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; Troy Miller, Acting 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, Brownsville Division

REPLY BRIEF OF INTERVENOR DEFENDANTS – APPELLANTS DACA RECIPIENTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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State of Arkansas

State of Kansas

State of Louisiana

State of Mississippi

State of Nebraska

State of South Carolina

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United States of America

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INTRODUCTION

Appellees' Brief is more remarkable for what it does not say than what it does.[1] Appellees cite "*Texas DAPA*" (their name for *Texas I*) 44 times, but ignore that *Texas I*'s standing decision relied on a finding regarding costs associated with driver's licenses that Texas has disclaimed here. Appellees also either disregard entirely or fail to address convincingly intervening decisions of the U.S. Supreme Court and of this Court that undermine *Texas I*'s holdings with respect to standing: *California v. Texas*, 141 S. Ct. 2104 (2021); *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); and *El Paso County v. Trump*, 982 F.3d 332 (5th Cir. 2020). Appellees also cite evidence that the district court "credited," but ignore that the district court acknowledged contrary evidence that, at the very least, created a disputed question of material fact precluding summary judgment in Appellees' favor.

Appellees' ignoring the fundamental flaws in the District Court's standing ruling does not make them disappear. The District Court granted summary judgment to Appellees based on a series of speculative predictions, and it did so by impermissibly weighing evidence, drawing inferences, and making credibility determinations. If Intervenor-Appellants were not entitled to summary judgment in

[1] Citations to "Appellee Br." refer to the Brief of Appellees. Citations to "DACA-Intervenor Br." refer to the Brief of Defendants – Appellants DACA Recipients.

their favor on the question of standing, the case should at least have proceeded to trial.

Appellees' other arguments fare no better. On their substantive claim, Appellees ignore that the Supreme Court has, since *Texas I*, specifically reaffirmed DHS's enforcement discretion in the immigration context, including with respect to ***classes*** of immigrants. Nor have Appellees justified the scope of the District Court's relief, either its vacatur of DACA or its nationwide injunction. Appellees also ignore the significant reliance interests of DACA recipients, their families, and their communities, notwithstanding the Supreme Court's express statement in *Regents* that those interests are critical, *see Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-15 (2020), and they fail to address the impropriety of granting nationwide relief based on the claim of a single plaintiff. Even if Appellees have standing and their substantive claims are upheld, the District Court's relief should be vacated as overbroad.

ARGUMENT

I. APPELLEES FAIL TO OVERCOME THE DISTRICT COURT'S ERRORS IN GRANTING SUMMARY JUDGMENT IN THEIR FAVOR ON THE ISSUE OF STANDING.

In *California*, the Supreme Court rejected an expansion of *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) ("*Texas I*") and reaffirmed that a plaintiff cannot rely on mere speculation to satisfy Article III. *See* 141 S. Ct. at 2116-19. In urging

this Court to affirm the District Court's grant of summary judgment, however, Appellees invite this Court to disregard *California* in favor of an even broader expansion of *Texas I*.

Appellees' pocketbook-injury theory of standing mirrors the theory rejected by the Supreme Court in *California*, not the theory accepted by this Court in *Texas I*. Indeed, like the plaintiffs in *California*—and unlike the plaintiffs in *Texas I*—Appellees failed to tie even a single expenditure or unfavorable labor-market outcome to DACA. And even if they had, Appellees failed to explain how such injuries would be redressable through this litigation, relying instead on a dubious theory of self-deportation that both ignores plain historical facts and hinges on the admitted speculations of a single expert witness. Absent any demonstration of specific pocketbook injuries; a direct link between those injuries and DACA; and redressability, *California* controls. The District Court therefore should have found that Appellees lacked standing and granted summary judgment in Intervenor-Appellants' favor.

The District Court concluded otherwise only by improperly crediting Appellees' one-sided version of the record and ignoring the contrary evidence that the District Court itself had previously expressly acknowledged. The Court compounded its error by disregarding century-old precedent prohibiting states from suing the federal government as *parens patriae* (particularly where a state represents

only a subset of its population), and by erroneously affording Appellees special solicitude. Based on these legal errors, this Court should reverse or at least vacate the District Court's order and remand for trial to resolve material factual disputes.

A. The District Court Erred in Adopting Appellees' Overbroad and Speculative Theory of Pocketbook Injuries.

The Supreme Court's decision in *California* demonstrates the error in the District Court's standing opinion, which Appellees cannot escape: a state plaintiff relying on a pocketbook-injury theory of standing must introduce both (i) ***specific facts*** demonstrating an ***actual*** injury; and (ii) a "necessary connection"—demonstrated by "significant evidence" and "comprehensive studies"—between the challenged policy and the asserted economic impact. *California*, 141 S. Ct. at 2118-19. Pure speculation and false syllogisms simply do not suffice. *Id.* Yet the District Court's finding below that Appellees established actual injury and a direct link between DACA and any state expenditures turned on precisely that (despite clear evidence to the contrary).

