MULTI-CIRCUIT
MULTI-STATE
15-XXXX-OP

IN RE: NATURAL BORN CITIZEN PARTY NATIONAL COMMITTEE ET AL.

(Similarly situated class members in excess of 50 million natural born U.S. citizens eligible to be nominated and placed the 2016 federal election ballots as electoral college electors of the individual states by the Natural Born Citizen Party National Committee
Special Masters supervising an estimated $5 billon citizen-voter vetting budget 2016 CINC-POTUS election cycle)

P.O. Box 312 (351 North Road) Hurley, NY 12443 845-389-4366 845-331-1925 fax

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MANDAMUS TO STAY THE 2016 FEDERAL GENERAL ELECTION PENDING IMMEDIATE REMOVAL OF INELIGIBLE AKA OBAMA AND ALL OF HIS EXECUTIVE OFFICE NOMINATED APPOINTEES, ACTIONS AND ORDERS SINCE JANUARY 2009

SPECIAL MASTERS

MANDAMUS OF THIS MULTI-CIRCUIT SPECIAL COURT AND ITS 13 CIRCUITS (First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits) SPECIAL MASTERS TO CONDUCT AN IMMEDIATE MILITARY ASSISTED

NATIONAL RE-CENSUS OF NATURAL BORN CITIZENS AND LEGALLY VETTED NATURALIZED CITIZENS

FOLLOWED BY MULTI-CIRCUIT COURT IMPOSED CONGRESSIONAL REAPPORTIONMENT

FOLLOWED BY THE CONFIRMATION OF A 2016 ELECTORAL COLLEGE CINC-POTUS ELECTION ON OR ABOUT DECEMBER 2016 AND BY THE NEWLY REAPPORTIONED AND REDISTRICTED CONGRESS ON OR ABOUT JANUARY 2017

The 2016 presidential election revolves around the seminal issue of an ineligible nomination and misprision of treason as chief executive and as the unconstitutionally nominated executive agency heads under color of law and so called executive agency actions or orders facilitating the mass amnesty of illegal aliens and their non-14th amendment "anchor babies" so as to dilute the constitutional redistricting census and ultimate votes of natural born citizens of the Republic of the United States.

Natural Born Citizen Party National Committee Party Rules

NBCP-NC "Party Vetters" must be sworn public officers themselves having currently affirmed or sworn an oath of office in loyalty to the US constitution including as well as the various state constitutions. (e.g. NBCP-NC National Notary Public Project "Rabenda Rule")

NBCP-NC "candidate-electors" must themselves have documentation proving both their birth parents themselves being natural born US citizens and NBCP-NC Candidate-Electors being otherwise NBC eligible to be elected CINC-POTUS (No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.) Section 1 of Article Two of the United States Constitution sets forth the eligibility requirements for serving as president of the United States, under clause 5:

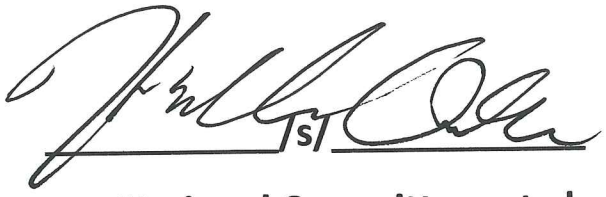
NBCP-NC 2016 "Party Members"

NBCP-NC 2016 "party voters" are that class of the general class of documented US citizens that will elect NBCP-NC 2016 presidential electors. Party Voters must be vetted by NBCP-NC electors as having both birth parents were US citizens at NBCP-NC member's birth and otherwise including being of current federal election voting age before date of CINC-POTUS General Election November 2016.

NBCP-NC Party 2016 CINC-POTUS Candidates must be vetted by elected NBCP-NC Electors as being otherwise natural born citizens eligible to be elected CINC-POTUS. (e.g. "Trump Rule")

Senior Pre-2009 DATE OF RANK "Hollister/Kerchner Rule" O5-O6 Retired US Military Commissioned Constitutional Officers

Thursday, November 12, 2015



Natural Born Citizen Party National Committee, et al.

Harold William Van Allen

Co-Chairperson

P.O. Box 312 (351 North Road) Hurley, NY 12443 845-389-4366 845-331-1925 fax

CC: R. Craig Lawrence, AUSA DCD

IN THE UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Ave. N.W.
Washington, DC 20001
202-216-7000

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee, et al."

Originating Case: USDC-DCD 08-cv-02254

"HOLLISTER v SOETORO ET AL"

15-5251-OP

Originating Case: USDC-DCD 15-cv-1036

https://www.scribd.com/doc/284156157/USCA-DCC-15-5218-Document-1577344-Appellant-Brief-in-Re-Natural-Born-Citizen-Party-NC

"In re: Natural Born Citizen Party National Committee et al v FEC et al"

Originating Case: USDC-DCD 14-cv-995

"Strunk et al v DOS et al"

https://www.scribd.com/doc/263769795/USCA-DCC-14-5327-Strunk-Et-Al-v-DOS-Et-Al-Appellate-Brief-Filed-4-30-2015

IN THE UNITED STATES COURT OF APPEALS FOR THE

FIRST CIRCUIT

1 Courthouse Way, Suite 2500
Boston, MA 02210
(617) 748-9057

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee et al."

IN THE UNITED STATES COURT OF APPEALS FOR THE

SECOND CIRCUIT

40 Foley Square
New York, New York 10007
212-857-8585

15-3472-OP

"In re: Natural Born Citizen Party National Committee, et al."

Originating Case: USDC-NYND 1:04-cv-01193-LEK-RFT

"Loeber et al. v Spargo, et al."

**(National Association of Secretaries of State,
United States Election Assistance Corporation)**

Related USCA2C Cases

"Forjone, et al. v State of California, et al."

1:06-cv-01002-LEK-RFT (USCA2C 10-822-cv)

"USA v NYS BOE, et al."

1:06-cv-263-GLS (USCA2C 10-02320-cv)

15-3370-OP

"In re: Natural Born Citizen Party National Committee et al."

Originating Case: USDC-NYND 1:07-cv-00943-LEK-DRH

https://www.scribd.com/doc/285038043/USDC-NYND-1-07-Cv-00943-LEK-DRH-Schulz-Et-Al-v-State-of-New-York-Et-Al

"Schulz, et al. v State of New York, et al."

**Constitutional principle of the public nature of elections and right to petition
multi-state hand counting of general election ballots**

Mandamus to intervene, reinstate with regards to the issue of standing and consolidate with related active multi-state illegal amnesty executive actions by ineligible CINC-POTUS illegal alien amnesty cases
USCA-Fifth Circuit 15-41276-OP (USDC-TXSD 14-cv-254-ASH
USCA-DCC 15-5252-OP (USDC-DCD 15-cv-1036)

IN THE UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT

601 Market Street
Philadelphia, PA 19106
215-597-2995

15-3463-OP

"In re: Natural Born Citizen Party National Committee et al"

https://www.scribd.com/doc/285284988/USCA3C-15-3463-In-re-Natural-Born-Citizen-Party-National-Committee-et-al-filed-Original-Petition-for-Mandamus

ORIGINATNG CASE: USDC-NJ District: 1-09-cv-00253
Charles Kerchner, Jr., et al v. Barack Obama, et al
Senior Pre-2009 DATE OF RANK "Kerchner Rule"
O5-O6 Retired US Military Commissioned Constitutional Officers

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IN THE UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT

1100 East Main Street, Suite 501
Richmond, VA 23219
PHONE: (804) 916-2700

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee et al."
Originating Case
USDC-VAED-1:13-cv-00278-LMB-TCB
"Rudy v US Patent and Trademark Office"

IN THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

15-41276-OP

600 S. Maestri Place
New Orleans, LA 70130-3408
Telephone number:
(504) 310-7700

"In re: Natural Born Citizen Party National Committee et al."

https://www.scribd.com/doc/285694617/USCA5C-Doc-15-41276-in-Re-Natural-Born-Citizen-Party-National-Committee-Petition-for-Mandamus

Originating Case:

USDC TXSD (Brownsville) 1:14-cv-254 "State of Texas et al v USA et al"

IN THE UNITED STATES COURT OF APPEALS FOR THE

SIXTH CIRCUIT

15-XXXX-OP

100 E. Fifth Street
Cincinnati, Ohio 45202-3988
Phone: (513) 564-7000

"In re: Natural Born Citizen Party National Committee et al."

Originating Case

USDC-TNWD-Western Division- 2:12-cv-22143-STA

Liberty Legal Foundation et al. v National Democratic Party of the USA, et al

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IN THE UNITED STATES COURT OF APPEALS FOR THE

SEVENTH CIRCUIT

15-XXXX-OP

Room 2722
219 S. Dearborn Street
Chicago, IL 60604
(312) 435-5850

"In re: Natural Born Citizen Party National Committee et al."

IN THE UNITED STATES COURT OF APPEALS FOR THE

EIGHTH CIRCUIT

15-XXXX-OP

111 South 10th Street
St. Louis, MO. 63102
PHONE: (314) 244-2400

"In re: Natural Born Citizen Party National Committee et al."

IN THE UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

P.O. Box 193939
San Francisco, CA 94119-3939
(415) 355-8000

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee et al."

IN THE UNITED STATES COURT OF APPEALS FOR THE

TENTH CIRCUIT

1823 Stout Street Denver, CO 80257-1823.
303-844-3157

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee et al."

IN THE UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT

56 Forsyth Street, N.W.
Atlanta, GA 30303
PHONE: (404) 335-6100

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee et al."

IN THE UNITED STATES COURT OF APPEALS FOR THE

FEDERAL CIRCUIT

717 Madison Pl N.W.
Washington, DC 20005
202-275-8000

15-XXXX-OP

"In re: Natural Born Citizen Party National Committee et al."

USCAFC 14-1056
"Rudy v PATO"

Certification of Service

Clerks of US Courts of Appeals 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th,
District of Columbia Circuit, Federal Circuit
Originating Case District Judges:
USDC TXSD 14-cv-254-ASH (Andrew S. Hanen) Brownsville, TX
USDC DCD 15-cv-1036-RJL (Richard J. Leon) Washington DC
USDC NJ 09-cv-253-JBS Simandle New Jersey
USDC NYND 07-cv-943-LEK Kahn Albany, NY

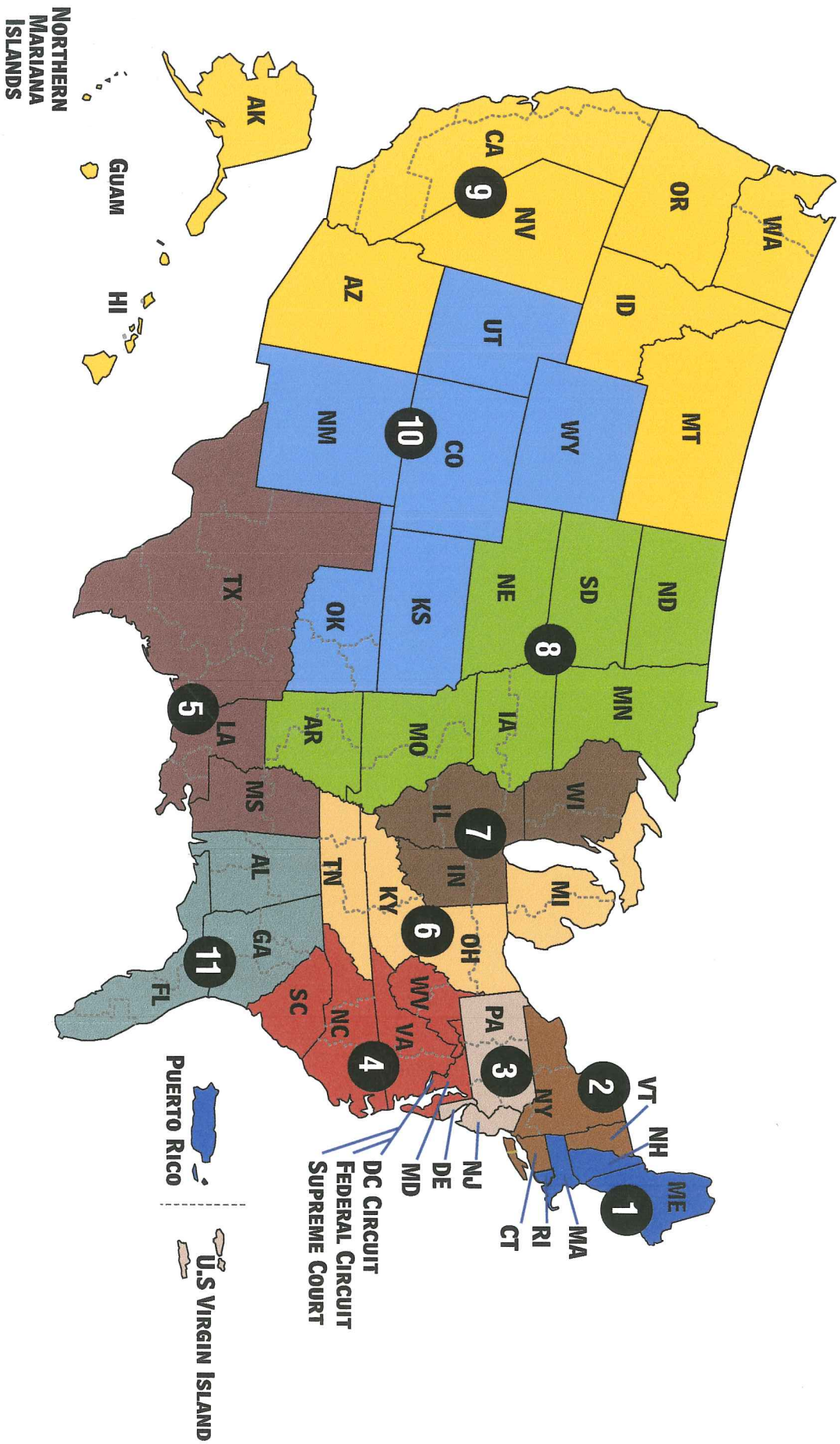
All 50 state election offices and state attorney general offices et al
US DOJ-FBI, DOD, DVA, DOS, DOC, DHS, CIA, Treasury Dept. (IRS, Secret Service),
FEC, USPTO
R. Craig Lawrence Esq, AUSA USDOJ
Robert L Schulz (Natural Born US Citizen)
Fairlene G. Rabenda (Natural Born US Citizen)

Larry Klayman Esq. / Joe Arpaio
Mario Apuzzo, Esq. / Charles Kerchner CDR (Ret)
FEC filed exploratory candidates for election 2016 CINC-POTUS
Theodore Cruz 2016 CINC-POTUS candidate)
Bobby Jindal 2016 CINC-POTUS candidate)
Marco Rubio (2016 CINC-POTUS candidate)
Rick Santorum 2016 CINC-POTUS candidate)
Christopher E Strunk (2016 CINC-POTUS candidate)
Donald J Trump (2016 CINC-POTUS candidate)

Updated November 12, 2015

/s/

Harold William Van Allen
Natural Born Citizen Party National Committee
Co-Chairperson 2016 CINC-POTUS Candidate-Elector
P.O. Box 312 (351 North Road) Hurley, NY 12443
845-389-4366 / 845-331-1925 fax hvanallen@hvc.rr.com


Geographic Boundaries
of United States Courts of Appeals and United States District Courts
AK
HI
GUAM
NORTHERN MARIANA ISLANDS
PUERTO RICO
U.S VIRGIN ISLAND
DC CIRCUIT
FEDERAL CIRCUIT
SUPREME COURT
1
2
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ME
VT
NH
MA
RI
CT
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AZ
NV
CA
OR
WA

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 9, 2015
Lyle W. Cayce
Clerk

No. 15-40238

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA;
STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS;
STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA;
STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA;
STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN;
PAUL R. LEPAGE, Governor, State of Maine;
PATRICK L. MCCRORY, Governor, State of North Carolina;
C. L. "BUTCH" OTTER, Governor, State of Idaho;
PHIL BRYANT, Governor, State of Mississippi;
STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA;
STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS;
ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA;
STATE OF TENNESSEE,

Plaintiffs–Appellees,

versus

UNITED STATES OF AMERICA;
JEH CHARLES JOHNSON, Secretary, Department of Homeland Security;
R. GIL KERLIKOWSKE,
Commissioner of U.S. Customs and Border Protection;
RONALD D. VITIELLO,
Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection;
SARAH R. SALDANA,
Director of U.S. Immigration and Customs Enforcement;
LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,

Defendants–Appellants.

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

Before KING, SMITH, and ELROD, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The United States[1] appeals a preliminary injunction, pending trial, forbidding implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). Twenty-six states (the "states"[2]) challenged DAPA under the Administrative Procedure Act ("APA") and the Take Care Clause of the Constitution;[3] in an impressive and thorough Memorandum Opinion and Order issued February 16, 2015, the district court enjoined the program on the ground that the states are likely to succeed on their claim that DAPA is subject to the APA's procedural requirements. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).[4]

The government appealed and moved to stay the injunction pending resolution of the merits. After extensive briefing and more than two hours of oral argument, a motions panel denied the stay after determining that the appeal was unlikely to succeed on its merits. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015). Reviewing the district court's order for abuse of discretion, we affirm the preliminary injunction because the states have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required for an injunction.[5]

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[1] This opinion refers to the defendants collectively as "the United States" or "the government" unless otherwise indicated.

[2] We refer to the plaintiffs collectively as "the states," but as appropriate we refer only to Texas because it is the only state that the district court determined to have standing.

[3] We find it unnecessary, at this early stage of the proceedings, to address or decide the challenge based on the Take Care Clause.

[4] We cite the district court's opinion as "Dist. Ct. Op., 86 F. Supp. 3d at ___."

[5] Our dedicated colleague has penned a careful dissent, with which we largely but

I.

A.

In June 2012, the Department of Homeland Security ("DHS") implemented the Deferred Action for Childhood Arrivals program ("DACA").[6] In the DACA Memo to agency heads, the DHS Secretary "set[] forth how, in the exercise of . . . prosecutorial discretion, [DHS] should enforce the Nation's immigration laws against certain young people" and listed five "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion."[7] The Secretary further instructed that "[n]o individual should receive deferred action . . . unless they [*sic*] first pass a background check and requests for relief . . . are to be decided on a case by case basis."[8] Although stating that "[f]or individuals who are granted deferred action . . . , [U.S. Citizenship and Immigration Services ("USCIS")] shall accept applications to determine whether these individuals qualify for work authorization," the DACA Memo purported to "confer[] no substantive right, immigration status or pathway to citizenship."[9] At least 1.2 million persons qualify for DACA, and approximately 636,000 applications were approved through 2014.

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respectfully disagree. It is well-researched, however, and bears a careful read.

[6] Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Prot., et al. 1 (June 15, 2012) (the "DACA Memo"), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[7] *Id.* (stating that an individual may be considered if he "[1] came to the United States under the age of sixteen; [2] has continuously resided in the United States for a[t] least five years preceding [June 15, 2012] and is present in the United States on [June 15]; [3] is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the [military]; [4] has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and [5] is not above the age of thirty").

[8] *Id.* at 2.

[9] *Id.* at 3.

Dist. Ct. Op., 86 F. Supp. 3d at 609.

In November 2014, by what is termed the "DAPA Memo," DHS expanded DACA by making millions more persons eligible for the program[10] and extending "[t]he period for which DACA and the accompanying employment authorization is granted . . . to three-year increments, rather than the current two-year increments."[11] The Secretary also "direct[ed] USCIS to establish a process, similar to DACA," known as DAPA, which applies to "individuals who . . . have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident" and meet five additional criteria.[12] The Secretary stated that, although "[d]eferred action does not confer any form of legal status in this country, much less citizenship[,] it [does] mean[] that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States."[13] Of the approximately 11.3 million illegal aliens[14] in the United

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[10] Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 3–4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

[11] *Id.* at 3. The district court enjoined implementation of the following three DACA expansions, and they are included in the term "DAPA" in this opinion: (1) the "age restriction exclud[ing] those who were older than 31 on the date of the [DACA] announcement . . . will no longer apply," *id.*; (2) "[t]he period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments," *id.*; (3) "the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010," *id.* at 4. Dist. Ct. Op., 86 F. Supp. 3d at 677–78 & n.111.

[12] DAPA Memo at 4 (directing that individuals may be considered for deferred action if they "[1] have, on [November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident; [2] have continuously resided in the United States since before January 1, 2010; [3] are physically present in the United States on [November 20, 2014], *and* at the time of making a request for consideration of deferred action with USCIS; [4] have no lawful status on [November 20, 2014]; [5] are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and [6] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate").

[13] *Id.* at 2 (emphasis added).

[14] Although "[a]s a general rule, it is not a crime for a removable alien to remain

States, 4.3 million would be eligible for lawful presence pursuant to DAPA. Dist. Ct. Op., 86 F. Supp. 3d at 612 n.11, 670.

"Lawful presence" is not an enforceable right to remain in the United States and can be revoked at any time, but that classification nevertheless has significant legal consequences. Unlawfully present aliens are generally not eligible to receive federal public benefits, *see* 8 U.S.C. § 1611, or state and local public benefits unless the state otherwise provides, *see* 8 U.S.C. § 1621.[15] But as the government admits in its opening brief, persons granted lawful presence pursuant to DAPA are no longer "bar[red] . . . from receiving social security

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present in the United States," it is a civil offense. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012); *see* 8 U.S.C. §§ 1182(a)(9)(B)(i), 1227(a)(1)(A)–(B). This opinion therefore refers to such persons as "illegal aliens":

> The usual and preferable term in [American English] is *illegal alien*. The other forms have arisen as needless euphemisms, and should be avoided as near-gobbledygook. The problem with *undocumented* is that it is intended to mean, by those who use it in this phrase, "not having the requisite documents to enter or stay in a country legally." But the word strongly suggests "unaccounted for" to those unfamiliar with this quasi-legal jargon, and it may therefore obscure the meaning.
>
> More than one writer has argued in favor of *undocumented alien* . . . [to] avoid[] the implication that one's unauthorized presence in the United States is a crime . . . . Moreover, it is wrong to equate illegality with criminality, since many illegal acts are not criminal. *Illegal alien* is not an opprobrious epithet: it describes one present in a country in violation of the immigration laws (hence "illegal").

BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 912 (Oxford 3d ed. 2011) (citations omitted). And as the district court pointed out, "it is the term used by the Supreme Court in its latest pronouncement pertaining to this area of the law." Dist. Ct. Op., 86 F. Supp. 3d at 605 n.2 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012)). "*[I]llegal alien* has going for it both history and well-documented, generally accepted use." Matthew Salzwedel, *The Lawyer's Struggle to Write*, 16 SCRIBES JOURNAL OF LEGAL WRITING 69, 76 (2015).

[15] Those provisions reflect Congress's concern that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates" and that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601. Moreover, the provisions incorporate a national policy that "aliens within the Nation's borders not depend on public resources to meet their needs" and that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.*

retirement benefits, social security disability benefits, or health insurance under Part A of the Medicare program."[16] That follows from § 1611(b)(2)–(3), which provides that the exclusion of benefits in § 1611(a) "shall not apply to any benefit[s] payable under title[s] II [and XVIII] of the Social Security Act . . . to an alien who is *lawfully present* in the United States as determined by the Attorney General . . . ." (emphasis added). A lawfully present alien is still required to satisfy independent qualification criteria before receiving those benefits, but the grant of lawful presence removes the categorical bar and thereby makes otherwise ineligible persons eligible to qualify.

"Each person who applies for deferred action pursuant to the [DAPA] criteria . . . shall also be eligible to apply for work authorization for the [renewable three-year] period of deferred action." DAPA Memo at 4. The United States concedes that "[a]n alien with work authorization may obtain a Social Security Number," "accrue quarters of covered employment," and "correct wage records to add prior covered employment within approximately three years of the year in which the wages were earned or in limited circumstances thereafter."[17] The district court determined—and the government does not dispute—"that DAPA recipients would be eligible for earned income tax credits once they received a Social Security number."[18]

As for state benefits, although "[a] State may provide that an alien who is *not lawfully present* in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under

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[16] Brief for Appellants at 48–49 (citing 8 U.S.C. § 1611(b)(2)–(3)).

[17] Brief for Appellants at 49 (citation omitted) (citing 42 U.S.C. § 405(c)(1)(B), (4), (5)(A)–(J); 8 C.F.R. § 1.3(a)(4)(vi); 20 C.F.R. §§ 422.104(a)(2), 422.105(a)).

[18] Dist. Ct. Op., 86 F. Supp. 3d at 654 n.64; *see also* 26 U.S.C. § 32(c)(1)(E), (m) (stating that eligibility for earned income tax credit is limited to individuals with Social Security numbers); 20 C.F.R. §§ 422.104(a)(2), 422.107(a), (e)(1).

subsection (a)," § 1621(d), Texas has chosen not to issue driver's licenses to unlawfully present aliens.[19] Texas maintains that documentation confirming lawful presence pursuant to DAPA would allow otherwise ineligible aliens to become eligible for state-subsidized driver's licenses. Likewise, certain unemployment compensation "[b]enefits are not payable based on services performed by an alien unless the alien . . . was *lawfully present* for purposes of performing the services . . . ."[20] Texas contends that DAPA recipients would also become eligible for unemployment insurance.

B.

The states sued to prevent DAPA's implementation on three grounds. First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking. *See* 5 U.S.C. § 553. Second, the states claimed that DHS lacked the authority to implement the program even if it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA. *See* 5 U.S.C. § 706(2)(A)–(C). Third, the states urged that DAPA was an abrogation of the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

The district court held that Texas has standing. It concluded that the state would suffer a financial injury by having to issue driver's licenses to DAPA beneficiaries at a loss. Dist. Ct. Op., 86 F. Supp. 3d at 616–23.

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[19] TEX. TRANSP. CODE § 521.142(a) ("An applicant who is not a citizen of the United States must present . . . documentation issued by the appropriate United States agency that *authorizes the applicant to be in the United States* before the applicant may be issued a driver's license." (emphasis added)).

[20] TEX. LAB. CODE § 207.043(a)(2) (emphasis added); *see also* 26 U.S.C. § 3304(a)(14)(A) (approval of state laws making compensation not payable to aliens unless they are "*lawfully present* for purposes of performing such services" (emphasis added)).

Alternatively, the court relied on a new theory it called "abdication standing": Texas had standing because the United States has exclusive authority over immigration but has refused to act in that area. *Id.* at 636–43. The court also considered but ultimately did not accept the notions that Texas could sue as *parens patriae* on behalf of citizens facing economic competition from DAPA beneficiaries and that the state had standing based on the losses it suffers generally from illegal immigration. *Id.* at 625–36.

The court temporarily enjoined DAPA's implementation after determining that Texas had shown a substantial likelihood of success on its claim that the program must undergo notice and comment. *Id.* at 677. Despite full briefing, the court did not rule on the "Plaintiffs' likelihood of success on their *substantive* APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine." *Id.* On appeal, the United States maintains that the states do not have standing or a right to judicial review and, alternatively, that DAPA is exempt from the notice-and-comment requirements. The government also contends that the injunction, including its nationwide scope, is improper as a matter of law.

II.

"We review a preliminary injunction for abuse of discretion."[21] A preliminary injunction should issue only if the states, as movants, establish

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.[22]

"As to each element of the district court's preliminary-injunction analysis

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[21] *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013).

[22] *Id.* (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)).

. . . findings of fact are subject to a clearly-erroneous standard of review, while conclusions of law are subject to broad review and will be reversed if incorrect."[23]

III.

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

As the parties invoking federal jurisdiction, the states have the burden of establishing standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). They must show an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 (citation omitted). "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

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[23] *Id.* (quoting *Janvey v. Alguire*, 647 F.3d 585, 591–92 (5th Cir. 2011)).

[24] We did not reach this issue in *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015). There, we concluded that neither the State of Mississippi nor Immigration and Customs Enforcement ("ICE") agents and deportation officers had standing to challenge DACA. *Id.* at 255. We explicitly determined that Mississippi had waived the theory that Texas now advances:

> In a letter brief filed after oral argument, Mississippi put forward three new arguments in support of its standing, [including] (1) the cost of issuing driver's licenses to DACA's beneficiaries . . . . Because Mississippi failed to provide evidentiary support on these arguments and failed to make these arguments in their opening brief on appeal and below, they have been waived.

Id. at 252 n.34.

A.

We begin by considering whether the states are entitled to "special solicitude" in our standing inquiry under *Massachusetts v. EPA*. They are.

The Court held that Massachusetts had standing to contest the EPA's decision not to regulate greenhouse-gas emissions from new motor vehicles, which allegedly contributed to a rise in sea levels and a loss of the state's coastal land. *Massachusetts v. EPA*, 549 U.S. at 526. "It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual" because "States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518.[25]

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

> The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry: "Congress has the power to define injuries and articulate

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[25] The dissent, throughout, cleverly refers to the states, more than forty times, as the "plaintiffs," obscuring the fact that they are sovereign states (while referring to the defendants as the "government"). *See* Dissent, *passim*.

[26] The dissent attempts to diminish the considerable significance of the "special solicitude" language, which, to say the least, is inconvenient to the United States in its effort to defeat standing. The dissent protests that it is "only a single, isolated phrase" that "appears only once." Dissent at 9.

The dissent, however, avoids mention of the Court's explanation that "[i]t is of considerable relevance that the party seeking review here is a sovereign State." *Massachusetts v. EPA*, 549 U.S. at 518. In light of that enlargement on the "special solicitude" phrase, it is obvious that being a state greatly matters in the standing inquiry, and it makes no difference, in the words of the dissent, "whether the majority means that states are afforded a relaxed standing inquiry by virtue of their statehood or whether their statehood, in [and] of itself, helps confer standing." Dissent at 9.

> chains of causation that will give rise to a case or controversy where none existed before." "In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." We will not, therefore, "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."[27]

Second, the EPA's decision affected Massachusetts's "quasi-sovereign" interest in its territory:

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.
>
> These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[28]

Like Massachusetts, the instant plaintiffs—the states—"are not normal litigants for the purposes of invoking federal jurisdiction," *id.* at 518, and the same two additional factors are present. First, "[t]he parties' dispute turns on the proper construction of a congressional statute,"[29] the APA, which authorizes challenges to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Similarly, the disagreement in *Massachusetts v. EPA* concerned the interpretation of the Clean Air Act, which provides for judicial review of "final action taken[] by the Administrator."

