No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF WEST VIRGINIA; STATE OF KANSAS; STATE OF MISSISSIPPI,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security; CHRIS MAGNUS, Commissioner, U.S. Customs and Border Protection; TAE D. JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement; UR M. JADDOU, Director of U.S. Citizenship and Immigration Services,

Defendants-Appellants,

ELIZABETH DIAZ; JOSE MAGANA-SALGADO; KARINA RUIZ DE DIAZ; JIN PARK; DENISE ROMERO; ANGEL SILVA; MOSES KAMAU CHEGE; HYO-WON JEON; BLANCA GONZALEZ; MARIA ROCHA; MARIA DIAZ; ELLY MARISOL ESTRADA; DARWIN VELASQUEZ; OSCAR ALVAREZ; LUIS A. RAFAEL; NANCI J. PALACIOS GODINEZ; JUNG WOO KIM; CARLOS AGUILAR GONZALEZ; STATE OF NEW JERSEY,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

REPLY BRIEF FOR FEDERAL APPELLANTS

Of Counsel:

JONATHAN E. MEYER
General Counsel

U.S. Department of Homeland Security

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JENNIFER B. LOWERY
Acting United States Attorney

SCOTT R. MCINTOSH
CYNTHIA A. BARMORE
JOSHUA M. KOPPEL
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

ARGUMENT 2

I. Plaintiffs Lack Standing 2

II. Plaintiffs Are Outside The Zone Of Interests Of The INA 6

III. The DACA Memorandum Is Exempt From Notice-And-Comment Rulemaking Requirements 7

IV. DACA Is Consistent With The INA 11

A. DACA Lawfully Creates Criteria For Certain Childhood Arrivals To Request Temporary Forbearance From Removal 11

B. The INA Permits DHS To Grant Work Authorization To DACA Recipients 16

C. Individual Grants Of Advance Parole Provide No Basis To Hold DACA Unlawful 21

V. DACA Does Not Violate The Take Care Clause 22

VI. The District Court's Invalidation Of DACA Is Overbroad 23

CONCLUSION 26

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adirondack Med. Ctr. v. Sebelius,
740 F.3d 692 (D.C. Cir. 2014) 19

Akhtar v. Gonzales,
450 F.3d 587 (5th Cir. 2006) 12

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,
458 U.S. 592 (1982)..... 4

Arrabally, Matter of,
25 I & N Dec. 771 (BIA 2012) 22

Association of Flight Attendants-CWA v. Huerta,
785 F.3d 710 (D.C. Cir. 2015) 9

Bennett v. Spear,
520 U.S. 154 (1997) 6

City & Cty. of San Francisco v. Barr,
965 F.3d 753 (9th Cir. 2020) 25

City & Cty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018) 25

Dalton v. Specter,
511 U.S. 462 (1994) 22

Davis Cty. Solid Waste Mgmt. v. EPA,
108 F.3d 1454 (D.C. Cir. 1997) 23

Department of Commerce v. New York,
139 S. Ct. 2551 (2019) 3, 4

Department of Homeland Sec. v. New York,
140 S. Ct. 599 (2020) 23

DHS v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020) 7, 8, 11, 12

East Bay Sanctuary Covenant v. Barr,
934 F.3d 1026 (9th Cir. 2019) 24-25, 25

Government of Manitoba v. Bernhardt,
923 F.3d 173 (D.C. Cir. 2019) 4

Henderson v. Stalder,
287 F.3d 374 (5th Cir. 2002) 3

Hernandez v. Reno,
91 F.3d 776 (5th Cir. 1996) 23, 25

Kariuki v. Tarango,
709 F.3d 495 (5th Cir. 2013) 4

Kennett-Murray Corp. v. Bone,
622 F.2d 887 (5th Cir. 1980) 3

Lincoln v. Vigil,
508 U.S. 182 (1993) 10

Los Angeles Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011) 26

Louisiana v. Becerra,
20 F.4th 260 (5th Cir. 2021) 25

Massachusetts v. EPA,
549 U.S. 497 (2007) 4

Narenji v. Civiletti,
617 F.2d 745 (D.C. Cir. 1979) 19-20

Professionals & Patients for Customized Care v. Shalala,
56 F.3d 592 (5th Cir. 1995) 9, 10

Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 11

Rollins v. Home Depot USA,
8 F.4th 393 (5th Cir. 2021) 13

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
576 U.S. 519 (2015) 20

Texas v. Biden,
20 F.4th 928 (5th Cir. 2021) 4, 5, 7, 8

Texas v. EEOC
933 F.3d 433 (5th Cir. 2019) 10

Texas v. EPA,
829 F.3d 405 (5th Cir. 2016) 18

Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 1, 3, 5, 7, 9, 11, 14, 22, 25

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 24

Statutes:

Administrative Procedure Act (APA),
5 U.S.C. § 553(b)(3)(A) 7

6 U.S.C. § 202(5) 19
8 U.S.C. § 1101(a)(13)(B) 21
8 U.S.C. § 1103(a)(1) 16, 19
8 U.S.C. § 1103(a)(3) 16, 19
8 U.S.C. § 1182 21
8 U.S.C. § 1182(a)(6)(A)(i) 22
8 U.S.C. § 1182(a)(9)(B)(i) 22
8 U.S.C. § 1182(a)(9)(B)(ii) 22
8 U.S.C. § 1182(d)(5)(A) 21
8 U.S.C. § 1324a(a) 17
8 U.S.C. § 1324a(h)(3) 16, 17, 18, 20