Both the District Court's and Appellees' theory of standing depends on a misleadingly simple syllogism that stands on entirely false premises. Specifically, Appellees contend that DACA caused recipients to come to the U.S., and that ***without*** DACA, recipients would self-deport, thereby reducing any costs to the state of providing them services. But this ignores the historical fact that DACA recipients arrived in the U.S. before DACA and stayed in the U.S. without DACA. Because

of that historical fact, neither Texas nor any other Appellee has tied even a single expenditure or unfavorable labor-market outcome to DACA.

Nor has Texas or any other Appellee overcome that historical fact to show that DACA's termination would redress their purported injuries. In fact, Texas's expert witness could only speculate as to the number of DACA recipients who would leave Texas if they lost DACA, describing them as "some," and a number between one and all. ROA.17478-79. In *Texas I*, Texas overcame this issue by making an evidentiary showing regarding the costs of providing DAPA recipients driver's licenses and by relying on the basic logic that Texans need to drive and DAPA allows recipients in Texas to apply for a license. But Texas expressly disclaimed that theory in this case. Under *California*, as well as this Court's decision in *El Paso*, the District Court should therefore have granted summary judgment in favor of Intervenor-Appellants.

1. *California*, not *Texas I*, controls this case.

As Intervenor-Appellants explained, *see* DACA-Intervenor Br. at 19-21, this Court had concluded at the appellate stage in the ACA litigation that the state plaintiffs did not need to show that any particular state employees would respond to the unenforceable coverage mandate by enrolling in state-funded healthcare. *See Texas v. United States*, 945 F.3d 355, 386 n.30 (5th Cir. 2019). That holding by this Court heavily relied on *Texas I*, which itself turned on Texas DAPA recipients'

"strong incentives" to apply for driver's licenses, a "practical necessity in most of the state." *Texas I*, 809 F.3d at 156-60. Yet the Supreme Court reversed this Court's holding in *California*, explaining that, because of the state plaintiffs' "counterintuitive theory of standing," Article III demanded more. *See* 141 S. Ct. at 2119. Thus, after *California*, when (as here) a state asserts a theory of standing that depends on the counterintuitive choices of third parties burdening the state's fisc, the state must show some quantifiable expenditures and cannot rely on "mere speculation" to demonstrate traceability and redressability. 141 S. Ct. at 2116-19 (quotations, citation omitted). Appellees failed on both fronts.

First, and critically, Appellees failed to introduce (and the District Court did not cite) any specific facts showing that Texas spent a cent on healthcare, education, or social services for a DACA recipient, even though the standing of all Appellees was based on that of Texas. *See Texas v. United States*, 549 F. Supp. 3d 572, 593-96 (S.D. Tex. 2021) ("*Texas II*") (merely assuming that, "in all probability," Texas spent money on DACA recipients, and that because "Texas has standing … this Court need not analyze the standing of any other plaintiff"); *see also* DACA-Intervenor Br. at 21 (citing ROA.24520-618) (each Appellee conceding no such evidence exists). Instead, Appellees and the District Court relied solely on data showing state expenditures on immigrants ***generally***, regardless of their relationship to DACA. *See Texas II*, 549 F. Supp. 3d. at 593-94 (citing total healthcare and

education expenditures on immigrants); Appellee Br. at 17 (same). In *California*, the Supreme Court specifically rejected such unreliable apples-to-oranges comparisons. *See* 141 S. Ct. at 2118 (finding unpersuasive statements from state officials that addressed the wrong time or were "vague as to the time period at issue").

In contrast to the record here, this Court's standing analysis in *Texas I* rested entirely on specific driver's license costs—a theory that Appellees have explicitly disavowed. *See Texas II*, 549 F. Supp. 3d at 586 ("Here, Texas does not allege injury due to driver's license costs"); ROA.4252. The plaintiffs in *Texas I* purported to directly quantify each DAPA recipient's potential impact on Texas—a minimum of $130.89 for each additional driver's license issued. 809 F.3d at 155. Appellees have entirely failed to do so here, *see* ROA.24520-618, and their reliance on assumptions and estimates is no substitute. *See* DACA-Intervenor Br. at 21-22.

Second, Appellees failed to introduce, and the District Court did not cite, specific facts showing that any Appellee incurred social services costs ***because of DACA***. Instead, Appellees introduced only a counterintuitive theory that "DACA provides a strong incentive for those otherwise unlawfully present in the United States to remain," such that it is "nearly unavoidable" that DACA caused Texas's asserted (but unproven) injury. Appellee Br. at 19, 21. The District Court found this theory sufficient to conclude that the link between DACA and Appellees'

purported pocketbook harm is straightforward. *See Texas II*, 549 F. Supp. 3d at 595-96; Appellee Br. at 19.

