IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*

Plaintiffs-Appellees,

v.

UNITED STATES, *et al.*

Defendants-Appellants.

No. 15-40238

APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

INTRODUCTION

The Federal Government seeks an immediate stay pending appeal of a nationwide preliminary injunction against the Department of Homeland Security (DHS). The Secretary of Homeland Security (Secretary) seeks to effectively prioritize the removal of aliens who have recently crossed the border, committed crimes, or threaten public safety and national security by, *inter alia*, establishing guidelines for considering requests for temporarily deferring removal of other aliens who pose no such threats and have longstanding and close family ties to the United States. The preliminary injunction restrains the exercise of that prosecutorial discretion, a quintessentially executive function that is traditionally unreviewable. In so doing, it undermines the Secretary's authority to enforce the Nation's immigration laws by disrupting the Secretary's comprehensive effort to effectively allocate limited enforcement resources.

The district court's order is unprecedented and wrong. The Constitution does not entitle States to intrude into the uniquely federal domain of immigration enforcement. *See Arizona v. United States*, 132 S. Ct. 2492 (2012). Yet the district court has taken the extraordinary step of allowing a State to override the United States' exercise of its enforcement discretion in the immigration laws. The court invented a novel theory of Article III standing that purports to confer standing on States without any actual injury. In the alternative, the court purported to find a cognizable injury to Texas based on indirect economic costs that are not the subject of these policies, that

federal law does not obligate Texas to bear, and in disregard of the expected economic benefits of these same policies – a standing theory that would radically expand the ability of States to intrude into this uniquely federal domain.

On the merits, the district court erred in holding that DHS violated the notice and comment requirements of the APA. The Secretary issued a memorandum that announces guidelines for the agency's exercise of enforcement discretion. It is a quintessential example of a general statement of policy, which the APA exempts from notice and comment. The court compounded these errors on standing and the APA by entering an overbroad injunction that restricts DHS nationwide, including in plaintiff States not found to have standing, and more remarkably, in States not parties to this litigation and that actively support the challenged policies.

In short, the preliminary injunction is a sweeping order that extends beyond the parties before the court and irreparably harms the Government and the public interest by preventing DHS from marshalling its resources to protect border security, public safety and national security, while also addressing humanitarian interests. In contrast, the plaintiffs will suffer no cognizable harm if a stay is granted.

The Government moved for a stay in the district court on February 23. On March 9, the district court issued an order that postpones action on any pending motions. In light of the urgent circumstances and critical federal interests at issue, including the need to protect national security, public safety, and the integrity of the border, the Government now seeks a stay from this Court. The Court should stay the

injunction in its entirety or, at the very least, stay it with respect to implementation in States other than Texas, or States that are not parties to this suit. We request that the appellees be directed to respond within 7 days after the filing of this motion and that the Court act on the motion within 14 days after the filing of the motion. The facts supporting emergency consideration of this motion are true and complete. We have notified the appellees of the filing of this motion by phone and email. Appellees have not yet responded, but they have opposed the request for a stay in the district court.

STATEMENT

I. Legal Background.

A. Congress has vested the Secretary with broad discretion over the administration and enforcement of the Nation's immigration laws, authorizing him to "establish such regulations; . . . issue such instructions; and perform such other acts *as he deems necessary* for carrying out his authority." 8 U.S.C. § 1103(a)(3) (emphasis added). This authority expressly includes discretion to establish and effectuate priorities regarding the removal of aliens. *See* 6 U.S.C. § 202(5) (directing Secretary to "establish national immigration enforcement policies and priorities").

Establishing removal priorities is essential to the faithful execution of the Nation's immigration laws. An estimated 11.3 million undocumented aliens are present in the United States. See Attachment 5, p. 9. Yet recent funding has allowed DHS's U.S. Immigration and Customs Enforcement (ICE) to annually remove fewer than four hundred thousand aliens, including aliens newly apprehended at the border.

Id. Thus, following Congressional policy, DHS has focused its limited resources on criminal aliens, threats to national security, and recent border crossers. *See* Consol. Appropriations Act, 2014, Pub. L. No. 113-76, div. F., Tit. II, 128 Stat. 5, 251 (2014); DHS Appropriations Act 2010, Pub. L. No. 111-83, 123 Stat. 2142 (2009). Executing those priorities, DHS removed approximately 2.4 million aliens from 2009 through 2014. Migration Policy Institute, *Deportation and Discretion* 13, 15 (October 2014); http://www.ice.gov/news/releases/dhs-releases-end-year-statistics (2014).