Regulation:

8 C.F.R. § 1.3(a)(4)(vi) 13

Legislative Material:

H.R. Rep. No. 99-62(I) (1986).....18

Other Authorities:

Bureau of Labor Stats., *Table A-1: Employment status of the civilian population by sex and age* (Nov. 2021), https://go.usa.gov/xefgr 17

DHS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015-January 2018* (2021), https://go.usa.gov/xFyw6 14

52 Fed. Reg. 46,092 (Dec. 4, 1987) 20

86 Fed. Reg. 53,736 (Sept. 28, 2021) 14, 23

Memorandum from Doris Meissner, Comm'r, INS, Exercising Prosecutorial Discretion, 2000 WL 33596819 (Nov. 17, 2000) 21

The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....24

U.S. Chamber of Commerce, *U.S. Chamber Launches Nationwide Initiative to Address National Worker Shortage Crises and Help America's Employers Fill Jobs* (June 1, 2021), https://perma.cc/9VWC-LHPD 5

USCIS, *Count of Active DACA Recipients by Month of Current DACA Expiration—June 30, 2021*, https://go.usa.gov/xMwtK.....14

USCIS, Form I-131, *Instructions for Application for Travel Document* (Apr. 24, 2019), https://go.usa.gov/xevHF 21

INTRODUCTION AND SUMMARY

Deferred Action for Childhood Arrivals (DACA) is a lawful exercise of enforcement discretion that enables the Department of Homeland Security (DHS) to focus its limited enforcement resources effectively while furthering important humanitarian and public interests. DACA is faithful to the Immigration and Nationality Act (INA) and finds support in decades of historical practices accepted by Congress and the Supreme Court. Plaintiffs argue that this Court's decision concerning Deferred Action for Parents of Americans (DAPA) in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), compels it to invalidate DACA, but DAPA differed in critical respects. And even for DAPA, *Texas* did not negate the Secretary's authority to grant temporary forbearance from removal (deferred action) to persons who are low priorities for removal. Moreover, to the extent the Court has procedural concerns about DACA, the forthcoming final notice-and-comment rulemaking will resolve them.

Even if this Court were to conclude that DACA is legally deficient in some respect, the district court's wholesale nationwide invalidation of the policy is unsupportable. There is no basis to invalidate DACA's core element of temporary forbearance from removal, which plaintiffs have not challenged. And even if injunctive relief were warranted for other aspects of DACA, an injunction limited to the plaintiff States would fully redress plaintiffs' asserted injuries, without upending the lives of DACA recipients in States that welcome and depend on them.

ARGUMENT

I. PLAINTIFFS LACK STANDING

A. As explained in our opening brief (at 15-19), plaintiffs' alleged injury from providing emergency healthcare services and public education to DACA recipients is too speculative to establish standing at summary judgment. Federal law requires that Texas provide these services to all undocumented immigrants, regardless of whether they are DACA recipients. ROA.25191. Accordingly, plaintiffs must do more than note that many DACA recipients live in Texas. Rather, they must show that invalidating DACA would cause recipients to leave the State; otherwise, Texas's social-services costs would remain the same.

Plaintiffs assert (at 21) that "[t]he causal chain" between invalidating DACA and emigration of DACA recipients "'is easy to see.'" But plaintiffs cannot rely on unsupported assertions, and the record does not permit summary judgment for plaintiffs because there is evidence that recipients would remain in the United States even without DACA. For instance, because DACA is available only to people who have been in the United States for many years already, and who have demonstrated their willingness to remain here even without lawful status, DACA only applies to people who are highly unlikely to leave the country even without deferred action. *See* U.S. Br. 16; ROA.18741 (requiring continuous residence since 2007).

Moreover, plaintiffs do not address evidence that DACA *decreases* Texas's costs of providing emergency Medicaid and public education. *See* U.S. Br. 18. By

permitting DACA recipients to access lawful employment and employer-subsidized health insurance, DACA reduces their dependence on emergency Medicaid and saves Texas millions of dollars in healthcare costs every year. *See* ROA.17994, ¶35, 17999, ¶43, 18005-06, ¶56, 18048-49, ¶51. Likewise, DACA encourages recipients to purchase homes and pay property taxes that fund public schools. And because Texas property values have increased quickly enough to offset student-enrollment increases, state aid to schools has not increased. *See* ROA.17950, ¶¶14-15.

Plaintiffs respond (at 18) that "costs may [not] be offset by gains elsewhere." But the point is not simply that DACA produces offsetting benefits "elsewhere" in Texas's budget. The point is that DACA reduces, rather than increases, the very financial burdens about which plaintiffs are complaining. *See Texas*, 809 F.3d at 156 (benefits negate standing where they are "sufficiently connected to the costs to qualify as an offset"); *Henderson v. Stalder*, 287 F.3d 374, 379-80 (5th Cir. 2002) (use of plaintiffs' tax dollars to produce a challenged license plate "is insufficient to confer standing" in part because motorists who choose the license plate pay additional fees that "offset the administrative costs" of the plates).

