No. 15-40238

In the United States Court of Appeals for the Fifth Circuit

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

v.

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 of Protection; SARAH R. SALDANA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,

Defendants-Appellants

On Appeal from the U.S. District Court for the Southern District of Texas, Brownsville Division, No. 14-cv-00254

AMICI CURIAE BRIEF FOR THE GOVERNORS OF TEXAS, LOUISIANA, NEW JERSEY, AND SOUTH DAKOTA IN SUPPORT OF PLAINTIFFS-APPELLEES AND DENIAL OF STAY

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Governors of Texas, Louisiana, New Jersey, and South Dakota ("*Amici* Governors"). They have two important interests in defending the preliminary injunction correctly entered by the district court. First, the injunction protects the executive branches in the Governors' States from irreparable injuries. In Texas, for example, the executive branch led by the Governor would be responsible for issuing driver's licenses, administering the healthcare system, and managing law-enforcement efforts in response to Defendants' unlawful and unilateral Directive.[1]

Second, the *Amici* Governors have an interest in rebutting the arguments offered by the State of Washington on behalf of 13 other States. The question presented is whether the President can unilaterally legalize the presence of millions of people and unilaterally give them myriad legal benefits, including work permits, Medicare, Social Security, and tax credits. This is *not* a debate over "national immigration policy." Washington Br. at 1. Nor does it matter whether the State of Washington "welcome[s] the immigration directives and expect[s] to benefit from them." *Id.* at 9. Regardless whether the DAPA Directive pleases policymakers in

[1] *See* Mem. from Jeh Charles Johnson to León Rodriguez, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014); Mem. from Jeh Charles Johnson to Thomas S. Winkowski, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) (collectively "DAPA," "Directive," or "DAPA Directive"). Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than *amici* and *amici*'s counsel—contributed money that was intended to fund preparing or submitting this brief. Prior to authoring this brief, counsel for *amicus* Governor of Texas previously served as counsel for plaintiff State of Texas.

Washington State, it squarely violates statutes enacted in Washington, D.C. And it is striking that for all of the ink Washington spills "welcom[ing]" the effects of DAPA, that State cannot spare one word to identify the legal basis for unilaterally issuing 5 million or more federal work permits and other entitlements.

ARGUMENT

I. WASHINGTON'S BRIEF IGNORES THE QUESTION PRESENTED

A. Like the Defendants, the State of Washington does its best to distract the court from the question presented. For example, Washington argues that this is merely a "policy" dispute that implicates the wisdom of policy papers by immigration activists and "Washington's leading liberal think tank."[2] But it is unclear what more the district court could have done to disabuse Washington of that misapprehension. The court below began "by emphasizing what is not involved in this case." PI Order at 4. "First," the court explained, "this case does not involve the wisdom, or the lack thereof, underlying [DAPA]." *Ibid.* Nor does this case "require the Court to consider the public popularity, public acceptance, public acquiescence, or public disdain for the DAPA program." *Id.* at 5-6.

Likewise, the Defendants argue at length that the injunction will interfere with the Department of Homeland Security's ability "to effectively prioritize the removal

[2] Ken Silverstein, *The Secret Donors Behind the Center for American Progress and Other Think Tanks*, THE NATION (June 10, 2013) (describing the Center for American Progress); *see* Washington Br. at 4-8 (collecting policy papers, including those by the Center for American Progress).

of aliens." Defendants' Mot. at 1. But no one ever has challenged DHS's ability to prioritize the removal of aliens. In fact, the district court expressly did *not* "enjoin or impair the [DHS] Secretary's ability to marshal his assets or deploy the resources of the DHS," nor did it "enjoin the Secretary's ability to set priorities for the DHS." PI Order at 123. Moreover, the court did not enjoin the Defendants' "non-enforcement" of the immigration laws; rather, when the Defendants grant legal benefits to millions of people, that "is actually affirmative *action* rather than inaction." *Id.* at 85.

B. The real question presented is a straightforward legal one: Does the Immigration and Nationality Act ("INA") authorize the Defendants to dispense with the law for 40% of the Nation's undocumented population, to grant "deferred action" to 40% of the undocumented population, and to hand out work permits, Social Security cards, and a slew of federal and state benefits to 40% of the undocumented population—all without any input from Congress and any review by any court ever? On that legal question, the most Washington can say (at 2) is that it "agree[s]" with Defendants that the federal government can grant legal benefits to whomever it wants, whenever it wants, and without any limitation.