B. To effectively focus its efforts on aliens who are priorities for removal, DHS must decide which of the 11 million aliens it will *not* expend its limited resources to remove. One longstanding form of this enforcement discretion is "deferred action," an administrative decision to defer, for a limited time, the removal of aliens who are low priorities for removal. Attach. 3, p.2. Such a decision can be revoked at any time. *Id.* Longstanding DHS regulations, promulgated after notice and comment, provide that an alien subject to deferred action may receive employment authorization upon a showing of economic necessity. *See* 8 U.S.C. 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).

The practice of making aliens eligible to request deferred action based on various criteria has been an established feature of immigration policy for decades. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 193-94 (D.D.C. 2014). Congress has approved, and even directed, the use of deferred action on multiple occasions. *See id.* at 194. The Supreme Court has cited with approval the Executive's "regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian

reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999).

C. In 2012, in a policy known as Deferred Action for Childhood Arrivals ("DACA"), DHS announced that certain aliens brought to the United States as children may request deferred action. Attach. 2. Aliens may not be considered for deferred action under DACA unless they satisfy the threshold criteria. DACA requests are evaluated on a case-by-case basis by immigration officers who review whether an alien satisfies the threshold criteria and whether other factors militate against deferred action. *Id.* Plaintiffs have not challenged the 2012 DACA policy.

D. In November 2014, the Secretary issued a series of guidance memoranda to further focus DHS enforcement efforts on national security, border security, and public safety. In one memorandum, the Secretary issued new polices for prioritizing removal of those aliens who pose a threat to national security, public safety, or border security, placing priority on removal of recent illegal border crossers, aliens convicted of serious criminal offenses, and aliens who engage in or support terrorism. Attach. 4.

Another memorandum, the 2014 Deferred Action Guidance, broadened the eligibility criteria for aliens to be considered for deferred action under DACA. Attach. 3, pp. 3-4. The broadened DACA eligibility criteria were to be implemented by February 18, 2015. *Id.* at 4. The Guidance also permits certain aliens to request deferred action under a policy, known as "DAPA," that is focused on aliens who are parents of U.S. citizens or of lawful permanent residents. *Id.* at 4-5. To request

deferred action under DAPA, an alien must, *inter alia*, have a child who is a U.S. citizen or who is a lawful permanent resident, have continuously resided in the United States since before 2010, and not represent a threat to national security, border security, or public safety. *Id.* Requests for deferred action under the Guidance are to be assessed "on a case-by-case basis," and deferred action can be revoked at any time. *Id.* Recipients of deferred action under DAPA may receive work authorization where there is economic necessity. *Id.* The DAPA process was to be implemented by May 19, 2015. *Id.* Starting November 24, 2014, the Guidance extended the length of deferred action from two to three years for all DACA recipients, including those requesting deferred action under the original 2012 DACA criteria, and established the same period for DAPA. *Id.* at 3, 5.

II. Procedural Background.

A. Plaintiff States sued, claiming that the newly announced deferred action guidelines violate the Take Care Clause of the Constitution, Art. II, § 3, Cl. 5, the APA's notice-and-comment requirement, 5 U.S.C. § 553, and the APA's substantive requirements, 5 U.S.C. § 706. On February 16, 2015, the district court issued a preliminary injunction that prohibits the Government from implementing "any and all aspects or phases" of DAPA and "any and all aspects or phases of the expansions (including any and all changes)" to DACA, as outlined in the 2014 Guidance. Order, pp. 1-2. The order prohibits implementation not only in Texas, but also in plaintiff States that have not been found to have standing—and in States that are not parties to

the suit, including ones that support these policies.

With respect to the threshold issue of Article III standing, the court rejected the plaintiff States' primary argument that the broadened deferred action will injure them by prompting further illegal immigration, because the court concluded that such a harm "is too attenuated" to support standing. Op. 56. But the court held that implementation of the Guidance will injure "at least one plaintiff, Texas." *Id.* at 67.

First, the court concluded that Texas, and possibly other plaintiff States, would incur costs in issuing driver's licenses to aliens granted deferred action and work authorization. In response to the argument that such costs are a consequence of the plaintiff States' choices and taken on voluntarily, the court sought to rely on *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), which held that Arizona violated the Equal Protection Clause by denying driver's licenses to DACA recipients based on state-created alienage classifications. The district court suggested that the Government would treat any state effort to limit the issuance of driver's licenses as illegal, Op. 25, ignoring the Government's explanation that the Guidance does not "compel[] States to provide driver's licenses to DACA and DAPA recipients so long as the States base eligibility on existing federal alien classifications," Attach. 9, pp. 6-7.

