive has discretion to abandon the endeavor. . . .").

For almost twenty years, the use of deferred action programs has been a staple of immigration enforcement. The executive branch has previously implemented deferred action programs for certain limited categories of aliens, including: certain victims of domestic abuse committed by United States

citizens and Lawful Permanent Residents;[2] victims of human trafficking and certain other crimes;[3] students affected by Hurricane Katrina;[4] widows and widowers of U.S. citizens;[5] and certain aliens brought to the United States as children.[6] Programs similar to

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[2] Defs.' Mem., Ex. 7 (Memorandum for Regional Directors et al., from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997)), ECF No. 13-7.

[3] Defs.' Mem., Ex. 8 (Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – "T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001)), ECF No. 13-8.

[4] Defs.' Mem., Ex. 9 (USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)*, at 1 (Nov. 25, 2005)), ECF No. 13-9 ("Since the Notice does not cover Katrina-impacted foreign academic students who have failed to maintain their F-1 status, such persons, and their F-2 dependents, may request a grant of deferred action and short term employment authorization based on economic necessity.").

[5] Defs.' Mem., Ex. 10 (Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009)), ECF No. 13-10.

[6] This is the DACA program challenged by the plaintiff. *See* Pl.'s Mot., Ex. A (Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1-2 (June 15, 2012)), ECF No. 6-1.

deferred action have been used extensively by the executive branch for an even longer period of time.[7]

Congress has acquiesced to, and even endorsed the use of, deferred action on removal of undocumented immigrants by the executive branch on multiple occasions. For example, in 2000, Congress expanded the deferred action program for certain victims of domestic abuse, permitting children over the age of twenty-one to be "eligible for deferred action and work authorization." 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV). Similarly, in 2008, Congress authorized the DHS to "grant . . . an administrative stay of a final order of removal" to individuals who could make an initial showing that they were eligible for a visa as victims of human trafficking and certain other crimes. *See* 8 U.S.C. § 1227(d)(1). Congress specifically noted that

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[7] In the 1970's through the 1990's, programs similar to deferred action were used to defer enforcement against undocumented immigrants who were awaiting approval of certain professional visas, *see United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979-81 (E.D. Pa. 1977), certain nurses eligible for H-1 visas, *see Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan 19, 1978); nationals of certain designated foreign states, *see* Defs.' Mem., Ex. 5 (*Moore, Charlotte J.*, Cong. Research Serv., *Review of U.S. Refugee Resettlement Programs and Policies* at 12-14 (1980)), ECF No. 13-5; and spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, *see* Defs.' Mem., Ex. 6 (Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990)), ECF No. 13-6.

"[t]he denial of a request for an administrative stay of removal . . . shall not preclude the alien from applying for . . . deferred action." *See* 8 U.S.C. § 1227(d)(2). In Division B to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, known by its short title of the REAL ID Act of 2005, Congress provided that state-issued driver's licenses were acceptable for federal purposes only if the state verifies that an applicant maintains evidence of lawful status, which includes evidence of "approved deferred action status." *See* Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (2005) (codified at 49 U.S.C. § 30301 note).

B. Challenged Immigration Programs

Against this lengthy historical record of the use of deferred action as a tool to carry out "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), the executive branch has more recently employed this tool in three programs, which the plaintiff challenges as unconstitutional or otherwise in violation of the Administrative Procedure Act. Specifically, the plaintiff challenges a June 15, 2012 program – known as Deferred Action for Childhood Arrivals ("DACA") – whose guidance is outlined in a memorandum by the former DHS Secretary entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." DACA permits, on a case-by-case basis, deferred action on removal for a period of two years for undocumented immigrants that: (1) are under the age

of 31 as of June 15, 2012; (2) were under the age of 16 at the time of arrival in the United States; (3) have continuously resided in the United States for at least five years immediately preceding June 15, 2012; (4) were present in the United States on June 15, 2012; (5) are in school, have graduated from high school, have obtained a general education development certificate, or have been honorably discharged from the Coast Guard or the Armed Forces of the United States; and (6) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose no threat to the national security or public safety. *See* Pl.'s Mot., Ex. A (Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012)), at 1-2, ECF No. 7-1.

The other two programs challenged by the plaintiff are outlined in a memorandum by the current DHS Secretary entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents." The memorandum revised the DACA program ("2014 DACA Revisions") and also created a new program that established guidelines for the request of deferred action by the parents of U.S. Citizens or Lawful Permanent Residents

("DAPA"). *See* Pl.'s Mot., Ex. D (Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (November 20, 2014) ("2014 Guidance Memorandum")), ECF No. 7-4.

The principal features of the 2014 DACA Revisions include: (1) removal of the age cap of 31 so that individuals may request deferred action under DACA regardless of their current age, as long as they entered the United States before the age of 16; (2) extension of the period of deferred action from two years to three years; and (3) adjustment of the relevant date by which an individual must have been in the United States from June 15, 2007 to January 1, 2010. *See* 2014 Guidance Memorandum at 3-4.

DAPA permits, on a case-by-case basis, deferred action on removal for a period of three years for illegal aliens who are parents of U.S. citizens and Lawful Permanent Residents. To be considered for deferred action under DAPA, an individual must meet the following guidelines: (1) have, as of November 20, 2014, a son or daughter who is a U.S. citizen or Lawful Permanent Resident; (2) have continuously resided in the United States since before January 1, 2010; (3) have been physically present in the United States on November 20, 2014 and at the time of making a request for deferred action with U.S. Citizenship and

Immigration Services; (4) have no lawful status as of November 20, 2014; (5) not fall within one of the categories of enforcement priorities set forth in additional agency guidelines;[8] and (6) present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate. *Id.*

C. Procedural Background

On November 20, 2014, in a televised address, President Barack Obama announced the principal features of the most recent deferred action programs, namely, the 2014 DACA Revisions and DAPA. On the

[8] In a November 20, 2014 Memorandum entitled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," the Secretary of DHS set forth three categories of undocumented immigrants who are considered to be priorities for removal. The first category, representing the highest priority for civil immigration authorities, concerns undocumented immigrants who are threats to national security, border security, and public safety. The second category, representing the second-highest priority for civil immigration authorities, concerns undocumented immigrants who have committed certain misdemeanors or recently committed certain immigration violations. The third category, representing the third-highest priority for civil immigration authorities, concerns undocumented immigrants who have been issued a final order of removal on or after January 1, 2014. *See* Pl.'s Mot., Ex. F (Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (November 20, 2014)) at 3-4, ECF No. 7-6. The plaintiff does not challenge the guidelines set forth in this memorandum. *See* Hrg. Tr. at 11.

same day, the plaintiff filed this action seeking invalidation of these two programs as well as DACA, which had been announced over two years earlier. Although the plaintiff's Complaint references a preliminary injunction, the plaintiff did not formally or separately move for a preliminary injunction, as required by the Local Civil Rules of this Court, until December 4, 2014. *See* Pl.'s Mot.; Local Civ. R. 65.1; Minute Order (Nov. 24, 2014).