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[27] *Massachusetts v. EPA*, 549 U.S. at 516–17 (citations omitted).

[28] *Id.* at 519–20 (alteration in original) (citation omitted) (quoting 42 U.S.C. § 7521(a)(1)).

[29] *Id.* at 516.

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

In enacting the APA, Congress intended for those "suffering legal wrong because of agency action" to have judicial recourse,[32] and the states fall well within that definition.[33] The Clean Air Act's review provision is more specific than the APA's, but the latter is easily adequate to justify "special solicitude" here. The procedural right to challenge EPA decisions created by the Clean Air Act provided important support to Massachusetts because the challenge Massachusetts sought to bring—a challenge to an agency's decision *not to act*—is traditionally the type for which it is most difficult to establish standing and a justiciable issue.[34] Texas, by contrast, challenges DHS's affirmative decision to set guidelines for granting lawful presence to a broad class of illegal aliens. Because the states here challenge DHS's decision to act, rather than its decision to remain inactive, a procedural right similar to that created by the Clean Air Act is not necessary to support standing. *See* 5 U.S.C. § 704.

As we will show, DAPA would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone, and at least in Texas, the

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[30] *See infra* part IV.

[31] *Massachusetts v. EPA*, 549 U.S. at 516–17 (citation omitted).

[32] 5 U.S.C. § 702.

[33] *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 694, 696 n.13 (10th Cir. 2009) (holding that New Mexico was entitled to "special solicitude" where one of its claims was based on the APA); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241–42 (10th Cir. 2008) (holding that Wyoming was entitled to special solicitude where its only claim was based on the APA).

[34] *See Heckler v. Chaney*, 470 U.S. 821, 831 (observing that "refusals to take enforcement steps" generally are subject to agency discretion, and the "presumption is that judicial review is not available.").

causal chain is especially direct: DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury.

Second, DAPA affects the states' "quasi-sovereign" interests by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses.[35] "[S]tates have a sovereign interest in 'the power to create and enforce a legal code.'"[36] Pursuant to that interest, states may have standing based on (1) federal assertions of authority to regulate matters they believe they control,[37] (2) federal preemption of state law,[38] and (3) federal interference with the enforcement of state law,[39] at least where "the state statute at issue regulate[s] behavior or provide[s] for the administration of a state program"[40] and does not "simply purport[] to immunize [state] citizens from federal law."[41] Those intrusions are analogous to pressure to change state law.[42]

Moreover, these plaintiff states' interests are like Massachusetts's in

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[35] *See, e.g.*, TEX. TRANSP. CODE § 521.142(a) (specifying the requirements for licenses), .181 (providing for the issuance of licenses), .421(a) (setting the fees for licenses); Dist. Ct. Op., 86 F. Supp. 3d at 616–17 (finding that Texas subsidizes its licenses).

[36] *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

[37] *See id.*

[38] *See, e.g.*, *Crank*, 539 F.3d at 1242; *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443–44 (D.C. Cir. 1989); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); *cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) (commenting that "a State has standing to defend the constitutionality of its statute" but not relying on that principle).

[39] *See Crank*, 539 F.3d at 1241–42; *Celebrezze*, 766 F.2d at 232–33; *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) (observing in another context that "a State clearly has a legitimate interest in the continued enforceability of its own statutes").

[40] *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011).

[41] *Id.* at 270.

[42] *See Crank*, 539 F.3d at 1241–42 (reasoning that Wyoming was entitled to "special solicitude" where its asserted injury was interference with the enforcement of state law).

ways that implicate the same sovereignty concerns. When the states joined the union, they surrendered some of their sovereign prerogatives over immigration.[43] They cannot establish their own classifications of aliens,[44] just as "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions [and] cannot negotiate an emissions treaty with China or India."[45] The states may not be able to discriminate against subsets of aliens in their driver's license programs without running afoul of preemption or the Equal Protection Clause;[46] similarly, "in some circumstances[, Massachusetts's] exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted."[47] Both these plaintiff states and Massachusetts now rely on the federal government to protect their interests.[48] These parallels confirm that DAPA affects the states' "quasi-sovereign" interests.

The significant opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), announced shortly before oral argument herein, reinforces that conclusion. The Court held that the Arizona Legislature had standing to sue in response to a ballot initiative that removed its redistricting authority and vested it instead in an independent commission. *Id.* at 2665–66. The Court emphasized that the legislature was "an institutional plaintiff asserting an institutional injury" to what it believed was its constitutional power to regulate elections. *Id.* at 2664. So too

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[43] *See generally Arizona v. United States*, 132 S. Ct. at 2498–2501.

[44] *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013) (en banc).

[45] *Massachusetts v. EPA*, 549 U.S. at 519.

[46] The Ninth Circuit has suggested that, *see Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061–67 (9th Cir. 2014), but we need not decide the issue.

[47] *Massachusetts v. EPA*, 549 U.S. at 519.

[48] *See id.*

are the states asserting institutional injury to their lawmaking authority. The Court also cited *Massachusetts v. EPA* as opining that the state in that case was "entitled to special solicitude in our standing analysis." *Id.* at 2664–65 n.10 (quoting *Massachusetts v. EPA*, 549 U.S. at 520).

The United States suggests that three presumptions against standing apply here. The first is a presumption that a plaintiff lacks standing to challenge decisions to confer benefits on, or not to prosecute, a third party. But the cases the government cites for that proposition either did not involve standing;[49] concerned only nonprosecution (as distinguished from both nonprosecution and the conferral of benefits);[50] or merely reaffirmed that a plaintiff must satisfy the standing requirements.[51]

The second presumption is against justiciability in the immigration context. None of the cases the government cites involved standing[52] and include only general language about the government's authority over immigration; without a specific discussion of standing, they are of limited relevance.[53]

The third presumption is that "[t]he [Supreme] Court's standing analysis . . . has been 'especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other

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[49] *See Chaney*, 470 U.S. at 823; *United States v. Cox*, 342 F.2d 167, 170 (5th Cir. 1965) (en banc).

[50] *See Linda R.S. v. Richard D.*, 410 U.S. 614, 615–16 (1973).

[51] *See Henderson v. Stalder*, 287 F.3d 374, 384 (5th Cir. 2002) (Jones, J., concurring).

[52] *See Arizona v. United States*, 132 S. Ct. at 2497; *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886 (1984); *Plyler v. Doe*, 457 U.S. 202, 205 (1982); *Fiallo v. Bell*, 430 U.S. 787, 788 (1977); *Mathews v. Diaz*, 426 U.S. 67, 69 (1976). In the other case the government cites, "we assume[d], without deciding, that the plaintiffs have standing." *Texas v. United States*, 106 F.3d 661, 664 n.2 (5th Cir. 1997).

[53] We address justiciability in part V.B, *infra*.

two branches of the Federal Government was unconstitutional.'"[54] We decide this appeal, however, without resolving the constitutional claim.

Therefore, the states are entitled to "special solicitude" in the standing inquiry. We stress that our decision is limited to these facts. In particular, the direct, substantial pressure directed at the states and the fact that they have surrendered some of their control over immigration to the federal government mean this case is sufficiently similar to *Massachusetts v. EPA*, but pressure to change state law may not be enough—by itself—in other situations.

B.

At least one state—Texas—has satisfied the first standing requirement by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries. Under current state law, licenses issued to beneficiaries would necessarily be at a financial loss. The Department of Public Safety "shall issue" a license to a qualified applicant. TEX. TRANSP. CODE § 521.181. A noncitizen "must present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." *Id.* § 521.142(a).

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

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[54] *Ariz. State Legislature*, 135 S. Ct. at 2665 n.12 (final alteration in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

[55] *See* Dist. Ct. Op., 86 F. Supp. 3d at 616.

[56] *See* TEX. DEP'T OF PUB. SAFETY, VERIFYING LAWFUL PRESENCE 4 (2013), https://www.txdps.state.tx.us/DriverLicense/documents/verifyingLawfulPresence.pdf (listing an acceptable document for a "Person granted deferred action" as "Immigration documentation with an alien number or I-94 number"); DAPA Memo at 2 ("Deferred action . . . means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.").

employment authorization.[57] Texas subsidizes its licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary.[58] Even a modest estimate would put the loss at "several million dollars." Dist. Ct. Op., 86 F. Supp. 3d at 617.

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

Even if the government is correct, that does not negate Texas's injury, because we consider only those offsetting benefits that are of the same type and arise from the same transaction as the costs.[59] "Once injury is shown, no

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[57] *See* TEX. DEP'T OF PUB. SAFETY, *supra* note 56, at 3 (stating that an "Employment Authorization Document" is sufficient proof of lawful presence); Dist. Ct. Op., 86 F. Supp. 3d at 616 n.14 (explaining that "[e]mployment authorization" is "a benefit that will be available to recipients of DAPA").

[58] *See* Dist. Ct. Op., 86 F. Supp. 3d at 617. Some of those costs are directly attributable to the United States. Under the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (codified as amended in scattered sections of Titles 8 and 49 U.S.C.), Texas must verify each applicant's immigration status through DHS, *see* 6 C.F.R. § 37.11(g), .13(b)(1), or the state's licenses will no longer be valid for a number of purposes, including commercial air travel without a secondary form of identification, *REAL ID Enforcement in Brief*, U.S. DEPARTMENT OF HOMELAND SECURITY (July 27, 2015), http://www.dhs.gov/real-id-enforcement-brief. Texas pays an average of 75¢ per applicant to comply with that mandate. *See* Dist. Ct. Op., 86 F. Supp. 3d at 617.

[59] *See, e.g.*, *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 656–59 (9th Cir. 2011) (holding that a hospice had standing to challenge a regulation that allegedly increased its costs in some ways even though the regulation may have saved it money in other ways or in other fiscal years); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570–75 (6th Cir. 2005) (concluding that a patient had standing to sue designers, manufacturers, and distributors of a medical device implanted in his body because it allegedly increased risk of medical problems even though it had not malfunctioned and had benefited him); *Markva v. Haveman*, 317 F.3d

attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that some particular aspect of the relationship is unlawful and has caused injury."[60] "Our standing analysis is not an accounting exercise . . . ."[61]

The one case in which we concluded that the costs of a challenged program were offset by the benefits involved a much tighter nexus. In *Henderson*, 287 F.3d at 379–81, we determined that taxpayers lacked standing to challenge a Louisiana law authorizing a license plate bearing a pro-life message, reasoning that the plaintiffs had not shown that the program would use their tax dollars, because the extra fees paid by drivers who purchased the plates could have covered the associated expenses. The costs and benefits arose out of the same transaction, so the plaintiffs had not demonstrated injury.

Here, none of the benefits the government identifies is sufficiently connected to the costs to qualify as an offset. The only benefits that are conceivably relevant are the increase in vehicle registration and the decrease in uninsured motorists, but even those are based on the independent decisions of DAPA beneficiaries and are not a direct result of the issuance of licenses. Analogously, the Third Circuit held that sports leagues had standing to challenge New Jersey's decision to license sports gambling, explaining that damage to the leagues' reputations was a cognizable injury despite evidence that more people would have watched sports had betting been allowed. *NCAA*, 730 F.3d

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547, 557–58 (6th Cir. 2003) (deciding that grandparents had standing to challenge a requirement that they pay more for Medicaid benefits than would similarly situated parents, even though the grandparents may have received more of other types of welfare benefits).

[60] 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4, at 147 (3d ed. 2015) (footnote omitted).

[61] *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013).

at 222–24. The diminished public perception of the leagues and the greater interest in sports were attributable to the licensing plan but did not arise out of the same transaction and so could not be compared.

In the instant case, the states have alleged an injury, and the government predicts that the later decisions of DAPA beneficiaries would produce offsetting benefits. Weighing those costs and benefits is precisely the type of "accounting exercise," *id.* at 223, in which we cannot engage. Texas has shown injury.

C.

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

The United States urges that Texas's injury is not cognizable, because the state could avoid injury by not issuing licenses to illegal aliens or by not subsidizing its licenses. Although Texas could avoid financial loss by requiring applicants to pay the full costs of licenses, it could not avoid injury altogether. "[S]tates have a sovereign interest in 'the power to create and enforce a legal code,'"[62] and the possibility that a plaintiff could avoid injury by incurring other costs does not negate standing.[63]

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[62] *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

[63] *See Texas v. United States*, 497 F.3d 491, 497 (5th Cir. 2007). The dissent theorizes that if "forcing Texas to change its laws would be an injury because states have a 'sovereign interest in the "power to create and enforce a legal code,"'" then *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), must be wrongly decided. Dissent at 12 n.16. The dissent posits that Pennsylvania (there) and Texas (here) faced pressure to change their laws, so their Article III standing *vel non* must be the same. But the dissent ignores a key distinction between *Pennsylvania v. New Jersey* and the instant case: As we explain below, the pressure

Indeed, treating the availability of changing state law as a bar to standing would deprive states of judicial recourse for many *bona fide* harms. For instance, under that theory, federal preemption of state law could never be an injury, because a state could always change its law to avoid preemption. But courts have often held that states have standing based on preemption.[64] And states could offset almost any financial loss by raising taxes or fees. The existence of that alternative does not mean they lack standing.

Relying primarily on *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), the United States maintains that Texas's injury is self-inflicted because the state voluntarily chose to base its driver's license policies on federal immigration law. In *Pennsylvania v. New Jersey*, *id.* at 664, 666, the Court held that several states lacked standing to contest other states' laws taxing a portion of nonresidents' incomes. The plaintiff states alleged that the defendant states' taxes injured them because the plaintiffs gave their residents credits for taxes paid to other states, so the defendants' taxes increased the amount of those credits, causing the plaintiffs to lose revenue. *Id.* at 663. The Court flatly rejected that theory of standing:

> In neither of the suits at bar has the defendant State inflicted any injury upon the plaintiff States through the imposition of the [challenged taxes]. The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand.

Id. at 664.

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that Pennsylvania faced to change its laws was self-inflicted; Texas's is not.

[64] *See, e.g.*, *Crank*, 539 F.3d at 1242; *Alaska*, 868 F.2d at 443-44; *Celebrezze*, 766 F.2d at 232–33.

The more recent decision in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), also informs our analysis. There, the Court held that Wyoming had standing to challenge an Oklahoma law requiring some Oklahoma power plants to burn at least 10% Oklahoma-mined coal. *Id.* at 447. The Court explained that Wyoming taxed the extraction of coal in the state and that Oklahoma's law reduced demand for that coal and Wyoming's corresponding revenue. *Id.* The Court emphasized that the case involved an "undisputed" "direct injury in the form of a loss of specific tax revenues." *Id.* at 448. It rejected Oklahoma's contention "that Wyoming is not itself engaged in the commerce affected, is not affected as a consumer, and thus has not suffered the type of direct injury cognizable in a Commerce Clause action," *id.*, concluding that Wyoming's loss of revenue was sufficient, *id.* at 448–50. The Court did not cite *Pennsylvania v. New Jersey* or discuss the theory that Wyoming's injury was self-inflicted.

Both the *Pennsylvania v. New Jersey* plaintiffs and Wyoming structured their laws in ways that meant their finances would have been affected by changes in other states' laws. Because the tax credits in *Pennsylvania v. New Jersey* were based on taxes paid to other states, any tax increases in other states would have decreased the plaintiffs' revenues, and any tax cuts would have had the opposite effect. Analogously, Wyoming's tax was based on the amount of coal extracted there, so any policies in other states that decreased demand for that coal would have diminished Wyoming's revenues, and any policies that bolstered demand would have had the opposite effect.

In other words, the schemes in both cases made the plaintiff states' finances dependent on those of third parties—either resident taxpayers or coal companies—which in turn were affected by other states' laws. The issues in *Pennsylvania v. New Jersey* and *Wyoming v. Oklahoma* were thus similar to the question here, but the Court announced different results. The two cases

are readily distinguishable, however, and, based on two considerations, *Wyoming v. Oklahoma* directs our decision.

First, Texas and Wyoming sued in response to major changes in the defendant states' policies. Texas sued after the United States had announced DAPA, which could make at least 500,000 illegal aliens eligible for driver's licenses and cause millions of dollars of losses; Wyoming sued after Oklahoma had enacted a law that cost Wyoming over $1 million in tax revenues. *See id.* at 445–46 & n.6. Conversely, the *Pennsylvania v. New Jersey* plaintiffs sued not because of a change in the defendant states' laws but because they believed that *Austin v. New Hampshire*, 420 U.S. 656 (1975), had rendered the defendants' laws unconstitutional. *See Pennsylvania v. New Jersey*, 426 U.S. at 661–63. The fact that Texas sued in response to a significant change in the defendants' policies shows that its injury is not self-inflicted.

Second, the plaintiffs' options for accomplishing their policy goals were more limited in this case and in *Wyoming v. Oklahoma* than in *Pennsylvania v. New Jersey*. Texas seeks to issue licenses only to those lawfully present in the United States, and the state is required to use federal immigration classifications to do so. *See Villas at Parkside Partners*, 726 F.3d at 536. Likewise, Wyoming sought to tax the extraction of coal and had no way to avoid being affected by other states' laws that reduced demand for that coal.[65]

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[65] It follows that the dissent's unsubstantiated claim that "Pennsylvania, like Texas, tied its law to that of another sovereign, whereas *Wyoming did not*" (emphasis added), is obvious error. Dissent at 12 n.16. The dissent ignores our explication of Texas's and Wyoming's policy goals. We do not assert that those states cannot change their laws to avoid injury from changes in the laws of another state. Rather, we demonstrate that Texas and Wyoming cannot both change their laws to avoid injury from amendments to another sovereign's laws *and* achieve their policy goals.

For example, although, as we have said but the dissent overlooks, Wyoming easily could have avoided injury from changes in Oklahoma's laws by abandoning entirely its tax on coal extraction, it would have surrendered its policy goal of taxing extraction in the first

By way of contrast, the plaintiff states in *Pennsylvania v. New Jersey* could have achieved their policy goal in myriad ways, such as basing their tax credits on residents' out-of-state incomes instead of on taxes actually paid to other states. That alternative would have achieved those plaintiffs' goal of allowing their residents to avoid double taxation of their out-of-state incomes, but it would not have tied the plaintiffs' finances to other states' laws. The fact that Texas had no similar option means its injury is not self-inflicted.

The decision in *Amnesty International* supports this conclusion: The Court held that the plaintiffs lacked standing to challenge a provision of the Foreign Intelligence Surveillance Act authorizing the interception of certain electronic communications. *Amnesty Int'l*, 133 S. Ct. at 1155. The plaintiffs alleged that they had been forced to take costly steps to avoid surveillance, such as traveling to meet in person and not discussing certain topics by email or phone. *Id.* at 1150–51. The Court held that any such injuries were self-inflicted, *id.* at 1152–53, reasoning that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 1151 (citing *Pennsylvania v. New Jersey*, 426 U.S. at 664). "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III

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place. Similarly, Texas could avoid financial loss by increasing fees, not subsidizing its licenses, or perhaps not issuing licenses to lawfully present aliens, but the consequence would be that by taking those actions Texas would have abandoned its fully permissible policy goal of providing subsidized licenses only to those who are lawfully present in the United States—a policy that, as we have repeatedly pointed out, Texas instituted well before the Secretary designed DACA or DAPA.

In essence, the dissent would have us issue the following edict to Texas: "You may avoid injury to the pursuit of your policy goals—injury resulting from a change in federal immigration law—by changing your laws to pursue different goals or eliminating them altogether. Therefore, your injuries are self-inflicted." Presumably the dissent would have liked for the Supreme Court to have issued a similar edict to Wyoming, which sought to tax the extraction of coal and had no way both to continue taxing extraction and to avoid being affected by Oklahoma's laws that reduced demand for that coal. *See* Dissent at 12–13.

standing simply by making an expenditure based on a nonparanoid fear." *Id.*

By way of contrast, there is no allegation that Texas passed its driver's license law to manufacture standing. The legislature enacted the law one year before DACA and three years before DAPA was announced,[66] and there is no hint that the state anticipated a change in immigration policy—much less a change as sweeping and dramatic as DAPA. Despite the dissent's bold suggestion that Texas's license-plate-cost injury "is entirely manufactured by Plaintiffs for this case," Dissent at 12, the injury is not self-inflicted.

In addition to its notion that Texas could avoid injury, the government theorizes that Texas's injury is not fairly traceable to DAPA because it is merely an incidental and attenuated consequence of the program. But *Massachusetts v. EPA* establishes that the causal connection is adequate. Texas is entitled to the same "special solicitude" as was Massachusetts, and the causal link is even closer here.

For Texas to incur injury, DAPA beneficiaries would have to apply for driver's licenses as a consequence of DHS's action, and it is apparent that many would do so. For Massachusetts's injury to have occurred, individuals would have had to drive less fuel-efficient cars as a result of the EPA's decision, and that would have had to contribute meaningfully to a rise in sea levels, causing the erosion of the state's shoreline. *See Massachusetts v. EPA*, 549 U.S. at 523. There was some uncertainty about whether the EPA's inaction was a substantial cause of the state's harm, considering the many other emissions sources involved.[67] But the Court held that Massachusetts had satisfied the causation

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[66] *See* Certain State Fiscal Matters; Providing Penalties, ch. 4, sec. 72.03, § 521.101(f-2), 2011 Tex. Gen. Laws 5254, 5344 (codified at TEX. TRANSP. CODE § 521.142(a)).

[67] *See Massachusetts v. EPA*, 549 U.S. at 523–24; *id.* at 540–45 (Roberts, C.J., dissenting) (questioning whether Massachusetts had lost land at all as a result of climate change and whether the EPA's decision had contributed meaningfully to any erosion).

requirement because the possibility that the effect of the EPA's decision was minor did not negate standing, and the evidence showed that the effect was significant in any event. *Id.* at 524–25.

This case raises even less doubt about causation, so the result is the same. The matters in which the Supreme Court held that an injury was not fairly traceable to the challenged law reinforce this conclusion. In some of them, the independent act of a third party was a necessary condition of the harm's occurrence, and it was uncertain whether the third party would take the required step.[68] Not so here.

DAPA beneficiaries have strong incentives to obtain driver's licenses, and it is hardly speculative that many would do so if they became eligible. In other cases, in which there was insufficient proof of causation, several factors potentially contributed to the injury, and the challenged policy likely played a minor role.[69]

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[68] *See, e.g.*, *Amnesty Int'l*, 133 S. Ct. at 1147–50 (explaining that, for a provision of the Foreign Intelligence Surveillance Act to have resulted in the monitoring of the plaintiffs' communications, the Attorney General and the Director of National Intelligence would have had to authorize the collection of the communications, the Foreign Intelligence Surveillance Court would have had to approve the government's request, and the government would have had to intercept the communications successfully); *Whitmore v. Arkansas*, 495 U.S. 149, 156–60 (1990) (reasoning that, for a death-row inmate's decision not to appeal to have harmed the plaintiff, who was another death row inmate, the court hearing any appeal would have had to rule in a way favorable to the plaintiff).

[69] *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013) (rejecting the theory "that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on."); *McConnell v. FEC*, 540 U.S. 93, 228 (2003) (commenting that the plaintiffs, candidates for public office, were unable to compete not because of increased hard-money limits but instead because of their personal decisions not to accept large contributions), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010); *Allen v. Wright*, 468 U.S. 737, 756–59 (1984) (observing that any lack of opportunity for the plaintiffs' children to attend racially integrated public schools was attributable not only to tax exemptions for discriminatory private schools but also to the decisions of private-school administrators and other parents), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

Far from playing an insignificant role, DAPA would be the primary cause and likely the only one. Without the program, there would be little risk of a dramatic increase in the costs of the driver's-license program. This case is far removed from those in which the Supreme Court has held an injury to be too incidental or attenuated. Texas's injury is fairly traceable to DAPA.

D.

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

E.

The United States submits that Texas's theory of standing is flawed because it has no principled limit. In the government's view, if Texas can challenge DAPA, it could also sue to block a grant of asylum to a single alien or any federal policy that adversely affects the state, such as an IRS revenue ruling that decreases a corporation's federal taxable income and corresponding state franchise-tax liability.

The flaw in the government's reasoning is that *Massachusetts v. EPA* entailed similar risks, but the Court still held that Massachusetts had standing. Under that decision, Massachusetts conceivably could challenge the government's decision to buy a car with poor fuel efficiency because the vehicle could contribute to global warming. The state might be able to contest any federal action that prompts more travel. Or it potentially could challenge any change in federal policy that indirectly results in greenhouse-gas emissions, such as a trade-promotion program that leads to more shipping. One of the

dissenting Justices in *Massachusetts v. EPA* criticized the decision on that ground,[70] but the majority found those concerns unpersuasive, just as they are here.

After *Massachusetts v. EPA*, the answer to those criticisms is that there are other ways to cabin policy disagreements masquerading as legal claims.[71] First, a state that has standing still must have a cause of action. Even the APA—potentially the most versatile tool available to an enterprising state—imposes a number of limitations. A state must be defending concerns that are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[72] It is unclear whether a state dissatisfied with an IRS revenue ruling would be defending such an interest. Moreover, judicial review is unavailable where the statute precludes it or the matter is committed to agency discretion. 5 U.S.C. § 701(a). Because of those restrictions, a state would have limited ability to challenge many asylum determinations. *See* 8 U.S.C. § 1252(b)(4)(D). Further, numerous policies that adversely affect states either are not rules at all or are exempt from the notice-and-comment requirements. *See generally* 5 U.S.C. § 553.

Second, the standing requirements would preclude much of the litigation the government describes. For example, it would be difficult to establish standing to challenge a grant of asylum to a single alien based on the driver's-license theory. The state must allege an injury that has already occurred or is

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[70] *See Massachusetts v. EPA*, 549 U.S. at 546 (Roberts, C.J., dissenting) ("Every little bit helps, so Massachusetts can sue over any little bit.").

[71] The dissent responds to this by asserting that "[t]he majority's observation that this suit involves 'policy disagreements masquerading as legal claims' is also telling." Dissent at 22. That of course is not what our sentence (which is not a description of the suit at hand) says at all.

[72] *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

"certainly impending";[73] it is easier to demonstrate that some DAPA beneficiaries would apply for licenses than it is to establish that a particular alien would. And causation could be a substantial obstacle. Although the district court's calculation of Texas's loss from DAPA was based largely on the need to hire employees, purchase equipment, and obtain office space,[74] those steps would be unnecessary to license one additional person.

Third, our determination that Texas has standing is based in part on the "special solicitude" we afford it under *Massachusetts v. EPA* as reinforced by *Arizona State Legislature*. To be entitled to that presumption, a state likely must be exercising a procedural right created by Congress and protecting a "quasi-sovereign" interest. *See Massachusetts v. EPA*, 549 U.S. at 520. Those factors will seldom exist. For instance, a grant of asylum to a single alien would impose little pressure to change state law. Without "special solicitude," it would be difficult for a state to establish standing, a heavy burden in many of the government's hypotheticals.

Fourth, as a practical matter, it is pure speculation that a state would sue about matters such as an IRS revenue ruling. Though not dispositive of the issue, the absence of any indication that such lawsuits will occur suggests the government's parade of horribles is unfounded,[75] and its concerns about the possible future effects of Texas's theory of standing do not alter our conclusion. The states have standing.

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[73] *Amnesty Int'l*, 133 S. Ct. at 1147 (emphasis omitted) (quoting *Defs. of Wildlife*, 504 U.S. at 565 n.2).

[74] *See* Dist. Ct. Op., 86 F. Supp. 3d at 616–17 (discussing the potential loss and citing a portion of a declaration addressing those expenses).

[75] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (stating, in response to an alleged "parade of horribles," that "[t]here will be time enough to address . . . other circumstances" in future cases without altering the Court's present conclusion).

IV.

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

The Supreme Court "ha[s] always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and "[w]e do not require any 'indication of congressional purpose to benefit the would-be plaintiff.'"[78] "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"[79]

The interests the states seek to protect fall within the zone of interests of the INA.[80] "The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States," which "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 132 S. Ct.

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[76] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Data Processing*, 397 U.S. at 153).

[77] *Id.* (quoting *Sec. Indus. Ass'n*, 479 U.S. at 399).

[78] *Id.* (quoting *Sec. Indus. Ass'n*, 479 U.S. at 399–400).

[79] *Id.* (quoting *Sec. Indus. Ass'n*, 479 U.S. at 399).

[80] The INA "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas v. Bica*, 424 U.S. 351, 353, 359 (1976)).

at 2500. Reflecting a concern that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates," 8 U.S.C. § 1601, "Congress deemed some *unlawfully present* aliens ineligible for certain state and local public benefits unless the state explicitly provides otherwise."[81] With limited exceptions, unlawfully present aliens are "not eligible for any State or local public benefit." 8 U.S.C. § 1621(a).

Contrary to the government's assertion, Texas satisfies the zone-of-interests test not on account of a generalized grievance but instead as a result of the same injury that gives it Article III standing—Congress has explicitly allowed states to deny public benefits to illegal aliens. Relying on that guarantee, Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes.

V.

The government maintains that judicial review is precluded even if the states are proper plaintiffs. "Any person 'adversely affected or aggrieved' by agency action . . . is entitled to 'judicial review thereof,' as long as the action is a 'final agency action for which there is no other adequate remedy in a court.'"[82] "But before any review at all may be had, a party must first clear the hurdle of 5 U.S.C. § 701(a). That section provides that the chapter on judicial review 'applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to

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[81] *United States v. Alabama*, 691 F.3d 1269, 1298 (11th Cir. 2012) (emphasis added) (citing 8 U.S.C. § 1621).

[82] *Chaney*, 470 U.S. at 828 (quoting 5 U.S.C. §§ 702, 704). The government does not dispute that DAPA is a "final agency action." *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

agency discretion by law.'" *Chaney*, 470 U.S. at 828.

"[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'"[83] The "'strong presumption' favoring judicial review of administrative action . . . is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

Establishing unreviewability is a "heavy burden,"[84] and "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345.

