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# State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation in *Texas v. United States*

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## Summary

States and localities can have significant interest in the manner and extent to which federal officials enforce provisions of the Immigration and Nationality Act (INA) regarding the exclusion and removal of unauthorized aliens. Depending upon the jurisdiction's specific concerns, this interest can be expressed in various ways, from the adoption of "sanctuary" policies limiting the jurisdiction's cooperation in federal enforcement efforts to the enactment of measures to deter unauthorized aliens from entering or remaining within the jurisdiction. In some cases, states or localities have also sued to compel federal officials to enforce the INA and other relevant laws.

In the mid-1990s, six states which were then home to over half the unauthorized aliens in the United States—Arizona, California, Florida, New Jersey, New York, and Texas—each filed suit alleging that federal officials' failure to check unauthorized migration violated the Guarantee and Invasion Clauses of the Constitution, the Tenth Amendment, and provisions of the INA. Concerns regarding standing—or who is a proper party to seek relief from a federal court—were sometimes noted. However, even when standing was assumed, the constitutional claims were seen to involve nonjusticiable "political questions," or failed on their merits. The states' statutory claims were similarly seen to involve matters committed to agency discretion by law and, thus, not reviewable by the courts. In three cases, the courts also noted that federal officials' alleged failure to control unauthorized migration did not constitute a reviewable "abdication" of their statutory duties.

Over a decade later, in 2011, Arizona asserted counterclaims challenging the federal government's alleged failure to stop unauthorized migration in the litigation over Arizona's S.B. 1070 measure. Although the court presumed that Arizona had standing, it rejected Arizona's claims regarding violations of the Invasion and Domestic Violence Clauses, Tenth Amendment, and immigration laws. Some claims were seen as precluded or otherwise settled by the earlier litigation. Others were found to involve nonjusticiable political questions, or otherwise failed. The court also rejected the argument that federal officials had abdicated their statutory duties.

Subsequently, in 2012, Mississippi, along with some U.S. Immigration and Customs Enforcement agents, challenged the Obama Administration's Deferred Action for Childhood Arrivals (DACA) initiative on the grounds that it runs afoul of the Take Care Clause, separation of powers, INA, and Administrative Procedure Act (APA). The ICE agents initially prevailed in their claim that DACA is contrary to the INA, although their case was ultimately dismissed on other grounds. However, Mississippi was found to lack standing because it could not show that aliens granted deferred action would have been removed but for DACA.

Most recently, in December 2014, over 25 states or state officials filed suit challenging the Administration's expansion of DACA and the creation of a DACA-like program for aliens who are parents of U.S. citizens or lawful permanent residents (known as DAPA). The states allege that these programs run afoul of the Take Care Clause and separation of powers principles of the Constitution, the INA, and substantive and procedural requirements of the APA. After finding that the states have standing, and that DAPA and the DACA expansion are judicially reviewable, a federal district court enjoined implementation of these programs on February 16, 2015, on the grounds that the states are likely to prevail in their argument that the programs run afoul of the APA's procedural requirements. Subsequently, on November 9, 2015, the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's finding as to the procedural violation of the APA, and also found for the states on their claim that DAPA and the DACA expansion substantively violate the APA because these programs are "not in accordance with law" and "in excess of statutory ... authority." The federal government then sought review from the Supreme Court, which granted its petition for certiorari on January 19, 2016. In so doing, the Court indicated that it would also consider the plaintiffs' Take Care Clause claims.

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States and localities can have significant interest in the manner and extent to which federal officials enforce provisions of the Immigration and Nationality Act (INA) regarding the exclusion and removal of unauthorized aliens.<sup>1</sup> Some states and localities, concerned that federal enforcement disrupts families and communities, or infringes upon human rights, have adopted “sanctuary” policies limiting their cooperation in federal efforts.<sup>2</sup> Other states and localities, in contrast, concerned about the costs of providing benefits or services to unauthorized aliens, or such aliens settling in their communities, have adopted measures to deter unauthorized aliens from entering or remaining within their jurisdiction.<sup>3</sup> In some cases, such states or localities have also sued to compel federal officials to enforce the immigration laws, or to compensate them for costs associated with unauthorized migration.<sup>4</sup>

This report provides an overview of prior and pending challenges by states to federal officials’ alleged failure to enforce the INA or other provisions of immigration law. It begins by discussing (1) the lawsuits filed by six states in the mid-1990s; (2) Arizona’s counterclaims to the federal government’s suit to enjoin enforcement of S.B. 1070; and (3) Mississippi’s challenge to the Deferred Action for Childhood Arrivals (DACA) initiative. It then describes the challenge brought by over 25 states or state officials in December 2014 to the recently announced expansion of DACA and the creation of a similar program for unauthorized aliens whose children are U.S. citizens or lawful permanent resident aliens (LPRs) (commonly known as DAPA).<sup>5</sup>