In accordance with the Local Rules governing preliminary injunctions – which permit a defendant seven days to respond to a motion for preliminary injunction once served – the Court ordered the defendants to respond to the plaintiff's motion for preliminary injunction by December 15, 2014. Ordinarily, the Local Rules make no provision for a reply brief in a motion for preliminary injunction and the Court did not initially permit a reply brief in this case. *See* Local Civ. R. 65.1. In opposition to the motion for preliminary injunction, the defendants argued that the plaintiff lacked standing to bring this suit and requested dismissal of the suit. *See* Defs.' Mem. at 14. The defendants subsequently asked this Court to construe this opposition as a motion to dismiss for lack of subject matter jurisdiction. *See* Notice, ECF No. 15. Due to the dispositive nature of the defendants' objection, and to ensure fairness to all the parties, the Court afforded the plaintiff the opportunity to submit a response to the defendants' objections. In addition, the Court permitted the plaintiff to file a supplemental declaration in support

of his standing to bring suit. The Court heard argument from both parties on December 22, 2014.

Now pending before the Court is the plaintiff's motion for a preliminary injunction and the defendants' motion to dismiss for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. LEGAL STANDARD

A. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011))). A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948 (2d ed. 1995)) (emphasis in original). The Supreme Court repeated this caution in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), stating that "[a] preliminary injunction is an extraordinary remedy never awarded as of right," *id.*

at 24, and, again, that "injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* at 22.

Authority can be found in this Circuit for the so-called "sliding scale" approach to evaluating the four preliminary injunction factors, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley*, 644 F.3d at 392. In particular, even if the plaintiff only "raise[s] a serious legal question on the merits," rather than a likelihood of success on the merits, a strong showing on all three of the other factors may warrant entry of injunctive relief. *Id.* at 398; *see also Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) ("[I]f the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success."); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("[A] court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.").

At the same time, the D.C. Circuit has acknowledged that the Supreme Court's decision in *Winter* "could be read to create a more demanding burden than the sliding-scale analysis requires." *Sherley*, 644

F.3d at 392 (internal quotations omitted).[9] Indeed, in *Winter*, the majority of the Supreme Court reversed a grant of injunctive relief, finding that the standard applied by the Ninth Circuit was "too lenient" in allowing injunctive relief on the "possibility" of irreparable injury, rather than its likelihood. *Winter*, 555 U.S. at 22; *see also Perry v. Perez*, 132 S. Ct. 934, 942 (2012) ("Plaintiffs seeking a preliminary injunction of a statute must normally demonstrate that they are likely to succeed on the merits of their challenge to that law.").

In *Aamer v. Obama*, the D.C. Circuit declined to opine about the continued viability of the "sliding scale" analysis of the four preliminary injunction factors, stating that it "remains an open question whether the 'likelihood of success' factor is 'an independent, free-standing requirement,' or whether, in cases where the other three factors strongly favor issuing an injunction, a plaintiff need only raise a 'serious legal question' on the merits." 742 F.3d at 1043; *see also Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065, 1074 (D.C. Cir. 2014) ("This circuit has repeatedly declined to take sides in a circuit split on the question of whether likelihood of success on the merits is a freestanding threshold requirement to

[9] The plaintiff, in his briefing, notes only the sliding-scale analysis and ignores the voluminous case law describing the uncertainty regarding the continued viability of the sliding-scale analysis in this Circuit. *See* Pl.'s Mot. at 11.

issuance of a preliminary injunction. . . . We need not take sides today.").

Under either approach, a court may not issue "a preliminary injunction based only on a possibility of irreparable harm . . . [since] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22; *see also In re Navy Chaplaincy*, 738 F.3d 425, 428 (D.C. Cir. 2013) (requiring proof that all four prongs of preliminary injunction standard be met before injunctive relief can be issued). Thus, the plaintiff bears the burden of persuasion on all four preliminary injunction factors in order to secure such an "extraordinary remedy."

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Indeed, federal courts are "forbidden . . . from acting beyond our authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008), and, therefore, have "an affirmative obligation 'to consider whether the constitutional and statutory authority exist for us to hear each dispute.'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (quoting *Herbert v. National Academy of Sciences*, 974 F.2d

192, 196 (D.C. Cir. 1992)). Absent subject matter jurisdiction over a case, the court must dismiss it. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); FED. R. CIV. P. 12(h)(3).

When considering a motion to dismiss under Rule 12(b)(1), the court must accept as true all uncontroverted 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 facts 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 court need not accept inferences drawn by the plaintiff, however, if those inferences are unsupported by facts alleged in the complaint or amount merely to legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). 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. United States 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).

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).

III. DISCUSSION

The plaintiff concedes, as he must, that "he and other similarly situated state law enforcement and other officials have no authority" to enforce the immigration laws of the United States. Compl. at 19; *see also Arizona*, 132 S. Ct. at 2507. Nonetheless, the plaintiff seeks to alter federal enforcement policy by asking the Court to halt three federal immigration programs that have the over-arching purpose of prioritizing federal enforcement efforts. *See Arizona*, 132 S. Ct. at 2499 (noting that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," who "as an initial matter, must decide whether it makes sense to pursue removal at all."). 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.

A. The Plaintiff Lacks Standing

Article III of the Constitution restricts the power of federal courts to hear only "Cases" and "Controversies." "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alterations in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Indeed, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation on federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (alterations in original) (internal quotations omitted).

The Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Defenders of Wildlife*, 504 U.S. at 560. First, the plaintiff must have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). Second, there must be "a causal connection between

the injury and the conduct complained of," i.e., the injury alleged must be fairly traceable to the challenged action of the defendant. *Id.* Finally, it must be "likely" that the complained-of injury will be "redressed by a favorable decision" of the court. *Id.* at 561. In short, "[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). Likewise, when declaratory or injunctive relief is sought – relief the plaintiff seeks here – a plaintiff "must show he is suffering an ongoing injury or faces an immediate threat of [future] injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

The plaintiff fails to meet any of the three elements of constitutional standing. Each of these requirements is addressed *seriatim* below.