Yet, like the plaintiffs whose theory of standing was rejected in *California*, Appellees and the District Court rely on a counterintuitive theory of traceability and redressability that finds no support in the record. Rather, the record below—including the terms of the DACA Memorandum itself—demonstrates that DACA did not incentivize DACA recipients to come to the U.S., and that DACA's rescission would not incentivize departures. By definition, DACA recipients, the very individuals whose behavior Appellees claim to predict, arrived in the U.S. as children before DACA and stayed in the U.S. for at least five years without DACA. *See* ROA.18741. In other words—as in *California*—it is demonstrable fact that DACA had no impact on eligible individuals' initial arrival in the U.S. or their longstanding continued presence here. *See* 141 S. Ct. at 2117 ("state plaintiffs have failed to show that the challenged … provision … will harm them by leading more individuals to enroll in these programs"). Moreover, DACA recipients' ties to the U.S. have only grown stronger over the past decade, further confirming that DACA's rescission would not lead DACA recipients to depart. *See, e.g.*, ROA. 9873-74, 24479-518. The above demonstrates that it is family, community, and belonging—not DACA—that incentivizes DACA recipients to stay in the U.S., which is their

home, and that they would continue to do so even if were DACA terminated. *See, e.g.*, ROA.9873-74.

Appellees' and the District Court's speculation with respect to traceability and redressability is even more evident when compared to *Texas I*. There, this Court found a direct link between DAPA and Texas's driver's license costs: it was DAPA ***alone*** that "would enable beneficiaries to apply for driver's licenses." 809 F.3d at 156. Here, by contrast, Appellees and the District Court tacitly acknowledge that none of Texas's assumed (but undemonstrated) social services expenditures on DACA recipients can be traced to ***DACA***. *See* Appellee Br. at 17-18; *Texas II*, 549 F. Supp. 3d at 593-94. For example, Appellees and the District Court concede that Texas would be required to educate DACA recipients enrolled in public school regardless of whether they received DACA. *See* Appellee Br. at 17; *Texas II*, 549 F. Supp. 3d at 593-94. That concession is consistent with Dr. M. Ray Perryman's expert conclusion that, if Texas spent any money on social services for DACA recipients, "it's not because they have DACA, it's because they are here." ROA.18061 (citation omitted).

Appellees, relying on *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021) ("*Texas MPP*")[2] and *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), argue

[2] The Supreme Court granted certiorari in *Texas MPP* and expedited the case for argument this term. *See Biden v. Texas*, 142 S. Ct. 1098 (2022) (Mem).

that, despite the mountain of contrary record evidence, the link between DACA and Appellees' purported pocketbook harm is "straightforward" and the "causal chain is easy to see." Appellee Br. at 19, 21 (quotations, citation omitted). But *Texas MPP* and *Department of Commerce* are entirely consistent with *California*, and they only demonstrate why this case is controlled by *California*, not *Texas I*.

As this Court recognized, the record in *Texas MPP* differed from the record in *California* in a very critical respect: the plaintiffs in *Texas MPP* had historical evidence about how relevant third parties ***had already reacted***, and so they based their future predictions about indirect pocketbook injuries on observed and documented past conduct. *See Texas MPP*, 20 F.4th at 972-73. Thus, the district court "did not merely prognosticate that, sometime in the future, MPP's termination would influence" third-parties' decisions, but rather "surveyed the record and found the relevant cause-and-effect ***had already been taking place***." *Id.* at 972 (emphasis added).[3] According to this Court, those "findings of ***past and present*** facts differentiate[d] [*Texas MPP*] from other[]" cases, including specifically *California*, "where the Supreme Court has refused to base standing on speculation about the ***future*** choices of third parties." *Id.* at 972-73 (emphasis in original).

[3] *Department of Commerce* provides Appellees no support for the same reason: the "evidence at trial established that noncitizen households have ***historically responded*** to the census at lower rates than other groups." 139 S. Ct. at 2566 (emphasis added).