1. Take for example federal work permits. Defendants argue (and Washington "agree[s]," Br. at 2) that 8 U.S.C. § 1324a(h)(3) gives DHS the power to issue a work permit for anyone it thinks needs one, without limitation. Defendants' Mot. at 4. But that reading of the INA makes surplusage of large swaths of the

statute. Indeed, if the definition of "unauthorized alien" in Section 1324a(h)(3) gave DHS such limitless power, there would be no reason for Congress to authorize work permits in particular circumstances. *But see, e.g.*, 8 U.S.C. § 1184(p)(6) (authorizing work permits for "any alien who has a pending, bona fide [U-visa] application"); *id.* § 1105a(a) (authorizing work permits for battered spouses of certain nonimmigrants); *id.* § 1154(a)(1)(D)(i)(II), (IV), 1154(a)(1)(K) (authorizing work permits for VAWA self-petitioners and children); *id.* § 1158(d)(2) (authorizing work permits for asylum applicants); *id.* § 1226(a)(3) (authorizing work permits for certain LPRs); *id.* § 1231(a)(7) (authorizing work permits for certain unremovable individuals). While the Plaintiffs and their *amici* have emphasized these provisions for months, neither the Defendants nor the State of Washington offers a single word to explain why Congress would enact a slew of meaningless provisions that do not add to the already limitless power that DHS supposedly has to grant work permits to whomever it pleases.

2. Or take Social Security Numbers ("SSNs"). If the Defendants can unilaterally authorize anyone to work in the United States whenever they please, then the Defendants also can unilaterally confer membership in the crown jewel of American entitlement programs: Social Security. That is because the Social Security Administration will give a SSN to anyone who can lawfully work in the United States. *See* 42 U.S.C. § 405(c)(2)(B)(i)(I). That SSN entitles an undocumented immigrant to Social Security benefits. *See id.* § 1382.

The SSN also unlocks a host of other entitlements. To take just one example, SSN holders qualify for the earned income tax credit. *See id.* § 32. And if an undocumented immigrant receives a SSN under Defendants' unilateral DAPA Directive in 2015, he or she can use that SSN to claim tax credits for *2014, 2013, and 2012*—long before Defendants unilaterally legalized the immigrant's presence. *See* Mem. from Mary Oppenheimer, Acting Assistant Chief Counsel, IRS, for Candice V. Cromling, Earned Income Tax Credit Program Manager, *Claiming Previously Denied Earned Income Credit due to Invalid Social Security Numbers* (June 9, 2000), *available at* www.irs.gov/pub/irs-wd/0028034.pdf. If only a small fraction of eligible individuals apply for those tax credits, it will cost the federal fisc $2 billion. *See* Senators Introduce Bill Disallowing Tax Credit Under 2014 Executive Actions (Mar. 10, 2015), *available at* http://www.grassley.senate.gov/news/news-releases/senators-introduce-bill-disallowing-tax-credit-under-2014-executive-actions.[3]

It is wrong to claim that these are mere "policy" questions, and that the 26 Plaintiff States want to "dictate" the answers. Washington Br. at 1. Congress passed the INA in 1952, and Harry Truman signed it into law. Since then, it has been amended by 31 Congresses and 11 Presidential administrations. The rule of law

[3] And the tax consequences do not end there. As the Plaintiffs explained in the district court, if the current President can suspend the INA for 40% or more of the population, then the next President can suspend the Internal Revenue Code for 40% or more of the population. *See* ECF No. 5, *Texas v. United States*, No. 14-254 (S.D. Tex. Feb. 2, 2015). Defendants and their *amici* have not even tried to respond to that point—presumably because they agree that their conception of executive power is unbounded by a limiting principle.

means nothing if it allows one President to unilaterally dispense with those statutes, unilaterally create a new immigration system, unilaterally create new employment and social welfare programs, and then claim that no plaintiff and no court can challenge his unilateralism.

II. WASHINGTON'S LEGAL ARGUMENTS ARE WRONG

Washington does offer three legal arguments. But all of them are wrong.

A. First, Washington cannot claim that the Plaintiff States made free choices to issue driver's licenses to deferred-action beneficiaries. *See* Washington Br. at 3. Arizona *tried* to make a free choice, and it chose not to give licenses to *any* deferred-action beneficiaries. *See* ECF No. 132, *Texas v. United States*, No. 14-254 (S.D. Tex. Feb. 2, 2015) (collecting sources); *cf.* Washington Br. at 3 (counterfactually claiming that Arizona denied licenses to only "one group of deferred-action recipients"). But the federal government successfully convinced the Ninth Circuit to hold that Arizona's choice was preempted. *See Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) (Arizona's choice conflicts with the obstacles and purposes of DHS's decision to give work permits to deferred-action beneficiaries because "the ability to drive may be a virtual necessity for people who want to work in Arizona"). Today, Arizona is issuing driver's licenses to deferred-action beneficiaries because the federal government won an injunction requiring that result; Defendants and their *amici* cannot pretend the State made a "free choice."