At worst, the record is genuinely disputed on these points, and the district court thus erred by crediting evidence on plaintiffs' side. *See* ROA.25194. Courts "must not resolve factual disputes by weighing conflicting evidence" at summary judgment. *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Plaintiffs' reliance (at 20-21) on *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), and

Texas v. Biden (*Texas MPP*), 20 F.4th 928 (5th Cir. 2021), is thus misplaced. In those cases, the district courts had resolved factual disputes relevant to standing after a full trial, and the courts' findings were reviewed for clear error. *See Department of Commerce*, 139 S. Ct. at 2566; *Texas MPP*, 20 F.4th at 941, 966. Here, the Court reviews the grant of summary judgment de novo and must view all evidence in the light most favorable to defendants. *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013). Because the record contains evidence that, at the very least, raises genuine issues of material fact, summary judgment for plaintiffs is unavailable.

B. Plaintiff States also do not have *parens patriae* standing to bring claims against the federal government. *See* U.S. Br. 19-20. Plaintiffs err (at 24-25) by relying on *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982), to assert the economic interests of their citizens. *Snapp* specifically stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n.16. Similarly, *Massachusetts v. EPA*, 549 U.S. 497 (2007), provides no help to plaintiffs. *Massachusetts* allowed a State "to assert its rights under federal law," *id.* at 520 n.17, based on the State's own "particularized injury in its capacity as a landowner," *id.* at 522, and its own quasi-sovereign interest in "preserv[ing] its sovereign territory," *id.* at 519. *Massachusetts* was thus a conventional case where a plaintiff established standing based on injury to its own interests, not based on injury to third parties. *See Government of Manitoba v. Bernhardt*, 923 F.3d 173, 181-83 (D.C. Cir. 2019). Here, in contrast, the alleged impact of labor-market competition on plaintiffs'

citizens does not cause any injury to plaintiffs *themselves*. And contrary to plaintiffs' suggestion (at 27), this Court has never adopted their theory of *parens patriae* standing. *See Texas*, 809 F.3d at 150 (noting that the district court "considered but ultimately did not accept" that "Texas could sue as *parens patriae*"); *Texas MPP*, 20 F.4th at 968-70 (finding standing based on Texas's own financial harm).

Regardless, plaintiffs err in contending (at 25-26) that DACA causes economic harm to other residents. That theoretical harm is based on speculation about incentives and labor-market dynamics. Plaintiffs have never identified any employer who ever hired a DACA recipient over a U.S. citizen, whether to lower healthcare costs or for other reasons. Nor have plaintiffs introduced evidence that wages declined because of labor-market competition by DACA recipients. In fact, the record belies plaintiffs' claims, which are especially implausible in light of labor shortages in Texas and nationwide. *See* U.S. Br. 19-20; ROA.18063-65, ¶¶18-26; Amicus Br. of Economists 5-15; Amicus Br. of U.S. Companies and Business Associations 15-23; U.S. Chamber of Commerce, *U.S. Chamber Launches Nationwide Initiative to Address National Worker Shortage Crises and Help America's Employers Fill Jobs* (June 1, 2021), https://perma.cc/9VWC-LHPD ("American businesses of every size, across every industry, in every state are reporting unprecedented challenges filling

open jobs."). At the very least, that is enough to create a genuine dispute of material fact that precludes summary judgment for plaintiffs.[1]

II. PLAINTIFFS ARE OUTSIDE THE ZONE OF INTERESTS OF THE INA

Plaintiffs also have no right to review under the Administrative Procedure Act (APA) because the interests they assert are outside the zone of interests protected by the INA. *See* U.S. Br. 21-22. Plaintiffs argue (at 28) that the INA protects States from "imminent and actual harm to their fiscs," but their failure to identify any specific INA provision that protects that interest is fatal to their claims. Whether plaintiffs satisfy "the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question … but by reference to the particular provision of law upon which the plaintiff relies." *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997). Plaintiffs have not shown that any "particular provision" underlying their INA claims is aimed at protecting state fiscs. *See* Pl. Br. 35-36, 40-41, 43-44 (discussing provisions that make certain noncitizens *eligible* for deferred action, cancellation of removal, work authorization, and lawful status); *id.* at 39-40 (removability provisions); *id.* at 41, 43 (employment restrictions); *id.* at 41-42, 44 (parole and unlawful presence bars).

[1] Contrary to plaintiffs' contention (at 26), intervenors' experts did not "concede[]" that labor-market competition from DACA recipients decreases wages. They acknowledged that recipients "compete" for jobs, ROA.22906, ¶6, but as discussed, such competition does not reduce employment or decrease wages for other residents.

Plaintiffs rely solely on *Texas MPP*, 20 F.4th at 975, which does not hold that the INA protects state fiscs generally. *Texas MPP* concerned a federal program whose termination was alleged to increase the number of immigrants in Texas who would request a state-subsidized driver's license, *id.* at 970, and this Court previously held such injury falls within the INA's zone of interests because "Congress has explicitly allowed states to deny [certain] public benefits to illegal aliens," *Texas*, 809 F.3d at 163. Costs associated with public education and emergency medical services are wholly different, though, because those services must be provided to all residents.