In contrast, the only historical evidence in the record here shows that, despite DACA's uncertain fate and temporary rescission, DACA recipients, including Intervenor-Appellants, have stayed in the U.S. *See* DACA-Intervenor Br. at 43 (citing ROA.17968, 18069-77, 18103-04, 24485, 24517).[4] Likewise, even though there are individuals who previously had DACA grants but no longer do, Appellees introduced, and the District Court cited, no evidence demonstrating that any DACA recipients left the U.S. after losing or relinquishing their DACA grants. It is no answer for Appellees to continue relying on the same three pieces of speculative, outdated, and inapposite evidence they claim were "credited" by the District Court: Dr. Potter's guess that some DACA recipients might leave the U.S. if DACA were terminated; Dr. Wong's half-decade-old, methodologically flawed survey; and vague statements in Intervenor-Appellants' declarations, divorced from their context. *See* Appellee Br. at 22-23. Putting aside those flaws, *see* DACA-Intervenor Br. at 27-30, the declarations and testimony credited by the District Court address

[4] Appellees rely on *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014), to suggest that they "need not definitively demonstrate that a victory would completely remedy [their] harm." Appellee Br. at 23-24. But the issue in *Sanchez* was whether an organization that coordinated foster care for unaccompanied immigrant children on the government's behalf would ensure the return of children to their parents if specifically required to do so by court order. 761 F.3d at 500, 506. That inquiry was much more easily answered than prognosticating how individuals will resolve the unpredictable, multifaceted questions they would face if DACA were terminated.

only how DACA recipients might respond to DACA's termination; none of the evidence demonstrates what DACA recipients have actually done.

Thus, like in *California*, Appellees' attempt to demonstrate standing based only on speculation about pocketbook costs and the complicated choices of independent third parties—*i.e.*, assuming DACA recipients confronted with DACA's termination would abandon their families, communities, and lives in the U.S.—fails. *California* holds such speculation insufficient to establish standing.

2. Under *California* and *El Paso,* Intervenor-Appellants are entitled to summary judgment.

Because *California* controls, Appellees needed "stronger evidence," such as "comprehensive studies," to support standing. 141 S. Ct. at 2119. Instead, Appellees relied on one of Intervenor-Appellants' experts, Dr. Perryman, to claim DACA imposes costs. *See Texas II*, 549 F. Supp. 3d at 593. But Dr. Perryman testified he is "not aware of any costs to the State of Texas as a result of DACA"; he "provide[d] no evidence of such costs in [his] report or analysis"; he "did not conduct a study of whether DACA recipients imposed costs on the State of Texas"; and he is "aware of no studies or other research that identifies such costs." ROA.18059-60.

Considering Dr. Perryman's testimony, this Court's decision in *El Paso County v. Trump* further demonstrates the errors in Appellees' (and the District Court's) theory of traceability and redressability. In *El Paso*, this Court relied on

three primary factors to find the county lacked standing and to direct dismissal of the suit. Each applies with equal force here, and Appellees fail to distinguish them.

First, this Court held that the county had failed to demonstrate a "direct link, such as the loss of a specific tax revenue," between the challenged reallocation and the county's fisc. 982 F.3d at 340. Likewise, here, Appellees have failed to demonstrate a direct link between DACA and any specific expenditures, *see* ROA.24520-618, relying instead on the same theory of general negative economic impact this Court found insufficient in *El Paso*. *See* 982 F.3d at 341.

Second, this Court held that the county's theory of redressability was too speculative, because it relied on discretionary spending decisions made during a previous budget cycle that the relevant agency was now free to ignore. *See id.* at 341-42. Likewise, here, Appellees' theory of redressability relies extensively on stale data from nearly five years ago (Dr. Wong's 2017 survey) to predict how independent third parties (DACA recipients) will act today. *See* DACA-Intervenor Br. at 28-30.

Third, this Court held that allowing the county to challenge executive policies based only on incidental economic impacts would transform courts into "general complaint bureaus." 982 F.3d at 341 (citation omitted). Appellees' theory of injury here is likewise overbroad. *See* DACA-Intervenor Br. at 24-25.

Thus, Appellees lack the "stronger evidence" and "direct link" between DACA and their alleged injuries that *California* and *El Paso* demand. 141 S. Ct. at 2119; 982 F.3d at 340. Because it was Appellees' burden to establish specific facts to demonstrate that direct link (and not Intervenor-Appellants' burden to negate it), *see* DACA-Intervenor Br. at 17-18 (collecting cases), the District Court should have granted summary judgment in Intervenor-Appellants' favor based on Appellees' failure to meet their burden.[5]

B. By Inviting this Court To Affirm on the Basis of the District Court's Credibility Determinations, Appellees Confirm That, at a Minimum, Material Facts Are in Dispute.

Even if summary judgment in favor of Intervenor-Appellants was not warranted, the District Court's summary judgment in favor of Appellees was legal error, because it depended on impermissibly resolving disputed issues in favor of Appellees. On appeal, Appellees selectively present record evidence, arguing that, because the District Court "credited" their interpretation of the record, this Court should affirm. Appellee Br. at 17, 22, 24. Appellees' choice of the word "credited" is no accident: the District Court recognized that Intervenor-Appellants had introduced enough "contrary evidence" to create "factual disputes" regarding

[5] Appellees claim this Court lacks jurisdiction over the District Court's denial of Intervenor-Appellants' motion for summary judgment. Appellee Br. at 3. To the contrary, "upon [ ] appeal from adverse final judgment … the interlocutory rulings … are regarded as merged into the final judgment terminating the action. *Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983).

standing, 549 F. Supp. 3d at 595-96, but it granted summary judgment in Appellees' favor nonetheless. But "crediting" disputed evidence is precisely what District Courts cannot do at the summary judgment stage.