1. *Injury in Fact*

At the outset, the plaintiff's Complaint and motion for preliminary injunction fail to identify whether the plaintiff is bringing suit in his individual capacity or in his official capacity as the elected Sheriff of Maricopa County. *Compare* Compl. ¶ 3 (noting only that "[t]he Plaintiff Joe Arpaio is the elected Sheriff of Maricopa County, State of Arizona"), *with* ¶ 8

(detailing that each defendant was being sued "in their individual and official capacities"). The Court clarified during oral argument that the plaintiff is bringing suit in both his personal and official capacities. Hrg. Tr. at 5. Regardless of whether the plaintiff is suing in his individual or official capacity, or both, the plaintiff cannot demonstrate a cognizable injury from the challenged deferred action programs.

a) Personal Capacity

The law is well-settled that ordinarily, "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws. . . ." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897 (1984) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). This is merely the application of the long-standing principle that a plaintiff "raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Defenders of Wildlife*, 504 U.S. at 573-74). As a result, a plaintiff who seeks to vindicate only the general interest in the proper application of the Constitution and laws does not suffer the type of direct, concrete and tangible harm that confers standing and warrants the exercise of jurisdiction. Yet, this is the type of suit the plaintiff attempts to bring in his

personal capacity. *See* Supp. Decl. of Sheriff Joe Arpaio ¶ 3 ("Pl.'s Supp. Decl."), ECF No. 20-1 ("By this lawsuit, I am seeking to have the President and the other Defendants obey the U.S. Constitution and the immigration laws. . . .").

The plaintiff does offer one additional theory, however, in support of his claim of injury in his individual capacity. The plaintiff cites press reports and press releases from his own office that undocumented immigrants have targeted him for assassination as a result of the plaintiff's "widely known stance on illegal immigration." *See* Press Release, Bomb Threats against Sheriff Arpaio and Office on Upsurge as Another Suspect is Indicted, Maricopa County Sheriff's Office (August 21, 2013) ("Threats Press Release"), ECF No. 21-1. Such threats are deplorable and offensive to the entire justice system. Nevertheless, these allegations cannot confer standing on the plaintiff in his individual capacity in this case. In requesting injunctive relief, the plaintiff "must show he is suffering an ongoing injury or faces an immediate threat of [future] injury." *Dearth*, 641 F.3d at 501. The plaintiff has presented no evidence that these threats are ongoing. "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Defenders of Wildlife*, 504 U.S. at 564 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974))).

Moreover, as will be discussed in detail below, even an ongoing threat to the plaintiff by undocumented immigrants would not provide the plaintiff with standing to challenge the deferred action programs at issue. The plaintiff must not only show that he is injured, but that the plaintiff's injury is fairly traceable to the challenged deferred action programs and that the injury is capable of redress by this Court in this action. The plaintiff cannot meet this showing. The challenge deferred action programs did not cause the threats to the plaintiff's life. Rather, criminal action by third-parties not before the court caused the threats to the plaintiff. Moreover, according to the plaintiff's press release, the alleged assassins were motivated by the plaintiff's "widely known stance on illegal immigration," a stance pre-existing this case and these challenged programs. *See* Threats Press Release. Furthermore, an injunction in this case would do nothing either to alter the plaintiff's views on "illegal immigration" or to redress the targeting of the plaintiff resulting from his "widely known stance on illegal immigration." This dooms the plaintiff's standing to bring this suit in his personal capacity as an ordinary citizen.

b) Official Capacity

Even if the plaintiff can circumvent these limitations by bringing suit in his official capacity as Sheriff of Maricopa County, the plaintiff still lacks standing.

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. 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. 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. The plaintiff further alleges that, "the experiences and records of the Sheriff's office show that many illegal aliens . . . are repeat offenders, such that Plaintiff Arpaio's deputies and other law enforcement officials have arrested the same illegal aliens for various different crimes." Compl. ¶ 31. 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.

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'Neill*, 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). 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. 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. Thus, even if the plaintiff's official functions could be viewed as a "legally protected interest," the challenged deferred action programs do not amount to "an invasion" of that interest in a manner that is "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560. 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.

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.[10] 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. Fortunately, the standing doctrine is not so limp. As the Supreme Court has repeatedly emphasized: "'a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in [the] proper application of the Constitution and laws, and seeking relief that no more directly [or] tangibly benefits him than it does the public at large – does not state an Article III case or controversy.'"

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[10] Although prior case law has occasionally suggested that "generalized grievances" should be analyzed as part of prudential standing, the Supreme Court recently suggested that such concerns should be considered as part of Article III standing. *See Lexmark Int'l*, 134 S. Ct. at 1387 n.3 ("While we have at times grounded our reluctance to entertain [suits concerning generalized grievances] in the 'counsels of prudence' (albeit counsels 'close[ly] relat[ed] to the policies reflected in' Article III), we have since held that such suits do not present constitutional 'cases' or 'controversies.'" (internal citations omitted) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982))). Although there is some dispute within this Circuit as to whether prudential standing should be considered jurisdictional, there is no dispute that where the plaintiff cannot meet the irreducible constitutional minimum of Article III standing, the court need not address whether the plaintiff has prudential standing. *See generally Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012). Accordingly, the Court does not address whether prudential concerns prevent the plaintiff from establishing standing.

Lance v. Coffman, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504 U.S. at 573); *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. . . ."). Simply put, a state official has not suffered an injury in fact to a legally cognizable interest because a federal government program is anticipated to produce an increase in that state's population and a concomitant increase in the need for the state's resources. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 520-521 (2007) (finding standing for Massachusetts because of state's "quasi-sovereign interests" relating to its "desire to preserve its sovereign territory" not because of the increase in state expenditures resulting from federal policy concerning global warming).

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.

Even drawing all inferences in favor of the plaintiff, the terms of the challenged deferred action programs do not support the plaintiff's theory. The challenged deferred action programs would have no impact on *new* immigrants, as the guidance defining the programs makes clear that these programs only apply to undocumented immigrants residing in the United States prior to January 1, 2010. 2014 Guidance Memorandum at 4. Thus, it is speculative that a program, which does not apply to future immigrants, will nonetheless result in immigrants crossing the border illegally into Maricopa County (and other borders of this country).

The plaintiff has been unable to show that the challenged deferred action programs have interfered with his official duties as Sheriff in a manner that "is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" and has therefore failed in his burden to establish an injury in fact. *Defenders of Wildlife*, 504 U.S. at 560.