III. THE DACA MEMORANDUM IS EXEMPT FROM NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS

The DACA memorandum is exempt from notice and comment as a "general statement[] of policy," 5 U.S.C. § 553(b)(3)(A), because it does not impose any rights or obligations and leaves DHS and its decisionmakers free to exercise discretion. *See* U.S. Br. 22-27.[2]

Plaintiffs argue (at 29-30) that the Supreme Court implicitly decided that DACA is subject to notice and comment in *DHS v. Regents of the University of California*, 140 S. Ct. 1891, 1906 (2020). *Regents*, however, did not address that issue. *See id.* at 1903 n.1 (plaintiffs' notice-and-comment claims were "not before [the Court]"). The portion of *Regents* on which plaintiffs rely held that the DACA rescission

[2] As our opening brief explained (at 22 n.1), plaintiffs' notice-and-comment claim will become moot when DHS issues a final rule. Plaintiffs have not disagreed.

memorandum is reviewable because the DACA memorandum did not simply "announce a passive non-enforcement policy." *Id.* at 1906. But this Court has held that policy statements can be reviewable even though they do not require notice and comment. *See Texas MPP*, 20 F.4th at 949 ("[A] 'policy statement' … can nonetheless constitute 'final agency action' under the APA."). Plaintiffs' reliance (at 33) on *Texas MPP* is misplaced for the same reason. While this Court concluded that a policy statement constituted reviewable final agency action, it "express[ed] no view" on "whether this rule requires notice and comment," reiterating that "not all rules *do* require notice and comment." *Id.* at 947-49, 985 n.15. Thus, the fact that DACA is reviewable does not preclude it from being a policy statement exempt from notice-and-comment requirements. Because the DACA memorandum prospectively guides the agency's pre-existing discretion to grant deferred action, does not create any rights or obligations, and leaves agency decisionmakers free to exercise discretion, it is a general statement of policy.

Plaintiffs argue (at 33) that the DACA memorandum cannot be a policy statement because DHS decisions to grant deferred action are "effectively adjudications" that confer certain legal rights. As our opening brief explained (at 25), however, the DACA memorandum did not create the administrative practice of deferred action or alter its legal consequences, such as potential eligibility for Social Security or work authorization. Nor did the DACA memorandum grant deferred action to any individual. The DACA memorandum itself thus does not "impose any

rights and obligations." *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). Rather, the memorandum guides DHS employees' consideration of requests for deferred action and focuses DHS's limited enforcement resources on higher-priority individuals. The memorandum is thus an archetypal policy statement, guiding the use of enforcement resources, "appris[ing] the public of the agency's intentions," and "inform[ing] the decisions of those who exercise the agency's discretion" to grant deferred action under pre-existing authority. *Association of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015).

The DACA memorandum also leaves the agency and its employees discretion to determine whether to grant or deny deferred action to any particular requestor. *See* U.S. Br. 23-24, 26-27. Plaintiffs rely (at 34) on *Texas* for the proposition that "grants of relief are not discretionary under the DACA program," but they do not account for the different procedural posture of that case. In *Texas*, the Court reviewed the grant of a preliminary injunction for abuse of discretion and the relevant findings for clear error. 809 F.3d at 175-76. Here, the Court is reviewing a grant of summary judgment de novo. And as the district court acknowledged, the record demonstrates genuine disputes of fact regarding application of DACA's deferred-action criteria, which preclude summary judgment on that basis. *See* ROA.25204 ("there is a factual dispute concerning whether agents reviewing DACA applications exercise discretion"). The record includes evidence that "each initial DACA request is individually considered," and that individuals who meet the DACA criteria "are not automatically granted

deferred action." ROA.18158-59. The DACA memorandum provides an analytical framework to guide decisionmakers when considering requests, but it ultimately "leav[es] the agency and its decisionmakers free to exercise discretion" in making the ultimate determination whether to grant deferred action. *Professionals & Patients*, 56 F.3d at 595.

Contrary to plaintiffs' assertion (at 32), an agency's creation of an "analytical method" for enforcement decisions does not categorically require notice and comment. Indeed, the very purpose of policy statements is "to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power"—that is, to establish a method for exercising that power. *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993). Plaintiffs' reliance on *Texas v. EEOC*, 933 F.3d 433, 443 (5th Cir. 2019), is thus misplaced. There, the Court found that EEOC guidance bound the agency because, by its terms, it "le[ft] *no room* for EEOC staff *not* to" take certain action. *Id.* (first emphasis added). In contrast, the DACA memorandum explicitly provides that "requests for relief pursuant to this memorandum are to be decided on a case by case basis" and that individuals will be "*considered* for an exercise of prosecutorial discretion" if they satisfy the memorandum's criteria. ROA.18741-42 (emphasis added).

IV. DACA IS CONSISTENT WITH THE INA

A. DACA Lawfully Creates Criteria For Certain Childhood Arrivals To Request Temporary Forbearance From Removal

1. DACA's "defining feature" is "the decision to defer removal (and to notify the affected alien of that decision)." *Regents*, 140 S. Ct. at 1911. As explained in our opening brief (at 27-42), Congress authorized DHS to use deferred action to implement the Secretary's enforcement priorities. For decades, DHS has granted deferred action to individuals based on class-wide criteria that make them low priorities for enforcement. That "regular practice" is part of the Secretary's recognized "discretion to abandon the endeavor" of enforcement "[a]t each stage" of the process. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Granting temporary "forbearance" from removal to DACA recipients is thus "squarely within [DHS's] discretion." *Regents*, 140 S. Ct. at 1911-12.