Even if the paucity of record evidence credited by the District Court were sufficient to defeat Intervenor-Appellants' summary judgment motion (and it is not), it underscores that the District Court erred in entering summary judgment for Appellees. At best for Appellees, given the "contrary evidence" and "factual disputes" the District Court identified, summary judgment was appropriate for neither party. *See* Fed. R. Civ. P. 56(a). By asking this Court to affirm on the basis of credibility determinations and evidence-weighing, Appellees implicitly concede as much. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[c]redibility determinations [and] the weighing of the evidence … are jury functions, not those of a judge" ruling on a summary judgment motion).[6]

Appellees' incomplete discussion of the record only further underscores the point. Appellees (as did the District Court) selectively cite a small subset of documents and testimony they believe would, if credited, establish standing—as though their burden were only identifying potential facts on their side. *See, e.g.*, Appellee Br. at 17 (relying on a mere expert ***assumption*** to attempt to demonstrate

[6] *Texas MPP* and *Department of Commerce* were, by contrast, decisions reached following full bench trials. *See* 20 F.4th at 945; 139 S. Ct. at 2564.

injury in fact). By focusing only on supposedly favorable facts, however, Appellees (as did the District Court) fail to mention, let alone distinguish, the contrary evidence Intervenor-Appellants introduced. *See, e.g.*, DACA-Intervenor Br. at 22, 29-30, 42-44 (citing numerous examples).

At the very least, that evidence—conspicuously absent from Appellees' Brief and the District Court's opinion—shows that "reasonable minds could differ" as to whether Appellees have standing, *Anderson*, 477 U.S. at 250-51, and the District Court thus erred in granting summary judgment for Appellees.

C. Neither Special Solicitude nor *Parens Patriae* Theories Overcome Appellees' Lack of Standing.

The organization of Appellees' Brief is not a coincidence: by beginning with a request for special solicitude, *see* Appellee Br. at 15, and devoting disproportionate airtime to *parens patriae* standing, *see id.* at 24-27, Appellees implicitly concede that, unless their Article III burden is reduced, they lack standing. But neither doctrine saves Appellees from their inadequate showing of any harm from DACA.

With respect to special solicitude, Appellees have failed to identify how DACA affects any quasi-sovereign interest, and thus cannot invoke this "seldom" supported theory. *Texas I*, 809 F.3d at 162. Appellees contend they merit special solicitude because they surrendered a "sovereign prerogative[]" to control immigration. Appellee Br. at 16 (citation omitted). But that novel and expansive proposition—that states have special solicitude to challenge any federal action

relating to a prerogative surrendered in joining the union—finds no support in Appellees' cited cases, which require an injury to a state's quasi-sovereign interests. *See Texas MPP*, 20 F.4th at 969-70 (pressure to change driver's license laws); *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007) (harm to coastline). Nor is Appellees' argument consistent with *Murphy*—a post-*Texas I* case the District Court failed to distinguish and Appellees ignore entirely—and its reaffirmation that federal actions (like DACA) regulating only private actors do not offend dual sovereignty principles or intrude on states' quasi-sovereign interests. *See* DACA-Intervenor Br. at 41 (discussing *Murphy*, 138 S. Ct. at 1475-77, 1481). As Appellees identified no quasi-sovereign injury, the District Court erred in affording special solicitude.

With respect to *parens patriae*, Appellees cannot avoid the Supreme Court's century-old command: a "State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). Appellees' reliance on *Massachusetts v. EPA*, which did not disturb *Mellon*, is misplaced. Moreover, under *Alfred L Snapp*, a *parens patriae* must "allege[] [more] than injury to an identifiable group," 458 U.S. at 607, which Appellees have failed to do. Appellees' incomplete portrayal of the factual record cannot overcome this clear precedent.

Appellees' reliance on *Massachusetts v. EPA*, *Texas I*, and *Texas MPP*, Appellee Br. at 24-27, demonstrates their argument's weakness, as those cases do not concern *parens patriae*. The *Massachusetts* decision, in which the state did not even invoke *parens patriae* standing, clearly did not overturn *Mellon*, which unequivocally and universally bars states from suing the federal government as *parens patriae*. *See* DACA-Intervenor Br. at 31-32. Similarly, *Texas I* and *Texas MPP* merely address whether the states in those cases were entitled to ***special solicitude***; neither suggests, let alone holds, that a state can sue the federal government as *parens patriae*. *See Texas I*, 809 F.3d at 151-55; *Texas MPP*, 20 F.4th at 969-70. Meanwhile, Appellees make no attempt to distinguish *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 181-83 (D.C. Cir. 2019) or *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009), in which sister circuits have expressly rejected the District Court's incorrect theory. *See* DACA-Intervenor Br. at 30-32.