The United States relies on 8 U.S.C. § 1252(g)[85] for the proposition that the INA expressly prohibits judicial review. But the government's broad reading is contrary to *Reno v. American-Arab Anti-Discrimination Committee ("AAADC")*, 525 U.S. 471, 482 (1999), in which the Court rejected "the

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[83] *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

[84] *Mach Mining*, 135 S. Ct. at 1651 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)).

[85] With limited exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g).

unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'"[86] The Court emphasized that § 1252(g) is not "a general jurisdictional limitation," but rather "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'"[87]

None of those actions is at issue here—the states' claims do not arise from the Secretary's "decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien," § 1252(g); instead, they stem from his decision to grant lawful presence to millions of illegal aliens on a class-wide basis. Further, the states are not bringing a "cause or claim by or on behalf of any alien"—they assert their own right to the APA's procedural protections. *Id.* Congress has expressly limited or precluded judicial review of many immigration decisions,[88] including some that are made in the Secretary's "sole and unreviewable discretion,"[89] but DAPA is not one of them.

Judicial review of DAPA is consistent with the protections Congress affords to states that decline to provide public benefits to illegal aliens. "The

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[86] *AAADC*, 525 U.S. at 482. "We are aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation . . . ." *Id.*

[87] *Id.* (quoting § 1252(g)).

[88] *See AAADC*, 525 U.S. at 486–87 (listing "8 U.S.C. § 1252(a)(2)(A) (limiting review of any claim arising from the inspection of aliens arriving in the United States), [(B)] (barring review of denials of discretionary relief authorized by various statutory provisions), [(C)] (barring review of final removal orders against criminal aliens), [(b)(4)(D)] (limiting review of asylum determinations)"); *see also, e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v) (barring review of waiver of reentry restrictions); 1226a(b)(1) (limiting review of detention of terrorist aliens); 1229c(e) (barring review of regulations limiting eligibility for voluntary departure), (f) (limiting review of denial of voluntary departure).

[89] *E.g.*, 8 U.S.C. §§ 1613(c)(2)(G), 1621(b)(4), 1641.

Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens,"[90] but, through § 1621, Congress has sought to protect states from "bear[ing] many of the consequences of unlawful immigration."[91] Texas avails itself of some of those protections through Section 521.142(a) of the Texas Transportation Code, which allows the state to avoid the costs of issuing driver's licenses to illegal aliens.

If 500,000 unlawfully present aliens residing in Texas were reclassified as lawfully present pursuant to DAPA, they would become eligible for driver's licenses at a subsidized fee. Congress did not intend to make immune from judicial review an agency action that reclassifies millions of illegal aliens in a way that imposes substantial costs on states that have relied on the protections conferred by § 1621.

The states contend that DAPA is being implemented without discretion to deny applications that meet the objective criteria set forth in the DAPA Memo, and under *AAADC*, judicial review could be available if there is an indication that deferred-action decisions are not made on a case-by-case basis. In *AAADC*, a group of aliens "challenge[d] . . . the Attorney General's decision to 'commence [deportation] proceedings' against them," and the Court held that § 1252(g) squarely deprived it of jurisdiction. *AAADC*, 525 U.S. at 487. The Court noted that § 1252(g) codified the Secretary's discretion to decline "the initiation or prosecution of various stages in the deportation process," *id.* at 483, and the Court observed that "[p]rior to 1997, deferred-action decisions were governed by internal [INS] guidelines which considered [a variety of factors]," *id.* at 484 n.8. Although those guidelines "were apparently rescinded,"

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[90] *Arizona v. United States*, 132 S. Ct. at 2498.

[91] *Id.* at 2500.

the Court observed that "there [was] no indication that the INS has ceased making this sort of determination on a case-by-case basis." *Id.* But the government has not rebutted the strong presumption of reviewability with clear and convincing evidence that, *inter alia*, it is making case-by-case decisions here.[92]

A.

Title 5 § 701(a)(2) "preclude[s] judicial review of certain categories of administrative decisions that courts traditionally have regarded as "committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citation omitted). For example, "an agency's decision not to institute enforcement proceedings [is] presumptively unreviewable under § 701(a)(2)." *Id.* (citation omitted). Likewise, "[t]here is no judicial review of agency action 'where statutes [granting agency discretion] are drawn in such broad terms that in a given case there is no law to apply,'"[93] such as "[t]he allocation of funds from a lump-sum appropriation." *Vigil*, 508 U.S. at 192.

1.

The Secretary has broad discretion to "decide whether it makes sense to pursue removal at all"[94] and urges that deferred action—a grant of "lawful presence" and subsequent eligibility for otherwise unavailable benefits—is a

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[92] *See, e.g.*, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015) (Higginbotham, J.) ("[T]here is a 'strong presumption,' subject to Congressional language, that 'action taken by a federal agency is reviewable in federal court.'" (quoting *RSR Corp. v. Donovan*, 747 F.2d 294, 299 n.23 (5th Cir. 1984))).

[93] *Perales v. Casillas*, 903 F.2d 1043, 1047 (5th Cir. 1990) (alteration in original) (citation omitted).

[94] *Arizona v. United States*, 132 S. Ct. at 2499 ("A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." (citation omitted)).

presumptively unreviewable exercise of prosecutorial discretion.[95] "The general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise."[96] Where, however, "an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."[97]

Part of DAPA involves the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens. But importantly, the states have not challenged the priority levels he has established,[98] and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities.

Deferred action, however, is much more than nonenforcement: It would affirmatively confer "lawful presence" and associated benefits on a class of unlawfully present aliens. Though revocable, that change in designation would trigger (as we have already explained) eligibility for federal benefits—

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[95] The dissent misleadingly declares, "In other words, deferred action itself is merely a brand of 'presumptively unreviewable' prosecutorial discretion." Dissent at 14. The dissent attributes that statement to this panel majority when in fact, as shown above, we accurately cite the statement as coming from the Secretary.

[96] *Chaney*, 470 U.S. at 838 (citation omitted); *see Vigil*, 508 U.S. at 190–91.

[97] *Chaney*, 470 U.S. at 832.

[98] *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Thomas Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014) (the "Prioritization Memo"), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

for example, under title II and XVIII of the Social Security Act[99]—and state benefits—for example, driver's licenses and unemployment insurance[100]—that would not otherwise be available to illegal aliens.[101]

The United States maintains that DAPA is presumptively unreviewable prosecutorial discretion because "'lawful presence' is not a status and is not something that the alien can legally enforce; the agency can alter or revoke it at any time."[102] The government further contends that "[e]very decision under [DAPA] to defer enforcement action against an alien necessarily entails allowing the individual to be lawfully present . . . . Deferred action under DAPA and 'lawful presence' during that limited period are thus two sides of the same coin."[103]

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[99] *See supra* part I.A. DAPA would also toll the duration of the recipients' unlawful presence under the INA's reentry bars, which would benefit aliens who receive lawful presence as minors because the unlawful-presence clock begins to run only at age eighteen. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I). Most adult beneficiaries would be unlikely to benefit from tolling because, to be eligible for DAPA, one must have continuously resided in the United States since before January 1, 2010, and therefore would likely already be subject to the reentry bar for aliens who have "been unlawfully present in the United States for one year or more." § 1182(a)(9)(B)(i)(II); *see* § 1182(a)(9)(C)(i)(I).

[100] *See supra* part I.A.

[101] *Cf.* Memorandum from James Cole, Deputy Att'y Gen., to All U.S. Attorneys (Aug. 29, 2013) (the "Cole Memo"), http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf. The Cole Memo establishes how prosecutorial discretion will be used in relation to marihuana enforcement under the Controlled Substances Act. Unlike the DAPA Memo, it does not direct an agency to grant eligibility for affirmative benefits to anyone engaged in unlawful conduct. As we have explained, to receive public benefits, aliens accorded lawful presence must satisfy additional criteria set forth in the various benefit schemes, but they nevertheless become *eligible* to satisfy those criteria. That eligibility is itself a cognizable benefit.

[102] Supplemental Brief for Appellants at 16. *But see* 8 U.S.C. § 1201(i) ("After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation."); § 1227(a)(1)(B) (providing that any alien "whose nonimmigrant visa . . . has been revoked under section 1201(i) of this title, is deportable").

[103] Supplemental Brief for Appellants at 16 (emphasis omitted).

Revocability, however, is not the touchstone for whether agency is action is reviewable. Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons newly eligible for them "provides a focus for judicial review." *Chaney*, 470 U.S. at 832.

Moreover, if deferred action meant only nonprosecution, it would not necessarily result in lawful presence. "[A]lthough prosecutorial discretion is broad, it is not 'unfettered.'"[104] Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change. Regardless of whether the Secretary has the authority to offer lawful presence and employment authorization in exchange for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion.

This evident conclusion is reinforced by the Supreme Court's description, in *AAADC*, of deferred action as a nonprosecution decision:

> To ameliorate a harsh and unjust outcome, the INS may *decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.* This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action . . . . *Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien*, even on grounds normally regarded as aggravated.[105]

In their procedural claim, the states do not challenge the Secretary's decision

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[104] *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

[105] *AAADC*, 525 U.S. at 484 (emphasis added) (quoting 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (1998)); *accord Johns v. Dep't of Justice*, 653 F.2d 884, 890 (5th Cir. Aug. 1981) ("The Attorney General also determines whether (1) to refrain from (or, in administrative parlance, to defer in) executing an outstanding order of deportation, or (2) to stay the order of deportation." (footnote omitted)); *see also Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (per curiam).

to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation," nor does deferred action mean merely that "no action will thereafter be taken to proceed against an apparently deportable alien."[106]

Under DAPA, "[d]eferred action . . . means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States,"[107] a change in designation that confers eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens. Thus, DAPA "provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."[108]

2.

"The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised."[109] In *Perales*, 903 F.2d at 1051, we held that the INS's decision *not* to grant pre-hearing voluntary departures and work authorizations to a group of aliens was committed to agency discretion because "[t]here are no statutory standards for the court to apply . . . . There is nothing

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[106] *AAADC*, 525 U.S. at 484 (quoting GORDON, MAILMAN & YALE-LOEHR, *supra* note 105).

[107] DAPA Memo at 2 (emphasis added).

[108] *Chaney*, 470 U.S. at 832. Because the challenged portion of DAPA's deferred-action program is not an exercise of enforcement discretion, we do not reach the issue of whether the presumption against review of such discretion is rebutted. *See id.* at 832–34; *Adams v. Richardson*, 480 F.2d 1159, 1161–62 (D.C. Cir. 1973) (en banc) (per curiam).

[109] *Perales*, 903 F.2d at 1051 (quoting *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (per curiam)).

in the [INA] expressly providing for the grant of employment authorization or pre-hearing voluntary departure to [the plaintiff class of aliens]." Although we stated that "the agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law," *id.* at 1045, that case involved a challenge to the *denial* of voluntary departure and work authorization.

Under those facts, *Perales* faithfully applied *Chaney*'s presumption against judicial review of agency inaction "because there are no meaningful standards against which to judge the agency's exercise of discretion." *Id.* at 1047. But where there is affirmative agency action—as with DAPA's issuance of lawful presence and employment authorization—and in light of the INA's intricate regulatory scheme for changing immigration classifications and issuing employment authorization,[110] "[t]he action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Chaney*, 470 U.S. at 832.

The United States asserts that 8 C.F.R. § 274a.12(c)(14),[111] rather than DAPA, makes aliens granted deferred action eligible for work authorizations. But if DAPA's deferred-action program must be subjected to notice-and-comment, then work authorizations may not be validly issued pursuant to that subsection until that process has been completed and aliens have been "granted deferred action." § 274a.12(c)(14).

Moreover, the government's limitless reading of that subsection—allowing for the issuance of employment authorizations to any class of illegal

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[110] *See* infra part VII.

[111] "An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, [may be able to obtain work authorization upon application] if the alien establishes an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14).

aliens whom DHS declines to remove—is beyond the scope of what the INA can reasonably be interpreted to authorize, as we will explain.[112] And even assuming, *arguendo*, that the government does have that power, Texas is also injured by the grant of lawful presence itself, which makes DAPA recipients newly eligible for state-subsidized driver's licenses.[113] As an affirmative agency action with meaningful standards against which to judge it, DAPA is not an unreviewable "agency action . . . committed to agency discretion by law." § 701(a)(2).

B.

The government urges that this case is not justiciable even though "'a federal court's "obligation"' to hear and decide cases within its jurisdiction is 'virtually unflagging.'"[114] We decline to depart from that well-established principle.[115] And in invoking our jurisdiction, the states do not demand that the federal government "control immigration and . . . pay for the consequences of federal immigration policy" or "prevent illegal immigration."[116]

Neither the preliminary injunction nor compliance with the APA requires the Secretary to enforce the immigration laws or change his priorities

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[112] The class of aliens eligible for DAPA is not among those classes of aliens identified by Congress as eligible for deferred action and work authorization. *See infra* part VII.

[113] *See* TEX. DEP'T OF PUB. SAFETY, VERIFYING LAWFUL PRESENCE, *supra* note 56.

[114] *Lexmark*, 134 S. Ct. at 1386 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

[115] *See Sprint Commc'ns*, 134 S. Ct. at 590 ("Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))).

[116] *Texas v. United States*, 106 F.3d at 664; *see also Sure-Tan*, 467 U.S. at 897 ("[P]rivate persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws . . . ."); *Fiallo*, 430 U.S. at 792 ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))).

for removal, which have expressly not been challenged.[117] Nor have the states "merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in [a benefits program]." *Diaz*, 426 U.S. at 84.[118] DAPA was enjoined because the states seek an opportunity

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[117] *See* Brief for Appellees at 2 ("[T]he district court's injunction does not touch—and this lawsuit has never challenged—the Executive's separate memorandum establishing three categories for removal prioritization, or any decision by the Executive to forego a removal proceeding.").

[118] The main thrust of the dissent could be summarized as claiming that "[i]t's Congress's fault." The President apparently agrees: As explained by the district court, "it was the failure of Congress to enact such a program that prompted [the President] . . . to 'change the law.'" *See infra* note 200. The dissent opens by blaming Congress for insufficient funding—*to-wit*, "decades of congressional appropriations decisions, which require DHS . . . to de-prioritize millions of removable each year due to these resource constraints." Dissent at 5–6 (footnote omitted).

The dissent's insistent invocation of what it perceives as Congress's inadequate funding is regrettable and exposes the weakness of the government's legal position. *See, e.g.*, Dissent at 1 ("unless and until more resources are made available by Congress"); *id.* ("if Congress is able to make more resources for removal available"); *id.* at 4 ("given the resource constraints faced by DHS"); *id.* ("to maximize the resources that can be devoted to such ends"); *id.* at 5 ("decades of congressional appropriations decisions"); *id.* at 6 ("due to these resource constraints"); *id.* at 7 n.9 (""if Congress were to substantially increase the amount of funding"); *id* at 14 ("DHS's limited resources"); *id.* at 43 n.55 ("the decades-long failure of Congress to fund"); *id.* at [50] ("Congress's choices as to the level of funding for immigration enforcement").

The facts, not commentary on political decisions, are what should matter. Thus the dissent's notion that "this case essentially boils down to a policy dispute," Dissent at 22, far misses the mark and avoids having to tackle the hard reality—for the government—of existing law. Similarly unimpressive is the dissent's resort to hyperbole. *E.g.*, Dissent at 10 ("[t]he majority's breathtaking expansion of state standing"); *id.* at 11 ("the majority's sweeping 'special solicitude' analysis"); *id.* at 11 n.14 ("the sweeping language the majority uses today"); *id.* at 42 n.54 ("this radical theory of standing"); *id* at 47 n.61 ("The majority's ruling . . . is potentially devastating.").

The dissent also claims that despite limited funding, "DHS . . . has been removing individuals from the United States in record numbers." Dissent at 20. At the very least, the statistics on which the dissent relies are highly misleading. Although DHS claims that a record-high of 0.44 million aliens were deported in 2013, it arrives at that number by using only "removals" (which are deportations by court order) per year and ignoring "returns" (which are deportations achieved without court order). If, more accurately, one counts total removals and returns by both ICE and the Border Patrol, deportations peaked at over 1.8 million in 2000 and plunged to less than half—about 0.6 million—in 2013. In that thirteen-year interim, the number of aliens deported per court directive (that is, removed) roughly

to be heard through notice and comment, not to have the judiciary formulate or rewrite immigration policy. "Consultation between federal and state officials is an important feature of the immigration system,"[119] and the notice-and-comment process, which "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making,"[120] facilitates that communication.

At its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis. The states properly maintain that DAPA's grant of lawful presence and accompanying eligibility for benefits is a substantive rule that must go through notice and comment, before it imposes substantial costs on them, and that DAPA is substantively contrary to law. The federal courts are fully capable of adjudicating those disputes.

VI.

Because the interests that Texas seeks to protect are within the INA's zone of interests, and judicial review is available, we address whether Texas has established a substantial likelihood of success on its claim that DAPA must be submitted for notice and comment. The United States urges that DAPA is exempt as an "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). "In contrast, if a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously. The

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doubled from about 0.2 million to 0.44 million. The total number of deportations is at its lowest level since the mid-1970's. U.S. DEP'T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 103tbl.39 (2014), http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

[119] *Arizona v. United States*, 132 S. Ct. at 2508.

[120] *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

'APA's notice and comment exemptions must be narrowly construed.'"[121]

A.

The government advances the notion that DAPA is exempt from notice and comment as a policy statement.[122] We evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) "impose[s] any rights and obligations" and (2) "genuinely leaves the agency and its decision-makers free to exercise discretion."[123] There is some overlap in the analysis of those prongs "because '[i]f a statement denies the decisionmaker discretion in the area of its coverage . . . then the statement is binding, and creates rights or obligations.'"[124] "While mindful but suspicious of the agency's own characterization, we . . . focus[] primarily on whether the rule has binding effect on agency discretion or severely restricts it."[125] "[A]n agency pronouncement will

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[121] *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (footnote omitted) (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)).

[122] The government does not dispute that DAPA is a "rule," which is defined by the APA as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes [various substantive agency functions] or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

[123] *Prof'ls & Patients*, 56 F.3d at 595 (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam)); *see also Vigil*, 508 U.S. at 197 (describing general statements of policy "as 'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'" (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979))); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("A general statement of policy is a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim, in determining the resolution of a [s]ubstantive question of regulation.").

[124] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)).

[125] *Prof'ls & Patients*, 56 F.3d at 595 (footnote omitted); *accord id.* ("[W]e are to give some deference, 'albeit "not overwhelming,"' to the agency's characterization of its own rule." (quoting *Cmty. Nutrition Inst.*, 818 F.2d at 946)); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) ("This court, however, must determine the category into which the rule falls: '[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.'"

be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Gen. Elec.*, 290 F.3d at 383 (citation omitted).

Although the DAPA Memo facially purports to confer discretion,[126] the district court determined that "[n]othing about DAPA '*genuinely* leaves the agency and its [employees] free to exercise discretion,'"[127] a factual finding that we review for clear error. That finding was partly informed by analysis of the implementation of DACA, the precursor to DAPA.[128]

Like the DAPA Memo, the DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, but the district court found that those statements were "merely pretext"[129] because only about 5% of the 723,000 applications accepted for evaluation had been denied,[130] and "[d]espite a request by the [district] [c]ourt, the [g]overnment's

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(alteration in original) (quoting *Brown Express*, 607 F.2d at 700)).

[126] *See Crane*, 783 F.3d at 254–55. In *Crane*, we held that the plaintiff ICE agents and deportation officers had not "demonstrated the concrete and particularized injury required to give them standing" to challenge DACA, *id.* at 247, because, *inter alia*, they had not alleged a sufficient factual basis for their claim that an employment action against them was "certainly impending" if they "exercise[d] [their] discretion to detain an illegal alien," *id.* at 255. That conclusion was informed by the express delegation of discretion on the face of the DACA Memo and by the fact that no sanctions or warnings had yet been issued. *Id.* at 254–55. We did not hold that DACA was an unreviewable exercise of prosecutorial discretion or that the DACA criteria did not have binding or severely restrictive effect on agency discretion. *See id.* at 254–55.

[127] Dist. Ct. Op., 86 F. Supp. 3d at 670 (second alteration in original) (quoting *Prof'ls & Patients*, 56 F.3d at 595).

[128] *Id.* at 579–60. *See* 3 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 15.05[3] (2014) ("In general, the agency's past treatment of a rule will often indicate its nature.").

[129] Dist. Ct. Op., 86 F. Supp. 3d at 669 n.101.

[130] *Id.* at 609; *see id.* (noting that "[i]n response to a Senate inquiry, the USCIS told the Senate that the top four reasons for denials were: (1) the applicant used the wrong form; (2) the applicant failed to provide a valid signature; (3) the applicant failed to file or complete Form I–765 or failed to enclose the fee; and (4) the applicant was below the age of fifteen and thus ineligible to participate in the program"); *id.* at *669 n.101 ("[A]ll were denied for failure

counsel did not provide the number, if any, of requests that were denied [for discretionary reasons] even though the applicant met the DACA criteria . . . ."[131] The finding of pretext was also based on a declaration by Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria";[132] DACA's Operating Procedures, which "contain[] nearly 150 pages of specific instructions for granting or denying

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to meet the criteria (or 'rejected' for technical filing errors, errors in filling out the form or lying on the form, and failures to pay fees), or for fraud.").

Relying on the Neufeld declaration, the dissent tries to make much of the distinction between denials and rejections. Dissent at 37. The district court did in fact mistakenly write "denials" (used to describe applications refused for failure to meet the criteria) in the above quoted passage where the USCIS response actually said "rejections" (applications refused for procedural defects). USCIS reported that approximately 6% of DACA applicants were rejected and that an additional 4% were denied. USCIS does not draw a distinction between denials of applicants who did not meet the criteria and denials of those who met the criteria but were refused deferred action as a result of a discretionary choice.

USCIS could not produce any applications that satisfied all of the criteria but were refused deferred action by an exercise of discretion. *Id.* at 669 n.101 ("[A]ll were denied for failure to meet the criteria or 'rejected' for technical filing errors, errors in filling out the form or lying on the form, and failures to pay fees), or for fraud.")." Given that the government offered no evidence as to the bases for other denials, it was not error—clear or otherwise—for the district court to conclude that DHS issued DACA denials under mechanical formulae.

[131] Dist. Ct. Op., 86 F. Supp. 3d at 609. The parties had ample opportunity to inform the district court, submitting over 200 pages of briefing over a two-month period with more than 80 exhibits. The court held a hearing on the motion for a preliminary injunction, heard extensive argument from both sides, and "specifically asked for evidence of individuals who had been denied for reasons other than not meeting the criteria or technical errors with the form and/or filing." *Id.* at 669 n.101.

[132] Dist. Ct. Op., 86 F. Supp. 3d at 609–10.

deferred action";[133] and some mandatory language in the DAPA Memo itself.[134] In denying the government's motion for a stay of the injunction, the district court further noted that the President had made public statements suggesting that in reviewing applications pursuant to DAPA, DHS officials who "don't follow the policy" will face "consequences," and "they've got a problem."[135]

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[133] *Id.* at 669 (footnote omitted). For example, the DACA National Standard Operating Procedures ("SOP") specifically directs officers on which evidence an applicant is required to submit, what evidence is to be considered, "the weight to be given" to evidence, and the standards of proof required to grant or deny an application. U.S. DEP'T OF HOMELAND SEC., NATIONAL STANDARD OPERATING PROCEDURES: DACA 42 (2012). To elaborate: An affidavit alone may not support an application, and DACA applicants must prove education and age criteria by documentary evidence. *Id.* at 8–10. The SOP also mandates, however, that "[o]fficers will NOT deny a DACA request solely because the DACA requestor failed to submit sufficient evidence with the request . . . officers will issue a [Request for Evidence (RFE)] . . . whenever possible." *Id.* at 42.

DHS internal documents further provide that "a series of RFE [ ] templates have been developed and *must* be used," and those documents remind repeatedly that "[u]se of these RFE templates is mandatory." (Emphasis added.) And "[w]hen an RFE is issued, the response time given shall be 87 days." SOP at 42.

These specific evidentiary standards and RFE steps imposed by the SOP are just examples the district court had before it when it concluded that DACA and DAPA "severely restrict[ ]" agency discretion. *Prof'ls & Patients*, 56 F.3d at 595. Far from being clear error, such a finding was no error whatsoever.

[134] Dist. Ct. Op., 86 F. Supp. 3d at 648–49, 671 n.103. There the district court exhibited its keen awareness of the DAPA Memo by quoting the following from it:

> I [the Secretary] hereby direct USCIS to establish a process, similar to DACA . . . . Applicants must file . . . . Applicants must also submit . . . . [Applicants] shall also be eligible . . . . Deferred action granted pursuant to the program shall be for a period of three years. . . . As with DACA, the above criteria are to be considered for all individuals . . . . ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria . . . . ICE is further instructed to review pending removal cases . . . . The USCIS process shall also be available to individuals subject to final orders of removal.

Id. at 611–12 (paragraph breaks omitted.) This detailed explication of the DAPA Memo flies in the face of the dissent's unjustified critique that the district court "eschew[ed] the plain language of the [DAPA] Memorandum." Dissent at 31.

[135] *Texas v. United States*, No. B-14-254, 2015 WL 1540022, at *3 (S.D. Tex. Apr. 7, 2015).

The DACA and DAPA Memos purport to grant discretion, but a rule can be binding if it is "applied by the agency in a way that indicates it is binding,"[136] and there was evidence from DACA's implementation that DAPA's discretionary language was pretextual. For a number of reasons, any extrapolation from DACA must be done carefully.[137]

First, DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied relief would seem unlikely to apply. But the issue of self-selection is partially mitigated by the finding that "the [g]overnment has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances)." Dist. Ct. Op., 86 F. Supp. 3d at 663 (footnote omitted).

Second, DACA and DAPA are not identical: Eligibility for DACA was

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[136] *Gen. Elec.*, 290 F.3d at 383; *accord McLouth Steel*, 838 F.2d at 1321–22 (reviewing historical conformity as part of determination of whether rule was substantive or non-binding policy, despite language indicating that it was policy statement); *id.* at 1321 ("More critically than EPA's language [,] . . . its later conduct applying it confirms its binding character.").

[137] The dissent, citing *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014), criticizes the states and the district court for enjoining DAPA without "an early snapshot" of its implementation. Dissent at 32. First, the dissent overlooks a fundamental principle of preliminary injunctions: An injunction is of no help if one must wait to suffer injury before the court grants it. *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) ("[T]he injury need not have been inflicted when application [for the injunction] is made or be certain to occur[.]").

Second, the dissent assumes the conclusion of *National Mining*—that the agency action in question is not subject to pre-enforcement review—is applicable here and asserts that we need an "early snapshot" of DAPA enforcement. The two cases are easily distinguished. The court found EPA's "Final Guidance" exempt from pre-enforcement review because it had "no legal impact." *National Mining*, 758 F.3d at 253; *see id.*, at 252 ("The most important factor concerns the actual legal effect (or lack thereof) of the agency action on regulated entities. . . . As a legal matter, the Final Guidance is meaningless . . . [and] has no legal impact."

DAPA, by contrast, has an effect on regulated entities (i.e. illegal aliens). DAPA removes a categorical bar to illegal aliens who are receiving state and federal benefits, so it places a cost on the states. The states are not required to suffer the injury of that legal impact before seeking an injunction. *See id.* 252.

restricted to a younger and less numerous population,[138] which suggests that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial. Further, the DAPA Memo contains additional discretionary criteria: Applicants must not be "an enforcement priority as reflected in the [Prioritization Memo]; and [must] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." DAPA Memo at 4. But despite those differences, there are important similarities: The Secretary "direct[ed] USCIS to *establish a process, similar to DACA*, for exercising prosecutorial discretion," *id.* (emphasis added), and there was evidence that the DACA application process *itself* did not allow for discretion, regardless of the rates of approval and denial.[139]

Instead of relying solely on the lack of evidence that any DACA application had been denied for discretionary reasons, the district court found pretext for additional reasons. It observed that "the 'Operating Procedures' for implementation of DACA contains nearly 150 pages of specific instructions for granting or denying deferred action to applicants" and that "[d]enials are

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[138] Approximately 1.2 million illegal aliens are eligible for DACA and 4.3 million for DAPA. Dist. Ct. Op., 86 F. Supp. 3d at 609, 670.

[139] Despite these differences and the dissent's protestations to the contrary (*see*, e.g., Dissent at 34–38), DACA is an apt comparator to DAPA. The district court considered the DAPA Memo's plain language, in which the Secretary equates the DACA and DAPA procedure, background checks, fee exemptions, eligibility for work authorizations, durations of lawful presence and work authorization, and orders DHS to establish, for DAPA, processes similar to those for DACA:

> In order to align the DACA program more closely with the other deferred action authorization outlined below, . . . I hereby direct USCIS to establish a process, similar to DACA . . . . There will be no fee waivers, and like DACA . . . . As with DACA, the above criteria are to be considered for all individuals . . . .

DAPA Memo at 4–5. *See* Dist. Ct. Op., 86 F. Supp. 3d at 610–11. The district court's conclusion that DACA and DAPA would be applied similarly, based as it was in part on the memorandum's plain language, was not clearly erroneous and indeed was not error under any standard of review.

recorded in a 'check the box' standardized form, for which USCIS personnel are provided templates. Certain denials of DAPA must be sent to a supervisor for approval[, and] there is no option for granting DAPA to an individual who does not meet each criterion." Dist. Ct. Op., 86 F. Supp. 3d at 669 (footnotes omitted). The finding was also based on the declaration from Palinkas that, as with DACA, the DAPA application process itself would preclude discretion: "[R]outing DAPA applications through service centers instead of field offices . . . created an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers" and "prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped." *See id.* at 609–10 (citing that declaration).