Plaintiffs do not dispute that DHS may forbear from removing persons who qualify for deferred action under DACA. They acknowledge that *Texas* did not "require[] the Secretary to remove any alien or to alter his enforcement priorities," Pl. Br. 37 (quoting *Texas*, 809 F.3d at 166), which aligns with the Supreme Court's understanding that *Texas* did nothing to impair DHS's "forbearance authority," *Regents*, 140 S. Ct. at 1911. Nor do plaintiffs take issue with the Secretary's priorities in this case, Pl. Br. 37, or contest DHS's discretion to employ class-wide criteria to help determine individual grants of deferred action, Pl. Br. 44 (acknowledging past

practice to grant deferred action on class-wide bases); Pl. Br. 29 (arguing DACA is "not simply a non-enforcement policy" because it "did not merely refuse to institute proceedings against a particular entity or even a particular class" (quoting *Regents*, 140 S. Ct. at 1906)); *see also Akhtar v. Gonzales*, 450 F.3d 587, 593-94 (5th Cir. 2006) (recognizing DHS may exercise its discretion "by rule" rather than only by adjudicating individual applications).

Plaintiffs nevertheless argue that DACA's deferred-action policy is impermissible under the INA because it purportedly gives recipients lawful immigration status and "categorically exempt[s]" them from statutory removal provisions. But DACA does neither of those things. Persons accorded deferred action under DACA do not have lawful immigration status, and they remain subject to removal. The decision to temporarily forbear removal does not change recipients' immigration status and does not give them any defense to removal or entitle them to cancellation of removal. Forbearance is simply a determination that DHS's limited enforcement resources are better spent removing other individuals, such as threats to public safety or national security. *See* U.S. Br. 36-37, 50-51. Indeed, plaintiffs make no claim that DHS's resources would be better spent removing the students, veterans, and other individuals who comprise the DACA population. It is thus true but irrelevant that the Secretary cannot grant lawful immigration status to DACA recipients as a class and cannot give recipients any legal defense to removal. DACA has never purported to

do either of those things, and their impermissibility provides no basis for invalidating the forbearance policy that DACA actually institutes.

In suggesting that deferred action under DACA impermissibly changes recipients' immigration status, plaintiffs rely on the term "lawful presence." As explained in the government's opening brief (at 50-51), "lawful presence" does not confer lawful status, give recipients any defense to removal, or mean that it is lawful for such a noncitizen to remain in the United States. Instead, DACA recipients have been deemed "lawfully present" under separate regulations (not under the DACA memorandum) for the specific purpose of eligibility for participation in a limited number of federal programs. *See, e.g.*, 8 C.F.R. § 1.3(a)(4)(vi) (Social Security). As noted in the opening brief (at 51-52), plaintiffs forfeited any challenge to those lawful-presence designations by failing to challenge them in their complaint or at summary judgment. Plaintiffs offer no response; they fail to argue even on appeal that any of DHS's particular "lawful presence" designations are invalid under the relevant statutory authority. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument by failing to raise it in the first instance in the district court … or by failing to adequately brief the argument on appeal.").

2. Plaintiffs also err by equating DACA with the DAPA and Expanded DACA policies that this Court reviewed in *Texas*. Even if *Texas* had invalidated DAPA's forbearance policy (which it did not), its analysis would not control here because DACA applies to far fewer people. Plaintiffs argue (at 38) that the analysis in *Texas*

"did not turn on the size of the program," but the size and scope of that policy is precisely why this Court considered DAPA to "implicate[] questions of deep economic and political significance" and therefore lie beyond DHS's discretion. *See* 809 F.3d at 181-82. While DAPA applied to 4.3 million people, *id.*, DACA applies to an estimated 1.5 million people, comprising only certain young people who entered the United States as children, ROA.25208-09. To put those numbers in context, DAPA covered 38% of the undocumented population, while DACA applies to only 13%. *See* DHS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015-January 2018*, at 1 (2021), https://go.usa.gov/xFyw6 (DHS Estimates). Moreover, that estimate likely overstates the DACA-eligible population, in light of the fact that there are fewer than 600,000 current DACA recipients (comprising just 5% of the undocumented population), *see id.*; USCIS, *Count of Active DACA Recipients by Month of Current DACA Expiration—June 30, 2021*, https://go.usa.gov/xMwtK, and projections that the active DACA population will never exceed 1 million people, *see* 86 Fed. Reg. 53,736, 53,800 (Sept. 28, 2021). Those numbers may not be "insignificant," Pl. Br. 38, but Congress has not confined DHS to insignificant exercises of enforcement discretion.

The history of the Family Fairness deferred-action policy confirms that DHS has discretion to institute a deferred-action policy of DACA's magnitude. As we explained (U.S. Br. 37-39), Family Fairness also applied to an estimated 1.5 million people. Plaintiffs dismiss Family Fairness (at 44-45) as an "interstitial" policy that was

far afield from DACA. But they fail to respond at all to the historical record, which shows that DACA is no less "interstitial" than Family Fairness was.