Appellees also implicitly concede that their assertion of *parens patriae* fails because they seek to represent only a small subset of their populations: residents whom Appellees claim would directly compete with DACA recipients in the labor market. *See* Appellee Br. at 25-26. Even the District Court's incomplete discussion of the record confirms that any alleged unfavorable impact of DACA would be narrowly limited to "similarly skilled workers." 549 F. Supp. 3d at 587 (citation omitted). Neither Appellees nor the District Court cited any evidence suggesting

DACA negatively impacts the economic wellbeing of Texas's (or any other Appellee's) general population, or that DACA's termination would make the average Texan better off. Nor could they: the record demonstrates, and *amici* confirm, that DACA generates tremendous economic benefits in Texas and other states. *See* ROA.18044, 22906; *see also, e.g.*, Br. of Amici Curia 69 Local Gov'ts at 5-12; Br. of U.S. Cos. & Bus. Ass'ns as Amici Curiae at 3-15.

Appellees' only response is to declare, as did the District Court, that standing is "not an accounting exercise." Appellee Br. at 18; *Texas I*, 809 F.3d at 156; *Texas II*, 549 F. Supp. 3d at 593. But the exceptional theory of standing that Appellees assert under *parens patriae* requires that a court consider a challenged policy's impact on the state's population as a whole; it is not a vehicle for states to pick winners and losers among its residents. *See* DACA-Intervenor Br. at 33-34 (collecting cases). Thus, when (as here) a challenged policy's benefits to the general population outweigh its burdens to a narrow, "identifiable group," a state lacks *parens patriae* standing. *Alfred L. Snapp*, 458 U.S. at 607. The District Court erred in holding otherwise.

Finally, Appellees' theory of *parens patriae* standing rests on an unsupported factual premise: Appellees and the District Court merely assume DACA causes negative labor market outcomes, even though Appellees introduced no facts to support that assumption. *See* DACA-Intervenor Br. at 35-38. For example,

Appellees assert that DACA "necessarily" decreases wages. Appellee Br. at 25-26. For support, Appellees cite only the District Court's opinion, which relied on mere predictions, rather than any empirical evidence. *See id.* (citing *Texas II*, 549 F. Supp. 3d at 587-88); *see also* DACA-Intervenor Br. at 35-37 (discussing flaws in evidence cited by District Court). Then, to argue that these predictions are not genuinely disputed, Appellees once again rely only on the District Court, which ignored record expert opinions contradicting Appellees' contentions about DACA's actual and theoretical economic effects. *See* DACA-Intervenor Br. at 34-35, 42-44. And Appellees' argument that DACA's termination would "necessarily" redress these supposed economic injuries—another essential element of standing—cites no evidence at all. *See* Appellee Br. at 26. Article III demands "specific facts," not Appellees' mere say-so. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12 (2013).

II. LIKE THE DISTRICT COURT, APPELLEES' RELIANCE ON *TEXAS I* TO SUPPORT THEIR SUBSTANTIVE CHALLENGE IGNORES THE IMPORTANT DIFFERENCES BETWEEN DACA AND DAPA AND SIGNIFICANT INTERVENING PRECEDENT.

The District Court's holding (and Appellees' defense thereof) that DACA is substantively unlawful relies almost entirely on this Court's opinion in *Texas I*, but that ignores both the significant ways in which DACA differs from DAPA as well

as important legal developments since *Texas I*.[7] After this Court decided *Texas I*, the Supreme Court both clarified in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020), the general proposition that courts should not "impos[e] limits on an agency's discretion that are not supported by the text," and specifically noted in *Regents* that "forbearance [from removal] remain[s] squarely within the discretion" of DHS under relevant immigration laws. 140 S. Ct. at 1912. Those holdings undermine the District Court's opinion in three key respects that Appellees fail to address.