As the government points out, there was conflicting evidence on the degree to which DACA allowed for discretion. Donald Neufeld, the Associate Director for Service Center Operations for USCIS, declared that "deferred action under DACA is a . . . case-specific process" that "necessarily involves the exercise of the agency's discretion," and he purported to identify several instances of discretionary denials.[140] Although Neufeld stated that approximately 200,000 requests for additional evidence had been made upon receipt of DACA applications, the government does not know the number, if any, that related to discretionary factors rather than the objective criteria. Similarly,

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[140] The states properly maintain that those denials were not discretionary but instead were required because of failures to meet DACA's objective criteria. For example, Neufeld averred that some discretionary denials occurred because applicants "pose[d] a public safety risk," "[were] suspected of gang membership or gang-related activity, had a series of arrests without convictions" or "ongoing criminal investigations." As the district court aptly noted, however, those allegedly discretionary grounds fell squarely within DACA's objective criteria because DACA explicitly incorporated the enforcement priorities articulated in the DACA Operation Instructions and the memorandum styled Policies for Apprehension, Detention, and Removal of Undocumented Immigrants. Dist. Ct. Op., 86 F. Supp. 3d at 669 n.101.

the government did not provide the number of cases that service-center officials referred to field offices for interviews.[141]

Although the district court did not make a formal credibility determination or hold an evidentiary hearing on the conflicting statements by Neufeld and Palinkas, the record indicates that it did not view the Neufeld declaration as creating a material factual dispute.[142] Further, the government did not seek an evidentiary hearing, nor does it argue on appeal that it was error not to conduct such a hearing. Reviewing for clear error, we conclude that the states have established a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion.

B.

A binding rule is not required to undergo notice and comment if it is one "of agency organization, procedure, or practice." § 553(b)(A). "[T]he substantial impact test is the primary means by which [we] look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation."[143] "An agency rule that modifies

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[141] The United States was also given the chance to show that it planned to put DAPA into effect in a manner different from how it implemented DACA; it failed to take advantage of that opportunity. Further, after assuring the district court that "[USCIS] does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015," the government later admitted to having approved dozens of DAPA applications and three-year employment authorization to more than 100,000 aliens satisfying the original DACA criteria; the government could not demonstrate which applicants, if any, were rejected on purely discretionary grounds, as distinguished from failure to meet the requirements set forth in the memoranda.

[142] After a hearing on the preliminary injunction, the government filed a sur-reply that included the Neufeld declaration. The government did not seek an evidentiary hearing, but the states requested one if the "new declarations create a fact dispute of material consequence to the motion." No such hearing was held, and the court cited the Palinkas declaration favorably, *e.g.*, Dist. Ct. Op., 86 F. Supp. 3d at 609–10, 613 n.13, 669 n.101, yet described other sources as providing insufficient detail, *e.g.*, *id.* at 669 n.101.

[143] *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984); *accord*

substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply."[144] DAPA undoubtedly meets that test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes.[145]

The District of Columbia Circuit applies a more intricate test for distinguishing between procedural and substantive rules.[146] The court first looks at the "'effect on those interests ultimately at stake in the agency proceeding.' Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive."[147]

Further, "a procedural rule generally may not 'encode [] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of

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STEIN, *supra*, §15.05[5] ("Procedural and practice rules have been distinguished from substantive rules by applying the substantial impact test.").

[144] *Kast Metals*, 744 F.2d at 1153; *accord Brown Express*, 607 F.2d at 701–03.

[145] *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) ("[Substantive] rules . . . grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed." (omission in original) (quoting *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980))).

[146] *Compare Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (recognizing that the D.C. Circuit "has expressly rejected" "the Fifth Circuit's 'substantial impact' standard for notice and comment requirements"), *with City of Arlington v. FCC*, 668 F.3d 229, 245 (5th Cir. 2012) ("The purpose of notice-and-comment rulemaking is to assure fairness and mature consideration of rules having a substantial impact on those regulated." (quoting *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011))), *aff'd on other grounds*, 133 S. Ct. 1863 (2013), *and Phillips Petroleum*, 22 F.3d at 620 (reaffirming substantial-impact test announced in *Brown Express*).

[147] *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013) (citation omitted) (quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987)).

behavior,'"[148] but "the fact that the agency's decision was based on a value judgment about procedural efficiency does not convert the resulting rule into a substantive one."[149] "A corollary to this principle is that rules are generally considered procedural so long as they do not 'change the *substantive standards* by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide."[150]

Applying those considerations to DAPA yields the same result as does our substantial-impact test. Although the burden imposed on Texas is derivative of conferring lawful presence on beneficiaries, DAPA establishes "'the *substantive standards* by which the [agency] evaluates applications' which seek a benefit that the agency [purportedly] has the power to provide"—a critical fact requiring notice and comment.[151]

Thus, DAPA is analogous to "the rules [that] changed the substantive criteria for [evaluating station allotment counter-proposals]" in *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (per curiam), holding that notice and comment was required. In contrast, the court in *JEM Broadcasting*, 22 F.3d at 327, observed that "[t]he critical fact here, however, is that the 'hard look' rules did not change the *substantive standards* by which the FCC evaluates license applications," such that the rules were procedural. Further, receipt of DAPA benefits implies a "stamp of approval" from the government and "encodes a substantive value judgment," such that the program cannot be

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[148] *Nat'l Sec. Counselors*, 931 F. Supp. 2d at 107 (alterations in original) (quoting *Am. Hosp.*, 834 F.2d at 1047).

[149] *Id.* (quoting *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 282 (D.C. Cir. 2000)).

[150] *Id.* (alteration in original) (quoting *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994)).

[151] *Id.* (first alteration in original) (quoting *JEM Broad.*, 22 F.3d at 327).

considered procedural. *Am. Hosp.*, 834 F.2d at 1047.

C.

Section 553(a)(2) exempts rules from notice and comment "to the extent that there is involved . . . a matter relating to . . . public property, loans, grants, benefits, or contracts." To avoid "carv[ing] the heart out of the notice provisions of Section 553",[152] the courts construe the public-benefits exception very narrowly as applying only to agency action that "clearly and directly relate[s] to 'benefits' as that word is used in section 553(a)(2)."[153]

DAPA does not "clearly and directly" relate to public benefits as that term is used in § 553(a)(2). That subsection suggests that "rulemaking requirements for agencies managing benefit programs are . . . voluntarily imposed,"[154] but USCIS—the agency tasked with evaluating DAPA applications—is not an agency managing benefit programs. Persons who meet the DAPA criteria do not directly receive the kind of public benefit that has been recognized, or was likely to have been included, under this exception.[155]

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[152] *Hous. Auth. of Omaha v. U.S. Hous. Auth.*, 468 F.2d 1, 9 (8th Cir. 1972) ("The exemptions of matters under Section 553(a)(2) relating to 'public benefits,' could conceivably include virtually every activity of government. However, since an expansive reading of the exemption clause could easily carve the heart out of the notice provisions of Section 553, it is fairly obvious that Congress did not intend for the exemptions to be interpreted that broadly.").

[153] *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1061 (5th Cir. 1985).

[154] *Alcaraz v. Block*, 746 F.2d 593, 611 (9th Cir. 1984).

[155] *See e.g.*, *Vigil*, 508 U.S. at 184, 196 (clinical services provided by Indian Health Service for handicapped children); *Hoerner v. Veterans Admin.*, No. 88-3052, 1988 WL 97342, at *1–2 & n.10 (4th Cir. July 8, 1988) (per curiam) (unpublished) (benefits for veterans); *Baylor Univ. Med. Ctr.*, 758 F.2d at 1058–59 (Medicare reimbursement regulations issued by Secretary of Health and Human Services); *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 813 (D.C. Cir. 1975) (food stamp allotment regulations). The Departments of Agriculture, Health and Human Services, and Labor have waived the exemption for matters relating to public property, loans, grants, benefits, or contracts. *See* 29 C.F.R. § 2.7 (Department of Labor); Public Participation in Rule Making, 36 Fed. Reg. 13,804, 13,804 (July 24, 1971) (Department of Agriculture); Public Participation in Rule Making, 36 Fed. Reg. 2532, 2532 (Jan. 28, 1971)

In summary, the states have established a substantial likelihood of success on the merits of their procedural claim. We proceed to address whether, in addition to that likelihood on the merits, the states make the same showing on their substantive APA claim.[156]

VII.

A "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Although the district court enjoined DAPA solely on the basis of the procedural APA claim, "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record."[157] Therefore, as an alternate and additional ground for affirming the injunction, we address this substantive issue, which was fully briefed in the district court.[158]

Assuming *arguendo* that *Chevron*[159] applies,[160] we first "ask whether

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(Department of Health and Human Services, then known as Health, Education, and Welfare).

[156] We reiterate that DAPA is much more than a nonenforcement policy, which presumptively would be committed to agency discretion. Therefore, even where a party has standing and is within the requisite zone of interests, a traditional nonenforcement policy would not necessarily be subject to notice and comment just because DAPA must undergo notice-and-comment review.

[157] *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (citation and internal quotation marks omitted).

[158] "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011) (citation and internal quotation marks omitted). At oral argument, the parties agreed that no further factual development is needed to resolve the substantive APA challenge.

[159] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[160] "[T]he fact that the Agency previously reached its interpretation through means

Congress has 'directly addressed the precise question at issue.'"[161] It has. "Federal governance of immigration and alien status is extensive and complex." *Arizona v. United States*, 132 S. Ct. at 2499. The limited ways in which illegal aliens can lawfully reside in the United States reflect Congress's concern that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates," 8 U.S.C. § 1601(3), and that "[i]t is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy," § 1601(5).

In specific and detailed provisions, the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present[162] and confers eligibility for "discretionary relief allowing [aliens in

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less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (citation omitted). Instead, we consider factors such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ." *Id.* We need not decide whether DHS's interpretation satisfies that test, however, because, as we explain, the agency cannot prevail even under *Chevron*.

Chevron deference requires the courts to accept an agency's reasonable construction of a statute as long as it is "not patently inconsistent with the statutory scheme." *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 813 (5th Cir. 2000). As explained below, we decide that, assuming *Chevron* deference does apply, DAPA is not a reasonable construction of the INA, because it is "manifestly contrary" to the INA statutory scheme. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

An agency construction that is manifestly contrary to a statutory scheme could not be persuasive under the test in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), a test that affords agency constructions less deference than does *Chevron*. *See Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (providing that under *Skidmore*, an "interpretation is entitled to respect only to the extent it has the power to persuade"). Therefore, our decision to forego discussion of the *Walton* factors is sensible. *See Griffon v. U.S. Dep't of Health & Human Servs.*, 802 F.2d 146, 148 n.3 (5th Cir. 1986) (noting that where an interpretive rule is unreasonable, "there is no need to decide whether *Chevron* or a less exacting standard applies").

[161] *Mayo Found.*, 562 U.S. at 52 (quoting *Chevron*, 467 U.S. at 842).

[162] *E.g.*, lawful-permanent-resident ("LPR") status, *see* 8 U.S.C. §§ 1101(a)(20), 1255;

deportation proceedings] to remain in the country."[163] Congress has also identified narrow classes of aliens eligible for deferred action, including certain petitioners for immigration status under the Violence Against Women Act of 1994,[164] immediate family members of lawful permanent residents ("LPRs") killed by terrorism,[165] and immediate family members of LPRs killed in combat and granted posthumous citizenship.[166] Entirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA were it not enjoined. *See* DAPA Memo at 4.

Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status: In general, an applicant must (i) have a U.S. citizen child who is at least twenty-one years old, (ii) leave the United States, (iii) wait ten years, and then (iv) obtain one of the limited number of family-preference visas from a United States consulate.[167] Although DAPA does not confer the full panoply of benefits

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nonimmigrant status, *see* §§ 1101(a)(15), 1201(a)(1); refugee and asylum status, *see* §§ 1101(a)(42), 1157–59, 1231(b)(3); humanitarian parole, *see* § 1182(d)(5); temporary protected status, *see* § 1254a. *Cf.* §§ 1182(a) (inadmissible aliens), 1227(a)–(b) (deportable aliens).

[163] *Arizona v. United States*, 132 S. Ct. at 2499 (citing 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure)); *see also* § 1227(d) (administrative stays of removal for T- and U-visa applicants (victims of human trafficking, or of various serious crimes, who assist law enforcement)).

[164] Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of the U.S. Code). *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV).

[165] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361.

[166] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95; *see also* 8 U.S.C. § 1227(d)(2) (specifying that "[t]he denial of a request for an administrative stay of removal [for T- and U-visa applicants] shall not preclude the alien from applying for . . . deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws . . . .").

[167] *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255; *see Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2199 (2014) (recognizing that legal immigration "takes time—and often a lot of it. . . . After a sponsoring petition is approved but before a visa application can be filed, a family-sponsored immigrant may stand in line for years—or even

that a visa gives, DAPA would allow illegal aliens to receive the benefits of lawful presence solely on account of their children's immigration status without complying with any of the requirements, enumerated above, that Congress has deliberately imposed. DAPA requires only that prospective beneficiaries "have . . . a son or daughter who is a U.S. citizen or lawful permanent resident"—without regard to the age of the child—and there is no need to leave the United States or wait ten years[168] or obtain a visa.[169] Further, the INA does not contain a family-sponsorship process for parents of an LPR child,[170] but DAPA allows a parent to derive lawful presence from his child's LPR status.

The INA authorizes cancellation of removal and adjustment of status if, *inter alia*, "the alien has been physically present in the United States for a continuous period of *not less than 10 years* immediately preceding the date of such application" and if "removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(A) (emphasis added). Although LPR status is more substantial than is lawful presence, § 1229b(b)(1) is the most specific delegation of authority to the Secretary to change the immigration classification of removable aliens that meet only the DAPA criteria and do not fit within the specific

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decades—just waiting for an immigrant visa to become available.").

[168] Although "[t]he Attorney General has sole discretion to waive [the ten-year reentry bar] in the case of an immigrant who is the *spouse or son or daughter* of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in *extreme hardship* to the citizen or lawfully resident spouse or parent of such alien," § 1182(a)(9)(B)(v) (emphasis added), there is no such provision for waiving the reentry bar for *parents* of U.S. citizen or LPR children.

[169] DAPA Memo at 4.

[170] *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1152(a)(4), 1153(a).

categories set forth in § 1229b(b)(2)–(6).

Instead of a ten-year physical-presence period, DAPA grants lawful presence to persons who "have continuously resided in the United States since before January 1, 2010," and there is no requirement that removal would result in exceptional and extremely unusual hardship. DAPA Memo at 4. Although the Secretary has discretion to make immigration decisions based on humanitarian grounds, that discretion is conferred only for particular family relationships and specific forms of relief—none of which includes granting lawful presence, on the basis of a child's immigration status, to the class of aliens that would be eligible for DAPA.[171]

The INA also specifies classes of aliens eligible[172] and ineligible[173] for work authorization, including those "eligible for work authorization and deferred action"—with no mention of the class of persons whom DAPA would make eligible for work authorization. Congress "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,'"[174] in part by "establishing an extensive 'employment verification system,' designed to deny employment to aliens who . . . are not *lawfully present* in the

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[171] *See, e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v), (C)(iii) (authorizing waiver of reentry bars for particular classes of inadmissible aliens), 1227(a)(1)(E)(iii) (authorizing waiver of inadmissibility for smuggling by particular classes of aliens).

[172] *E.g.*, 8 U.S.C. §§ 1101(i)(2) (human-trafficking victims in lawful-temporary-resident status pursuant to a T-visa), 1105a(a) (nonimmigrant battered spouses), 1154(a)(1)(K) (grantees of self-petitions under the Violence Against Women Act), 1158(c)(1)(B), (d)(2) (asylum applicants and grantees), 1160(a)(4) (certain agricultural workers in lawful-temporary-resident status), 1184(c)(2)(E), (e)(6) (spouses of L- and E-visa holders), (p)(3)(B) (certain victims of criminal activity in lawful-temporary-resident status pursuant to a U visa), 1254a(a)(1)(B) (temporary-protected status holders), 1255a(b)(3)(B) (temporary-resident status holders).

[173] *E.g.*, 8 U.S.C. §§ 1226(a)(3) (limits on work authorizations for aliens with pending removal proceedings), 1231(a)(7) (limits on work authorizations for aliens ordered removed).

[174] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (alteration in original) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).

United States."[175]

The INA's careful employment-authorization scheme "protect[s] against the displacement of workers in the United States,"[176] and a "primary purpose in restricting immigration is to preserve jobs for American workers."[177] DAPA would dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country.

DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[178] DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly."[179] But assuming *arguendo* that *Chevron* applies and that Congress has not directly addressed the precise

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[175] *Id.* (emphasis added) (citation omitted) (quoting 8 U.S.C. § 1324a(a)(1)).

[176] *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194 (quoting Powers and Duties of Service Officers; Availability of Service Records; Employment Authorization; Excludable or Deportable Aliens, 48 Fed. Reg. 51,142, 51,142 (Nov. 7, 1983)).

[177] *Id.* (quoting *Sure-Tan*, 467 U.S. at 893); *see* 8 U.S.C § 1182(a)(5)(A)(i) (listing among the classes of excludable aliens those who "seek[] to enter the United States for the purpose of performing skilled or unskilled labor . . . , unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed").

[178] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[179] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

question at hand, we would still strike down DAPA as an unreasonable interpretation that is "manifestly contrary" to the INA. *See Mayo Found.*, 562 U.S. at 53.

The dissent, relying on *Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991), theorizes that our analysis is nothing but an application of the *expressio unius est exclusio alterius*[180] canon of construction, which the dissent claims is of limited utility in administrative law. Dissent at 46. The dissent's observation is astray, however, because our statutory analysis does not hinge on the *expressio unius* maxim.

Moreover, the Supreme Court and this court have relied on *expressio unius* in deciding issues of administrative law. While noting "the limited usefulness of the *expressio unius* doctrine in the administrative context,"[181] some courts have declined to apply it mostly because they find it unhelpful for the specific statute at issue.[182] On other occasions, both our circuit and the Supreme Court have employed the canon in addressing administrative law.[183] Nor has the District of Columbia Circuit expressly foreclosed use of the canon on questions of statutory interpretation by agencies.[184] Our distinguished

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[180] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 701 (10th ed. 2014).

[181] *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 443–44 (5th Cir. 1999).

[182] *Id.* at 444 (concluding, on the basis of other statutory provisions, that "Congress intended to allow the FCC broad authority to implement this section").

[183] *See, e.g., Christensen v. Harris Cnty.*, 529 U.S. 576, 582–83 (2000) (discussing *expressio unius*, and concluding that it does not inform the result, without suggesting that it has no applicability in administrative law); *Rodriguez-Avalos v. Holder*, 788 F.3d 444, 451 (5th Cir. 2015) (per curiam) (relying on the expression of a term in one section of the statute to infer that its absence in another section suggests intent to foreclose its implication in the latter, even though the statute was subject to interpretation by the Board of Immigration Appeals).

[184] *See Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000)

dissenting colleague, in fact, relied on *expressio unius* to uphold a decision of the Board of Immigration Appeals, concluding that the Equal Access to Justice Act did not provide for fee-shifting in proceedings before the Board. *See Hodge v. Dep't of Justice*, 929 F.2d 153, 157 n.11 (5th Cir. 1991) (King, J.).

For the authority to implement DAPA, the government relies in part on 8 U.S.C. § 1324a(h)(3),[185] a provision that does not mention lawful presence or deferred action, and that is listed as a "[m]iscellaneous" definitional provision expressly limited to § 1324a, a section concerning the "Unlawful employment of aliens"—an exceedingly unlikely place to find authorization for DAPA.[186] Likewise, the broad grants of authority in 6 U.S.C. § 202(5),[187] 8 U.S.C. § 1103(a)(3),[188] and 8 U.S.C. § 1103(g)(2)[189] cannot reasonably be construed as

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("The Comptroller argues that the *expressio unius* maxim cannot preclude an otherwise reasonable agency interpretation. This is not entirely correct. True, we have rejected the canon in some administrative law cases, but only where the logic of the maxim . . . simply did not hold up in the statutory context. . . . In this case, the two canons upon which we rely [*expressio unius* and avoidance of surplusage] inarguably compel our holding that § 24 (Seventh) unambiguously does not authorize national banks to engage in the general sale of insurance as 'incidental' to 'the business of banking.'"); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV.1253, 1280 (1997) ("[P]ost-*Chevron* cases have often set aside agency interpretations by drawing upon the full range of conventional statutory construction techniques at step one. Arguments from statutory structure and purpose . . . are regularly examined at that step. So are canons of construction.") (footnotes omitted).

[185] "As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General."

[186] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[187] "The Secretary . . . shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities."

[188] "[The Secretary] . . . shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."

[189] "The Attorney General shall establish such regulations, prescribe such forms of

assigning "decisions of vast 'economic and political significance,'"[190] such as DAPA, to an agency.[191]

The interpretation of those provisions that the Secretary advances would allow him to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility. Even with

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bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."

[190] *Util. Air*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159); *accord id.* ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159)).

[191] The dissent urges the courts to give DHS leeway to craft rules regarding deferred action because of the scope of the problem of illegal immigration and the insufficiency of congressional funding. Dissent at 50. That is unpersuasive. "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Brown & Williamson*, 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

Because we conclude, at *Chevron* Step One, that Congress has directly addressed lawful presence and work authorizations through the INA's unambiguously specific and intricate provisions, we find no reason to allow DHS such leeway. There is no room among those specific and intricate provisions for the Secretary to "exercise discretion in selecting a different threshold" for class-wide grants of lawful presence and work authorization under DAPA. *Util. Air*, 134 S. Ct. at 2446 n.8.

We merely apply the ordinary tools of statutory construction to conclude that Congress directly addressed, yet did not authorize, DAPA. *See King*, 135 S. Ct. at 2483 (noting that to determine whether Congress has expressed its intent, we "must read the words in their context and with a view to their place in the overall statutory scheme"; *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) ("First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue."); *Util. Air*, 134 S. Ct at 2441 (recognizing the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Now, even assuming the government had survived *Chevron* Step One, we would strike down DAPA as manifestly contrary to the INA under Step Two. *See Chevron*, 467 U.S. at 844; *Mayo Found.*, 562 U.S. at 53.

"special deference" to the Secretary,[192] the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.

Presumably because DAPA is not authorized by statute, the United States posits that its authority is grounded in historical practice, but that "does not, by itself, create power,"[193] and in any event, previous deferred-action programs are not analogous to DAPA. "[M]ost . . . discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters,"[194] but DAPA is not such a program. Likewise, many of the previous programs were bridges from one legal status to another,[195]

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[192] *Texas v. United States*, 106 F.3d at 665 ("Courts must give special deference to congressional and executive branch policy choices pertaining to immigration.").

[193] *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). *But see NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]he longstanding 'practice of the government' can inform our determination of 'what the law is.'" (citation omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

[194] ANDORRA BRUNO ET AL., CONG. RESEARCH SERV., ANALYSIS OF JUNE 15, 2012 DHS MEMORANDUM, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN 9 (July 13, 2012); *see* CHARLOTTE J. MOORE, CONG. RESEARCH SERV., ED206779, REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 9, 12–14 (1980).

[195] *See* Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978) (deferring action on the removal of nonimmigrant nurses whose temporary licenses expired so that they could pass permanent licensure examinations); Memorandum from Michael Cronin, Acting Exec. Assoc. Comm'r, Office of Programs, INS, to Michael Pearson, Exec. Assoc. Comm'r, Office of Field Operations, INS 2 (Aug. 30, 2001) (directing that possible victims of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464, "should not be removed from the United States until they have had the opportunity to avail themselves of the . . . VTVPA," including receipt of a T- or U-visa); Memorandum from Paul Virtue, Acting Exec. Assoc. Comm'r, INS, to Reg'l Dirs., INS, et al. 3 (May 6, 1997) (utilizing deferred action for VAWA self-petitioners "pending the availability of a visa number"); Press Release, USCIS, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina 1 (Nov. 25, 2005) (deferring action on students "based upon the fact that the failure to maintain status is directly due to Hurricane Katrina"); *see also United States ex rel. Parco v. Morris*,

whereas DAPA awards lawful presence to persons who have never had a legal status[196] and may never receive one.[197]

Although the "Family Fairness" program did grant voluntary departure to family members of legalized aliens while they "wait[ed] for a visa preference number to become available for family members," that program was interstitial to a statutory legalization scheme.[198] DAPA is far from interstitial: Congress

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426 F. Supp. 976, 980 (E.D. Pa. 1977) (discussing an INS policy that allowed aliens to "await the availability of a [Third Preference] visa while remaining in this country" under "extended voluntary departure").

[196] DAPA Memo at 4 (limiting DAPA to persons who "have no lawful status").

[197] *Id.* at 5 (specifying that DAPA "confers no . . . immigration status or pathway to citizenship"). Throughout the dissent is the notion that DHS must pursue DAPA because Congress's funding decisions have left the agency unable to deport as many illegal aliens as it would if funding were available. But the adequacy or insufficiency of legislative appropriations is not relevant to whether DHS has statutory authority to implement DAPA. Neither our nor the dissent's reasoning hinges on the budgetary feasibility of a more thorough enforcement of the immigration laws; instead, our conclusion turns on whether the INA gives DHS the power to create and implement a sweeping class-wide rule changing the immigration status of the affected aliens without full notice-and-comment rulemaking, especially where—as here—the directive is flatly contrary to the statutory text.

The dissent's repeated references to DAPA as the appropriate continuation of a longstanding practice, *see, e.g.*, Dissent at 2, badly mischaracterizes the nature of DAPA. Previous iterations of deferred action were limited in time and extent, affecting only a few thousand aliens for months or, at most, a few years. MEMORANDUM ON THE DEP'T OF HOMELAND SEC.'S AUTH. TO PRIORITIZE REMOVAL OF CERTAIN ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES AND TO DEFER REMOVAL OF OTHERS, Dep't of Justice, Office of Legal Counsel, at *15–*17 (Nov. 19, 2014).

Nothing like DAPA, which alters the status of more than four million aliens, has ever been contemplated absent direct statutory authorization. In its OLC memorandum, the Department of Justice noted that "extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action." *Id.* at *18 n.8. Deferred action may be a decades-old tool, but it has never been used to affect so many aliens and to do so for so expansive a period of time.

[198] *See* Memorandum from Gene McNary, Comm'r, INS, to Reg'l Comm'rs, INS 1 (Feb. 2, 1990) (authorizing extended voluntary departure and work authorization for the spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359); *see also* Memorandum from Donald Neufeld, Acting Assoc. Dir., USCIS, to Field Leadership, USCIS 1 (Sept. 4, 2009)

has repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ("DREAM Act"),[199] features of which closely resemble DACA and DAPA.

Historical practice that is so far afield from the challenged program sheds no light on the Secretary's authority to implement DAPA. Indeed, as the district court recognized, the President explicitly stated that "it was the failure of Congress to enact such a program that prompted him . . . to 'change the law.'"[200] At oral argument, and despite being given several opportunities, the attorney for the United States was unable to reconcile that remark with the position that the government now takes. And the dissent attempts to avoid the impact of the President's statement by accusing the district court and this panel majority of "relying . . . on selected excerpts of the President's public statements." Dissent at 24, 33 n.41.

The dissent repeatedly claims that congressional silence has conferred on DHS the power to act. *E.g.*, Dissent at 46–47. To the contrary, any such inaction cannot create such power:

> "[D]eference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Chevron*[,] 467 U.S. at 843–44[]. To suggest, as the [agency] effectively does, that *Chevron* step two is implicated at any

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(authorizing deferred action for "the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" because "no avenue of immigration relief exist[ed]" and "[t]his issue has caused a split among the circuit courts of appeal and is also the subject of proposed legislation in . . . Congress").

[199] "[A] bill that would have become the 'DREAM' Act never became law[; it] passed the House of Representatives during the 111th Congress and then stalled in the Senate." *Common Cause v. Biden*, 748 F.3d 1280, 1281 (D.C. Cir.) (citing H.R. 5281, 111th Cong. (2010)), *cert. denied*, 135 S. Ct. 451 (2014)).

[200] Dist. Ct. Op., 86 F. Supp. 3d at 657 & n.71 (quoting Press Release, Remarks by the President on Immigration—Chicago, Ill., The White House Office of the Press Sec'y (Nov. 25, 2014)).

> time a statute does not expressly *negate* the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

Through the INA's specific and intricate provisions, "Congress has 'directly addressed the precise question at issue.'" *Mayo Found.*, 562 U.S. at 52. As we have indicated, the INA prescribes how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization. DAPA is foreclosed by Congress's careful plan; the program is "manifestly contrary to the statute"[201] and therefore was properly enjoined.[202]

VIII.

The states have satisfied the other requirements for a preliminary injunction. They have demonstrated "a substantial threat of irreparable injury if the injunction is not issued." *Sepulvado*, 729 F.3d at 417 (quoting *Byrum*, 566 F.3d at 445). DAPA beneficiaries would be eligible for driver's licenses and other benefits, and a substantial number of the more than four million potential beneficiaries—many of whom live in the plaintiff states—would take advantage of that opportunity. The district court found that retracting those benefits would be "substantially difficult—if not impossible," Dist. Ct. Op.,

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[201] *Mayo Found.*, 562 U.S. at 53 (quoting *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242 (2004)).

[202] We do not address whether single, ad hoc grants of deferred action made on a genuinely case-by-case basis are consistent with the INA; we conclude only that the INA does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens.

86 F. Supp. 3d at 673, and the government has given us no reason to doubt that finding.

The states have shown "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted." *Sepulvado*, 729 F.3d at 417 (quoting *Byrum*, 566 F.3d at 445). The states have alleged a concrete threatened injury in the form of millions of dollars of losses.

The harms the United States has identified are less substantial. It claims that the injunction "obstructs a core Executive prerogative" and offends separation-of-powers and federalism principles. Those alleged harms are vague, and the principles the government cites are more likely to be affected by the resolution of the case on the merits than by the injunction.

Separately, the United States postulates that the injunction prevents DHS from effectively prioritizing illegal aliens for removal. But the injunction "does not enjoin or impair the Secretary's ability to marshal his assets or deploy the resources of the DHS [or] to set priorities," including selecting whom to remove first, *see* Dist. Ct. Op., 86 F. Supp. 3d at 678, and any inefficiency is outweighed by the major financial losses the states face.