2. *Causation and Redressability*

The plaintiff's speculative injury is not the only infirmity in the plaintiff's standing theory. A plaintiff must not only show an "injury in fact," but must also show that the injury is fairly traceable to the allegedly harmful conduct and that the relief sought by the plaintiff will likely redress the injury. *Defenders of Wildlife*, 504 U.S. at 560. Two overarching

principles apply to the causation and redressability inquiry in this case.

First, this case involves the purported "standing to challenge [an executive action] where the direct cause of injury is the independent action of . . . third part[ies]." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1269 (D.C. Cir. 2007). Indeed, it is the actions taken by undocumented immigrants – migrating to Maricopa County and committing crimes once there – that are purportedly the direct cause of the plaintiff's injury. As will be discussed, however, "courts [only] occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004).[11]

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[11] The plaintiff attempts to rely upon the doctrine of competitor standing to avoid the strict limitations imposed on cases where the source of the plaintiff's harm is the independent actions of third parties. Yet, the cases on which the plaintiff relies, *see Mendoza v. Perez*, 754 F.3d 1002, 1012-14 (D.C. Cir. 2014); *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004); and *Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, No. 14-cv-529, 2014 WL 6537464, at *4 (D.D.C. Nov. 21, 2014), do not support the plaintiff's standing argument in this case. Standing was found in those cases because a plaintiff suffered an injury in fact "when an agency lift[ed] regulatory restrictions on their competitors or otherwise allow[ed] increased competition." *Mendoza*, 754 F.3d at 1011 (quoting *La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). The doctrine of competitor standing is not implicated in this case, as the plaintiff's resources are not strained because he is forced to compete with undocumented immigrants in a limited

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Second, and relatedly, the programs challenged by the plaintiff do not regulate the plaintiff directly; rather, they regulate federal immigration officials. As the Supreme Court has made clear, "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed" to confer standing. *Defenders of Wildlife*, 504 U.S. at 562 (emphasis in original). When standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (internal quotations and citations omitted); *see also id.* ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." (internal quotation marks omitted)).

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market. Moreover, the plaintiff cannot rely on a supposed "procedural injury" because, since the plaintiff has no authority to enforce the Federal immigration laws, the plaintiff cannot demonstrate the challenged deferred action programs "threaten[ ] [a] concrete interest" of the plaintiff as opposed to an injury common to all members of the public. *Mendoza*, 754 F.3d at 1010.

The Court first addresses the plaintiff's failure to show causation before discussing the plaintiff's failure to demonstrate redressability.

a) Causation

The D.C. Circuit has identified "two categories of cases where standing exists to challenge government action though the direct cause of injury is the action of a third party." *Renal Physicians*, 489 F.3d at 1275. "First, a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *National Wrestling Coaches*, 366 F.3d at 940. Importantly, in this category of cases, the challenged government conduct must authorize the specific third-party conduct that causes the injury to the plaintiff. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) ("Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries. . . . "). In the present case, the challenged agency action – the ability to exercise enforcement discretion to permit deferred action relating to certain undocumented immigrants – does not authorize the conduct about which the plaintiff complains. The challenged deferred action programs authorize immigration officials to exercise discretion on removal; they do not authorize new immigration

into the United States (let alone Maricopa County); they do not authorize undocumented immigrants to commit crimes; and they do not provide permanent status to any undocumented immigrants eligible to apply for deferred action under any of the challenged programs. 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.

Second, standing has been found "where the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *National Wrestling Coaches*, 366 F.3d at 941. This record is sparse regarding a link between the challenged deferred action programs and the third-party conduct. Although the plaintiff has submitted numerous press releases and letters to officials documenting Maricopa County's struggle with illegal immigration along the southern

border, the plaintiff has submitted no evidence showing that the challenged deferred action programs are, or will be, the cause of the crime harming the plaintiff or the increase in immigration, much less "substantial evidence." Indeed, the plaintiff severely undermines his own argument by stating that "millions more illegal aliens will be attracted into the border states of the United States, *regardless of the specific details*" of current executive branch immigration policies. Compl. ¶ 30 (emphasis added). If the details of the challenged deferred action programs do not matter as to whether or not the plaintiff will suffer an injury, then the plaintiff's injuries cannot be fairly traceable to these programs. Similarly, the plaintiff observes that "the Executive Branch is not deporting illegal aliens in any significant numbers" and that regardless of the provision of deferred action programs "illegal aliens are very unlikely to be deported." Pl.'s Mot. at 12. Implicit in this observation is the plaintiff's admission that regardless of the challenged deferred action programs, the plaintiff is likely to continue to suffer the claimed injury.

In sum, the plaintiff has failed to demonstrate that the challenged deferred action programs are the cause of his alleged injury.

b) Redressability

Similar to the causation requirement, "it is 'substantially more difficult' for a petitioner to establish redressability where the alleged injury arises from

the government's regulation of a third party not before the court." *Spectrum Five LLC v. Fed. Commc'ns Comm'n*, 758 F.3d 254, 261 (D.C. Cir. 2014) (quoting *Nat'l Wrestling Coaches*, 366 F.3d at 933); *see also Defenders of Wildlife*, 504 U.S. at 562. The plaintiff must allege facts that are "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Renal Physicians*, 489 F.3d at 1275. In other words, the plaintiff must allege facts sufficient to demonstrate a substantial likelihood that, as a result of injunctive relief in this case, there would not be an increase in undocumented immigrants in Maricopa County and there would not be an increase in crimes committed by undocumented immigrants in Maricopa County. This is a "substantially more difficult" task. *Spectrum Five LLC*, 758 F.3d at 261.

On this point, the D.C. Circuit's decision in *National Wrestling Coaches* is instructive. There, plaintiffs challenged an interpretive rule promulgated by the Department of Education, which laid out three ways in which the Department would assess whether educational institutions had complied with Department regulations that required such institutions to select sports and levels of competition to "effectively accommodate the interests and abilities of members of both sexes.'" 366 F.3d at 934-35 (quoting 45 C.F.R. § 86.41(c)(1) and 34 C.F.R. § 106.41(c)(1)). That regulation had been promulgated pursuant to Title IX of the Education Amendments of 1972, which prohibited

discrimination on the basis of sex in federally funded educational programs and activities. *See id.* at 934. The plaintiffs were "membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni," and their asserted injuries arose "from decisions by educational institutions to eliminate or reduce the size of men's wrestling programs to comply with the Department's interpretive rules implementing Title IX." *Id.* at 935.