The court further suggested that standing could be predicated on a novel "abdication" theory, which the court acknowledged was "not well-established." Op. 57, 61. While recognizing that the Federal Government retains plenary authority over immigration policy, the court suggested that States could establish Article III standing

by showing that the Government had "abdicated" that authority. *Id.* at 57-67.

The court declined to rule on plaintiffs' substantive claims. *Id.* at 121-22. Instead, the court relied exclusively on the claim that the Guidance should have undergone notice and comment. *Id.* at 110. The court concluded that the plaintiff States would suffer irreparable harm absent a preliminary injunction because the grants of deferred action would be "virtually irreversible" and the States would incur unrecoverable costs. *Id.* at 115. The court stated that the Government would not be harmed by an injunction that preserves the status quo. *Id.* at 119.

B. The Government moved for a stay in the district court on February 23. On March 9, the court issued an order postponing action on any pending motions. Attach.11. The court instead scheduled a hearing on March 19 concerning an advisory submitted by the Government concerning DHS's grant, prior to the issuance of the preliminary injunction, of three-year periods of deferred action and work authorization for requests submitted under the unchallenged 2012 DACA criteria (see Attach. 3, p. 3), and plaintiffs' request for discovery regarding that matter. On March 12, the Government made a supplemental filing that explained that the March 19 hearing is not germane to the stay motion. See Attach. 12. The filing informed the district court that, in view of the urgency of obtaining a stay of the preliminary injunction and the court's postponement of action on any motions, the Government is now proceeding to this Court. *Id.* at 1; see FRAP 8(a)(2)(A)(ii).

ARGUMENT

Four factors govern a request for a stay pending appeal: (1) whether the movant is likely to succeed on the merits; (2) whether the movant will suffer irreparable harm absent a stay; (3) whether a stay will substantially harm the other parties; and (4) whether a stay serves the public interest. *See Planned Parenthood v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). Where the balance of equities tilts strongly in favor of a stay, the moving party "'need only present a substantial case on the merits when a serious legal question is involved.'" *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). Applying these standards, the preliminary injunction was an extraordinary overreach that should be stayed pending appeal.

I. This Case Is Not Justiciable Because Plaintiffs Lack Standing.

Article III standing requires an injury that is (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The district court found standing, at least for Texas, on two grounds. Both are wrong, and prudential considerations also weigh strongly against entertaining this suit.

A. The plaintiff States cannot establish standing based on the district court's "abdication" theory—a theory that the plaintiffs did not advance, that the district court recognized is novel, *see* Op. 61, and that no other court has concluded could support Article III standing. The theory is baseless because it confuses the merits of the States' substantive APA claim with the threshold question of standing. Whether or not DHS is acting within its lawful discretion, a State cannot bring a suit without

demonstrating that it has suffered concrete, cognizable injuries as a result of the agency action. This is an "irreducible" constitutional requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, the court's reasoning allows States to bring suit—absent any identifiable harm—to challenge the Government's exercise of enforcement authority in an area that Congress has committed exclusively to the federal Government. It thus turns the established bar to any State entitlement to a role in the field of immigration enforcement into a justification for allowing the States to interfere with federal immigration discretion through the courts.

The district court's underlying premise is also wrong. Far from "abdicating" its authority to enforce the Nation's immigration laws, DHS is vigorously enforcing those laws, removing 2.4 million aliens from 2009 through 2014. See p. 4 *supra*. Because the number of aliens subject to removal vastly outstrips the resources that Congress has given DHS to remove them, DHS must decide which cases to prioritize. Consistent with Congress's direction, DHS has prioritized the removal of criminal aliens, national security threats, and recent border crossers, and has correspondingly chosen to defer the removal of certain aliens who, among other things, are not dangers to public safety or national security, entered the United States years ago, and whose removal would impose significant humanitarian costs. Far from "abdication," this is responsible enforcement in the face of real-world constraints.