First, neither the District Court nor Appellees seriously contest that Congress delegated broad authority to the DHS Secretary to enforce immigration laws and priorities. *See* DACA-Intervenor Br. at 45 (citing 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a)). However, Appellees still argue that, because Congress did not expressly identify DACA recipients among the categories of immigrants eligible for discretionary relief and deferred action, Congress must have intended to exclude them. *See* Appellee Br. at 35. But the Supreme Court unequivocally rejected that logic in *Little Sisters*, where it held that, when Congress has granted agencies "sweeping authority" to exercise broad executive discretion, courts must refrain

[7] As noted in Intervenor-Appellants' opening brief (at 44 n.8), Appellees' procedural challenge to DACA will be moot once DHS's ongoing notice-and-comment rulemaking is complete. Appellees appear to concede this, *see* Appellee Br. at 29 n.5, disputing only whether it is already moot.

from "imposing limits on an agency's discretion that are not supported by the text" of the statute, because doing so would "alter, rather than [ ] interpret" the statute. 140 S. Ct. at 2380-81. That applies with special force here; Congress did not prohibit DHS from implementing DACA, which otherwise fits comfortably within DHS's discretion under the immigration statutes, and courts should not engraft limits Congress did not impose. *See* DACA-Intervenor Br. at 44-47.

Second, Appellees misunderstand the impact of *Regents*. The *Regents* majority very clearly stated that DHS has authority "not to enforce the immigration laws ***as to a class*** … of low-priority" immigrants, 140 S. Ct. at 1911 (emphasis added, citation omitted), not just "as to an individual," as Appellees would have it. *Cf*. Appellee Br. at 37-38; *Texas II*, 549 F. Supp. 3d. at 621 (citing Justice Thomas's partial dissent, rather than the *Regents* majority opinion).

Third, Appellees say DACA must violate the INA because Congress would not have delegated a decision of such "economic and political significance" to an agency. Appellee Br. at 38 (citation omitted); *see also Texas II*, 549 F. Supp. 3d. at 615 (same). Again, *Regents* squarely forecloses that argument, emphasizing that the policy choices surrounding DACA "are for DHS," in part because of the size of the group impacted. 140 S. Ct. at 1910. DACA is well within the contours of previous exercises of enforcement discretion and deferred action by DHS and its predecessors, including the Family Fairness Program ("FFP"), which alone

ultimately benefitted 1.5 million people who lacked any legal status. DACA-Intervenor Br. at 48. Appellees discount FFP merely because Congress subsequently endorsed it. Appellee Br. 44-45. But that argument illogically assumes that FFP—an exercise of executive enforcement discretion—became lawful only ***after*** Congress legislated. Moreover, Appellees' characterization of FFP as "interstitial" is revisionist history; FFP was adopted as executive policy two weeks after an attempt to enact it as legislation was defeated, and Congress twice more failed to pass legislative proposals in 1987 and 1989. *See* ROA.572-73, 8885; American Immigration Council, *Reagan-Bush Family Fairness: A Chronological History* 3-4 (2014), https://perma.cc/EG3G-Z7DA.

III. THERE IS NO REASON FOR THE COURT TO ADDRESS APPELLEES' TAKE CARE CLAUSE ARGUMENT.

Although the District Court declined to rule on the issue, Appellees ask this Court to break entirely new ground and rule that the DACA Memorandum violates the Take Care Clause. *See* Appellee Br. at 47-48. But, as the District Court correctly recognized, the Take Care Clause is understudied and widely misunderstood. *See Texas II*, 328 F. Supp. 3d 662, 710-12 (S.D. Tex. 2018) (collecting sources). Few Supreme Court cases have directly interpreted it and scholars are divided on its meaning. *Id.* At least one court has held that the Take Care Clause does not create a private right of action. *See Las Americas Immigr. Advoc. Ctr. v. Biden*, -- F. Supp. 3d --, 2021 WL 5530948, at *3 (D. Or. Nov. 24, 2021). Nor has the issue received

the requisite attention here: the summary judgment briefs below devoted only three pages to the Take Care Clause, *see* ROA.22422-23, 23522-23, 23946-47, and only a single page of appellate briefing has discussed it, *see* Appellee Br. at 47-48. If a decision on the Take Care Clause is required, the Court should remand to the District Court for further briefing and factual development. *See Texas MPP*, 20 F.4th at 965 ("[W]e are a court of review, not of first view.") (citation omitted).

If the Court does address the issue, it should reject Appellees' arguments. As the Supreme Court has recognized, the Take Care Clause is a source of executive prosecutorial discretion, including the Executive's discretion ***not*** to prosecute. *See, e.g.*, *United States v. Armstrong*, 504 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (because "it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed,'" the Executive has "special province" not to prosecute).[8] DACA is precisely the sort of prosecutorial discretion that the Supreme Court recognized in *Heckler* is firmly rooted in, not a violation of, the Take Care Clause. 470 U.S. at 832.

IV. APPELLEES FAIL TO JUSTIFY A NATIONWIDE INJUNCTION.

The Supreme Court emphasized in *Regents* that any response to a finding that DACA is unlawful must take DACA recipients', their families', and their

[8] DACA's case-by-case discretion stands in stark contrast to MPP's termination, which eliminated individual discretion. *See Texas MPP*, 20 F.4th at 973-74.

communities' reliance interests into account. *See* 140 S. Ct. at 1913-14. Yet Appellees entirely ignore these important reliance interests, and the significant differences between this case and *Texas I* that make nationwide relief particularly inappropriate here.