Thus, in *National Wrestling Coaches*, like in the instant case, "the necessary elements of causation and redressability . . . hinge[d] on the independent choices of . . . regulated third part[ies]." *Id.* at 938. The D.C. Circuit found redressability lacking in *National Wrestling Coaches* because "nothing but speculation suggests that schools would act any differently than they do with the [challenged interpretive rule] in place" since "[s]chools would remain free to eliminate or cap men's wrestling teams and may in some circumstances feel compelled to do so to comply with the statute and the [previous Department] Regulations." *Id.* at 940. Further, the court found that "other reasons unrelated to the challenged legal requirements [*e.g.*, moral considerations, budget constraints] may continue to motivate schools to take such actions." *Id.* From this analysis, and a comprehensive review of the case law, the *National Wrestling Coaches* court concluded that "it is purely speculative whether a decision in appellants' favor would alter the process by which schools determine whether to field certain sports teams." *Id.* at 944.

The same concerns animating the outcome in *National Wrestling Coaches* drive the result in this case. Many "other reasons unrelated to the challenged legal requirements" may motivate the conduct allegedly causing harm to the plaintiff. Indeed, the motivation for any individual to come to the United States (or, once present here, to commit a crime in Maricopa County), does not rest solely upon the challenged deferred action programs. Such decisions are complicated and multi-faceted, involving both national and international factors. A ruling by this Court enjoining the challenged deferred action programs will likely not change the complex and individualized decision making of undocumented immigrants allegedly causing harm to the plaintiff. 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.

Moreover, the plaintiff acknowledges that the defendants only have limited resources to facilitate removal, *see* Hrg. Tr. at 14. Relief from this Court will not grant additional resources to the executive branch allowing it to remove additional undocumented immigrants or to prevent undocumented immigrants from arriving. Thus, the plaintiff's complaint regarding the large number of undocumented immigrants and the limited number of removals will not change as a result of any order by the Court in this litigation. Consequently, the plaintiff's alleged harm stemming

from the expenditure of resources to deal with the large number of undocumented immigrants in Maricopa County will remain. In other words, regardless of the outcome of this case, the Court can afford no relief to the plaintiff's injury. *Cf. Bauer v. Marmara*, No. 13-ap-7081, 2014 WL 7234818, at *6 (D.C. Cir. December 19, 2014) (holding that plaintiff was "unable to satisfy the redressability prong of Article III standing because the court cannot compel the Government to pursue action to seek forfeiture of the disputed vessels").

"When redress depends on the cooperation of a third party, 'it becomes the burden of the [party asserting standing] *to adduce facts* showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.'" *U.S. Ecology v. U.S. Dep't of Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000) (emphasis added) (quoting *Defenders of Wildlife*, 504 U.S. at 562); *see also Klamath Water v. Fed. Energy Reg. Comm'n*, 534 F.3d 735, 739 (D.C. Cir. 2008) ("In a case like this, in which relief for the petitioner depends on actions by a third party not before the court, the petitioner must demonstrate that a favorable decision would create 'a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002))). The plaintiff has been unable to meet this burden.

* * *

Taken together, the Court finds that the plaintiff has not and cannot show that: (1) he suffers a concrete and particularized injury (as opposed to a speculative and generalized grievance); (2) the cause of the plaintiff's injury can be fairly traced to the challenged deferred action programs; and (3) a favorable ruling by this Court would redress the plaintiff's alleged injury. A plaintiff "may be disappointed if the Government declines to pursue [enforcement], but disappointment of this sort is a far cry from the injury and redressability required to prove Article III Standing." *Bauer*, 2014 WL 7234818, at *6. As a result, the plaintiff lacks standing to bring this challenge, requiring dismissal of this lawsuit for lack of subject matter jurisdiction.

B. Preliminary Injunction

The plaintiff's motion for preliminary injunction likewise fails as the plaintiff can show neither a likelihood of success on the merits nor irreparable harm due to his lack of standing. As an initial matter, because "standing is a necessary predicate to any exercise of [the Court's] jurisdiction, the [plaintiff] and [his] claims have no likelihood of success on the merits," if the plaintiff lacks standing. *Smith v. Henderson*, 944 F. Supp. 2d 89, 99 (D.D.C. 2013) (internal quotations and citations omitted); *see also Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 241 (D.D.C. 2013) ("The first component of the likelihood of success on the merits prong usually

examines whether the plaintiffs have standing in a given case." (internal quotations omitted)).

Moreover, the same problem that confronts the plaintiff's standing argument – the inability to obtain redress from an order by this Court – likewise dooms the plaintiff's ability to show irreparable harm. Indeed, "it would make little sense for a court to conclude that a plaintiff has shown irreparable harm when the relief sought would not actually remedy that harm." *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 153 (D.D.C. 2011); *see also Navistar, Inc. v. Environmental Protection Agency*, No. 11-cv-449, 2011 WL 3743732, at *3 (D.D.C. Aug. 25, 2011) (Wilkins, J.) ("Because an injunction will not redress its alleged injuries, [the plaintiff's] claim that it will suffer irreparable harm in the absence of a preliminary injunction is tenuous at best.").

Nevertheless, even if the plaintiff were able to establish standing, the plaintiff would face a number of legal obstacles to prevail and, therefore, could not demonstrate a likelihood of success on the merits nor any of the other preliminary injunction factors.[12]

[12] The plaintiff has highlighted a recently out-of-Circuit opinion from the Western District of Pennsylvania ("Pennsylvania court") to buttress his claims regarding his likelihood of success on the merits. *See* Pl.'s Notice of Suppl. Auth., ECF No. 14 (citing *United States v. Juarez-Escobar*, 2014 U.S. Dist. LEXIS 173350 (W.D. Pa. Dec. 16, 2014)). In that case, the court considered the applicability of the DAPA program to a criminal defendant (who had been arrested locally for driving under the influence with a minor present in the vehicle) in connection with