B. The court also erred in finding that Texas had standing based on financial

costs it allegedly will incur when aliens who receive deferred action and obtain work authorization apply for driver's licenses. This harm is indirect, speculative, and not cognizable. Nothing in the Guidance requires aliens who receive work authorization to apply for licenses, requires States to issue licenses to these aliens, or requires States to charge a particular fee. Any economic impact Texas may incur due to issuing driver's licenses at a particular cost is thus the same indirect and incidental impact that States incur any time DHS grants any alien work authorization for any reason.

Such an indirect impact provides no basis for standing to challenge an agency's policies regarding the exercise of enforcement discretion. "[P]rivate persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws by [DHS]." *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 897 (1984); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (a private plaintiff "lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution"). The same rule applies to States, which may not interfere with the federal Government's ordering of immigration enforcement priorities. *See Arizona*, 132 S. Ct. at 2499.

Texas's claims of financial harm also ignore the prospect that deferred action and work authorization will lead to increased state tax revenues from aliens working legally. *See* Attach. 10, p. 6 (*amicus* estimate that implementing the Guidance in Texas may lead to $338 million increase in the state tax base over five years). Indeed, the district court recognized the possibility of "economic benefits that States will reap by

virtue of these individuals working, paying taxes, and contributing to the community." Op. at 54. Given the potential for such gains to offset cost, Texas has not shown that indirect financial harm is "*certainly* impending." *Clapper*, 133 S. Ct. at 1148.

The financial costs of issuing driver's licenses are also "self-inflicted injuries." *See Clapper*, 133 S. Ct. at 1152. Contrary to the district court's view, the Ninth Circuit's decision in *Arizona Dream Act* left States free to issue and charge fees for driver's licenses as they see fit, as long as their licensing schemes satisfy rational-basis scrutiny. *See Arizona Dream Act Coalition v. Brewer*, 2015 WL 300376, at *9 (D. Ariz. Jan. 22, 2015). Nor did the Government argue that federal preemption principles require States to issue licenses to deferred action recipients. States may choose to issue driver's licenses to deferred action recipients or not, as long as they base eligibility on federal immigration classifications rather than creating new state-law classifications of aliens. The district court's assumption that the federal Government would contest the legality of any effort by States to deny driver's licenses to deferred action recipients, Op. 25, disregards the Government's express statements. *See* Attach. 9, pp. 6-7.

The district court's driver's-license standing theory is subject to no limiting principle. If accepted, it could allow States to sue DHS any time it grants any alien work authorization and the State allows work authorization to be the basis for obtaining a benefit under state law. Indeed, the court's theory would seem to give States standing to sue the Federal Government over any policy that has any collateral economic consequences for the States, including when state policies themselves cause

such an economic consequence. This would radically alter the balance between the States and the federal Government and insert Article III courts into policy disputes between them. This Court has already rejected a strikingly similar theory, explaining that state expenditures on services for undocumented aliens "are not the result of federal coercion" nor legally attributable to the actions of federal immigration authorities. *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997).

C. Compelling prudential considerations also weigh against entertaining this challenge. Courts are properly reluctant to interfere with the administration of the Nation's immigration laws. "The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into" the field of immigration. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). And the fact that *States* have brought this suit further counsels caution. The "responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches *of the Federal Government*" rather than the States. *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (emphasis added); *see also Arizona*, 132 S. Ct. at 2499 (emphasizing breadth of "federal power to determine immigration policy"). Accordingly, this Court dismissed as non-justiciable Texas's claim that the federal government had "failed to enforce the immigration laws and refuse[d] to pay the costs resulting therefrom." *Texas*, 106 F.3d at 666. That this suit threatens "state interference with the exercise of federal powers" thus presents "an important argument against standing." *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 678 (D.C. Cir. 1976).

II. The Government Is Likely To Prevail On Appeal.

The United States is also likely to succeed on appeal because plaintiffs' claims fail on their own terms. At the outset, the States lack an APA cause of action because an agency's decision not to undertake enforcement action involves discretionary judgments regarding resource allocation and other factors that are not amenable to judicial oversight and is presumptively unreviewable under the APA. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). For the same reasons, judicial review of the exercise of enforcement discretion under the INA is precluded by law, 5 U.S.C. § 701(a)(1), and the prospect of judicial intrusion into a matter so closely tied to the protection of the Nation's borders and foreign relations provides compelling grounds for denying relief, 5 U.S.C. § 702. Moreover, the States are not within the zone of interests protected by any relevant provision of the Immigration and Nationality Act (INA). *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Nothing in the INA suggests that Congress intended for States to challenge the Secretary's exercise of prosecutorial discretion as to third-party aliens. *Cf. Sure-Tan,* 467 U.S. at 897.