The government also complains that the injunction imposes administrative burdens because DHS has already leased office space and begun hiring employees to implement DAPA. Such inconveniences are common incidental effects of injunctions, and the government could have avoided them by delaying preparatory work until the litigation was resolved.[203] Finally, the government reasonably speculates that the injunction burdens DAPA beneficiaries and

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[203] *Cf. Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004) ("[W]hen the potential harm to each party is weighed, a party 'can hardly claim to be harmed [where] it brought any and all difficulties occasioned by the issuance of an injunction upon itself.'" (second alteration in original) (quoting *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990))).

their families and discourages them from cooperating with law-enforcement officers and paying taxes. But those are burdens that Congress knowingly created, and it is not our place to second-guess those decisions.

The states have also sufficiently established that "an injunction will not disserve the public interest." *Sepulvado*, 729 F.3d at 417 (quoting *Byrum*, 566 F.3d at 445). This factor overlaps considerably with the previous one, and most of the same analysis applies.[204] The main difference is that, instead of relying on their financial interests, the states refer to the public interest in protecting separation of powers by curtailing unlawful executive action.

Although the United States cites the public interest in maintaining separation of powers and federalism by avoiding judicial and state interference with a legitimate executive function, there is an obvious difference: The interest the government has identified can be effectively vindicated after a trial on the merits. The interest the states have identified cannot be, given the difficulty of restoring the *status quo ante* if DAPA were to be implemented.[205] The public interest easily favors an injunction.

IX.

The government claims that the nationwide scope of the injunction is an abuse of discretion and requests that it be confined to Texas or the plaintiff

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[204] *Cf. Nken v. Holder*, 556 U.S. 418, 435 (2009) ("Once an applicant satisfies the first two factors [for a stay of an alien's removal pending judicial review], the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.").

[205] *See Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir. 1997) ("It is well settled that the issuance of a prohibitory injunction freezes the status quo, and is intended 'to preserve the relative positions of the parties until a trial on the merits can be held.' Preliminary injunctions commonly favor the status quo and seek to maintain things in their initial condition so far as possible until after a full hearing permits final relief to be fashioned." (citation omitted) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981))).

states. But the Constitution requires "an *uniform* Rule of Naturalization";[206] Congress has instructed that "the immigration laws of the United States should be enforced vigorously and *uniformly*";[207] and the Supreme Court has described immigration policy as "a comprehensive and *unified* system."[208] Partial implementation of DAPA would "detract[] from the 'integrated scheme of regulation' created by Congress,"[209] and there is a substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.

Furthermore, the Constitution vests the District Court with "the judicial Power of the United States."[210] That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction.[211]

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[206] U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

[207] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (emphasis added).

[208] *Arizona v. United States*, 132 S. Ct. at 2502.

[209] *Id.* (quoting *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 288–89 (1986)).

[210] U.S. CONST. art. III, § 1

[211] *See, e.g., Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2006) (upholding a nationwide injunction after concluding it was "compelled by the text of [§ 706 of the] Administrative Procedure Act"), *aff'd in part & rev'd in part on other grounds by Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (concluding that the plaintiff organizations lacked standing to challenge the forest service action in question); *Chevron Chem. Co. v. Voluntary Purchasing Grps.*, 659 F.2d 695, 705–06 (Former 5th Cir. Oct. 1981) (instructing district court to issue broad, nationwide injunction); *Brennan v. J.M. Fields, Inc.*, 488 F.2d 443, 449–50 (5th Cir. 1973) (upholding nationwide injunction against a national chain); *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 826 (5th Cir. 1972) ("[C]ourts should not be loath[ ] to issue injunctions of general applicability. . . . 'The injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium.'" (quoting *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962)).

"We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air*, 134 S. Ct. at 2444 (citation omitted). Agency announcements to the contrary are "greet[ed] . . . with a measure of skepticism." *Id.*

The district court did not err and most assuredly did not abuse its discretion. The order granting the preliminary injunction is AFFIRMED.

No 09-5080
Consolidating No. 09-5161

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

GREGORY S. HOLLISTER, et al.

Appellants,

v.

Barry Soetoro, in his capacity as a natural person; de facto President in posse; and as de jure President in posse , also known as Barack Obama, et al.

Appellees.

Case Below 08-2254 JR

APPELLANTS JOINT BRIEF

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A. The Basis for the District Court's Subject Matter Jurisdiction

The District Court had jurisdiction pursuant to the Federal Interpleader Act, 28 U.S.C. § 1335. Alternatively Federal Rule of Civil Procedure 22 and diversity under 28 U.S.C. § 1332 existed. In addition, in a proposed amended complaint the plaintiff Hollister asserted jurisdiction also for a direct violation of the constitutional requirement in Article II, Section 1, Clause 5 concerning the eligibility of an individual to be President of the United States if he is not, as is there stated, a "natural born citizen." Such jurisdiction is asserted under *Bivens v. Six Federal Narcotics Agents*. The amounts involved are the remuneration that a Colonel recalled to active duty status would receive if recalled to active duty for a full tour plus, in the present situation, hazardous duty extra pay. Thus they far exceed the $500. amount for jurisdiction under the Federal Interpleader Act and also exceed the amount required for diversity jurisdiction of $75,000.

B. The Basis for Court of Appeals Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. It is from final decisions below, both as to the case of Colonel Hollister, which was dismissed upon motion and as to the Rule 11 reprimand of the undersigned

John D. Hemenway, which was made final after a portion of the sanction originally sought was withdrawn.

C. Filing Dates

Decision and Memorandum and Opinion dismissing main case upon motion to dismiss and Order dismissing: March 5, 2009. Notice of appeal of main case filed: March 16, 2009. Memorandum Order discharging Rule 11 Show of Cause against John D. Hemenway but reprimanding him under Rule 11: March 24, 2009. John D. Hemenway notice of appeal of March 24, 2009 Memorandum Order: April 16, 2009.

D. Assertion

The disposition of Colonel Hollister's claims in his complaint by dismissal was final as was the disposition of the sanctions against Hemenway under Rule 11.

II. Issues Presented for Review

1) Did the lower court err as a matter of law and/or abuse its discretion by finding the Federal Interpleader Act and/or the Federal Rule of Interpleader inapplicable when it found that the plaintiff Hollister had failed to state a claim upon which relief could be granted?

2) Did the lower court fail to take the factual allegations of the complaint as true and thereby err, particularly the alleging of a *de facto*

holding of office by the defendant Soetoro a/k/a Obama that was not *de jure*?

3) In so finding the Federal Interpleader Act inapplicable did the lower court ignore the plain language of the Interpleader Act?

4) Did the lower court err when it dismissed the complaint for failure to state a claim because it was influenced by bias that it exhibited?

5) Did the lower court err and/or abuse its discretion by sanctioning Appellant's Attorney, John D. Hemenway under Rule 11 and by finding the law suit "frivolous," particularly by doing so without any inquiry into the prefiling inquiry that was made and allowing the presentation of the evidence alleged in the complaint and the law researched at a hearing and in failing to allow reprimanded counsel discovery?

6) Did the lower court err in failing to allow the amendment of the complaint, and particularly did it err in refusing the addition of a *Bivens* count as part of the amendment sought?

7) Did the lower court violate fundamental rights of the plaintiff and his reprimanded counsel by not having any hearing before dismissing and reprimanding, particularly when it made a finding of frivolousness?

8) Did the lower court err in the way it treated the attempt of the plaintiff to deposit an amount into the escrow of the court?

9) Did the lower court exhibit improper bias against the plaintiff and his local counsel based upon its attitude toward the two other counsel who signed filings that it exhibited in reliance upon observations from the Internet?

10) Did the lower court exhibit such an improper reliance upon unverified information from the Internet that it rendered its decision invalid and subject to being vacated with a remand?

11) Did the lower court give such an impression and appearance of improper bias that it rendered its decision invalid and subject to being vacated and create an impression of lack of impartiality and disinterest in fair adjudication?

12) Did the lower court improperly and erroneously rely upon undisclosed sources on the Internet and the web site of one of the signatory counsel it refused to admit *pro hac vice* as if they were some form of *res judicata* and exhibit reversible bias in doing so?

13) Did the lower court attack what it perceived as the politics of non-local counsel and their participation in what it perceived as a political movement or politically inspired campaign so as to exhibit political bias on its own part that showed disregard for the Constitution and the Rule of Law that was improper and in error from the outset?

III. Statement of the Case

On entering the Air Force, Col. Hollister took an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic." [Appx 9-10] He has reaffirmed that oath. This oath has been construed as one placing upon each member of the Armed Forces a legal duty to obey all lawful orders, but only lawful orders. This is reflected in the Uniform Code of Military Justice.

Col. Hollister alleged grounds to show why he's concerned that Defendant Soetoro is not Constitutionally qualified to be President and Commander-In-Chief, citing concerns about whether Defendant Soetoro ever was a natural-born citizen of the United States (as the Constitution, Art. II, Section I, Cl. 5, requires for being President), or, even if so, whether Defendant Soetoro lost any natural-born citizenship he ever once might have had while living as a child in Indonesia. [Appx 12-17]

For such reasons, if Col. Hollister ever receives an order recalling him to active duty issued by, or under the authority of, Defendant Barry Soetoro (a/k/a Barack Obama) under the auspices of being President of the United States and acting *de facto* as such, he will be entitled to know whether this or any other orders given by the said defendant are orders which he, Colonel Hollister, has a legal obligation to obey, or an order which he has a legal

obligation to disobey. [Appx 20] As an officer in the Individual Ready Reserve Col. Hollister has an especial right to the intangible property right of honest services from the said defendant as an office holder *de facto* or *de jure* and a right to know which of those two types of office holder the said defendant is. It can't be both. Further, during the entire time that defendant Barry Soetoro a/k/a Obama ran for President he was an office holder as a member of the United States Senate and so during that time also had the fiduciary obligation toward individuals such as Colonel Hollister as United States citizens and members of the Individual Ready Reserve to accord them and give to them the intangible property right of honest services. Yet if the said defendant ran for President knowing that he did not possess the necessary qualifications as he must have under the allegations of the complaint, then he did not give such honest services to the citizens and to Colonel Hollister in particular, a practice which he has continued as the occupant of the Oval Office acting as President *de facto* if not *de jure*.

As a member of the Individual Ready Reserve Col. Hollister controls and in effect owns an obligation, an obligation which he must fulfill but if he has good reason to believe and he has alleged that he does, that the defendant Soetoro a/k/a Obama is only a *de facto* president and not a *de jure*

actual constitutionally eligible President, then he should resist obeying that Order. Thus this is an action in the nature of Interpleader.

Col. Hollister is a claimant to the value of his own services and he must claim those services as his own not to give to a man occupying the office of President *de facto* but not *de jure*. He is obliged to give those services to the defendant Biden so long as he has reason to believe that the defendant Soetoro a/k/a Obama is only a president *de facto* and not a *de jure* President. At this point the two Interpleader defendants he has named are not in contention, but at what Professor Chafee has called the second stage of Interpleader they are likely to be unless the Defendant Soetoro a/k/a Obama at some points acknowledges that he is a constitutional fraud who ran for president as a sitting United States Senator knowing full well his constitutional qualification to be President was at the least "in doubt" in the words of the Supreme Court in 1874.

Thus, as what he now knows and believes to be the case is revealed as the case upon the development of discovery, Colonel Hollister will have reason to fear the hazards and vexations of multiple conflicting orders in what should be a situation of orderly constitutional succession with respect to his duties unless, as is unlikely, the defendant Soetoro a/k/a Obama concedes that he was not eligible to be President but nonetheless decided to

run for the office, thus committing fraud in doing so, and then presumed to occupy the office *de facto* while knowing that he was not qualified to occupy it *de jure*.

As information comes out in this legal system of this federal jurisdiction or any other jurisdiction (the courts of Hawaii, for example) that indicates more strongly that the defendant Soetoro a/k/a Obama has been all along a constitutional fraud, there is no way it can be predicted whether the defendant Biden will act responsibly to his oath to uphold and defend the Constitution or whether he will avoid that obligation as many seem to be doing at this point. Certainly there are signs that the political machine associated for so long with Chicago politics craves power and does not like to yield power and that those who are key players in it seek to retaliate against those who pose any threat to their power.

Further, the doubt that Soetoro a/k/a Obama is constitutionally qualified has spread and may produce other interpleader complainants in the armed services. Under such circumstances the present low morale in the armed forces and the doubt that has spread through them could mestasize absent an orderly lawful resolution. Doubts, in particular could spread up and down the chains of command among the armed services and those all those all along those chains who have sworn oaths to uphold the

Constitution against all enemies foreign and domestic and not to any person. There could be division within the chain of command above the plaintiff Hollister as to whether Soetoro a/k/a Obama is or is not the lawfully-constituted President and Commander-In-Chief, and all of this may have the most horrendous consequences for our country, including the possible development of a Constitutional-military legal crisis. [Appx 19, 21-22]

The Court cannot help but have noted the restive mood among many citizens, the concern over historically unparalleled attempts to push through government programs before we as a people have time to absorb their content and impact and in which there is contention between factions that is at high level and there are signs of retaliatory acts and anger by many. It is a situation for which the device of Interpleader is well suited to preserve the Rule of Law based upon the Constitution. Conflicts in the second stage of Interpleader can be reasonably anticipated just as they exist now between the plaintiff Col. Hollister who is not, therefore, a neutral stakeholder and the defendant Soetoro a/k/a Obama in the first stage of the Interpleader and the Rule of Law based on the Constitution can be preserved by the responsible use of this ancient device that traces back into the common law. [Appx 19, 21-22].

And with regard to the *Bivens* claim: the constitutional infirmity and deception of it claimed in this case by the plaintiff Hollister is not "incident" to his military service. It was, as he alleges, perpetrated quite apart from that service. It only creates a problem under his obligation to perform military service again if called. It did not arise in the first place as an incident to his military service in any way. That obligation includes an obligation to observe the Nuremberg principles and once he should report he would be in a legal system mandated by Congress to which this Court or any other civilian court would be called upon to defer as a matter of abstention and comity. That is so by statute which dictates such deference to that military judicial system and where within that military judicial system there is no equitable device of Interpleader or any other procedure within that legal system prescribed by Congress which could effectively resolve the problem presented by the plaintiff Hollister in his complaint in this case. In this sense the use of *Bivens* in conjunction with the use of Interpleader provides an even more effective remedy for a case in which standing is clear under the traditional use of Interpleader and *Bivens* applies in the traditional second stage of Interpleader because the constitutional violation complained of was not incident to the military service of the plaintiff, Col. Hollister.

No hearing was ever held below, although hearings were requested. The case was dismissed upon motion to dismiss in an opinion in which the lower court found that the plaintiff Hollister had standing but had not stated a claim upon which relief could be granted. App. 213 ff., 208-212. A first amended complaint was moved for but never accepted. The two out-of-the-jurisdiction attorneys, Philip J. Berg of Pennsylvania and Lawrence Joyce of Arizona, were characterized by the lower court as "*agents provocateurs*" and Philip J. Berg in particular was characterized by the lower court as "probably" the "real plaintiff" in the case. App. 209, 211. They were moved to be admitted *pro hac vice* but the lower court did not grant that motion. App. 220. They did sign the filings in the lower court. In any case they have now resigned from representing Colonel Hollister and are no longer involved although they, along with "blogging and twittering" on the Internet were the focus of much of the lower court's opinion dismissing the case.

The above is the statement of Colonel Hollister's case but the undersigned, on his own account, is also an appellant in this matter. The statement of the case of the undersigned is relatively simple. In his March 5, 2009, opinion dismissing the case the judge below attacked the undersigned under Rule 11, seeking to impose upon the undersigned the entire legal bill

of the defendants Soetoro a/k/a Obama and Biden. This would be the Bauer firm that is so highly favored by Soetoro a/k/a Obama and was heavily involved in his election which Col. Hollister claims was a knowing constitutionally fraudulent exercise. (This subject law firm according to public FEC records, available over the Internet, has been paid over 1.4 million dollars at this point, a good portion of which has been for defending the fraud thus claimed, a fact which we ask the Court to take notice of.)

The undersigned was ordered to file a Show of Cause as to why he should not have thus been so sanctioned and charged, which the undersigned did. In seeking to assess this fine upon the undersigned the judge below overlooked several points of clear law. The first is that when a judge, as opposed to a party, initiates a move for Rule 11 sanctions he is not allowed by the terms and operation of the Rule to assess such legal fees and expenses as the other side has run up. The second overlooked point was that it is clear "hornbook" law set out copiously in the leading authorities that if such Rule sanctions are sought to be imposed the attorney and/or party thus sought to be assessed are entitled to an evidentiary hearing and even, arguably, according to some cases, to discovery. This was set out in the Show of Cause filed by the undersigned, along with some of the history of the undersigned, who also served in the military (and in the Cold War in the

Foreign Service) and swore the oath to uphold and defend the Constitution repeatedly. (App. 223 ff., App. 252 ff.) In response to the Show of Cause the lower court reduced its Rule 11 sanction to a "reprimand," (App. 264) which the undersigned separately appealed from the appeal of the main case.(App.265) The Court then joined the two appeals.

IV. Statement of Facts

Gregory S. Hollister retired with the rank of Colonel in the United States Air Force and was honorably discharged therefrom after 20 years of service; but he is subject to the Individual Ready Reserve, which means that he is subject for life to the possibility of being recalled at any time to active duty by the Commander-In-Chief of the Armed Forces, the President of the United States [App. 9,10]. The Defendant Soetoro a/k/a Obama is occupying the Office of the President of the United States and Commander-in-Chief of the Armed Forces of the United States by virtue of that, *de facto* if not *de jure*. (App. 8 style and App. 11,12, 26-27) The defendant Biden is occupying the office of Vice-President of the United States. Col. Hollister does not know of any facts disqualifying the defendant Biden from assuming the Office of President and Commander-in-Chief in the regular line of constitutional succession if the defendant Soetoro a/k/a Obama should cease to hold that office because he did not come to occupy it legitimately.

Anyone occupying both offices lawfully is entitled to the obligation alleged by Col. Hollister which he owes as a retired military officer subject to recall to active duty. If the allegations of his complaint are found to be true, the conflict between who will be entitled to enforce the "stake" of his obligation as a retired officer subject to such recall will be resolved but until then the conflict as to whom he owes his obligation remains. [App. 11, 18-23]

V. SUMMARY OF ARGUMENT

The standard of review is *de novo*. The defendant Soetoro a/k/a Obama is an office holder *de facto* but not *de jure*. As such the plaintiff has timely filed his case and the election of the said defendant may be declared invalid and any order that may come from him to the plaintiff declared invalid. The clear wording of the Federal Intepleader Act in its use of the word "obligation" must be heeded and so the plaintiff Hollister is covered under the Act. In any case there is an intangible property right that applies here. That members of the Individual Ready Reserve may be called is not speculative. The court below exhibited palpable bias here, reversible bias and had no justification for its Rule 11 sanctions, attempted and given, except bias. The proposed amended complaint should have been considered and granted, both as a matter of course and in the interests of justice.

A hearing should have been held and the deposit into escrow accepted. The lower court was required to rely upon law not "blogging and twittering" and the like on the Internet. The clear language of the Federal Interpleader Act and Rule 22 of the Federal Rules of Civil Procedure allows claims based upon what is uncertain in the future and thus to some degree speculative. The decision below should be vacated and this case remanded for further proceedings.

VI. ARGUMENT

A. STANDARD OF REVIEW

As stated the court below found that it had subject matter jurisdiction and dismissed the case for failure to state a claim, thus invoking Rule 12(b)(6). The standard of Review for such a dismissal is *de novo*. It has long since been the "accepted rule" that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (footnote omitted) *Conley v. Gibson*, 355 U.S.41, 45-6 (1957). And see *Wagener v. SBC Pension Plan-Non Bargained*, 407 F.3d 395, 401-02 (D.C.Cir.2005).

As is equally well known and accepted at this point the oft-quoted passage above from *Conley v. Gibson* was modified and clarified in the

opinion of the Supreme Court in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007) to emphasize that it is factual allegations that must be taken as true for purposes of a Rule 12(b)(6) dismissal motion, not conclusions of law or conclusory assertions. For example, in the present case the allegations of fact contained in ¶¶ 22-23 of the complaint are detailed fact allegations that must be taken as true. App. 14-15.

In that regard we point again to the fact that the lower court did make a finding of subject matter jurisdiction and dismissed the case under Rule 12(b)(6) for failure to state a claim, as pointed out above. The lower court specifically found: "Plaintiff having invoked both diversity and the federal interpleader statute, I do have jurisdiction." The lower court then went on to find: "Because the plaintiff's only claim invokes the interpleader statute, however, the suit must be dismissed for failure to state a claim." App. 208=212. We point this out because although both plaintiff Col. Hollister and the undersigned did appeal from the rulings and findings of the lower court, the defendants Soetoro a/k/a Obama and Biden did not. They noted no counter-appeal and did not appeal the finding by the court below of subject matter jurisdiction. We point this out because we are entitled as a matter of due process to focus on what has actually been appealed and put before this Court at the present time. We do not maintain that the Court may

not *sua sponte* examine the question of subject matter jurisdiction. Clearly it may. But if the other side insists as it previously did on addressing that which it did not choose to put before the Court or if the Court decides to examine the question we request as part of due process to be given an adequate opportunity to address the issue. As it is we believe that we are entitled to focus on what was appealed and put before the Court.

B. *DE FACTO* AND *DE JURE* THE TIMELINESS OF THE PRESENT COMPLAINT: THE UNCONSTITUTIONAL ELECTION PREVENTS RECOGNITION OF THE AUTHORITY TO COMMAND

Although the plaintiff Hollister raised the issue in his complaint of occupation of an elected office that is *de facto* and not *de jure* beginning with the style and then with substantial factual allegations in the complaint and it was pursued in his filings by the citation, for example, of case law about this issue, the court below chose not to address the issue, perhaps because of its preoccupation with such things as "blogging and twittering" on the Internet and punishing the plaintiff for having among his counsel individuals that the court below deemed *agents provocateurs*. At this time we would like to point the Court by way of looking at that issue as it affected or did not affect the lower court's decision not to apply Interpleader here so as to find that plaintiff Hollister had stated a claim upon which relief might be granted, to the opinion in *Ryder v. United States*, 515 U.S. 177, 115

S.Ct. 2031, 132 L.Ed.2d 136 (1995). In that case the Supreme Court decreed that where a party raises the issue of an elected or appointed official having been elected or appointed in violation of requirements set out in the Constitution, and does so raise the issue of the constitutional violation before he is actually subjected to the decision in question, then, pursuant to the *de facto* officer doctrine, decisions made by the elected or appointed officer whose election or appointment was not in accord with the Constitution must be invalidated, even retroactively. It is when the party seeks the relief that determines whether the *de facto* officer doctrine applies. Thus, Colonel Hollister's applying ahead of the decision to recall him, to have the question of the constitutional validity of the defendant Soetoro a/k/a Obama's election is timely and his use of interpleader is justified. Under the holding in *Ryder,* the constitutionally invalid election of Soetoro a/k/a Obama should be vacated and the appropriate steps under the Constitution for succession to the office by a validly elected or chosen party should be declared to be in order so that, upon recall, Colonel Hollister will be able to fulfill his obligation without any concern that the Commander-in-Chief of the armed forces is giving an order that is illegal.

This is so unless, of course, there is some factor of political fear or favor that enters the picture here. One would think that such a factor would

not be applied because of the impression it would give to the public that courts are not neutral and are not interested in the preservation of the Rule of Law based upon the Constitution. If the *de facto* officer doctrine as set out by the Supreme Court were applied here, then the defendant Soetoro a/k/a Obama would be declared to not be an officer *de jure,* as prayed for in Colonel Hollister's complaint and the defendant Biden would be declared, under the Constitution as violated by the defendant Soetoro a/k/a Obama, to be the President *de jure* as a matter of constitutional succession until any further remedies dictated by the Constitution and in accord with it were undertaken. Why would that not be the case is the question?

C. THE CLEAR LANGUAGE OF THE WORD "OBLIGATION" IN THE STATUTE, WHICH IS IN THE DISJUNCTIVE

We have previously pointed out that the lower court in this case, in its dismissal opinion of March 5, 2009, seemed obsessively preoccupied with a need to characterize Colonel Hollister's "obligation" to report if called to do so as a member of the Individual Ready Reserve as "money or property." App. 219-211. Thus the lower court says: "Plaintiff has not cited a single case that lends even colorable support to the notion that his alleged `duties' can be the `money or property' to which the interpleader statute applies." This obsession on the part of the lower court with the words "money" and

"property" seems to ignore the clear language of the federal interpleader statutes where it uses the word "obligation" in parallel.

We speak of the statute's clear, disjunctive use of "obligation" in the phrase: "...or being under any obligation written or unwritten to amount of $500 or more,..." This phrase is at the end of a disjunctive list of other phrases in 28 U.S.C. § 1335(a). First the subsection speaks of a "...person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more,...." that is true. But then it next speaks of an "obligation" in addition to property, and does so in the disjunctive.

Thus it speaks next of such a person or entity, using the disjunctive "or" as an alternative to money or property that the person or entity might have, instead of having in his or its custody or possession: "a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500...." Then, there is a further use of the disjunctive "or" in such manner that it clearly refers back to the instruments or documents just mentioned to provide for subject matter jurisdiction when such instrument or document, rather than having the value or amount of $500, instead is one "...providing for the delivery or payment or the loan of money or property of such amount or value,...." Obviously, for example, this last would apply to such things as

warehouse receipts or bills of lading such as are used universally in commerce. It is then, at the end of the listing process, with yet another disjunctive "or" that the phrase we first referred to in this paragraph is mentioned. Thus the use by Congress in the Interpleader Act of the clear language phrase "being under any obligation written or unwritten to the amount of $500 or more,..." (emphasis added) is meant to be an alternative to "property" as such as that term is used in the list which the statute employs at the outset.

Although the complaint may have contributed to the confusion by trying, with legal citations that are not pled facts, and legal conclusions about what is "property" of a non-tangible sort it, is evident from the facts that were pled about plaintiff Hollister's rank, his years of service and his being subject to active duty recall and his fact assertion that that obligation is worth more than $500 and that, therefore, he has plainly asserted an "obligation" within the clear language of the statute. In fact it would seem to be worthy of judicial notice that Colonels on active duty, when one considers that "tours" are several years long, are entitled and obliged to receive more than $500 of pay, not to mention benefits and that, thus, the obligation that a Colonel has to serve if so recalled is an obligation worth far

more than $500. In fact it is an "obligation" that is clearly worth more than $75,000.

We argue here for the application of 28 U.S.C. § 1335 itself as a matter of course based on its clear language and the obvious and plain meaning of the term "obligation" without any recourse to straining after fitting the obligation within some reported concept of an unusual type of "property" of a non-tangible nature rather than focusing directly on the word "obligation" itself and its actual use in the statute. In his analysis of standing which in essence was a subject matter jurisdiction analysis, the lower court judge seems to have only dwelt on concepts of "property" as used in parts of the opening section of the statute that do not deal with the "obligation" that is at issue here and which Congress obviously intended to be understood as something different from "property" as the lower court focused solely, if not obsessively upon it. It is quite clear that under these facts as alleged Colonel Hollister cannot simultaneously owe this obligation to both defendants as Commander-in-Chief. He alleges as part of phase 1 of interpleader that the obligation is his and because of what he alleges about the ineligibility to be President of the defendant Soetoro a/k/a Obama he does not owe it to Soetoro a/k/a Obama and then if he should establish that lack of eligibility of the defendant Soetoro a/k/a Obama in phase 1 of the interpleader, then in

phase 2 of interpleader there would clearly be a conflict between the defendant Soetoro a/k/a Obama and the defendant Biden as to how and when the defendant Biden would succeed to the duties and responsibilities of the defendant Soetoro a/k/a and become the President *de jure.*

In speaking of the two phases of interpleader we adopt the well-known language of Professor Zachariah Chafee, Jr., who, for so many years, was the foremost legal scholar writing about interpleader. See, for example, his law review articles: *Broadening the Second Stage of Interpleader* 56 Harv. L. Rev. 541 (Jan.1943) and *Broadening the Second Stage of Federal Interpleader* 56 Harv. L. Rev. 929 (May, 1943). In his exhaustive writings as modern interpleader law developed Professor Chafee traced and emphasized the continually liberalizing and broadening of interpleader as a remedy. See also: *The Federal Interpleader Act of 1936: I* 45 Yale L. J. 963 (April, 1936). We would ask the Court to take this liberal and greatly broadened nature of modern interpleader into account.

The Supreme Court has long since pointed out that in construing Acts of Congress, such as the federal interpleader statute in this instance:

> In construing the words of an Act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to unreasonable results plainly at variance with the evident purpose of the legislation. *Ozawa v. United States*, 260 U.S. 178, 180, 194, 43 S.Ct. 65, 67 L.Ed.

> 199; *Ohio v. Helvering*, 292 U.S. 360, 370, 54 S.Ct. 725, 78 L.Ed. 1307.
>
> *City of Lincoln, Neb. v. Ricketts*, 297 U.S. 373, 376, 56 S.Ct. 507, 509, 80 L.Ed. 724.

In *City of Lincoln* the counsel for the parties in the position of the counsel for the defendants Soetoro a/k/a Obama and Biden here urged a departure from the plain meaning of a word in a statute and were rebuffed in that effort by the Supreme Court. We would urge that this Court demand of counsel for the other side here that they justify any departure from simply holding the word "obligation," which is an ordinary and plain English word, to mean what it ordinarily means and is well understood to mean.

According to the Supreme Court, in fact, in order for the defendants below to prevail on the restricted interpretation that the court below adopted they would have to show that the use of the word "obligation" in its ordinary meaning would lead to "absurd results," and that the use of the word in its ordinary meaning was not "consonant with the purpose of the Act." Here is what the Supreme Court says:

> True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results. *United States v. Katz*, 271 U.S. 354, 362, 46 S.Ct. 513, 516, 70 L. Ed. 986, or would thwart the obvious purpose of the statute, *Haggar v. Helvering*, 308 U.S. 389, 60 S.Ct. 337, 84 L.Ed. 340. But courts are not free to reject that meaning where, as here, no such consequences follow, and, as

> here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure.
>
> *Helvering v. Hammel*, 311 U.S. 504, 510-11, 61 S.Ct. 368, 371, 85 L.Ed. 303 (1941).

So far, there has been no showing of any justification for departing from the ordinary meaning of the word "obligation" as used in the Federal Interpleader Act, 28 U.S.C. § 1335 as it was ignored by the court below and the ignoring of that plain meaning is clear error.