As explained in our opening brief (at 37-39), both policies were in place while one house of Congress had passed a bill to address the covered population. And while plaintiffs emphasize Congress's failure to pass the DREAM Act, both policies were established in the wake of Congress's failure to protect the covered population. Indeed, two weeks before INS instituted Family Fairness in 1987, Congress had rejected a legislative proposal to provide a pathway to lawful status for those covered by the policy. Less than a year earlier, in 1986, Congress had passed the Immigration Reform and Control Act (IRCA), which declined to extend the INA's protections to those same individuals. And when INS expanded Family Fairness in 1990, the House had just failed to advance a Senate proposal to protect the covered individuals from deportation. *Texas*'s characterization of Family Fairness as "interstitial" was dictum, but if this Court considers Family Fairness to be "interstitial," DACA is equally interstitial.

Contrary to plaintiffs' argument (at 46), DHS's discretion to institute a deferred-action policy of DACA's size does not mean the agency can grant deferred action to everyone unlawfully in the United States. DHS is not claiming discretion to systematically abandon enforcement of the immigration laws as long as it "occasionally" takes "some" enforcement action, Pl. Br. 46. Instead, DACA represents a means of allocating the agency's limited enforcement resources in line

with the Secretary's enforcement priorities. The resources allocated by Congress are only sufficient to allow the removal of a very small fraction of the undocumented population. *See* U.S. Br. 3, 28. No one seriously contends that DACA recipients, rather than threats to public safety or national security, should be among the small percentage of noncitizens prioritized for removal with those limited resources. Given that reality, DHS's enforcement discretion necessarily permits it to determine that DACA-eligible individuals (who, even by high estimates, make up just 13% of the undocumented population) are a low priority for enforcement and to grant them temporary forbearance from removal.

B. The INA Permits DHS To Grant Work Authorization To DACA Recipients

Granting work authorization to DACA recipients is also fully consistent with the INA. The INA permits the employment of noncitizens who are "authorized to be so employed … by the Attorney General" (now, the Secretary). 8 U.S.C. § 1324a(h)(3); *see also id.* § 1103(a)(1), (a)(3) (conferring upon the Secretary broad authority to administer the immigration laws). For decades, the Attorney General and then the Secretary have granted work authorization by regulation to deferred-action recipients, including under Family Fairness. *See* U.S. Br. 42-50.

1. Plaintiffs argue (at 36) that, because this Court in *Texas* rejected work authorization under DAPA, it must reject work authorization under DACA. But as discussed, DACA's magnitude is far smaller and supported by direct historical

precedent. *See supra* pp. 13-16. Even if all 1.5 million potentially DACA-eligible individuals joined the civilian workforce, they would total less than 1% of that population. *See* Bureau of Labor Stats., *Table A-1: Employment status of the civilian population by sex and age* (Nov. 2021), https://go.usa.gov/xefgr. Plaintiffs offer no reason why increasing the labor pool by less than 1% (in practice, much less) should be considered a "question of deep economic and political significance" that Congress withheld from DHS. *See* Amicus Br. of Economists 3-4 (explaining that DACA recipients, a "miniscule portion of Texas's workforce," have "no meaningful impact on the state's job market").

2. Plaintiffs also argue (at 42-43) that IRCA does not grant DHS authority to provide work authorization. In so doing, they discount the significance of the definition of "unauthorized alien" in 8 U.S.C. § 1324a(h)(3). But that definition is at the heart of IRCA's employment provisions. IRCA's core substantive provision makes it unlawful to hire "an unauthorized alien (as defined in subsection (h)(3))." *Id.* § 1324a(a). "[U]nauthorized alien" is defined as someone who is not "lawfully admitted for permanent residence" or "authorized to be so employed by [the INA] or by the Attorney General" (now, the Secretary). *Id.* § 1324a(h)(3). Congress thus chose to allow the employment of noncitizens who are "authorized to be so employed" either by the INA "or" by the Secretary—thereby recognizing that the Secretary may grant work authorization even to people whom the INA does not otherwise authorize to work. *Id.*

Plaintiffs attempt to circumvent IRCA's clear text by relying on the House Report's description of the bill. *See* Pl. Br. 41, 43 (arguing that IRCA prohibits the employment of noncitizens who are "unauthorized to work" because they "entered the country illegally" (quoting H.R. Rep. No. 99-682(I), at 46, 51-52 (1986))). But as just discussed, that is not how the statute defines "unauthorized alien." Plaintiffs' proffered understanding of IRCA's purpose is thus foreclosed by the statute's plain text. *See Texas v. EPA*, 829 F.3d 405, 422 n.27 (5th Cir. 2016) (refusing to "consider passing commentary in the legislative history … when the statutory text itself yields a single meaning"). Because DACA recipients are "authorized to be so employed … by the [Secretary]," 8 U.S.C. § 1324a(h)(3), work authorization does nothing to undermine IRCA.