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the defendant's sentencing, upon his plea of guilty to illegal reentry in violation of 8 U.S.C. § 1326. *Id.* at *1-*4. Throughout the opinion, the court expresses an over-arching concern with the fairness of the prosecution in light of the uneven enforcement of the immigration laws. *See, e.g.*, *id.* at *5 ("Defendant appears before this Court, in part, because of arguably unequal and arbitrary immigration enforcement in the United States."); *id.* at *6-*7 (observing that "[h]ad Defendant been arrested in a 'sanctuary state' or a 'sanctuary city,' local law enforcement likely would not have reported him to Homeland Security" and "he would likely not have been indicted" and "would not be facing sentencing and/or deportation"); *id.* at *39-*40 (noting "an arbitrariness to Defendant's arrest and criminal prosecution" given existence of "'sanctuary cities' [where] . . . if an undocumented immigrant was arrested for a minor offense, local law enforcement would not automatically notify ICE"); *id.* at *41 (describing "Defendant's current criminal prosecution and the civil deportation hearing that will undoubtedly follow as a result of this criminal proceeding" as "arguably . . . arbitrary and random"). Consistent with this theme, the court reviewed the DAPA program to evaluate "whether it would unjustly and unequally impact this Defendant in light of this Court's obligation to avoid sentencing disparities among defendants with similar records who have been found guilty of similar conduct," citing 18 U.S.C. § 3553(a)(6). *Id.* at *24; *see also id.* at *12-*13 (expressing "concern [ ] that the Executive Action might have an impact on this matter, including any subsequent removal or deportation"). In other words, under the rubric of a sentencing factor that sentencing courts are required to consider under 18 U.S.C. § 3553(a), the Pennsylvania court set out to evaluate whether the DAPA program was applicable to the defendant and, if so, whether the consequences of his conviction, including deportation, would amount to an unwarranted sentencing disparity because similarly situated defendants could obtain deferred removal. *See* 18 U.S.C. § 3553(a)(6) (requiring sentencing court, "in determining the particular sentence to be imposed," to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

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The Pennsylvania court ultimately determined that the DAPA program was not applicable to the defendant for two reasons: first, the court opined that the DAPA program "is unconstitutional," *id.* at *33, *38; and, second, even if the DAPA program were constitutional, the court made critical factual findings that the defendant did not meet the eligibility criteria for DAPA's deferred action, *id.* at *45 ("The bottom line for this Defendant is that . . . he does not fall into any newly created or expanded deferment category. . . ."); *id.* at *57 ("this Defendant is possibly not entitled to the deferred action status that would enable him to defer deportation"). Despite the defendant's lack (or "possible[ ]" lack) of eligibility for the DAPA program, the court viewed the defendant as "more 'family' than 'felon,' " *id.* at *45, *58, due to his "close bond with his brother," who resided in the United States, *id.* at *57-*58 prompting the court to give the defendant the opportunity to withdraw his guilty plea or proceed to sentencing, *id.* at *59.

While fully respectful of the concern animating this decision, which focused on the fairness of the prosecution and guilty plea of the defendant for the crime of illegal reentry, this Court does not find the reasoning persuasive for at least three reasons. First, most notably, the Pennsylvania court's consideration of the constitutionality of the DAPA program flies in the face of the " 'well-established principle governing the prudent exercise of [a] [c]ourt's jurisdiction that normally [a] [c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case.' " *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)); *see also United States v. Thomas*, 572 F.3d 945, 952 (D.C. Cir. 2009) (Ginsburg J., concurring). Thus, the Pennsylvania court appears to have put the proverbial "cart before the horse" since finding the defendant likely ineligible for the DAPA program made consideration of the program's constitutionality unnecessary. Second, the purported basis for the Pennsylvania court's consideration of the DAPA program was to avoid unwarranted sentencing disparities, as required by 18 U.S.C. § 3553(a)(6). Yet, the DAPA program has no bearing on the *sentence* imposed

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While not necessary to resolve this case, the Court outlines several of these obstacles. First, with respect to the plaintiff's likelihood of success on the merits, the challenged deferred action programs continue a longstanding practice of enforcement discretion regarding the Nation's immigration laws. Such discretion is conferred by statute, *see* 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3), and the manner of its exercise through

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by the Pennsylvania court since, as the Supreme Court has made clear, "[r]emoval is a civil, not criminal, matter." *Arizona*, 132 S. Ct. at 2499. To the extent that the Pennsylvania court was focused on the defendant's likely deportation following the imposition of the sentence, this collateral consequence could not result in an *unwarranted* disparity since the defendant's likely ineligibility for DAPA means that the defendant was not similarly situated to persons who are eligible. Finally, even if the Pennsylvania court's concern were correct that the defendant was subject to potentially unequal enforcement of a criminal statute and faced prosecution in the Western District of Pennsylvania when he was unlikely to face prosecution in other districts, such enforcement disparities are inherent in prosecutorial discretion and have no bearing on the analysis under § 3553(a)(6), which requires consideration of *sentence* disparities among similarly situated defendants convicted of the same offense in federal court, not *enforcement* disparities. *Accord United States v. Washington*, 670 F.3d 1321, 1327 (D.C. Cir. 2012) ("U.S. Attorney's lawful exercise of discretion in bringing a federal prosecution" rather than local prosecution, which may result in different sentences, does not support a departure under § 3553(a)(6)); *United States v. Clark*, 8 F.3d 839, 842-843 (D.C. Cir. 1993) ("reject[ing] the claim that the [U.S.] government's 'arbitrary use' of its discretion to indict defendants under either federal or D.C. law could be a mitigating circumstance within the meaning of § 3553(b)" or was appropriate to consider in exercise of district court's authority to avoid unwarranted sentencing disparities under § 3553(a)(6)).

deferred action on removal has been endorsed by Congress, *see, e.g.*, 8 U.S.C. § 1227(d)(2). Thus, the deferred action programs are consistent with, rather than contrary to, congressional policy. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

In addition, although the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of the law to the unconstitutional rewriting of the law for the following reason: The programs still retain provisions for meaningful case-by-case review.[13] *See* 2014 Guidance Memorandum at 4 (requiring that a DAPA applicant present "no other factors that, in the exercise of discretion, make[ ] the grant of deferred action inappropriate"). This case-by-case decisionmaking reinforces the conclusion that the challenged programs amount only to the valid exercise of prosecutorial discretion and reflect the reality that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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[13] Statistics provided by the defendants reflect that such case-by-case review is in operation. As of December 5, 2014, 36,860 requests for deferred action under DACA were denied and another 42,632 applicants were rejected as not eligible. Defs.' Mem., Ex. 22 (USCIS, Current Statistics: Deferred Action for Childhood Arrivals: Pending, Receipts, Rejected, Approvals, and Denials (2014)), ECF No. 13-22.