D. THE RECOGNIZED AND WELL DEVELOPED LAW OF THE "INTANGIBLE RIGHT OF HONEST SERVICES" TO WHICH CITIZENS ARE ENTITLED FROM ELECTED OFFICEHOLDERS AS PART OF THE LATTER'S FIDUCIARY RESPONSIBILITIES

But even at that it is not the case that the law takes no recognition of non-tangible property such as obligations and does not consider them as "property." This is best illustrated by the extensive history of the development of the legal concept of the obligation of the duty of honest services which the office holder owes to the ordinary citizen. This concept is now firmly established as the "intangible property right of honest services." On the part of the office holder it is said to be a "fiduciary obligation" that extends back into the common law. An excellent summary of the history of the development of this concept of the "intangible property right of honest services," which arose in the Department of Justice prosecutions of mail and wire fraud under the criminal laws as found in Title

18 of the U.S. Code and then, with the adoption of RICO, began to be used in civil litigation, is found in several cases from the United States Courts of Appeal. Here is one such history, which focuses on the mail fraud statute in the criminal code, 18 U.S.C. § 1341 but applies equally to wire fraud under 18 U.S.C. § 1343 such as is alleged in the complaint in this case:

> At common law, the prohibition of fraud generally was regarded as protecting property rights only. *See McNally v. United States*, 498 U.S. 350, 358 n.8, 107 S.Ct. 2875, 2881 n. 8, 97 L.Ed.2d 292 (1987). As early as the 1940's, however, the federal prosecutors seeking to combat government corruption began using section 1341 to prosecute schemes seeking to combat government corruption began using section 1341 to prosecute schemes to defraud the public of the honest and faithful services of government officials. *See, e.g.*, *Shushan v. United States*, 117 F.2d 110 (5th Cir.), *cert.denied*, 313 U.S. 574, 61 S.Ct. 1085, 85 L.Ed. 1531 (1941). In the 1987 *McNally* case, the Supreme Court rejected this practice by holding that section 1341 was "limited in scope to the protection of property rights" and therefore did not prohibit schemes to defraud the citizens of their intangible right to honest and impartial government. *McNally,* 483 U.S. at 360, 107 S. Ct. at 2882.
>
> Section 1346 was enacted in 1988 to revive the "honest-services" theory of mail fraud. We have recognized that Congress passed this provision to overrule *McNally* and reinstate prior law. *See Waymer*, 55 F.3d at 568 n. 3. Consequently, we consider pre-*McNally* cases as persuasive authority in evaluating the scope of honest-services fraud. Both the former Fifth Circuit [footnote omitted] before *McNally* and this circuit after *McNally* consistently have held that schemes by government officials to deprive the public of their right to honest services, when a mailing is involved, constitute mail fraud. *See, e.g., United States v. Castro*, 89 F.3d 1448 (11th Cir.1996); *Waymer*, 56 F.3d 564; *Steiner v.*

> *United States*, 134 F.3d 931 (5th Cir.), *cert. denied*, 319 U.S. 774, 63 S.Ct. 1439, 87 L.Ed. 1721 (1943); *Shushan*, 117 F.2d 110.
>
> The crux of this theory is that when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest. Elected officials generally owe fiduciary duty to the electorate. *See Shushan*, 117 F.2d at 115 (noting that "[n]o trustee has more sacred duties than a public official"). When a government officer decides how to proceed in an official endeavor—as when a legislator decides how to vote on an issue—his constituents have a right to have their best interests form the basis of that decision. If the official instead secretly makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services. *See United States v. Sawyer*, 86 F.3d 713, 784 (1st Cir.1996)("The cases in which a deprivation of an individual's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain."). *U.S. v Lopez-Lukis*, 102 F.3d 1164, p 1168-69 (11th Cir. 1997)

For a similar history from another circuit see *U.S. v. Urcuioli*, 513 F.3d 290, 293-94 (1st Cir. 2008). Given that the complaint in this cases makes allegations of just such wire fraud it is not the case that the concept of the obligation alleged here is not conceived of as property in the law. We note that the complaint alleges and it is a matter of public record that the defendant Soetoro a/k/a Obama was an elected office holder from the moment when he first announced his run for the presidency and that he knew during that time that he was not constitutionally eligible for that run and was

thus engaged in a conflict of interest as he sought the greater emolument and power of the higher office. He even, as a matter of public record, participated as a United States Senator in proceedings in that chamber concerning the constitutional eligibility of his rival Senator John McCain under Article II, Section 1 Clause 5 of the Constitution without ever disclosing his conflict of interest.

E. ERROR OF THE LOWER COURT CONCERNING THE LACK OF REALITY IN THE POSSIBILITY THAT PLAINTIFF HOLLISTER, AS A MEMBER OF THE INDIVIDUAL READY RESERVE, MIGHT BE RECALLED TO SERVE; IT IS NOT "SPECULATIVE"

In its opinion of March 24, 2009, which is also on appeal here, the court below makes quite light of the obligation of Colonel Hollister as a member of the Individual Ready Reserve. For example, at App. 211, referring to the citation by the undersigned of the case of *Underwriters at Lloyds v. Nichols*, 363 F.2d 357 (8th Cir.1966) the lower court speaks of that opinion as "concluding that interpleader requires real claims, at least the threat of real claims – not theoretical, polemical, speculative, or I'm afraid-it-might-happen-someday claims."

The lower court was sufficiently anxious to further make this point about the possibility that a member of the Individual Ready Reserve is subject to recall is entirely unrealistic and "speculative" that it then cited and quoted a case which undermines its own point about a tangible "res" or

"stake" in order further thus disparage Colonel Hollister's concerns as a member of the individual ready reserve. At App. 208-212 he quoted from *Xerox Corp. v. Nashua Corp.*, 314 F.Supp. 1187 (S.D.N.Y.1970) establishing, *inter alia* that it is no longer necessary that the interpleading party be wholly neutral and that it is no longer required that there be a "stake" or "fund" as such. And referring to that opinion he said that Judge Weinfeld nonetheless dismissed the complaint in that case by finding that (quoting from Judge Weinfeld's opinion) "the postulated situation envisaged by Nashua remains no more than a conjectural view of possible conflicting holdings."

It has been held that a court may take judicial notice of official government websites and the facts put forward on them. If the Court will go to this official Air Force Web site:

http://www.arpc.afrc.af.mil/library/factsheets/factsheet.asp?id=8925

It will find there that members of the Air Force Individual Ready Reserve are subject to the following:

-- recall to active duty in time of war or national emergency.

-- Must be available to report immediately upon notification of mobilization.

-- Are required to participate in one of the below methods of annual screening:

--- Annual Survey -- Airmen will receive a survey form in about six months (on initial assignment) and annually thereafter. Complete and return promptly to:…

According to official websites there are some 110,000 members in the individual ready reserves of the different services and they are an important component of our armed forces. See 10 U.S.C. §§ 10101, 10102, 10110 and 10205. Apparently the official view of the DOD does not accord with that of the judge below here.

To rub salt into the wound the judge below then goes on in his March 24, 2009 opinion to compare Colonel Hollister to those waging war against us, citing Judge Jackson's opinion and overturn in refusing to impose sanctions in *Saltany v. Reagan*, 702 F.Supp. 319, 322 (D.D.C. 1988), a case in which subjects of Muammar Qadafy tried to sue the U.S. for retaliating against Colonel Qadafy when he attacked our people. Is this neutrality and lack of bias, comparing Colonel Hollister to those standing by Colonel Qadafy in order to rule in error that his complaint stated no case? Is it applying applicable law? Does it reflect actuality or a bias so severe that an honorable member of the Air Force and his motives have been equated to those whom our Air Force had to strike as a necessity of war?

F. OF BIAS AND THE ISSUES PRESENTED CONCERNING IT

Having thus touched on Issue presented number 4 we proceed to discuss issues presented 9 and 11 and 12 concerning bias as well. We point to the official Code of Conduct for United States Judges and in particular to

Canon 1, Canon 2 A and to 2 B, particularly where the latter speaks to political relationships to influence judicial conduct or judgment and Canon 3 A (1) and (2) and (3). The lawyer Philip J. Berg is known both as a former Deputy Attorney General of Pennsylvania and a long time Democrat Party county Chairman of Montgomery County, Pennsylvania, a prosperous suburban county outside Philadelphia. In his well known capacity as a politician he was heavily involved in the defeat of the defendant Soetoro a/k/a Obama in the 2008 Democratic Presidential primary in Pennsylvania. He then became well known and discussed in conservative media as the court below duly noted as an early filer of law suits about the constitutional eligibility of the defendant Soetoro a/k/a Obama. He has initiated two other such law suits as a *pro se* plaintiff. He has appeared frequently about these lawsuits on conservative talk radio. The question is, does this participation in two other law suits and a political movement as the court below perceived it about these questions justify the comments that the court below engaged in or due the exhibit at least a perception of bias that it is improper under the Judicial Code of Conduct and/or case law.

It is clear that cases in which Philip J. Berg was himself the plaintiff and which invoked neither interpleader or Bivens do not create either issue or claim preclusion with regard to this case. So the question is did the

defendants improperly continually bring them up in an effort to bias the judge below and did that effort appear to succeed as far as public perception goes? Was it bias, in other words, to evidence a bias against Berg and Joyce, the lawyers that cannot by the public be seen as other than evidencing an improper bias against the plaintiff Hollister? There are clear signs that it did and that it also gave the appearance of a bias against the local attorney, the undersigned that is improper.

The lumping of the undersigned and Colonel Hollister together with the attorneys Berg and Joyce in what the court below clearly saw as a political movement showed disrespect, and certainly an appearance of disrespect for the undersigned and for Colonel Hollister that clearly violates the canons of judicial conduct. The undersigned and Colonel Hollister are entitled to have their participation in this case considered on its own, without their participation in it being colored by the participation of Berg and/or Joyce in other cases with which the undersigned and Colonel Hollister have no involvement. Such matters as the lower court's disparaging of the political movement concerning "eligibility" litigation by saying that it contained at least a "couple of dozen" adherents, besides being demonstrably false, was completely unnecessary and did nothing but indicate bias and a complete disregard for the obligation to respect litigants and lawyers. The

same can be said of giving the link to Philip J. Berg's website and commenting upon it and disparaging the amount of the donations solicited upon it (paltry in comparison to the large amounts paid as recorded at the FEC to the counsel for the defendants and appellees).

More importantly the overall weight of the unnecessary commentary of the court below gave credence to the impression that the judge below had no respect whatsoever for the Constitution which members of the military swear to defend and uphold and an allegation that it had been dealt with in a fraudulent manner. The judge himself has sworn to uphold it and he could have given the invoking of it some respect but did not do so. Mssrs. Berg and Joyce are now gone from the case but it is, nonetheless, important to reverse and eradicate the bias that they seem to have inspired in the court below. We ask this Court at this time, to recall what it said in *Tynan v. U.S.*, 376 F.2d 761, 764-65, 126 U.S.App.D.C. 206, 209-10 (D.C.Cir.1967) where it said, referring to the facts to be considered in considering a question of judicial bias that is improper. In that case this court said concerning the facts that they were:

> …only acts and conduct occurring in courtroom during trial of case or in relation to court's official action of ruling upon issues and questions which were part of the proceeding, and since none of the asserted facts concerning prejudice originated in any extrajudicial source affidavits failed to meet

> statutory requirements and judge properly refused to recuse himself.

Here, by contrast, we are talking the exact opposite. We are talking about comments and observations that are exclusively of origination outside of the four corners of this case and do not in any way stem from observations of behavior by either Colonel Hollister or the undersigned, or for that matter, the attorneys Berg and Joyce, before the court below while it was considering or deciding questions and issues in this case.

G. OF BIAS AND RULE 11

Indeed, the reliance on matters outside the four corners of this case here was so extensive and palpable that it clearly not only prejudiced the plaintiff Colonel Hollister in a completely improper way, it also quite clearly influenced the attack on the undersigned under the guise of Rule 11. See Issue Presented number 5. It is difficult to explain otherwise the attempt by the lower court to levy the sanction of forcing the undersigned to have to pay the entire legal fees and expenses of the defendants from their very high-priced and powerful law firm, an effort designed, clearly, to wipe out financially an aging solo practitioner. Rule 11 in clear language disallows such a *sua sponte* effort by a judge. Moreover, as set out in the undersigned's Supplement to his Show of Cause, (App. 243-252) the effort violated "hornbook" law concerning Rule 11 that where there has been no

hearing and thus no opportunity to observe the behavior and demeanor of an attorney it is a violation of due process to levy such a sanction, and that the undersigned also had not only a right to an evidentiary hearing but also a strong argument for discovery in connection with the charges.

An even stronger indication that the bias exhibited in the court below influenced the Rule 11 sanction effort is that while the entire focus of the enormous body of law under Rule 11 is on "pre-filng inquiry" or a lack thereof, there was absolutely no effort by the court below to ascertain what the pre-filing inquiry in this case did or did not consist of. Instead of determining what the pre-filing inquiry was the court below used words like "frivolous" as a sort of unsupported name-calling. It did not really even investigate the basis in fact for the complaint, for example, even though, as is required with fraud allegations, a great many factual details are alleged. And since it categorically refused to get into the issue of what the Article II, Section 1, Clause 5 eligibility phrase "Natural Born Citizen" means (App. xxxxx) neither did it even bother to look into whether or not there was reasonably believed to be a warrant in law or in a good faith extension of existing law for the complaint. Thus, as to the three accepted prongs of Rule 11 law, it actually did not look into any of them. As we have pointed out before the decision in *Minor v. Happersett,* 88 (Wall.) U.S. 162 (1874) alone

provides for justification for an attorney to seek a good faith extension of existing law by filed the present complaint. In that case the Supreme Court said that where one parent, particularly the father in light of the status of things at the founding and the actual holding in that case, was not a U.S. citizen then the status of an individual as a Natural Born Citizen in the phrase of Article II, Section 1, Clause 5 of the Constitution was in "doubt." The defendant Soetoro a/k/a Obama throughout his political career and certainly from the beginning to the end of his quest for the presidency and into the present day publicly has asserted in every kind of media that his father was a Kenyan subject. Thus it cannot be "frivolous" to seek to clarify what the Supreme Court has said is doubt. Further, it is clear that although the court below withdrew the most egregious part of its error, the attempt to financially destroy the undersigned in order to benefit one of the key advisors to and participants in the constitutionally fraudulent campaign of the defendant Soetoro a/k/a Obama the bias remained in the levying of even a reprimand under Rule 11 without the required due process and without any justification in actual Rule 11 law.

H. THE FAILURE TO EVEN CONSIDER THE AMENDED COMPLAINT

The lower court's opinion of March 5, 2009, shows clearly that it took no notice of the amended complaint proposed by the plaintiff Hollister. This

relates to Issue Presented 6. At that point no responsive pleading had been filed, only dismissal motions. Yet the court below did not consider the proposed amended complaint as one filed as a matter of right under Rule 15 (a)(1). Nor did it consider it under Rule 15 (a) (2) as a proposed amended complaint with regard to which leave to file should be "freely" given as "justice" so requires. In fact the court below, from what can be seen in the record, ignored the requirements of Rule 15 and the rule itself completely. There is no evidence that it gave any consideration to the proposed amended complaint at all. It does not even require anything except the language of the Rule itself to see that this is reversible error. It is reversible error because the proposed amended complaint sought to add a *Bivens* count, which the plaintiff was entitled to have considered. Issue Presented 7. This was not a *Bivens* claim by the plaintiff Hollister that was "incident to his military service." So it is not a claim barred by cases such as *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) . The court below was clearly required to give it consideration and did not even do so, much less the required consideration required to determine if the plaintiff Hollister was entitled to the amendment as a "matter of course" or to see if permission to amend should be freely given in the interests of justice.. It thereby clearly erred.

I. UNDER THE CIRCUMSTANCES A HEARING SHOULD HAVE BEEN HELD

Looking to Issue Presented 7 we point out that the combination of the bias already discussed and the leaping to that bias by relying upon such things as "blogging and twittering" on the Internet by "America's vigilant citizenry" rather than the law indicates that in this case in particular a hearing should have been held, not only because one was required for the undersigned under Rule 11 "hornbook" law but because it might have illustrated that Colonel Hollister was not some dupe of *agents provocateurs* as indicated by the court below it its bias. In fact, while the attorney Berg is known to be associated with Secretary of State and former Senator and first lady Hillary Clinton it is a matter of record that while Bill Clinton was serving as President Colonel Hollister protested actions by then-President Clinton that he thought were overreaching under the Constitution and took a risk in doing so. So he takes his oath very seriously indeed and that would have come out in a hearing. He was not a "foot soldier" in some campaign by Clintonite *agents* at all and a hearing would have clearly so revealed.

The court below indicated in its March 5, 2009 opinion (App. 208-12) that it had already twice decided in the case before even considering the dismissal motion of the defendants that the case was "frivolous." So this is that unusual situation where in addition to bias based on matters outside the

corners of the case there is bias based on the record in the case itself. The court below had decided the motion to dismiss before it undertook to consider and grant it in proper order. A hearing clearly could have made a difference.

J. THE REFUSAL TO ACCEPT THE DEPOSIT INTO ESCROW

For the same reasons set out above in discussing the use of the word "obligation" in the Federal Interpleader Act and because of the way in which the fulfillment by Colonel Hollister of that obligation would take place over time the plaintiff maintains that the amount he offered into the court escrow was reasonable and supported in law and that it should have been accepted. He maintains, therefore, that not to accept it was error. This assertion is in reference to Issue Presented 8.

K. OF BLOGGING AND TWITTERING

It is astonishing and even startling that a United States District Court judge would ignore the enormous body of law on *res judicata* in its branches of issue and claim preclusion as they are called now and indulge in excessive reliance upon such "sources" while bemoaning the fact that a veteran of the armed forces would actually think that he might go to a court to have serious doubts of constitutional eligibility of a *de facto* presidential office holder and even the deceptions committed in arriving at that status addressed. Looking

at Issues Presented 10 and 12 it can be seen that any court that is concerned with the Rule of Law based upon the Constitution only has to state these questions to see that they speak of error.

We have already dealt above with political perceptions when discussing bias and so have dealt with Issue Presented 13. We close with a further argument addressed to the lower court's expressions about the "speculative" nature of Colonel Hollister's concerns about being called up.

L. FURTHER OF LACK OF IMMEDIACY AND "SPECULATION"

Looking further at the clear language of the Federal Interpleader Act, 28 U.S.C. § 1335, we see that it speaks of it speaks of "adverse claimants" who "are claiming," or who "may claim." (emphasis added). Thus the clear language of the statute indicates that the claims concerned may not be certain. Thus an element of being in the future and of being "speculative" in the strictest sense is built into the statute. The same is true of the language of Rule 22. So one element of pure Article III opining which is relevant to the lower courts' discussion is removed by the clear language of the statute and the rule.

VI. CONCLUSION: RELIEF SOUGHT

The decision of the court below was in error and it should be reversed, vacated and this case should be remanded with instructions.

Respectfully submitted,

/s/

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CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a) and D.C. Cir. R. 32(a), I hereby certify that this brief contains 9785 words, excluding the parts exempted by the rules, and has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point typeface.

/s/
John D. Hemenway

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically upon counsel of record this 20th day of November, 2009, and will serve by hand seven (7) copies upon the Clerk of the Court, and by United States mail, postage prepaid one (1) copy upon counsel for the defendants pursuant to the rules.

/s/
John D. Hemenway

ADDENDUM OF STATUTES AND RULES

U.S. Code, Title 28 § 1335

U.S. Code, Title 28 §1653

F.R.C.P. Rule 11

F.R.C.P. Rule 22

F.R.C.P. Rule12(b)(1) through (7)

F.R.C.P. Rule 15

U.S. CODE, Title 10 - ARMED FORCES Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION CHAPTER 1007 - ADMINISTRATION OF RESERVE COMPONENTS
§ 10205. Members of Ready Reserve: requirement of notification of change of status

U. S. Code, Title 10 - ARMED FORCES Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION CHAPTER 1003 - RESERVE COMPONENTS GENERALLY
§ 10110. Air Force Reserve: composition

U.S. Code, Title 10 - ARMED FORCES Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION CHAPTER 1003 - RESERVE COMPONENTS GENERALLY
§ 10102. Purpose of reserve components

U.S. Code, Title 10 - ARMED FORCES Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION CHAPTER 1003 - RESERVE COMPONENTS GENERALLY
§ 10101. Reserve components named

NB: This unofficial compilation of the U.S. Code is current as of Jan. 8, 2008 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 85 - DISTRICT COURTS; JURISDICTION

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

(June 25, 1948, ch. 646, 62 Stat. 931; Pub. L. 109–2, § 4(b)(1), Feb. 18, 2005, 119 Stat. 12.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(26) (Mar. 3, 1911, ch. 231, § 24, par. 26, as added Jan. 20, 1936, ch. 13, § 1, 49 Stat. 1096).

Words "civil action" were substituted for "suits in equity"; word "plaintiff" was substituted for "complainant"; and word "judgment" was substituted for "decree," in order to make the language of this section conform with the Federal Rules of Civil Procedure.

The words "duly verified" following "in the nature of interpleader," near the beginning of the section, were omitted. Under Rule 11 of the Federal Rules of Civil Procedure pleadings are no longer required to be verified or accompanied by affidavit unless specially required by statute. Although verification was specially required by section 41 (26) of title 28, U.S.C., 1940 ed., the need therefor is not apparent.

Provisions of section 41 (26)(b) of title 28, U.S.C., 1940 ed., relating to venue are the basis of section 1397 of this title. (See, also, reviser's note under said section.)

Subsections (c) and (d) of said section 41 (26) relating to issuance of injunctions constitute section 2361 of this title. (See reviser's note under said section.)

Subsection (e) of such section 41 (26), relating to defense in nature of interpleader and joinder of additional parties, was omitted as unnecessary, such matters being governed by the Federal Rules of Civil Procedure.

Changes were made in phraseology.

Amendments

2005—Subsec. (a)(1). Pub. L. 109–2 inserted "subsection (a) or (d) of" before "section 1332".

Effective Date of 2005 Amendment

Amendment by Pub. L. 109–2 applicable to any civil action commenced on or after Feb. 18, 2005, see section 9 of Pub. L. 109–2, set out as a note under section 1332 of this title.

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART V - PROCEDURE
CHAPTER 111 - GENERAL PROVISIONS

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

(June 25, 1948, ch. 646, 62 Stat. 944.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 399 (Mar. 3, 1911, ch. 231, § 274c, as added Mar. 3, 1915, ch. 90, 38 Stat. 956).

Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

Rule 22. Interpleader

(a) Grounds.

(1) By a Plaintiff.

Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) By a Defendant.

A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes.

This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

TITLE 10 - ARMED FORCES
Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION
CHAPTER 1003 - RESERVE COMPONENTS GENERALLY

§ 10101. Reserve components named

The reserve components of the armed forces are:

(1) The Army National Guard of the United States.
(2) The Army Reserve.
(3) The Navy Reserve.
(4) The Marine Corps Reserve.
(5) The Air National Guard of the United States.
(6) The Air Force Reserve.
(7) The Coast Guard Reserve.

(Added Pub. L. 103–337, div. A, title XVI, § 1661(a)(1), Oct. 5, 1994, 108 Stat. 2970; amended Pub. L. 109–163, div. A, title V, § 515(b)(1)(Z), Jan. 6, 2006, 119 Stat. 3233.)

Prior Provisions

Provisions similar to those in this section were contained in section 261 (a) of this title, prior to repeal by Pub. L. 103–337, § 1661(a)(2)(A).

Amendments

2006—Par. (3). Pub. L. 109–163 substituted "Navy Reserve" for "Naval Reserve".

Change of Name

Pub. L. 109–163, div. A, title V, § 515(a)(1), Jan. 6, 2006, 119 Stat. 3233, provided that: "The reserve component of the Armed Forces known as the Naval Reserve is redesignated as the Navy Reserve."

Pub. L. 109–163, div. A, title V, § 515(h), Jan. 6, 2006, 119 Stat. 3237, provided that: "Any reference in any law, regulation, document, record, or other paper of the United States to the Naval Reserve, other than a reference to the Naval Reserve regarding the United States Naval Reserve Retired List, shall be considered to be a reference to the Navy Reserve."

Pub. L. 108–375, div. A, title V, § 517, Oct. 28, 2004, 118 Stat. 1884, which authorized the Secretary of the Navy, with the President's approval, to redesignate the Naval Reserve as the "Navy Reserve", was repealed by Pub. L. 109–163, div. A, title V, § 515(a)(2), Jan. 6, 2006, 119 Stat. 3233.

Effective Date

Chapter effective Dec. 1, 1994, except as otherwise provided, see section 1691 of Pub. L. 103–337, set out as a note under section 10001 of this title.

Transfer of Functions

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468 (b), 551 (d), 552 (d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Yellow Ribbon Reintegration Program

Pub. L. 110–181, div. A, title V, § 582, Jan. 28, 2008, 122 Stat. 122, provided that:

"(a) Establishment of Program.—The Secretary of Defense shall establish a national combat veteran reintegration program to provide National Guard and Reserve members and their families with sufficient information, services,

referral, and proactive outreach opportunities throughout the entire deployment cycle. This program shall be known as the Yellow Ribbon Reintegration Program.

"(b) Purpose of Program; Deployment Cycle.—The Yellow Ribbon Reintegration Program shall consist of informational events and activities for members of the reserve components of the Armed Forces, their families, and community members to facilitate access to services supporting their health and well-being through the 4 phases of the deployment cycle:

"(1) Pre-Deployment.

"(2) Deployment.

"(3) Demobilization.

"(4) Post-Deployment-Reconstitution.

"(c) Executive Agent.—The Secretary shall designate the Under Secretary of Defense for Personnel and Readiness as the Department of Defense executive agent for the Yellow Ribbon Reintegration Program.

"(d) Office for Reintegration Programs.—

"(1) Establishment.—The Under Secretary of Defense for Personnel and Readiness shall establish the Office for Reintegration Programs within the Office of the Secretary of Defense. The office shall administer all reintegration programs in coordination with State National Guard organizations. The office shall be responsible for coordination with existing National Guard and Reserve family and support programs. The Directors of the Army National Guard and Air National Guard and the Chiefs of the Army Reserve, Marine Corps Reserve, Navy Reserve, and Air Force Reserve may appoint liaison officers to coordinate with the permanent office staff. The office may also enter into partnerships with other public entities, including the Department of Health and Human Services, Substance Abuse and the Mental Health Services Administration, for access to necessary substance abuse and mental health treatment services from local State-licensed service providers.

"(2) Center for excellence in reintegration.—The Office for Reintegration Programs shall establish a Center for Excellence in Reintegration within the office. The Center shall collect and analyze 'lessons learned' and suggestions from State National Guard and Reserve organizations with existing or developing reintegration programs. The Center shall also assist in developing training aids and briefing materials and training representatives from State National Guard and Reserve organizations.

"(e) Advisory Board.—

"(1) Appointment.—The Secretary of Defense shall appoint an advisory board to analyze the Yellow Ribbon Reintegration Program and report on areas of success and areas for necessary improvements. The advisory board shall include the Director of the Army National Guard, the Director of the Air National Guard, Chiefs of the Army Reserve, Marine Corps Reserve, Navy Reserve, and Air Force Reserve, the Assistant Secretary of Defense for Reserve Affairs, an Adjutant General on a rotational basis as determined by the Chief of the National Guard Bureau, and any other Department of Defense, Federal Government agency, or outside organization as determined by the Secretary of Defense. The members of the advisory board may designate representatives in their stead.

"(2) Schedule.—The advisory board shall meet on a schedule determined by the Secretary of Defense.

"(3) Initial reporting requirement.—The advisory board shall issue internal reports as necessary and shall submit an initial report to the Committees on Armed Services of the Senate and House of Representatives not later than 180 days after the end of the 1-year period beginning on the date of the establishment of the Office for Reintegration Programs. The report shall contain—

"(A) an evaluation of the implementation of the Yellow Ribbon Reintegration Program by State National Guard and Reserve organizations;

"(B) an assessment of any unmet resource requirements; and

"(C) recommendations regarding closer coordination between the Office of Reintegration Programs and State National Guard and Reserve organizations.

"(4) Annual reports.—The advisory board shall submit annual reports to the Committees on Armed Services of the Senate and the House of Representatives following the initial report by the first week in March of subsequent years following the initial report.

"(f) State Deployment Cycle Support Teams.—The Office for Reintegration Programs may employ personnel to administer the Yellow Ribbon Reintegration Program at the State level. The primary function of team members shall be—

"(1) to implement the reintegration curriculum through the deployment cycle described in subsection (g);

"(2) to obtain necessary service providers; and

"(3) to educate service providers regarding the unique military nature of the reintegration program.

"(g) Operation of Program Through Deployment Cycle.—

"(1) In general.—The Office for Reintegration Programs shall analyze the demographics, placement of State Family Assistance Centers and their resources before a mobilization alert is issued to affected State National Guard and Reserve organizations. The Office of Reintegration Programs shall consult with affected State National Guard and Reserve organizations following the issuance of a mobilization alert and implement the reintegration events in accordance with the Reintegration Program phase model.

"(2) Pre-deployment phase.—The Pre-Deployment Phase shall constitute the time from first notification of mobilization until deployment of the mobilized National Guard or Reserve unit. Events and activities shall focus on providing education and ensuring the readiness of members of the unit, their families, and affected communities for the rigors of a combat deployment.

"(3) Deployment phase.—The Deployment Phase shall constitute the period from deployment of the mobilized National Guard or Reserve unit until the unit arrives at a demobilization station inside the continental United States. Events and services provided shall focus on the challenges and stress associated with separation and having a member in a combat zone. Information sessions shall utilize State National Guard and Reserve resources in coordination with the Employer Support of Guard and Reserve Office, Transition Assistance Advisors, and the State Family Programs Director.

"(4) Demobilization phase.—

"(A) In general.—The Demobilization Phase shall constitute the period from arrival of the National Guard or Reserve unit at the demobilization station until its departure for home station.

"(B) Initial reintegration activity.—The purpose of this reintegration program is to educate members about the resources that are available to them and to connect members to service providers who can assist them in overcoming the challenges of reintegration.