On the merits, the district court erred in holding that the plaintiff States are likely to succeed on the notice-and-comment APA challenge. The Guidance is a "general statement of policy," which the APA expressly exempts from notice and comment, because it "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citation omitted); *see* 5 U.S.C. § 553(b)(3)(A). Specifically, the Guidance

describes how DHS will exercise its preexisting discretion in deferring the removal of low-priority aliens for a limited and revocable period. *Cf. Dept. of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1155 (5th Cir. 1984) (agency plan for allocating resources by focusing safety inspections on employers with highest injury rates did not require notice and comment); *American Hosp. Ass'n v. Bowen*, 834 F.3d 1037 (D.C. Cir. 1987) (publication of enforcement-allocation criteria did not require notice-and-comment).

In treating the Guidance as a substantive rule, the district court erroneously suggested that it entitles deferred action recipients to obtain the ability to work lawfully and to receive other affirmative benefits. Aliens who receive deferred action may be granted work authorization where there is economic necessity, but that is not due to the Guidance; it is due to an agency regulation originally promulgated in 1981through notice-and-comment rulemaking. *See* 8 C.F.R. § 274a.12(c)(14); 46 Fed. Reg. 25079-03, 25081 (May 5, 1981). Under the APA, once is enough. *See* 5 U.S.C. § 553(b). And a grant of deferred action does not confer a right to a driver's license under the REAL ID Act. States need not participate in the REAL ID program, and if they do, the Act does not require them to give licenses to aliens with deferred action; it merely allows proof of deferred action to satisfy one of the Act's requirements. *See* Pub. L. No. 109-13, div. B, § 202(c)(2)(B)(viii), 119 Stat. 231, 313 (2005).

The district court also erred in reasoning that the Guidance is not a "statement of policy" because it supposedly establishes a "binding norm" compelling subordinate DHS agents to grant deferred action whenever the guideline criteria are met. Op. 108

(quoting *Professionals & Patients for Customized Care v. Shalala,* 56 F.3d 592, 596-97 (5th Cir. 1995)); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). Neither *Shalala* nor *Young* remotely suggests that a superior officer cannot bind his subordinates without going through notice and comment. Rather, *Shalala* and *Young* considered whether the agency had "*bound itself*." *Young*, 818 F.2d at 948 (emphasis added); *see Shalala*, 56 F.3d at 600 (notice-and-comment not required where "the policy does not foreclose *the agency's* exercise of its discretion in bringing an enforcement action" (emphasis added)). Here, DHS retains unfettered discretion to revoke any grant of deferred action at any time, and the Secretary could revoke the Guidance at any time. And unlike in *Young*, the Guidance uses retrospective criteria that do not create a new "norm" for the future primary conduct of a regulated entity.

Moreover, the Guidance leaves the Secretary's agents with discretion regarding issuance of deferred action through implementation of the Guidance. The Guidance expressly provides that even when the threshold criteria are satisfied, "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." Attach. 3, p. 4. The record below shows that DHS in fact has denied deferred action under the 2012 DACA guidelines for aliens who meet the threshold criteria but nonetheless do not warrant a favorable exercise of discretion. Attach. 6, ¶¶ 18-24. Accordingly, the district court in *Arpaio* correctly found that DHS will retain case-by-case discretion and that case-by-case review has taken place under DACA. 27 F. Supp. 3d at 193-94, 209-210.

III. The Balance Of Harms And Public Interest Favor A Stay.

The Government will suffer irreparable harm absent a stay. An injunction interfering with immigration enforcement, issued at the behest of the States, offends basic separation-of-powers and federalism principles and impinges on core Executive functions. The injunction therefore necessarily causes the Government an irreparable harm that will not be cured even if Defendants ultimately prevail.

The injunction also irreparably interferes with DHS's ability to protect the Homeland and secure our borders. Deferred action helps immigration officials distinguish criminals and other high-priority aliens from aliens who are not priorities for removal and whose cases may additionally burden already backlogged immigrations courts. *See* Attach. 7, ¶¶ 14-17; Attach. 8, ¶¶ 7-10. Rather than wasting resources determining whether encountered individuals are enforcement priorities, DHS would be able to rely on proof of deferred action to quickly confirm that they are not. *See id.* Enjoining the Guidance thus will "mak[e] it more difficult [for DHS] to efficiently and effectively carry out its mission." Attach. 7, ¶ 17.