A. Appellees Conspicuously Ignore Reliance Interests, Which Demonstrates the Error in the District Court's Remedy.

Regents unequivocally held that even assuming DACA were unlawful, DHS "was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." 140 S. Ct. at 1915 (emphasis modified); *see also Texas MPP*, 20 F. 4th at 990 (under *Regents*, DHS required to consider reliance interests with respect to MPP termination).

Yet Appellees ignore these reliance interests. Appellees nowhere acknowledge that DACA recipients are individuals who, alone and with their families, have relied on DACA to build successful lives that contribute to the richness and strength of their communities. *See* ROA.23591-686, 23692-717, 24273-74, 24479-518. Appellees use the word "reliance" just once in their brief—in its second-to-last sentence—and only then to argue that this Court should ignore reliance interests as purportedly premature. *See* Appellee Br. at 51. Appellees cite no authority for their contention that the disruptive consequences of the District Court's permanent injunction are shielded from review simply because, due to a

temporary stay, those harms have not yet come to pass. *See id.* In fact, Appellees' own citations support the opposite conclusion: in *Sanchez*, the district court "stayed the enforcement of [its] order pending [the] appeal," but this Court nonetheless addressed the stayed order. 761 F.3d at 499.

Even if this Court agrees with Appellees on the merits, DACA recipients' reliance interests demonstrate that neither a permanent injunction nor vacatur is in the public interest. *See* DACA-Intervenor Br. at 51-56. Appellees have no response other than the tautology that agencies should enforce the law. Appellee Br. at 50-51. But that is no answer where, as here, the agency must use discretion in enforcement and must take into account reliance interests. *Regents*, 140 S. Ct. at 1916 ("The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew."). And Appellees have no adequate response to the fact that DHS has already published a notice of proposed rulemaking to promulgate a new regulation to address these issues. 86 Fed. Reg. 53,736 (Sept. 28, 2021). This Court should thus reverse the District Court's injunction and vacatur and instead remand without vacatur to allow the DHS rulemaking process to conclude.

B. A Nationwide Injunction Is Particularly Inappropriate Here.

Appellees' exclusive reliance on *Texas I* to support the District Court's nationwide injunction, *see* Appellee Br. at 50, is misplaced, especially in light of this Court's more recent clarification that *Texas I* "does not hold that nationwide

injunctions are required or even the norm." *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021) (per curiam). Appellees fail to grapple with the numerous differences between this case and *Texas I* that make nationwide injunctive relief particularly inappropriate here. First, unlike in *Texas I*, where more than half the states challenged DAPA, *see* 809 F.3d at 146, here only a small minority of states seek DACA's termination, and only one even attempted to establish standing. Second, in contrast to *Texas I*, the federal defendants for much of this litigation failed to defend DACA, raising the prospect of nationwide relief through collusive litigation. *See* DACA-Intervenor Br. at 54-55. Third, unlike in *Texas I*, long before the District Court issued its opinion in this case, numerous other courts, including courts of appeals, held that DACA is a lawful exercise of DHS's discretion, *see id.* at 54 (collecting cases).

Under Appellees' misguided theory, decisions across the country upholding government action apply solely to that specific case, but the first ruling against the government precludes enforcement of the policy anywhere—including in those jurisdictions where the policy has been upheld on appeal. For precisely these reasons, numerous Justices have questioned the wisdom of nationwide injunctions. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (nationwide injunctions are "flaw[ed]" because they dictate "how the defendant must act towards persons who are not parties to the case"); *Trump v.*

Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (describing "universal injunctions" as "legally and historically dubious"). This Court should thus be particularly wary of affirming nationwide relief where, as here, the District Court considered and credited evidence of harm from only a single plaintiff. If the Court determines that DACA should be enjoined (and it should not), it should do so on a much narrower basis.

CONCLUSION

Intervenor-Appellants respectfully request that this Court reverse and vacate the District Court's Order and enter judgment in their favor on the issue of Appellees' lack of standing, or in the alternative remand the case to the District Court to resolve pending factual disputes at trial or to remand DACA to DHS without vacatur.

[*signature page follows*]

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 30, 2022, the undersigned caused the foregoing document to be filed electronically by using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the volume limitation provided in Fed. R. App. P. 32(a)(7)(B), in that it contains 6,495 words, excluding parts of the brief exempted under Fed. R. App. P. 32(d), according to the word-count feature of Microsoft Word. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, size 14 point.

Dated: March 30, 2022

/s/ Nina Perales
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