"(5) Post-deployment-reconstitution phase.—

"(A) In general.—The Post-Deployment-Reconstitution Phase shall constitute the period from arrival at home station until 180 days following demobilization. Activities and services provided shall focus on reconnecting members with their families and communities and providing resources and information necessary for successful reintegration. Reintegration events shall begin with elements of the Initial Reintegration Activity program that were not completed during the Demobilization Phase.

"(B) 30-day, 60-day, and 90-day reintegration activities.—The State National Guard and Reserve organizations shall hold reintegration activities at the 30-day, 60-day, and 90-day interval following demobilization. These activities shall focus on reconnecting members and their families with the service providers from the Initial Reintegration Activity to ensure that members and their families understand what benefits they are entitled to and what resources are available to help them overcome the challenges of reintegration. The Reintegration Activities shall also provide a forum for members and their families to address negative behaviors related to combat stress and transition.

"(C) Member pay.—Members shall receive appropriate pay for days spent attending the Reintegration Activities at the 30-day, 60-day, and 90-day intervals.

"(h) Outreach Services.—As part of the Yellow Ribbon Reintegration Program, the Office for Reintegration Programs may develop programs of outreach to members of the Armed Forces and their family members to educate such members and their family members about the assistance and services available to them under the Yellow Ribbon Reintegration Program. Such assistance and services may include the following:

"(1) Marriage counseling.

"(2) Services for children.

"(3) Suicide prevention.

"(4) Substance abuse awareness and treatment.

"(5) Mental health awareness and treatment.

"(6) Financial counseling.

"(7) Anger management counseling.

"(8) Domestic violence awareness and prevention.

"(9) Employment assistance.

"(10) Preparing and updating family care plans.

"(11) Development of strategies for living with a member of the Armed Forces with post-traumatic stress disorder or traumatic brain injury.

"(12) Other services that may be appropriate to address the unique needs of members of the Armed Forces and their families who live in rural or remote areas with respect to family readiness and servicemember reintegration.

"(13) Assisting members of the Armed Forces and their families find and receive assistance with military family readiness and servicemember reintegration, including referral services.

"(14) Development of strategies and programs that recognize the need for long-term follow-up services for reintegrating members of the Armed Forces and their families for extended periods following deployments, including between deployments.

"(15) Assisting members of the Armed Forces and their families in receiving services and assistance from the Department of Veterans Affairs, including referral services."

Pilot Program on Enhanced Quality of Life for Members of the Army Reserve and Their Families

Pub. L. 109–163, div. A, title V, § 520, Jan. 6, 2006, 119 Stat. 3238, provided that:

"(a) Pilot Program Required.—

"(1) In general.—The Secretary of the Army shall carry out a pilot program to assess the feasibility and advisability of using a coalition of military and civilian community personnel in order to enhance the quality of life for members of the Army Reserve and their families.

"(2) Locations.—The Secretary shall carry out the pilot program in areas of the United States in which members of the Army Reserve and their families are concentrated. The Secretary shall select one area in two States for purposes of the pilot program.

"(b) Participating Personnel.—A coalition of personnel under the pilot program shall include—

"(1) military personnel; and

"(2) appropriate members of the civilian community, such as clinicians and teachers, who volunteer for participation in the coalition.

"(c) Report.—Not later than April 1, 2007, the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the pilot program carried out under this section. The report shall include—

"(1) a description of the pilot program;

"(2) an assessment of the benefits of using a coalition of military and civilian community personnel in order to enhance the quality of life for members of the Army Reserve and their families; and

"(3) such recommendations for legislative or administrative action as the Secretary considers appropriate in light of the pilot program."

Annual Review

Pub. L. 108–375, div. A, title V, § 513(h), Oct. 28, 2004, 118 Stat. 1882, provided that:

"(1) The Secretary of Defense shall annually review the reserve components of the Armed Forces with regard to—

"(A) the roles and missions of the reserve components; and

"(B) the compensation and other benefits, including health care benefits, that are provided for members of the reserve components under the laws of the United States.

"(2) The Secretary shall submit a report of the annual review, together with any comments and recommendations that the Secretary considers appropriate, to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

"(3) The first review under paragraph (1) shall take place during fiscal year 2006."

Pay of Administration, Training, and Supply Maintenance Technicians for Army Reserve Contingent Upon Reserve Status

Pub. L. 104–61, title VIII, § 8016, Dec. 1, 1995, 109 Stat. 654, provided that none of the funds appropriated for Department of Defense during and after fiscal year 1996 were to be obligated for pay of any individual who was initially employed after Dec. 1, 1995, as technician in administration and training of Army Reserve and maintenance and repair of supplies issued to Army Reserve unless such individual was also military member of Army Reserve troop program unit that he or she was employed to support, prior to repeal by Pub. L. 105–85, div. A, title V, § 522(e), Nov. 18, 1997, 111 Stat. 1735.

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 103–335, title VIII, § 8015, Sept. 30, 1994, 108 Stat. 2620.

Pub. L. 103–139, title VIII, § 8016, Nov. 11, 1993, 107 Stat. 1440.

Pub. L. 102–396, title IX, § 9019, Oct. 6, 1992, 106 Stat. 1904.

Pub. L. 102–172, title VIII, § 8018, Nov. 26, 1991, 105 Stat. 1175.

Pub. L. 101–511, title VIII, § 8018, Nov. 5, 1990, 104 Stat. 1878.

Pub. L. 101–165, title IX, § 9027, Nov. 21, 1989, 103 Stat. 1135.

Pub. L. 100–463, title VIII, § 8045, Oct. 1, 1988, 102 Stat. 2270–25.

Pub. L. 100–202, § 101(b) [title VIII, § 8055], Dec. 22, 1987, 101 Stat. 1329–43, 1329–72.

Pub. L. 99–500, § 101(c) [title IX, § 9054], Oct. 18, 1986, 100 Stat. 1783–82, 1783–111, and Pub. L. 99–591, § 101(c) [title IX, § 9054], Oct. 30, 1986, 100 Stat. 3341–82, 3341–111.

Pub. L. 99–190, § 101(b) [title VIII, § 8059], Dec. 19, 1985, 99 Stat. 1185, 1212.

Pub. L. 98–473, title I, § 101(h) [title VIII, § 8076], Oct. 12, 1984, 98 Stat. 1904, 1938.

Pub. L. 98–212, title VII, § 783, Dec. 8, 1983, 97 Stat. 1453.

Retention in Active Status of National Guard or Reserve Technicians Until Age Sixty

Pub. L. 104–61, title VIII, § 8017, Dec. 1, 1995, 109 Stat. 655, provided that: "Notwithstanding any other provision of law, during the current fiscal year and hereafter, the Secretaries of the Army and Air Force may authorize the retention in an active status until age sixty of any person who would otherwise be removed from an active status and who is employed as a National Guard or Reserve technician in a position in which active status in a reserve component of the Army or Air Force is required as a condition of that employment."

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 103–335, title VIII, § 8016, Sept. 30, 1994, 108 Stat. 2620.

Pub. L. 103–139, title VIII, § 8018, Nov. 11, 1993, 107 Stat. 1441.

Pub. L. 102–396, title IX, § 9022, Oct. 6, 1992, 106 Stat. 1905.

Pub. L. 102–172, title VIII, § 8022, Nov. 26, 1991, 105 Stat. 1176.

Pub. L. 101–511, title VIII, § 8022, Nov. 5, 1990, 104 Stat. 1879.

Pub. L. 101–165, title IX, § 9032, Nov. 21, 1989, 103 Stat. 1136.

Pub. L. 100–463, title VIII, § 8052, Oct. 1, 1988, 102 Stat. 2270–26.

Pub. L. 100–202, § 101(b) [title VIII, § 8064], Dec. 22, 1987, 101 Stat. 1329–43, 1329–73.

Pub. L. 99–500, § 101(c) [title IX, § 9063], Oct. 18, 1986, 100 Stat. 1783–82, 1783–112, and Pub. L. 99–591, § 101(c) [title IX, § 9063], Oct. 30, 1986, 100 Stat. 3341–82, 3341–112.

Pub. L. 99–190, § 101(b) [title VIII, § 8073], Dec. 19, 1985, 99 Stat. 1185, 1214.

Pub. L. 98–473, title I, § 101(h) [title VIII, § 8106], Oct. 12, 1984, 98 Stat. 1904, 1943.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

****

(b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature.

Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court.

By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General.

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions.

A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative.

On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction.

A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions.

The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order.

An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery.

This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course.

A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) Other Amendments.

In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond.

Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial.

If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent.

When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back.

An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States.

When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings.

On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

TITLE 10 - ARMED FORCES
Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION
CHAPTER 1007 - ADMINISTRATION OF RESERVE COMPONENTS

§ 10205. Members of Ready Reserve: requirement of notification of change of status

(a) Each member of the Ready Reserve shall notify the Secretary concerned of any change in the member's address, marital status, number of dependents, or civilian employment and of any change in the member's physical condition that would prevent the member from meeting the physical or mental standards prescribed for the member's armed force.

(b) This section shall be administered under regulations prescribed by the Secretary of Defense and by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy.

(Added Pub. L. 103–337, div. A, title XVI, § 1661(a)(1), Oct. 5, 1994, 108 Stat. 2977; amended Pub. L. 107–296, title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314.)

Prior Provisions

Provisions similar to those in this section were contained in section 652 of this title, prior to repeal by Pub. L. 103–337, § 1661(a)(3)(A).

Amendments

2002—Subsec. (b). Pub. L. 107–296 substituted "of Homeland Security" for "of Transportation".

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107–296, set out as a note under section 101 of this title.

TITLE 10 - ARMED FORCES
Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION
CHAPTER 1003 - RESERVE COMPONENTS GENERALLY

§ 10110. Air Force Reserve: composition

The Air Force Reserve is a reserve component of the Air Force to provide a reserve for active duty. It consists of the members of the officers' section of the Air Force Reserve and of the enlisted section of the Air Force Reserve. It includes all Reserves of the Air Force who are not members of the Air National Guard of the United States.

(Added Pub. L. 103–337, div. A, title XVI, § 1661(a)(1), Oct. 5, 1994, 108 Stat. 2971.)

Prior Provisions

Provisions similar to those in this section were contained in section 8076 of this title, prior to repeal by Pub. L. 103–337, § 1661(a)(3)(A).

TITLE 10 - ARMED FORCES
Subtitle E - Reserve Components
PART I - ORGANIZATION AND ADMINISTRATION
CHAPTER 1003 - RESERVE COMPONENTS GENERALLY

§ 10102. Purpose of reserve components

The purpose of each reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components.

(Added Pub. L. 103–337, div. A, title XVI, § 1661(a)(1), Oct. 5, 1994, 108 Stat. 2970; amended Pub. L. 108–375, div. A, title V, § 511, Oct. 28, 2004, 118 Stat. 1877.)

Prior Provisions

Provisions similar to those in this section were contained in section 262 of this title, prior to repeal by Pub. L. 103–337, § 1661(a)(2)(A).

Amendments

2004—Pub. L. 108–375 struck out ", during and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization," after "whenever".

Barack Obama presidential eligibility litigation

From Wikipedia, the free encyclopedia

Numerous lawsuits and ballot challenges, based on conspiracy theories related to Barack Obama's eligibility for the United States presidency, have been filed since 2008. These actions have sought to have Obama disqualified from running for, or being confirmed for, the Presidency of the United States, to declare his actions in office to be null and void, or to compel him to release additional documentation related to his U.S. citizenship.[1]

Contents

Challenges

By early 2012, dozens of lawsuits had been filed challenging Obama's eligibility in states including North Carolina,[2] Ohio,[3] Pennsylvania,[4] Hawaii,[5] Connecticut,[6] New Jersey, Texas and Washington.[5][7] No suit or challenge has resulted in the grant of any relief to the plaintiffs by any court or other body.

Obstacles

A major obstacle to most citizen suits has been lack of standing. In the initial wave of lawsuits challenging the validity of the 2008 presidential election, the only plaintiff who was a presidential candidate or presidential elector was Alan Keyes. The importance of the doctrine of standing was explained by Judge R.

Barclay Surrick of the United States District Court for the Eastern District of Pennsylvania in dismissing one suit. He noted that one of the principal aims of the doctrine is to prevent courts from deciding questions "where the harm is too vague." This was especially true for a presidential election, where a disgruntled voter who suffered no individual harm "would have us derail the democratic process by invalidating a candidate for whom millions of people voted and who underwent excessive vetting during what was one of the most hotly contested presidential primary in living memory."[8]

Expenses

Joseph Farah said via his *WorldNetDaily* (*WND*) publication that Obama has decided "to spend sums estimated in the hundreds of thousands of dollars to avoid releasing a state birth certificate that would put to rest all of the questions."[9] *WND* has since upped the claimed expenditure to $1.7 million, on the basis of the Obama presidential campaign paying out that much since the election to the law firm of Perkins Coie. However, as *Mother Jones* magazine has said, the campaign has had to employ lawyers to wind down its post-election operations and meet campaign finance law requirements.[10] At least one attorney representing Obama in the litigation has stated that he is working without pay.[11] Other attorneys interviewed by *Mother Jones* have stated that these lawsuits have been so weak that they have been easily resolved with "extremely minimal" monetary costs.[10]

Long form

On April 27, 2011, Obama released his original Hawaii long-form birth certificate.[12] Donald Trump took credit for Obama's birth certificate release, but at the same time questioned its authenticity.[13]

Civil suits

Federal

Berg v. Obama

On August 21, 2008, Pennsylvania attorney Philip J. Berg, a Democrat[14] and former deputy state attorney general, filed a complaint alleging that Obama was born in Kenya, not Hawaii, and was therefore a citizen of Kenya or possibly Indonesia, where he lived as a child.[15][16][17] He alleged that the "Certification of Live Birth" on Obama's website is a forgery.[18] U.S. District Judge R. Barclay Surrick dismissed the complaint in October 2008, finding that Berg lacked standing to bring the case and that his attempts to gain standing to pursue his claim were "frivolous and not worthy of discussion."[14][19]

Bypassing the United States Court of Appeals for the Third Circuit, Berg filed a petition for a writ of certiorari before judgment in the United States Supreme Court. On December 10, 2008, the Supreme Court denied Berg's request for an injunction against the seating of the Electoral College, scheduled for December 15.[20] On December 15, 2008, the petitioner refiled the application for injunction.[21] Two days later, Berg's appeal was denied without comment by Supreme Court Justice Anthony Kennedy.[17] Berg's previously denied request for an injunction was refiled with Justice Antonin Scalia on December 18, 2008.[21] On January 12, the Supreme Court denied the petition for certiorari. The application for stay addressed to

Justice Scalia and referred to the Court was also summarily denied on January 21, 2009.[21]

On November 12, 2009, the United States Court of Appeals for the Third Circuit affirmed the district court's ruling that Berg lacked standing.[22]

Essek v. Obama

On November 25, 2008, Daniel John Essek of Whitley County, Kentucky, filed a *pro se* federal lawsuit in the Kentucky Eastern District Court. The suit was originally filed as a Freedom of Information Act case, but was amended to a judicial challenge to Obama's qualifications for the Office of President of the United States. Essek sought to prevent the inauguration of Barack Obama on the grounds that Obama was not a natural born citizen based on allegations that Obama was born in Kenya.[23] District Judge Gregory F. Van Tatenhove dismissed the suit because of a lack of subject matter jurisdiction, stating that Mr. Essek's grievance was the generalized grievance of a voter, not a specific injury that would have granted him standing to sue.[24]

Kerchner v. Obama

On January 20, 2009, Attorney Mario Apuzzo filed a lawsuit in federal court, on behalf of Charles Kerchner and other plaintiffs, suing President-Elect Barack Obama, the United States Congress, Dick Cheney, and Nancy Pelosi alleging Obama was ineligible to be president, and that Congress failed to verify Obama's eligibility.[25] A federal district court in New Jersey dismissed the suit, ruling the plaintiffs lacked standing. On July 3, 2010, the United States Court of Appeals for the Third Circuit, citing *Berg v. Obama,* affirmed the dismissal, and ordered Apuzzo to show cause why he should not be sanctioned for initiating a frivolous appeal.[26] Apuzzo's subsequent request for a hearing was denied, but the order to show cause was discharged.[27][28] On November 29, 2010, the U.S. Supreme Court declined, without comment, to hear the case.[29]

Barnett v. Obama

On January 20, 2009, Orly Taitz filed a lawsuit in federal court, *Alan Keyes et al v. Barack H. Obama et al* against Obama, with Wiley Drake as one of the named parties for the plaintiff.[30] On July 13, 2009, the presiding judge dismissed the case without prejudice on technical grounds,[31] and on July 14, 2009, Taitz refiled a "First Amended Complaint" *Captain Pamela Barnett v. Barack Hussein Obama*[32] on behalf of Alan Keyes, Wiley Drake, Cynthia Davis, Gail Lightfoot, several other local politicians, and various armed service members. Taitz sought a declaratory judgment that Obama is ineligible for office and an injunction to void his actions and appointments as President.[33]

Two of the plaintiffs, Markham Robinson and Drake, subsequently attempted to dismiss their attorney, Orly Taitz, who refused to sign their substitution-of-attorney documents and instead filed to dismiss the two of them as plaintiffs in the case. On September 8, 2009, Judge David O. Carter denied the dismissal of Drake and Robinson as plaintiffs, and granted their motion to substitute Gary Kreep of the United States Justice Foundation as counsel for them, refused to dismiss Magistrate Judge Arthur Nakazato from the case, and set a tentative trial date for January 26, 2010.[34]

At a hearing on October 5, 2009, Carter considered the defendants' Motion to Dismiss and declined to rule

from the bench, saying that he would take the matter under advisement.[35] On October 7, 2009, he released a Minute Order finalizing the previously tentative dates for summary judgment motions and trial,[36] and on October 29, 2009, he dismissed the case.[37] On December 22, 2011, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal, ruling the plaintiffs lacked standing to challenge the eligibility of the sitting president.[38][39] On June 11, 2012, the U.S. Supreme Court declined, without comment, to hear the case.[40]

Citing new evidence, on August 14, 2012, Taitz filed a motion in Judge Carter's court to re-open the case.[41] The motion was denied on August 31, 2012.[42]

Hollister v. Soetoro

On March 5, 2009, a lawsuit filed by Philip Berg on behalf of Gregory S. Hollister, a retired Air Force colonel, against Barack Obama (referenced as "Barry Soetoro", the name given at the time of his enrollment in an Indonesian elementary school). The suit was dismissed in the United States District Court for the District of Columbia. The presiding judge, James Robertson, said the case was a waste of the court's time, calling Berg and another lawyer "agents provocateurs" and their local counsel, John Hemenway, "a foot soldier in their crusade." He ordered Hemenway to show cause why he should not pay the legal fees for Obama's attorney as a penalty for filing a complaint "for an improper purpose such as to harass".[43] The district court ultimately reprimanded Hemenway for his actions, and the United States Court of Appeals for the District of Columbia Circuit upheld the dismissal of the case and Hemenway's reprimand.[26] On January 18, 2011, the U.S. Supreme Court declined, without comment, to hear the case.[44]

Cook v. Good

On February 1, 2009, Stefan F. Cook, a Major in the United States Army Reserve, contacted Taitz via e-mail, asking to be part of her lawsuit. On May 8, he volunteered to serve for one year in Afghanistan beginning on July 15, 2009.[45] The Army accepted his offer and ordered him to report on that date.[45] On July 8, however, he filed suit, with Taitz as his lawyer, seeking a temporary restraining order and status as a conscientious objector, arguing that his deployment orders were invalid because Obama was not a natural-born U.S. citizen, and therefore ineligible to serve as commander-in-chief of the armed forces.[46] His orders were thereupon revoked; an Army spokesperson stated, "A reserve soldier who volunteers for an active duty tour may ask for a revocation of orders up until the day he is scheduled to report for active duty."[45] Accordingly, Cook's case was dismissed as moot on July 16.[47][48]

In the lawsuit, captioned Stefan Frederick Cook v. Wanda L. Good (Colonel Wanda L. Good -Commander, U.S. Army Human Resources Command – St. Louis) and filed in the United States District Court for the Middle District of Georgia, Cook asserted that he "would be acting in violation of international law by engaging in military actions outside the United States under this President's command. ... simultaneously subjecting himself to possible prosecution as a war criminal by the faithful execution of these duties."[46] In April, before Cook volunteered for deployment to Afghanistan, he had been included in Taitz's list of people she said she represented as plaintiffs, in a letter raising the citizenship issue.[49] A retired Army major general and an active reserve US Air Force lieutenant colonel subsequently joined the Georgia case as plaintiffs alongside Cook. Cook's deployment orders were canceled, and a government spokesman explained, "The Commanding General of SOCCENT (U.S. Special Operations Central Command) has determined that he does not want the services of Major Cook, and has revoked his deployment orders."[50]

An Army CENTCOM spokesman rejected as false claims that the revocation validated Cook's claims: "This in no way validates any of the outlandish claims made by Maj. Cook or his attorney. The idea that this validates those charges about the president's fitness for office is simply false."[51]

After the case was filed, Taitz alleged that Cook had been terminated from his civilian job with a defense contractor, after the situation at his company had become "nutty and crazy".[52]

Cook received significant media coverage on July 16, 2009, from Fox News's Sean Hannity.[45][53][54]

After the lawsuit was reported in the *Columbus Ledger-Enquirer*, the newspaper reported receiving "the highest volume of traffic ever by a single story in the history of ledger-enquirer.com, including written threats against the newspaper", with nearly half a million new readers and hundreds of e-mails. The threats prompted an increase in security around the courthouse where Cook's case was heard, as well as precautions being taken to protect the author of the newspaper's reports on the case. Executive Editor Ben Holden noted: "The chatter had the feel of a righteous cause – almost a religious cause – because some people hate this president."[55]

Rhodes v. Macdonald

In September 2009, Taitz filed Rhodes v. MacDonald (Colonel Thomas MacDonald – Garrison Commander, Fort Benning, Georgia) on behalf of Captain Connie Rhodes, a U.S. Army physician, sought a restraining order to stop Rhodes' forthcoming deployment to Iraq. In the request for a restraining order, Taitz argued the order was illegal since Obama was illegally serving as President. On September 16, federal judge Clay D. Land (the same judge who heard *Cook v. Good*) rejected the motion and denounced it as frivolous.[56]

Within hours of Land's decision, Taitz told the news site *Talking Points Memo* that she felt Land's refusal to hear her case was an act of treason.[57] Two days later, she filed a motion to stay Rhodes' deployment pending rehearing of the dismissal order. She repeated her treason allegations against Land and made several other intemperate statements, including claims that Land was aiding and abetting purported aspirations of "dictatorship" by Obama.[58] Land rejected the motion as frivolous and ordered her to show cause why she should not be fined $10,000 for abuse of judicial process.[59]

A few hours later, a letter bearing Rhodes's signature arrived, stating that Taitz filed the motion without her knowledge or consent, asking Land to remove Taitz as her attorney of record in the case, and stating that it was her "plan to file a complaint with the California State Bar due to [Taitz's] reprehensible and unprofessional actions."[60] On September 26, 2009, Taitz filed a motion with the court seeking to withdraw as counsel for Rhodes, so she could divulge in court "privileged attorney-client communications" since the dismissed *Rhodes* case "is now a quasi-criminal prosecution of the undersigned attorney, for the purpose of punishment."[61]

On October 13, 2009, Judge Clay Land ordered "Counsel Orly Taitz ... to pay $20,000 to the United States, through the Middle District of Georgia Clerk's Office, within thirty days of the date of this Order as a sanction for her misconduct in violation of Rule 11 of the Federal Rules of Civil Procedure." Land's decision stated:

> The Court finds that counsel's conduct was willful and not merely negligent. It demonstrates bad faith on her part. As an attorney, she is deemed to have known better. She owed a duty to

> follow the rules and to respect the Court. Counsel's pattern of conduct conclusively establishes that she did not mistakenly violate a provision of law. She knowingly violated Rule 11. Her response to the Court's show cause order is breathtaking in its arrogance and borders on delusional. She expresses no contrition or regret regarding her misconduct. To the contrary, she continues her baseless attacks on the Court.[62]

Upon learning of Land's ruling, Taitz said she would appeal the sanction, declaring that Judge Land was "scared to go against the regime" of the "oppressive" Obama administration, and that the sanction was an attempt to "intimidate" her.[63] On March 15, 2010, the United States Court of Appeals for the Eleventh Circuit affirmed the sanctions against Taitz.[64] On August 9, 2011, the federal government filed an abstract of judgment, a document placing a lien in the amount of $20,000 plus interest on all her real property,[65] prompting Taitz to say, "I will pay the money, and I will continue fighting."[66] On January 10, 2011, the U.S. Supreme Court declined, without comment, to hear the case.[67]

Taitz v. Obama

On January 27, 2010, Taitz, *in propria persona*, filed a petition for writ of *quo warranto*. On April 14, 2010, U.S. District Court Chief Judge Royce C. Lamberth dismissed the petition; and, alluding to the novel *Don Quixote*, he wrote, "The Court is not willing to go tilting at windmills with her."[68]

Taitz v. Astrue

In February 2011, Taitz filed, *in propria persona*, a Freedom of Information Act suit against the Social Security Administration, alleging the agency improperly refused to disclose to her information about Obama's social security number. After Taitz repeatedly failed to follow the court rule regarding the redaction of social security numbers in court filings, Chief Judge Lamberth wrote that Taitz "is either toying with the Court or displaying her own stupidity… There is no logical explanation she can provide as to why she is now wasting the Court's time, as well as the staff's time, with these improper redactions."[69][70] On August 30, 2011, the court granted summary judgment in favor of the government, writing "As her numerous filings with the Court demonstrate, plaintiff will stop at nothing to get to the bottom of this alleged conspiracy. Unfortunately for plaintiff, today is not her lucky day."[71][72]

Taitz v. Ruemmler

Taitz sought to compel White House Counsel Kathryn Ruemmler under FOIA to grant access to Obama's "long form" birth certificate.[73][74] On October 17, 2011, Chief Judge Lamberth noted Taitz's "Sisyphean quest" and dismissed the suit.[75]

Archibald v. U.S. Department of Justice

In November 2011, George Archibald filed a FOIA suit seeking "information regarding Obama's birth in 1961, family background, citizenship, residency, immigration, expatriation/repatriation, and other matters related to Obama's origins and nationality generated during the FBI's 2008 investigation of presidential candidates".[76]

Sibley v. Obama

Montgomery Sibley, a disbarred lawyer who once represented Deborah Jeane Palfrey (the so-called "D.C. Madam"), sued Obama in January 2012, alleging that he is not a natural-born citizen and that his birth certificate is a forgery.[77] A federal judge dismissed Sibley's suit on June 6, 2012.[78][79] In March 2012, Sibley also filed his suit with the U.S. Supreme Court, stating that the district court had been "too slow" in considering his case.[80]

State

Martin v. Lingle

On October 17, 2008, another lawsuit was filed in a state circuit court of Hawaii[81] by Andy Martin, who was earlier declared by the U.S. Court of Appeals for the Eleventh Circuit to be a "notoriously vexatious and vindictive litigator who has long abused the American legal system", and who uses lawsuits as "a cruel and effective weapon against his enemies".[82]

Martin's lawsuit sought to order the state to release a copy of Sen. Obama's long-form birth certificate.[81] The short-form birth certificate that the Obama campaign posted online states his place of birth as Honolulu, Hawaii.[81] Martin's lawsuit claimed that because Martin "strives for factual accuracy and attempts to conduct thorough research", he should have a copy of Obama's birth certificate from the state and not a certificate "posted on a Web site". Under Hawaii law, only the person whom the record is concerned with, or a spouse, parents, descendant or someone with a common ancestor, or someone acting on behalf of such a person can obtain a copy of a vital record.