The court's assertion that the preliminary injunction merely preserves the status quo, Op. 119, is misplaced. The focus of the irreparable-harm inquiry "must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). In any event, the court issued its injunction less than 48 hours before DHS was scheduled to begin accepting requests under the modified DACA eligibility criteria on February 18. See

Attach. 3, p. 4. Thus, the court set back substantial preparatory work that DHS had already undertaken, including leasing space and initiating the hiring process for employees. Op. 76 n.55. Compelled cessation of these efforts jeopardizes implementation of the policy, and resuming and completing the preparatory work necessary for implementation will involve additional burdens. *Cf. Ruiz v. Estelle*, 650 F.2d 555, 571 (5th Cir. 1981) (granting stay to relieve state agency of "burden . . . in terms of time, expense, and administrative red tape" of complying with order).

By contrast, the plaintiff States will suffer no harm if a stay is granted. The plaintiffs have not shown that DHS's implementation of the Guidance will cause them any cognizable injury, much less irreparable harm. Although the district court credited Texas's claim that it will spend "millions of dollars" to provide driver's licenses to future deferred action recipients, Op. 115, it is *state law* that makes licenses available to such individuals and specifies the fee. And Texas is likely to receive offsetting financial benefits through increased state tax revenues. *See* p. 11 *supra*.

Finally, the interests of the public and of third parties strongly favor a stay. DAPA and the expansion of DACA will advance important border-safety, public-safety and national-security goals in the public interest. By preventing DHS from implementing its chosen approach for best administering the immigration laws, the preliminary injunction harms not only DHS, but also the public. The injunction also impairs the humanitarian interest of providing temporary relief for close family members of U.S. citizens and lawful permanent residents. Furthermore, local law

enforcement will be deprived of the benefits of deferred action, which encourages aliens who are not enforcement priorities to cooperate with law enforcement officers where they might otherwise fear coming forward. *See* Attach. 8, ¶ 13. And state and local governments will lose potentially significant new payroll tax revenue.

IV. At the Very Least, This Court Should Confine the Operation of the Preliminary Injunction To Texas or To the Plaintiff States

Even if the plaintiffs were entitled to preliminary relief, the injunction issued by the district court is drastically overbroad. Twenty-four States are not parties to this action, and a dozen States have participated as *amici* to oppose the plaintiff States' challenge. Yet the court enjoined DHS from implementing the Guidance nationwide, barring implementation in States that do not oppose it and in States that support it.

For the reasons set forth above, the injunction should be stayed in its entirety. Given the absence of a finding that any State other than Texas has standing, the injunction must be stayed in all States except Texas. But at the very least, this Court should stay the injunction insofar as it bars implementation of the Guidance outside of the plaintiff States. *Cf. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying nationwide injunction insofar as it "grants relief to persons other than" named plaintiff). A nationwide injunction flouts the settled principle that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *see also United States v. Mendoza*, 464 U.S. 154, 160 (1984) (stressing importance of allowing

development of the law through litigation in multiple courts). The possibility that Texas might eventually have to spend more money issuing driver's licenses, based on its own policy choices and subject to offsetting tax revenues, provides no basis for a single district court to enjoin the Guidance throughout the country.

The plaintiffs suggested that the APA mandates nationwide injunctive relief by providing for courts to "set aside" unlawful agency action. 5 U.S.C. § 706. But the APA does not require courts to issue injunctions at all, much less nationwide ones. *See* 5 U.S.C. § 703 (authorizing declaratory judgments "or" injunctions). Moreover, 5 U.S.C. § 706 is inapplicable because it concerns a court's remedial authority at the end of litigation, not the scope of preliminary relief. Preliminary injunctions under the APA are governed by 5 U.S.C. § 705, which provides that, "*to the extent necessary to prevent irreparable injury*," the reviewing court "*may* issue" orders to "preserve status or rights pending conclusion of the review proceedings" (emphasis added). That language makes clear that preliminary injunctions are discretionary and must be tailored to irreparable injury. Here, no State suffered irreparable injury, and even if a plaintiff had a cognizable injury, a nationwide injunction is manifestly excessive when other States expect to be benefited by the challenged policies.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be stayed pending appeal. At a minimum, the injunction should be stayed with respect to: (1) States that are not parties to this suit; and (2) plaintiff States other than Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on March 12, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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