Nor can Washington justify its "free choice" theory on 8 U.S.C. § 1621. *See* Washington Br. at 3. Congress enacted Section 1621 in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105—more commonly known as the Welfare Reform Act. And Section 1621 makes certain types of immigrants ineligible for defined types of welfare programs, like public housing and unemployment insurance. *See* 8 U.S.C. § 1621(c). While Congress gave States flexibility not to extend some benefits to some immigrants, Congress notably did *not* exclude immigrants from driver's license programs. *See ibid.*; *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there."). Thus, neither the federal government nor the State of Washington can avoid the fact that it is federal law as interpreted by the Ninth Circuit—not the States' "choices"—that would force the Plaintiffs to give driver's licenses to DAPA beneficiaries.

B. Second, the State of Washington cites no case to suggest that an Article III injury (like the injuries to the States' driver's license programs) disappears if it is offset by countervailing benefits (like increased tax revenue). *See* Washington Br. 4-7 (baldly asserting the point). That is because the law is decidedly to the contrary. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 223 (3d Cir. 2013) ("A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it."), *cert. denied sub nom. Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014); *Los Angeles Haven Hospice, Inc. v.*

Sebelius, 638 F.3d 644, 657 (9th Cir. 2011) ("[W]e disagree with the Secretary's premise that a hospice provider may be found to have standing to mount a facial challenge to the hospice cap regulation only if it suffered a "net" increase in its overpayment liability within the accounting year at issue in its administrative appeal."); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) ("[T]he fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing."); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574-75 (6th Cir. 2005) (increased risk from faulty medical device creates injury-in-fact, even if class members' own devices had not malfunctioned and may have been beneficial); *Aluminum Co. of America v. Bonneville Power Admin.*, 903 F.2d 585, 590 (9th Cir. 1989) (rejecting agency's standing argument because "[t]here is harm in paying rates that may be excessive, no matter what the California utilities may have saved"). As the leading treatise explains:

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

13A CHARLES A. WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. 3d § 3531.4 (3d ed. & 2014 Supp.).

Indeed, it is hard to imagine how the Article III standing inquiry would work were the law as Washington imagines it. For example, the Supreme Court held that Massachusetts has standing to challenge EPA's refusal to regulate new-car carbon

emissions that might contribute to global warming—notwithstanding the fact that everyone (including Massachusetts) would benefit financially from new-car sales. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). All that matters is that the Plaintiff States have pointed to Article III injuries that are concrete, traceable, and redressable; whether and to what extent those injuries could be netted out by other benefits is legally irrelevant.

And even if those benefits were legally relevant, the policy papers cited by Washington are not. It is well settled that a party cannot avoid summary judgment by offering "conclusory statements, speculation, and unsubstantiated assertions," *Pfau v. Gilger*, 211 F. App'x 271, 272 (5th Cir. 2006); it is *a fortiori* true that a party cannot win the extraordinary remedy of a stay pending appeal using advocacy papers from interest groups. The *Amici* Governors are proud of the economic and cultural benefits that hardworking immigrant families bring to our States. The way to evaluate the legal relevance of those contributions, however, is through the crucible of litigation—as the Plaintiff States did by offering more than 1,000 pages of record material before a preliminary-injunction hearing. It is not by citing handpicked articles in the footnotes of an amicus brief.[4]

[4] To take just one illustration of the problem, Washington asserts that the DAPA Directive would "grow[] the tax base." Br. at 5. But the State does not explain whether and to what extent the tax base would be *reduced* by new claims for earned income tax credits and other claims for publicly provided services. *See supra* pp. 4-5. Of course, Washington would have had to answer those questions if it had intervened in this lawsuit and actually tried to prove its claims, rather than asserting them in an *amicus* brief.

C. Finally, the scope of the preliminary injunction is unimpeachable. "A court must find prospective relief that fits the remedy to the wrong or injury that has been established." *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (opinion of Kennedy, J.). Here, the district court had jurisdiction over the Defendants and found that at least the State of Texas had satisfied all of the requirements for a preliminary injunction. It is entirely appropriate for the district court to use its equitable powers over the Defendants to protect Texas from irreparable injuries—regardless of whether Defendants would try to inflict them:

> Once a court has obtained personal jurisdiction over a defendant, that court has the power to command the defendant to perform acts outside the territorial jurisdiction of the court. Thus, the district court has the power to order nationwide relief where it is required.

Extraterritorial Effect of an Injunction, 19 Fed. Proc., L. Ed. § 47:38 (collecting cases); *see also United States v. Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996) (affirming nationwide injunction against an anti-abortion protester who "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility"). The Defendants in this case want to issue deferred-action documents and federal work permits that have nationwide effect; it would make no sense for the injunction not to apply nationwide.

CONCLUSION

Defendants' motion for a stay should be denied.

Respectfully submitted.
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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on March 23, 2015, I served a copy of the foregoing on all counsel of record via this Court's CM/ECF system.

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