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.[14]

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[14] The plaintiff makes three arguments in support of his motion for preliminary injunction based on the constitutional principles underlying the separation of powers. First, the plaintiff argues that the implementation of the challenged programs would use significantly all of the funds appropriated by Congress for immigration enforcement thereby frustrating the will of Congress. *See* Hrg. Tr. at 16-17; Pl.'s Mot. at 20. This is not so. "[T]he costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees." OLC Opinion at 27; 2014 Guidance Memorandum at 5 ("Applicants will pay the work authorization and biometrics fees, which currently amount to $465."). Should Congress disagree with the enforcement priorities set out by DHS in the challenged policies, Congress has the ability to appropriate funds solely for removal and the President cannot refuse to expend funds appropriated by Congress. *See Train v. City of New York*, 420 U.S. 35 (1975). Second, the plaintiff argues that the challenged deferred action programs violate *INS v. Chadha*, 462 U.S. 919 (1983), because the programs amount to unlawful legislation and/or rulemaking. Pl.'s Mot. at 20. This argument also misses the mark. Congress has delegated authority to DHS to establish priorities for the enforcement of the nation's immigration laws, *see* 6 U.S.C. 202(5), and, as *Chadha* recognizes, DHS is acting in an Article II enforcement capacity when determining

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Second, the plaintiff cannot demonstrate irreparable harm since the plaintiff waited two years to challenge the DACA program and because any harm to the plaintiff is likely to occur regardless of the challenged policies.

Finally, both the public interest and the balance of the equities do not support a preliminary injunction. Halting these deferred action programs would inhibit the ability of DHS to focus on its statutorily proscribed enforcement priorities (national security, border security, and public safety) and would upset the expectations of the DACA program's participants and the potentially eligible participants in the other challenged programs when none of those participants are currently before this Court.

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issues of deportation. *See Chadha*, 462 U.S. at 953 n.16. Third, the plaintiff contends that the challenged deferred action programs violate the non-delegation doctrine. Pl.'s Mot. at 17. Yet, a finding of excessive delegation of authority is extremely rare, given the low threshold that legislation must meet to overcome a non-delegation doctrine claim. *See United States v. Ross*, 778 F. Supp. 2d 13, 26 (D.D.C. 2011) ("[o]nly twice in [the Supreme Court's] history, and not since 1935, has [it] invalidated a statute on the ground of excessive delegation of legislative authority") (citations and quotations omitted). The Supreme Court has "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001)).

IV. CONCLUSION

For the foregoing reasons, the plaintiff's motion for preliminary injunction is denied and the defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

An appropriate Order accompanies this Memorandum Opinion.

Date: December 23, 2014 [SEAL] Digitally signed by Hon. Beryl A. Howell
DN: cn=Hon. Beryl A. Howell, o=U.S. District Court for the District of Columbia, ou=United States District Court Judge, email=howell_Chambers@dcd.uscourts.gov, c=US
Date: 2014.12.23 20:30:27 – 05'00'

BERYL A. HOWELL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH M. ARPAIO, *Sheriff, Maricopa County, Arizona*, Plaintiff, v. BARACK OBAMA, *in his individual and professional capacity as President, United States of America, et al.*, Defendants.	Civil Action No. 14-1966 (BAH) Judge Beryl A. Howell

ORDER

Upon consideration of the defendants' motion to dismiss for lack of subject matter jurisdiction, ECF Nos. 13, 15, and the plaintiff's motion for preliminary injunction, ECF No. 7, the related legal memoranda in support and in opposition, the declarations attached thereto, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that, because the Court lacks subject matter jurisdiction over this matter, the defendants' motion to dismiss is **GRANTED**; and it is further

ORDERED that the plaintiff's motion for preliminary injunction is DENIED;[1] and it is further

ORDERED that the Clerk of the Court close this case.

SO ORDERED

Date: December 23, 2014

This is a final and appealable Order.

[SEAL]

Digitally signed by Hon. Beryl A. Howell
DN: cn=Hon. Beryl A. Howell, o=U.S. District Court for the District of Columbia, ou=United States District Court Judge email=Howell_Chambers@dcd.uscourts.gov, c=US
Date: 2014.12.23 20:39:49 -5'00'

BERYL A. HOWELL
United States District Judge

[1] The plaintiff's motion for a preliminary injunction docketed at ECF No. 6 is DENIED as moot.

STATUTES (PROVISIONS) INVOLVED

Article I, Section 8 of the Constitution provides: "The Congress shall have power to . . . To establish a uniform rule of naturalization . . . "

Article III, Section 2, Clause 1, of the Constitution provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Article VI, Clause 2, of the Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

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5 U.S.C. § 704 provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

8 U.S.C. § 1103, primarily (a)(1), provides in relevant part:

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

the Attorney General with respect to all questions of law shall be controlling.

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

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

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

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

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter

or regulations issued thereunder upon officers or employees of the Service.

(7) He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(8) After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws.

(9) Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

(10) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney

General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

* * *

(g) Attorney General

(1) In general

The Attorney General shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

(2) Powers

The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General

determines to be necessary for carrying out this section.

8 U.S.C. § 1227 provides:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for

certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990)

or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub. L. 104-208, div. C, title VI, § 671(d)(1)(C), Sept. 30, 1996**, 110 Stat. 3009-723**

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States

in violation of this chapter (within the meaning of subparagraph (B)) if –

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether

willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who –

(i)

(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude Any alien who –

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a

single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate –

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of

imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting

with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent

action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted –

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud

and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of

this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in –

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship –

(i) [1] upon a determination that –

(I) the alien was acting is [2] self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime –

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(b) Deportation of certain nonimmigrants

An alien, admitted as a nonimmigrant under the provisions of either section 1101(a)(15)(A)(i) or 1101(a)(15)(G)(i) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a) of this section.

(c) Waiver of grounds for deportation

Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) of this section (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 1182(a) of this title) shall not apply to a special immigrant described in section 1101(a)(27)(J) of this title based upon circumstances that existed before the date the alien was provided such special immigrant status.

(d) Administrative stay

(1) If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until –

(A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

(B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings

under any other provision of the immigration laws of the United States.

(3) During any period in which the administrative stay of removal is in effect, the alien shall not be removed.

(4) Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.

8 U.S.C. § 1229a "Removal proceedings"

8 U.S.C. § 1231 "Detention and removal of aliens ordered removed"

EXCERPT OF CIRCUIT SPLIT ISSUES

Items optional for inclusion in the Appendix pursuant to Supreme Court Rule 14 include very large opinions, one of which came out two days ago.