The court denied Martin's petition, saying that Martin lacked "a direct and tangible interest in the record".[83] The court cited Martin's lack of legal standing to obtain another person's birth document.[84]

Donofrio v. Wells

In October 2008, Leo Donofrio, an attorney from New Jersey, filed suit against Nina Mitchell Wells, the Secretary of State of New Jersey, to challenge the eligibility of Obama, Republican presidential candidate John McCain (see details here) and the Socialist Workers Party candidate Roger Calero.[85] Donofrio asserted that all three candidates were ineligible: Obama due to having dual U.S. and British nationality at birth (the latter via Obama's father), McCain due to being born in the Panama Canal Zone, and Calero due to allegedly still having Nicaraguan citizenship.[86]

Donofrio was not among those who claimed Obama might have been born outside Hawaii.[87] Also, Donofrio did not challenge the fact that Obama is a U.S. citizen and instead challenged only whether Obama is a natural-born citizen.[88]

The case was referred to the Supreme Court by Justice Clarence Thomas. When the case reached the United States Supreme Court on December 8, 2008, the Court declined without comment to hear it.[86]

Wrotnowski v. Bysiewicz

On October 31, 2008, Greenwich resident and health food store owner Cort Wrotnowski filed a suit in the Connecticut Supreme Court against then Secretary of State Susan Bysiewicz challenging the authenticity of presidential candidate Obama's Hawaii birth certificate. The suit was dismissed after initial hearings.[89]

Wrotnowski appealed to the U.S. Supreme Court on November 25,[90] contending that the British citizenship of Obama's father made the president-elect ineligible to assume office. Leo Donofrio, whose earlier case against Obama's eligibility had been turned down, assisted Wrotnowski's Supreme Court appeal.[91] The request for stay or injunction was denied without comment on December 15, 2008.[90][92] Thomas Goldstein, who has argued numerous cases before the court and covers Supreme Court cases, commented that "The law has always been understood to be, if you are born here, you're a natural born citizen. And that is particularly true in this case, when you have a U.S. citizen parent like Barack Obama's mother".[92]

Keyes v. Bowen

On November 14, 2008, Alan Keyes and Markham Robinson, chairman of the American Independent Party and a California candidate for president elector, filed a lawsuit requesting that Obama provide documentation that he is a natural-born citizen of the United States.[93][94][95][96] Keyes also said in an interview that he would not be in favor of amending this requirement of the Constitution.[97] Keyes asserts that statements by Obama's paternal step-grandmother "raise doubts as to whether Barack Obama is in fact a natural born U.S. citizen, eligible to be president."[98][99][100]

California Superior Court Judge Michael P. Kenny sustained, without leave to amend, Secretary Bowen's and Obama's demurrers on Keyes' petition for writ of mandate and granted Obama's motion to quash the subpoena. Keyes was found not to be entitled to the records he sought, thereby declaring the case moot.[101][102] The California Court of Appeal affirmed the dismissal on October 25, 2010.[103] The California Supreme Court declined, without comment, to review the case on February 2, 2011.[104] On October 3, 2011, the U.S. Supreme Court declined, without comment, to hear the case.[105]

Ankeny v. Governor of the State of Indiana

In December 2008, Steve Ankeny and Bill Kruse filed a "Petition for Extraordinary Writ of Prohibition" against the Governor of Indiana to block "any popular votes for Barack Obama and Joe Biden for the appointment as Chief Electors [sic]." A hearing was held, and on March 16, 2009, the Governor's motion to dismiss was granted. The Plaintiffs appealed the ruling to the Indiana Court of Appeals, which upheld it on November 12, 2009.[106]

The appellate decision addressed the question of whether Obama's eligibility was affected by his father's lack of U.S. citizenship, saying that "[b]ased upon the language of Article II, Section 1, Clause 4 and the guidance provided by *Wong Kim Ark*, we conclude that persons born within the borders of the United States are 'natural born Citizens' for Article II, Section 1 purposes, regardless of the citizenship of their parents."[107] On April 1, 2010, the Supreme Court of Indiana rejected, without comment, a request to consider the case.[108]

Taitz v. Fuddy

In August 2011, Taitz filed, *in propria persona*, a suit against the director of the Hawaii Department of Health, seeking to review Obama's "long form" birth certificate.[109] On October 12, 2011, the Hawaii Circuit Court dismissed Taitz's suit.[110]

2012 election

2012 primary ballot challenges

On April 24, 2012, Obama secured enough delegates to ensure the nomination of the Democratic party for reelection.[111]

Alabama

A lawsuit filed by Albert Hendershot in December 2011 alleged Obama's birth certificate was forged and that he was ineligible to be on the Alabama primary ballot.[112] On January 9, 2012, Hendershot's suit was dismissed due to lack of jurisdiction, and two similar suits were filed by Harold Sorensen and another Alabama citizen from Pell City.[113] Sorensen requested that Judge Helen Shores Lee, who is black and also presided over Hendershot's suit, to recuse herself because "she has racial bias and a lack of Constitutional knowledge."[114] The Pell City suit was dismissed on January 13, 2012.[115] Sorenson's suit was dismissed for lack of jurisdiction on January 17, 2012, and the court awarded the Alabama Democratic Party its costs and fees; its attorney, however, promised not to collect the monies from Sorenson as long as he refrained from "bad-mouthing the court and this decision."[116]

Alaska

Gordon Epperly filed an objection to Obama's placement on the ballot, writing, "As Barack Hussein Obama II is of the 'mulatto' race, his status of citizenship is founded upon the Fourteenth Amendment to the United States Constitution. Before the [purported] ratification of the Fourteenth Amendment, the race of 'Negro' or 'mulatto' had no standing to be citizens of the United States under the United States Constitution."[117] The challenge was rejected as Alaska was not going to use a primary election to select delegates for the Democratic party.[118]

Arizona

A lawsuit filed in an Arizona superior court by Kenneth Allen (*Allen v. Arizona Democratic Party*) alleged that Obama was not a natural-born citizen because his father "was a resident of Kenya and thus a British citizen".[119] Allen argued that the U.S. Supreme Court's ruling in *Minor v. Happersett* required a natural-born citizen to be born in the U.S. of two U.S. citizen parents; however, the judge dismissed the suit on March 7, 2012, ruling that "President Obama is a natural born citizen under the Constitution" and that "[c]ontrary to Plaintiff's assertion, *Minor v. Happersett* ... does not hold otherwise."[120]

California

Gary Kreep (one of the attorneys who filed *Barnett v. Obama*) filed on the behalf of seven other Californians a lawsuit demanding that the California Secretary of State verify the eligibility of all

presidential candidates before putting them on the ballot.[121]

In July 2012, Taitz sued to block the certification of the primary election results, alleging "rampant election fraud"; she also alleged Obama engaged in "identity fraud."[122] Her suit was denied.[123] In October, 2012, Taitz tried to revive her election lawsuit by asking the court to compel Occidental College to produce student records for President Barack Obama, who attended Occidental from 1979 to 1981. The judge ruled that Taitz's motion did not meet basic legal requirements and ordered her to pay $4,000 in sanctions to Occidental's lawyer for the cost of opposing the motion.[124] The California Court of Appeal affirmed the dismissal and sanctions.[125]

Florida

Two lawsuits filed in state court, including one filed by Larry Klayman, seek to have Obama declared ineligible.[126][127] Joe Arpaio, the sheriff for Maricopa County, Arizona, submitted in support of Klayman's suit an affidavit stating "there is probable cause that [Obama's birth certificate] is a forgery."[128] Klayman also sent Arpaio a subpoena directing him to appear in the Florida courtroom.[129] The suit filed by Klayman was dismissed on June 29, 2012.[130]

Georgia

Several Georgian citizens (Carl Swensson and another Georgian represented by Georgia state representative Mark Hatfield, a Georgian represented by Taitz, and a Georgian represented by Van Irion) filed challenges with the Georgia Secretary of State, Brian Kemp, regarding Obama's inclusion on the March primary ballot.[131] Kemp referred the challenges to Deputy Chief Judge Michael Malihi, an administrative law judge, who denied Obama's motion to dismiss them and scheduled a hearing for January 26.[132]

On January 23, Malihi denied Obama's motion to quash a subpoena issued by Taitz to compel Obama to appear, saying that Obama did not show why he should not be at the hearing or how his testimony would not be helpful.[133] On January 25, Obama's attorney requested that Kemp halt the proceedings, and indicated that Obama would no longer participate in the litigation pending Kemp's decision.[134] Kemp denied their request and warned that their non-participation would be "at your own peril".[135]

Neither Obama nor his attorney appeared at the January 26 hearing. This normally would result in a default order, but the challengers requested Malihi to allow them to go ahead with the hearing and rule on "the merits of their arguments and evidence".[136][137] Taitz called eight witnesses (including herself), and presented seven exhibits in support of her claims that Obama was not a natural-born citizen, has used multiple names, has multiple Social Security numbers, and used a fake birth certificate. Taitz asked Malihi to find Obama in contempt for failing to appear.[138][139][140]

On February 3, Malihi recommended that Obama remain on the ballot. Concerning Taitz's case Malihi wrote: "The Court finds the testimony of the witnesses, as well as the exhibits tendered, to be of little, if any, probative value, and thus wholly insufficient to support plaintiffs' allegations".[137][141] The Drudge Retort described the hearing as, "Empty Table 1, Orly Taitz 0".[142]

On February 6, Kemp accepted Malihi's recommendation.[143] On February 13, the challengers filed for review.[144][145]

Illinois

Three challenges were filed against Obama's inclusion on the Illinois ballot, including one that challenged his birth certificate.[146]

Indiana

On February 24, Taitz appeared as a witness on the behalf of two residents of Indiana who had filed with the Indiana Election Commission a challenge to Obama's eligibility. The challengers demanded a default judgment against Obama, as neither he nor a representative appeared at the hearing; this motion was unanimously denied by the commission.

Taitz argued that the President's surname was not Obama, that he was not a natural-born citizen, and that he was using a stolen Social Security number. "When Taitz accused the commission of a cover-up, Dan Dumezich, the Merrillville Republican who is chairman of the commission, told her that if she was disrespectful one more time, 'your butt is going to be gone.'"[147] The challenge was denied.

Mississippi

In February 2012, Taitz sued the Mississippi state Democratic Party and the Mississippi Secretary of State alleging Obama was not a natural born citizen. Taitz accused the party of aiding and abetting in forgery and fraud when it submitted to the court a copy of Obama's birth certificate. In response, the party filed with the court a certified verification from Hawaii's State Registrar attesting to the accuracy of Obama's birth certificate. Taitz accused the registrar of being complicit with the forgery.[148]

New Hampshire

In November 2011, Taitz, backed by four New Hampshire state legislators, filed a complaint with the state's Ballot Law Commission challenging Obama's eligibility to compete in the primary election.[149] As Obama had paid the filing fee and his declaration of candidacy conformed to state law, the Commission unanimously voted to keep Obama on the ballot.[150] The Commission then denied a request for reconsideration.[151]

In response, Taitz wrote to William L. O'Brien, the Speaker of the House of the New Hampshire House of Representatives, and demanded the removal of Bill Gardner, New Hampshire's Secretary of State, for "egregious elections fraud, aiding and abetting fraud, forgery and possibly treason." D.J. Bettencourt, House Majority Leader of the New Hampshire House of Representatives, wrote to Taitz and called her actions "unbecoming of any legitimate political dialogue, nevermind one as ridiculous as the continued obsession over President Obama's birth place." Bettencourt added, "I have spoken to the Representatives who were present and expressed to them my strong desire that they immediately disassociate themselves from you and this folly."[152]

The aggrieved representatives then requested the New Hampshire Attorney General to investigate Obama's eligibility.[153]

New Jersey

In April 2012, Mario Apuzzo (the attorney who filed *Kerchner v. Obama*) argued to an administrative law judge on behalf of two New Jersey residents that Obama had yet to prove his identity and eligibility, and thus should not be placed on the ballot.[154]

Responding to the Petitioner's allegations that Barack Obama had not proven his eligibility, Administrative Law Judge Jeff S. Masin stated: "There appears to be no affirmative requirement that a person indorsed in a nominating petition for the Presidency present to the Secretary of State any certification or other proof that he is qualified for the Office." Further the judge ruled on the Plaintiff's assertions that Obama was ineligible due to his non-citizen father: "The petitioners' legal position on this issue, however well-intentioned, has no merit in law." [155] The decision to retain Barack Obama on the Primary Ballot was adopted by Kimberly M. Guadagno, New Jersey Secretary of State. The decision was upheld by the Appellate Division of New Jersey Superior Court on May 31, 2012. The New Jersey Primary was held on June 5.[156]

Pennsylvania

A lawsuit filed by Charles Kerchner (lead plaintiff in *Kerchner v. Obama*) was dismissed on March 1, 2012, on the ground that the court had jurisdiction only to hear challenges to defects in the nominating papers, which did not include questions about Obama's status as a natural-born citizen.[157] Two other suits, including one filed by Philip Berg (plaintiff in *Berg v. Obama*), were similarly dismissed.[158]

South Dakota

In May 2012, Thomas Scheveck filed a complaint with the South Dakota Board of Elections, arguing that Obama is not a natural-born citizen because his father was not a U.S. citizen. Scheveck cited the Supreme Court's ruling in *Minor v. Happersett* to support his claim that only a person born of two American parents can qualify as a natural-born citizen. Scheck also alleged Obama had been using a fraudulent birth certificate and Social Security Number.[159] In a unanimous decision on May 11, the elections board dismissed the complaint, citing a lack of jurisdiction to consider allegations of the type raised by Scheveck.[160]

2012 general election challenges

Illinois

On September 13, 2012, a state board rejected three challenges to Obama's placement on the November ballot, finding the challenges were raising arguments that had been previously rejected and based on "an incorrect legal interpretation of what constitutes a 'natural born citizen'".[161]

Indiana

Taitz filed a lawsuit in Indiana, and attempted to subpoena Maricopa County, Arizona Sheriff Joe Arpaio and one of his assistants, Mike Zullo, to compel them to testify about the results of their investigation into Obama's birth certificate. Zullo indicated the two did not intend to attend the trial, stating, "We don't want our information tainted by a circus show".[162]

Kansas

On September 10, 2012, Joe Montgomery filed a challenge to Obama being on the ballot, claiming that Obama's birth certificate was "doctored" and that he was not a natural-born citizen because he lacked two U.S. citizen parents.[163] On September 14, Montgomery claimed there was "animosity and intimidation" directed at him as well as his "personal and professional associations," and withdrew his objection.[164] At the September 17 meeting where the challenge was withdrawn, Taitz's request to speak was denied.[165] After the meeting was over, Taitz and an Obama supporter argued, and eventually both were escorted out of the building by a police officer.[166]

On September 20, Taitz filed a lawsuit in state court seeking to stay the board's actions.[167] On November 2, 2012, the court dismissed Taitz's suit due to her lack of standing.[168]

Mississippi

In a lawsuit initiated by Taitz, she claimed Obama's birth certificate and Social Security Number are fake, and sought to disqualify him from the ballot.[169]

New York

Christopher Earl Strunk sued the New York State Board of Elections and others to prevent President Obama from appearing on the 2012 presidential ballot. Strunk alleged Obama was connected to a massive conspiracy theory involving the Jesuits and others. Judge Arthur Schack said of the case: "If the complaint in this action was a movie script, it would be entitled 'The Manchurian Candidate Meets The Da Vinci Code.'" Strunk was fined over $177,000 in costs and penalties.[170]

Court challenges

Liberty Legal Foundation v. National Democratic Party

In October 2011, the Liberty Legal Foundation filed suit in Arizona, seeking to enjoin the Democratic National Committee from certifying Obama as its nominee for the 2012 U.S. presidential election on the ground that he did not have two citizen parents and thus, it contended, was not a natural-born citizen. The Foundation's complaint cited the U.S. Supreme Court's 1875 decision in *Minor v. Happersett* as supporting its claim that natural-born citizens were defined by the Supreme Court as "all children born in a country of parents who were its citizens".[171][172] This lawsuit was dismissed July 11, 2012, for "lack of jurisdiction." A defense motion for sanctions against plaintiff's attorney, Irion, was denied.[173]

An almost-identical lawsuit with the same parties was filed in Tennessee, and dismissed for lack of standing on June 21, 2012.[174] On August 24, the district court sanctioned the plaintiff's attorney, Irion, for filing a lawsuit that he "knew or reasonably should have known that the claims in this case had no basis in law".[175]

Tisdale v. Obama

On January 17, 2012, Charles Tisdale of Virginia brought a civil action before the US District Court for the Eastern District of Virginia. In the suit, Tisdale alleged that Barack Obama, Mitt Romney and Ron Paul each had a non-citizen parent, and therefore should be barred from the November 6, 2012, presidential ballot in Virginia. An *amicus* brief was filed in support of the Plaintiff by attorney Mario Apuzzo. District Judge

John A. Gibney, Jr., dismissed the suit with prejudice because the Plaintiff "does not to state a claim upon which relief may be granted." Judge Gibney explained: "It is well settled that those born in the United States are considered natural born citizens."[176] The dismissal was affirmed without comment by the US Court of Appeals for the Fourth Circuit on June 5, 2012.[177]

Sibley v. D.C. Board of Elections and Ethics

In June 2012, Sibley filed a lawsuit seeking to compel the District of Columbia's Board of Elections and Ethics to respond to his challenge that Obama is not a natural-born citizen and thus ineligible to stand for the 2012 general election.[78]

Daniels v. Ohio Secretary of State

In July 2012, Susan Daniels filed a lawsuit seeking to prevent the Ohio Secretary of State from placing Obama's name on the November 2012 ballot due to his alleged use of a fraudulent Social Security number.[178]

Epperly v. Obama

In July 2012, Gordon Epperly sued the Alaska Division of Elections to force it to obtain Obama's birth certificate before it places him on the ballot.[179]

House v. Obama

On August 10, 2012, Todd House, a doctor and presidential write-in candidate, filed a lawsuit alleging Obama was born in Kenya and not a natural-born citizen.[180] In dismissing the suit, the court ruled that Congress, and not it, was empowered under the U.S. Constitution to determine the president's eligibility.[181]

Begay v. Obama

Arnold Begay, a federal prisoner who pleaded guilty (in 2002) to aggravated sexual abuse of a child, filed a lawsuit claiming Obama was not a natural-born citizen and sought a court order demanding Obama to produce a sample of his DNA.[182]

Paige v. Condos

H. Brooke Paige, who lost the 2012 Vermont primary election for the Republican nomination for the U.S. Senate, sued the Vermont Secretary James Condos seeking to prevent Obama's name from appearing on the ballot. The lawsuit was prepared by Mario Apuzzo (the attorney who filed *Kerchner v. Obama*), but Paige represented himself in court as Apuzzo was not licensed in Vermont.[183] On September 21, 2012, the court denied Paige's request, ruling it had "been presented with a radically insufficient basis on which to issue a temporary or even a preliminary injunction".[184] On November 14, 2012, the case was dismissed because Paige lacked standing.[185] In October 2013, the Vermont Supreme Court ruled Obama's re-election mooted Paige's appeal, and dismissed the case.[186] Paige sought review in the United States Supreme Court.[187]

McInnish v. Bennett

In November 2012, the presidential candidate for the Constitution Party and a member of the Alabama Republican party, represented by Larry Klayman, alleged the Alabama Secretary of State had a duty to investigate Obama's eligibility. The trial court dismissed the complaint, and the Alabama Supreme Court affirmed the dismissal. Chief Justice Roy Moore and another justice dissented, arguing the Secretary of State did have the authority to conduct such an investigation. Two other justices wrote concurring opinions that supported the dismissal and addressed the dissenting opinions.[188]

Grinols v. Obama

On December 13, 2012, Taitz filed in Sacramento, California a lawsuit of behalf of James Grinols (a Republican elector from Minnesota), Robert Odden (a Libertarian elector from Minnesota), Keith Judd (a federal prisoner who was on the West Virginia Democratic primary ballot), Edward Noonan (who won the American Independent Party presidential primary in California), and Thomas MacLeran (who filed to run as a Republican for president) seeking to prevent Congress from certifying the Electoral College's vote.[189] The lawsuit also sought to prevent California officials from certifying the election results from the 2012 presidential election. On January 3, 2013, District Judge Morrison C. England Jr. denied the plaintiffs' request for a temporary restraining order to prevent Congress from certifying the Electoral College's vote.[190] In April 2013, the court dismissed the suit. In November 2015, the 9th Circuit affirmed the district court's dismissal.[191]

Criminal cases

The refusal to accept that Obama is the lawful president has led to acts of civil disobedience that have been criminally prosecuted.

Walter Fitzpatrick III and Darren Huff

Walter Fitzpatrick III was unsuccessful in persuading the foreperson of the Monroe County, Tennessee, grand jury to indict Obama for treason because of Obama's purported ineligibility to serve as President.[192][193] In response, in April 2010, Fitzpatrick accused the foreperson of violating State laws governing the length of time that a foreperson can serve and attempted to make a citizen's arrest. Fitzpatrick and Darren Huff of Georgia, who assisted him, were prosecuted by Tennessee for disrupting a meeting of the grand jury.[194]

Later that month, Huff (who was armed with a Colt .45 and an AK-47), Carl Swensson, and others returned to Tennessee. Huff had told FBI investigators that he intended to assist Fitzpatrick in making citizen's arrests and to have the State charges against Fitzpatrick dropped. According to the FBI, Huff carried a copy of "arrest warrants", signed by Fitzpatrick, that accused two dozen officials as "domestic enemies of the United States engaged in treason". Federal prosecutors charged Huff with transporting a firearm in furtherance of a civil disorder, as well as using a firearm in relation to a violent crime.

Fitzpatrick was convicted in Tennessee of disturbing a meeting and served 60 days in jail; Huff pleaded guilty to the same charge and avoided jail time.

At his October 2011 federal trial, witnesses testified that Huff said he would take over Madisonville,

Tennessee, after the Monroe Country grand jury there refused to indict Obama.[195] On October 25, 2011, Huff was convicted of transporting a firearm in furtherance of a civil disorder.[196] Huff was sentenced to four years in prison.[197]

Terrence Lakin

Main article: Court-martial of Terry Lakin

On April 13, 2010, the United States Army announced that it would court-martial Lt. Colonel Terrence Lee Lakin, a surgeon in the Army Medical Corps, for refusing to report for deployment to Afghanistan. Lakin asserted that, because of citizenship issues, Obama is not legally the Commander in Chief and, therefore, lacks the authority to send him to Afghanistan. The military revoked Lakin's Pentagon building pass and confiscated his government laptop computer.[198] Lakin was assigned to Walter Reed Army Medical Center while awaiting trial.[199]

Lakin's case differed from Stefan Cook's case in that Cook volunteered to deploy, received orders, and then filed a civil suit refusing to serve; the military responded by revoking Cook's voluntary orders.[50] Lakin was ordered to deploy and he refused the orders, whereupon the military eventually initiated a criminal law prosecution under the Uniform Code of Military Justice. On September 2, 2010, Presiding Judge Colonel Denise Lind issued a ruling in the case that Obama's status as a natural-born citizen is irrelevant in the court martial case against Lakin, as (1) his orders had come not from Obama himself but rather from senior officers with the independent legal authority to issue them and (2) Obama's eligibility is outside the jurisdiction of the military and falls within the jurisdiction of the United States Congress instead.[200]

Three retired generals publicly expressed support for Lakin. The first was Army Major General (retired) Paul E. Vallely, a senior military analyst for Fox News. In an interview, Vallely stated "I think many in the military, and many out of the military, question the natural-birth status of Barack Obama."[201] Following Vallely's announcement, Army Major General (retired) Jerry Curry and Air Force Lt. General (retired) Thomas G. McInerney also expressed public support for Lakin.[201][202]

On December 7, 2010, Lakin entered a guilty plea to the charges of disobeying his orders;[203] and, on December 15, 2010, a military jury convicted him on a charge of Missing Movement by Design.[204] He was sentenced to six months confinement and dismissed from service.[205] During the sentencing phase of the trial, the prosecution played a video that Lakin had posted online in which he challenged Obama's eligibility. Lakin tearfully responded that the video had been a mistake and that he "would not do this again".[205] Lakin served his time at the Midwest Joint Regional Correctional Facility at Fort Leavenworth, Kansas; and, on July 28, 2011, the United States Army Court of Criminal Appeals granted Lakin's request to withdraw his case from appellate review.[206]

In February 2012, the Kansas State Board of Healing Arts denied Lakin a license to practice medicine in that state because of his actions.[207] Board members noted that Lakin had jeopardized the health of soldiers in his unit by refusing to deploy. There was also doubt about whether Lakin would obey the law on any health-related legislation signed by Obama.

Theresa Cao

On January 6, 2011, the United States Constitution was read on the floor of the House of Representatives. As the section regarding the president's qualifications was being read, Theresa Cao shouted from the gallery, "Except Obama, except Obama. Help us, Jesus." Cao was arrested for disrupting Congress.[208]

Indictment attempts using "citizen grand juries"

Some campaigners, led by Carl Swensson, have sought to "finally expose the conspiracy behind President Obama's birth certificate" by forming what they term "citizen grand juries" to indict Obama.[209] The "grand juries" are based on the Fifth Amendment's premise that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury". Although the activists managed to hand out copies of "indictments" to Congressional staff,[210] the courts have not regarded the "citizen grand juries" favorably. In June 2009, a group of 172 campaigners declared themselves to be a "Super American Grand Jury" and voted to charge Obama with treason and accused him of not being a US citizen.[211] Chief Judge Royce C. Lamberth of the United States District Court for the District of Columbia rejected the "indictment" on July 2 and declared: "[T]here is no authority under the Rules of Procedure or in the statutes of the United States for this court to accept [a presentment]... The individuals who have made this presentment were not convened by this court to sit as a grand jury nor have they been selected at random from a fair cross section of this district. Any self-styled indictment or presentment issued by such a group has no force under the Constitution or laws of the United States."[212]

In 2013, a citizen grand jury formed by Larry Klayman "convicted" Obama of fraud.[213]

See also

- Barack Obama citizenship conspiracy theories
- United States presidential eligibility legislation
- Natural-born-citizen clause

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External links

- List of eligibility cases (http://tesibria.typepad.com/whats_your_evidence /BIRTHER%20CASE%20LIST.pdf), with references; documents over 201 cases dismissed, rejected or otherwise resolved in favor of Obama's eligibility, 6 pending as of December 2013

Categories: Conspiracy theories regarding Barack Obama | Barack Obama presidential campaign, 2008 | Presidency of Barack Obama | Democratic Party (United States) litigation

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UNITED STATES

United States Court of Appeals
For the First Circuit

No. 15-2379

IN RE: NATURAL BORN CITIZEN PARTY NATIONAL COMMITTEE, ET AL.; HAROLD WILLIAM VAN ALLEN, Co-Chairperson

Petitioners

CASE OPENING NOTICE

Issued: November 16, 2015

A petition for a writ of mandamus was received and docketed today by the clerk of the court of appeals in compliance with 1st Cir. R. 21.0. If the court requires a response to the petition, it shall do so by order.

The $500 docketing fee must be paid to the clerk of the court of appeals, in accordance with Fed. R. App. P. 21, by **December 1, 2015**. Failure to pay the fee, or obtain in forma pauperis status, may result in the dismissal of this petition for want of diligent prosecution.

An appearance form should be completed and returned immediately by any attorney who wishes to file pleadings in this court. 1st Cir. R. 12.0(a) and 46.0(a)(2). Any attorney who has not been admitted to practice before the First Circuit Court of Appeals must submit an application and fee for admission using the court's Case Management/Electronic Case Files ("CM/ECF") system prior to filing an appearance form. 1st Cir. R. 46.0(a). *Pro se* parties are not required to file an appearance form.

Dockets, opinions, rules, forms, attorney admission applications, the court calendar and general notices can be obtained from the court's website at www.ca1.uscourts.gov. Your attention is called specifically to the notice(s) listed below:

- Notice to Counsel and Pro Se Litigants

If you wish to inquire about your case by telephone, please contact the case manager at the direct extension listed below.

Margaret Carter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
John Joseph Moakley
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Case Manager: Garineh Ashjian - (617) 748-4664

United States Court of Appeals
For the First Circuit

NOTICE OF ELECTRONIC AVAILABILITY OF CASE INFORMATION

The First Circuit has implemented the Federal Judiciary's Case Management/Electronic Case Files System ("CM/ECF") which permits documents to be filed electronically. In addition, most documents filed in paper are scanned and attached to the docket. In social security and immigration cases, members of the general public have remote electronic access through PACER only to opinions, orders, judgments or other dispositions of the court. Otherwise, public filings on the court's docket are remotely available to the general public through PACER. Accordingly, parties should not include in their public filings (including attachments or appendices) information that is too private or sensitive to be posted on the internet.

Specifically, Fed. R. App. P. 25(a)(5), Fed. R. Bank. P. 9037, Fed. R. Civ. P. 5.2 and Fed. R. Cr. P. 49.1 require that parties not include, or partially redact where inclusion is necessary, the following personal data identifiers from documents filed with the court unless an exemption applies:

- **Social Security or Taxpayer Identification Numbers.** If an individual's social security or taxpayer identification number must be included, only the last four digits of that number should be used.
- **Names of Minor Children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- **Dates of Birth.** If an individual's date of birth must be included, only the year should be used.
- **Financial Account Numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- **Home Addresses in Criminal Cases.** If a home address must be included, only the city and state should be listed.

See also Rule 12 of this court's Administrative Order Regarding Case Management/Electronic Case Files System.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend caption to redact the identifier.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, national security information, and sensitive security information as described in 49 U.S.C. § 114.

Attorneys are urged to share this notice with their clients so that an informed decision can be made about inclusion of sensitive information. The clerk will not review filings for redaction. Filers are advised that it is the experience of this court that failure to comply with redaction requirements is most apt to occur in attachments, addenda, or appendices, and, thus, special attention should be given to them. For further information, including a list of exemptions from the redaction requirement, see http://www.privacy.uscourts.gov/.

United States Court of Appeals
For the First Circuit

NOTICE TO COUNSEL REGARDING
MANDATORY REGISTRATION AND TRAINING
FOR ELECTRONIC FILING (CM/ECF)

Beginning January 1, 2010, CM/ECF is mandatory for all attorneys filing in this court. Therefore, we strongly encourage all attorneys who practice in this court to register as an ECF Filer as soon as possible and become familiar with the system. Before you may file documents electronically in the CM/ECF system, you must complete the following steps.

- **Complete both of the mandatory Electronic Learning Modules (ELMs) located at** www.ca1.uscourts.gov on the CM/ECF (Electronic Filing) page. The lessons provide a step-by-step overview of how to file various types of documents, as well as how to avoid common filing errors.

- **Apply for admission if you are not a member of this court's bar**. In order to register as an ECF Filer, attorneys must be admitted to the bar of this court. For information on attorney admission, go to the Forms & Instructions page on the First Circuit's website at www.ca1.uscourts.gov.

- **Register for a PACER account at** http://www.pacer.psc.uscourts.gov if you or your law firm have not previously done so. A PACER account is required to view docket reports and electronically filed documents.

- **Register with PACER for a First Circuit Appellate ECF Filer account at** http://www.pacer.psc.uscourts.gov. You must register for an ECF Filer account with this court order to electronically file documents through the court's CM/ECF system. If you previously registered through PACER for electronic noticing in the First Circuit, and you are a member of the bar of the First Circuit Court of Appeals, you do not have to re-register for an appellate CM/ECF account.

- **Review the Administrative Order Regarding CM/ECF (which sets forth rules governing electronic filing) and the CM/ECF User's Guide.** Complete information about CM/ECF is available on the First Circuit's website at www.ca1.uscourts.gov.

cc:
Natural Born Citizen Party National Committee, et al.
Harold William Van Allen

United States Court of Appeals
For the First Circuit

NOTICE TO ALL CM/ECF USERS REGARDING
"NATIVE" PDF REQUIREMENT

All documents filed electronically with the court must be submitted as "native" Portable Document ("PDF") files. See Rule 1 of the Administrative Order Regarding Case Management/Electronic Case Files System ("CM/ECF"). A **native PDF file** is created by electronically converting a word processing document to PDF using Adobe Acrobat or similar software. A **scanned PDF file** is created by putting a paper document through an optical scanner. Use a scanner ONLY if you do not have access to an electronic version of the document that would enable you to prepare a native PDF file.

If you fail to file a document in the correct format, you will be asked to resubmit it. Instructions for converting Word or WordPerfect documents to PDF are available on the court's website at http://www.ca1.uscourts.gov/sites/ca1/files/WP_Conversion.pdf.