Plaintiffs further urge (at 41, 43-44) that because the INA expressly makes certain groups eligible for work authorization, DHS cannot grant work authorization to anyone else. But IRCA recognized that individuals can be "authorized to be so employed" either by the INA "*or*," separately, "by the [Secretary]." 8 U.S.C. § 1324a(h)(3) (emphasis added). Plaintiffs' interpretation would read that second clause out of the statute. They claim (at 41) that INA provisions granting work authorization to certain groups would be surplusage if DHS could "extend work authorization to whomever it pleases," but DHS's interpretation creates no surplusage. Those provisions prevent DHS from categorically withholding work authorization from those groups, whether or not the agency extends work

authorization to other groups. In any case, "[t]he surplusage canon" provides little guidance "when agency authority is at stake," because Congress frequently gives an agency overlapping authority to ensure it has flexibility to best administer the statutory scheme. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 699 (D.C. Cir. 2014). Moreover, that "canon is particularly unhelpful when both interpretive outcomes lead to some sort of surplusage," *id.*, and plaintiffs' interpretation would give no effect to other INA provisions that prohibit the Secretary from granting work authorization to certain noncitizens without lawful status. *See* U.S. Br. 49.

Finally, plaintiffs fault DHS for relying on historical practice, arguing that historical practice "does not, by itself, create power." Pl. Br. 43. But DHS has never claimed that longstanding practice is what creates the Secretary's authority to grant work authorization to DACA recipients. The INA creates that authority. In addition to the IRCA provision discussed above, Congress recognized in various other statutory provisions the Secretary's discretion to grant work authorization. *See* U.S. Br. 46-47. More broadly, Congress gave the Secretary authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), "administ[er] and enforce[]" the INA, 8 U.S.C. § 1103(a)(1), and "establish such regulations … as he deems necessary for carrying out his authority under the [INA]," *id.* § 1103(a)(3). Work authorization is "reasonably related to the duties imposed upon" the Secretary to administer the INA because it accounts for real-world consequences of granting temporary forbearance from removal. *See Narenji v. Civiletti*,

617 F.2d 745, 747 (D.C. Cir. 1979); U.S. Br. 43. Thus, even before IRCA was enacted, the agency properly exercised its statutory authority by granting work authorization to deferred-action recipients. *See* 52 Fed. Reg. 46,092, 46,092-93 (Dec. 4, 1987) (discussing pre-IRCA statutory authority).

Plaintiffs dismiss pre-IRCA practice as irrelevant because until then, there was no federal ban on hiring unauthorized workers.[3] But when Congress enacted IRCA, thereby creating that first federal ban, it took care to preserve the agency's discretion to grant work authorization. Congress was aware of the agency's longstanding regulations granting work authorization to deferred-action recipients when it enacted IRCA. By leaving that practice undisturbed and allowing work authorization to be granted "by the Attorney General," 8 U.S.C. § 1324a(h)(3), Congress "accepted and ratified" the agency's interpretation of its authority and adopted that "background understanding in the legal and regulatory system," *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536-37 (2015). *See* U.S. Br. 34-35, 45-46, 48. Thus, Congress did not need to amend IRCA's definition of "unauthorized alien" to permit the Secretary to grant work authorization to deferred-action recipients, because IRCA's original definition already preserved that authority.

[3] While there was no federal ban, work authorization was still required by some employers and the Social Security Administration to issue a social security card. *See* ROA.7634.

C. Individual Grants Of Advance Parole Provide No Basis To Hold DACA Unlawful

Plaintiffs' arguments (at 41-42, 44) regarding advance parole have no bearing on DACA's validity. Congress authorized DHS to parole on a case-by-case basis and for urgent humanitarian or significant public-benefit reasons "*any* alien" who is an applicant for admission, 8 U.S.C. § 1182(d)(5)(A) (emphasis added), and provided that "[a]n alien who is paroled … shall not be considered to have been admitted," *id.* § 1101(a)(13)(B). Because parole is not an admission, the inadmissibility grounds at 8 U.S.C. § 1182 do not apply to that determination, although of course DHS may consider any facts that would render a noncitizen inadmissible in deciding whether to grant parole in an exercise of discretion. This has long been recognized as a lawful means for inadmissible noncitizens without lawful status to enter the United States, far predating the 2012 DACA Memorandum. *See*, *e.g.*, Memorandum from Doris Meissner, Comm'r, INS, Exercising Prosecutorial Discretion, 2000 WL 33596819, at *10 (Nov. 17, 2000) (recognizing that INS may grant advance parole to noncitizens who are accorded a favorable exercise of prosecutorial discretion, including deferred action).

Because any applicant for admission may request parole, it is unsurprising that some happen to be DACA recipients. *See* U.S. Br. 52-53; USCIS, Form I-131, *Instructions for Application for Travel Document* 4-5 (Apr. 24, 2019), https://go.usa.gov/xevHF. That is an objection not to DACA, but to the well-

established parole scheme enacted by Congress that will continue to operate even absent DACA. Furthermore, a grant of advance parole simply confers a practical expectation that DHS likely will exercise its discretion to grant parole when the noncitizen presents at a port of entry to the United States. *See Matter of Arrabally*, 25 I & N Dec. 771, 778 n.6 (BIA 2012). Contrary to plaintiffs' suggestion (at 42 & n.9), DHS has never undertaken to "grant advance parole to DACA recipients on a class-wide basis." Finally, the DACA memorandum says nothing about advance parole. It is Congress that created parole; made "any alien applying for admission" eligible for parole; established that both parole and admission are sufficient to avoid inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i); and provided that parole is distinct from admission, such that parolees need not be admissible in order to come into the United States. Likewise, parolees, regardless of DACA, are not "unlawfully present in the United States" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) for the duration of their parole. *See id.* § 1182(a)(9)(B)(ii).