1) In the U.S. District Court for the Southern District of Texas, in *State of Texas, et. al. v. United States of America*, 86 F. Supp. 3d 591 (S.D. Tex. Feb. 16, 2015) (Case No. B-14-254, Order of Temporary Injunction) ..... 123 pages

2) The Fifth Circuit opinion May 26, 2015, denying a stay in *Texas v. United States of America*, 787 F.3d 733, 743 (5th Cir. May 26, 2015) ..... 68 pages

3) The Fifth Circuit opinion on November 9, 2015, upholding Judge Hanen's Temporary Injunction outright, in *Texas v. United States of America*, Appeal No. 15-40238..... 135 pages

4) Transcript of hearing on motion for preliminary injunction and Rule 12(b)(1) motion to dismiss for lack of jurisdiction in the District Court December 22, 2014..... 60 pages

The Petitioner summarizes key issues in lieu of the 135 page Fifth Circuit opinion available only two days ago after our printing process had begun.

The following disputes about standing among the Circuits are highlighted in the Fifth Circuit opinion in *Texas v. United States of America*, Appeal

No. 15-40238, November 9, 2015, upholding Judge Hanen's Temporary Injunction outright.

> The government claims the states lack standing to challenge DAPA. As we will analyze, however, their standing is plain, based on the driver's-license rationale,[24] so we need not address the other possible grounds for standing.

Page 9

> As the parties invoking federal jurisdiction, the states have the burden of establishing standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). They must show an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 (citation omitted).

Page 9

> "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Page 9

> We begin by considering whether the states are entitled to "special solicitude" in our

standing inquiry under *Massachusetts v. EPA*. They are.

Page 10

The Court identified two additional considerations that entitled Massachusetts "to special solicitude in [the Court's] standing analysis." *Id.* at 520.[26] First, the Clean Air Act created a procedural right to challenge the EPA's decision:

> The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.
>
> Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry:
>
> "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."

Pages 10-11

First, "[t]he parties' dispute turns on the proper construction of a congressional statute,"[29] the APA, which authorizes challenges to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Similarly, the disagreement in *Massachusetts v. EPA* concerned the interpretation of the Clean Air Act, which provides for judicial review of "final action

> taken[ ] by the Administrator." 42 U.S.C. § 7607(b)(1).
>
> Further, as we will explain, the states are within the zone of interests of the Immigration and Nationality Act ("INA");[30] they are not asking us to "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."[31]

Pages 11-12

> Because the states here challenge DHS's decision to act, rather than its decision to remain inactive, a procedural right similar to that created by the Clean Air Act is not necessary to support standing. See 5 U.S.C. § 704.

Page 12

> Pursuant to that interest, states may have standing based on (1) federal assertions of authority to regulate matters they believe they control,[37] (2) federal preemption of state law,[38] and (3) federal interference with the enforcement of state law,[39] . . .

Page 13

> Under current state law, licenses issued to beneficiaries would necessarily be at a financial loss. The Department of Public Safety "shall issue" a license to a qualified applicant. TEX. TRANSP. CODE § 521.181. A noncitizen "must present . . . documentation issued by the appropriate United States agency that

authorizes the applicant to be in the United States." Id. § 521.142(a).

If permitted to go into effect, DAPA would enable at least 500,000 illegal aliens in Texas[55] to satisfy that requirement with proof of lawful presence[56] or employment authorization.[57]

Pages 16-17

Instead of disputing those figures, the United States claims that the costs would be offset by other benefits to the state. It theorizes that, because DAPA beneficiaries would be eligible for licenses, they would register their vehicles, generating income for the state, and buy auto insurance, reducing the expenses associated with uninsured motorists. The government suggests employment authorization would lead to increased tax revenue and decreased reliance on social services.

Page 17

Even if the government is correct, that does not negate Texas's injury, because we consider only those offsetting benefits that are of the same type and arise from the same transaction as the costs.[59]

Page 17-18

In Henderson, 287 F.3d at 379-81, we determined that taxpayers lacked standing to challenge a Louisiana law authorizing a license plate bearing a pro-life message, reasoning that the plaintiffs had not shown that the

program would use their tax dollars, because the extra fees paid by drivers who purchased the plates could have covered the associated expenses.

Page 18

Texas has satisfied the second standing requirement by establishing that its injury is "fairly traceable" to DAPA. It is undisputed that DAPA would enable beneficiaries to apply for driver's licenses, and there is little doubt that many would do so because driving is a practical necessity in most of the state.

Page 19

Although Texas could avoid financial loss by requiring applicants to pay the full costs of licenses, it could not avoid injury altogether. "[S]tates have a sovereign interest in 'the power to create and enforce a legal code,'"[62] and the possibility that a plaintiff could avoid injury by incurring other costs does not negate standing.[63]

Page 19

By way of contrast, there is no allegation that Texas passed its driver's license law to manufacture standing. The legislature enacted the law one year before DACA and three years before DAPA was announced,[66] and there is no hint that the state anticipated a change in immigration policy – much

> less a change as sweeping and dramatic as DAPA.

Page 24

> In addition to its notion that Texas could avoid injury, the government theorizes that Texas's injury is not fairly traceable to DAPA because it is merely an incidental and attenuated consequence of the program. But *Massachusetts v. EPA* establishes that the causal connection is adequate. . . .
>
> There was some uncertainty about whether the EPA's inaction was a substantial cause of the state's harm, considering the many other emissions sources involved.[67] But the Court held that Massachusetts had satisfied the causation requirement because the possibility that the effect of the EPA's decision was minor did not negate standing, and the evidence showed that the effect was significant in any event. *Id.* at 524-25.

Pages 24-25

> Texas has satisfied the third standing requirement, redressability. Enjoining DAPA based on the procedural APA claim could prompt DHS to reconsider the program, which is all a plaintiff must show when asserting a procedural right. See id. at 518. And enjoining DAPA based on the substantive APA claim would prevent Texas's injury altogether.

Page 26

> Because the states are suing under the APA, they "must satisfy not only Article III's standing requirements, but an additional test: The interest [they] assert[ ] must be 'arguably within the zone of interests to be protected or regulated by the statute' that [they] say[ ] was violated."[76] That "test . . . 'is not meant to be especially demanding'" and is applied "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'"[77]

Page 29

> Alternatively, the court relied on a new theory it called "abdication standing": Texas had standing because the United States has exclusive authority over immigration but has refused to act in that area. *Id.* at 636-43.

Page 8

> The court also considered but ultimately did not accept the notions that Texas could sue as *parens patriae* on behalf of citizens facing economic competition from DAPA beneficiaries and that the state had standing based on the losses it suffers generally from illegal immigration. *Id.* at 625-36.

Page 8