V. DACA DOES NOT VIOLATE THE TAKE CARE CLAUSE

Plaintiffs briefly contend (at 47-48) that DACA "dispenses with the law in violation of the Take Care Clause," which directs the President to take care that the Nation's laws are faithfully executed. That argument recapitulates plaintiffs' statutory contentions in constitutional garb. "[C]laims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Specter*, 511 U.S. 462, 473 (1994); *see Texas*, 809 F.3d at 146 n.3 (declining to address Take Care

Clause). And as the settled history of prosecutorial discretion confirms, nothing about the Take Care Clause precludes the Executive Branch from exercising discretion when enforcing the laws.

VI. THE DISTRICT COURT'S INVALIDATION OF DACA IS OVERBROAD

1. As explained in our opening brief (at 53-54), the district court erred by invalidating DACA in its entirety. If this Court considers any part of DACA to be unlawful, it should invalidate only those parts and leave the rest intact. *See, e.g.*, *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997). Plaintiffs presumably agree, for they offer no response. In particular, they offer no ground to invalidate the forbearance policy at the heart of DACA, *supra* pp. 11-16, which DHS could have implemented even without DACA's other features. *See* 86 Fed. Reg. at 53,772 ("While lawful presence and employment authorization are important to the DACA policy's overall success for DHS, as well as to DACA recipients and their communities, DHS believes that any DACA rule should not be struck down in its entirety so long as the forbearance policy is found lawful.").

2. The district court also abused its discretion by issuing a nationwide injunction. *See* U.S. Br. 54. An injunction may not afford more relief than "necessary to give the prevailing party the relief to which he or she is entitled"—even in cases about immigration policy. *See Hernandez v. Reno*, 91 F.3d 776, 781 & n.16 (5th Cir. 1996) (narrowing an overly broad injunction affecting immigration policy); *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in

grant of stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit."). This principle of "providing equitable relief only to parties" protects against "[m]isuses of judicial power" that could "threaten 'the general liberty of the people'" by allowing courts to adjudicate more than "the rights of 'individual[s].'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2427-28 (2018) (Thomas, J., concurring) (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

More than half of DACA recipients live in States that strongly support DACA and welcome their presence. *See* Amicus Br. of 22 States and the District of Columbia 1. An injunction is an equitable remedy, and the negative effects of a nationwide injunction on DACA recipients, their home States and communities, educational institutions, U.S. businesses, and the U.S. economy weigh heavily against nationwide relief. Plaintiffs argue (at 50) that nationwide relief is nevertheless necessary to prevent DACA recipients in other States from moving to Texas and working there. But plaintiffs offer no reason to think that meaningful numbers of DACA recipients would leave their homes, jobs, and communities in States like New Jersey to work in the plaintiff States, or that those numbers would be sufficiently significant to support the extraordinary remedy of a nationwide injunction.

Plaintiffs also argue (at 50-51) that nationwide relief is warranted because this is an immigration case, but "all injunctions—even ones involving national policies—must be 'narrowly tailored to remedy the specific harm shown.'" *East Bay Sanctuary*

Covenant v. Barr, 934 F.3d 1026, 1029 (9th Cir. 2019). Even "in the immigration context," courts routinely hold that nationwide injunctions are inappropriate where nationwide relief is unnecessary to remedy the plaintiff's alleged injury. *See id.*; *e.g.*, *Hernandez*, 91 F.3d at 781; *City & Cty. of San Francisco v. Barr*, 965 F.3d 753, 764-66 (9th Cir. 2020); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018). This Court's decision in *Texas* is not to the contrary; that decision "does not hold that nationwide injunctions are required or even the norm," and "[a]s is true for all injunctive relief, the scope of the injunction must be justified based on the 'circumstances'" of the particular case. *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021) (quoting *Texas*, 809 F.3d at 188). While *Texas* reasoned that the need for uniformity in immigration policy supported a nationwide injunction, this Court has narrowed the scope of a nationwide injunction when nationwide relief was *not* necessary to provide full relief to the parties—even though it concerned immigration policy. *See Hernandez*, 91 F.3d at 781.

Finally, plaintiffs claim (at 51) that it is "premature" to consider DACA recipients' reliance interests when evaluating the propriety of nationwide relief because the district court partially stayed the injunction pending appeal. They offer no citation for that novel proposition. The district court entered a permanent nationwide injunction prohibiting the government "from administering the DACA program," which the court "temporarily stayed" pending appeal with respect to current recipients. ROA.25242-43. The merits of that injunction are at issue on

appeal, and the district court's partial stay (which will end after the appeal) has no bearing on the validity of the injunction itself, which would of course remain in place. *See, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (narrowing nationwide injunction that district court stayed pending appeal).

CONCLUSION

The district court's judgment and permanent injunction should be reversed.

Of Counsel:

JONATHAN E. MEYER
General Counsel
U.S. Department of Homeland Security

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JENNIFER B. LOWERY
Acting United States Attorney

/s/ Cynthia A. Barmore
SCOTT R. MCINTOSH
CYNTHIA A. BARMORE
JOSHUA M. KOPPEL
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

March 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, 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. Service will be accomplished by the appellate CM/ECF system.

/s/ Cynthia A. Barmore
CYNTHIA A. BARMORE

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,244 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Cynthia A. Barmore
CYNTHIA A. BARMORE