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<sup>1</sup> Among other things, the INA provides that aliens who enter or remain in the United States without authorization are subject to removal. *See* INA §212(a)(6), 8 U.S.C. §1182(a)(6) (prescribing the inadmissibility of illegal entrants and immigration violators); INA §237(a)(1), 8 U.S.C. §1227(a)(1) (prescribing the deportability of aliens who violate their immigration status or conditions of admission). The INA also provides for the initiation and conduct of removal proceedings, addresses whether aliens are to be detained pending removal, and expressly authorizes several types of relief from removal. *See, e.g.*, INA §236, 8 U.S.C. §1226 (apprehension and detention of aliens); INA §239, 8 U.S.C. §1229 (initiation of removal proceedings); INA §240, 8 U.S.C. §1229a (formal removal proceedings); INA §240a, 8 U.S.C. §1229b (cancellation of removal).

<sup>2</sup> For further discussion of “sanctuary” policies and the legal issues that may be raised by them, see generally CRS Report R43457, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement*, by (name redacted) and (name redacted).

<sup>3</sup> States and localities have generally been seen to be preempted or otherwise barred from adopting measures that would deter unauthorized aliens from settling or remaining in their jurisdiction by “paralleling” federal immigration laws. *See generally* archived CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by (name redacted) and (name redacted). *But see* archived CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by (name redacted) (finding that states and localities are generally not preempted from revoking the licenses of businesses that employ unauthorized aliens, or requiring employers within their jurisdiction to check employees’ work authorization in the federal government’s E-Verify database).

<sup>4</sup> States and localities are sometimes said to have been “forced” to bring such suits because they are seen to be preempted from enforcing federal immigration law on their own behalf. *See, e.g.*, *Texas v. United States*, No. 1:14-cv-254, Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support, at 26 (S.D. Tex., filed December 4, 2014).

<sup>5</sup> Department of Homeland Security (DHS) Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Children Are U.S. Citizens or Permanent Residents*, November 20, 2014 (copy on file with the author). A recent decision by the U.S. Court of Appeals for the Fifth Circuit refers to “[t]wenty-six states” challenging DAPA and the DACA expansion. *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657, \*8 (5<sup>th</sup> Cir., May 26, 2015). However, the caption of this decision and related filings name 27 state or state officials: (1) Texas, (2) Alabama, (3) Georgia, (4) Idaho, (5) Indiana, (6) Kansas, (7) Louisiana, (8) Montana, (9) Nebraska, (10) South Carolina, (11) South Dakota, (12) Utah, (13) West Virginia, (14) Wisconsin, (15) the governor of Maine, (16) the governor of North Carolina, (17) the governor of Idaho, (18) the governor of Mississippi, (19) North Dakota, (20) Ohio, (21) Oklahoma, (22) Florida, (23) Arizona, (24) Arkansas, (25) the Attorney General of Michigan, (26) Nevada, and (27) Tennessee. Other states have filed amicus briefs supporting the programs to grant deferred action to certain unauthorized aliens that the Obama Administration announced in November 2014. *See, e.g.*, *Texas v. United States*, (continued...)

The report does not address challenges to the federal government’s alleged failure to enforce the immigration laws that have been made by other parties, including private individuals, municipal officials, or, in one case, the people of a state (although not the state itself).<sup>6</sup> But see CRS Legal Sidebar WSLG1145, “*Sheriff Joe*” Found to Lack Standing to Challenge the Obama Administration’s Immigration Enforcement Priorities and Deferred Action Initiatives, by (name redacted).

## Litigation in the Mid-1990s

In the mid-1990s, six states which were then home to over half the unauthorized aliens in the United States<sup>7</sup>—Arizona, California, Florida, New Jersey, New York, and Texas—each challenged the federal government’s “fail[ure] to control illegal immigration.”<sup>8</sup> Each case raised somewhat different issues.<sup>9</sup> However, all resulted in losses for the states both before the reviewing federal district court and on appeal. Limitations on standing—or who is a proper party to seek judicial relief from a federal court—were noted in some cases.<sup>10</sup> However, even when standing was assumed,<sup>11</sup> the states’ constitutional and statutory claims failed, as discussed below.

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No. 1:14-cv-00254, States’ Motion for Leave to Participate as Amici Curiae and Brief in Opposition to Plaintiffs’ Motion for Preliminary Injunction (S.D. Tex., filed January 12, 2015) (copy on file with the author). Briefs in support of these programs have also been filed by some local governments, including local governments in states which are *challenging* the programs. *See, e.g.*, Texas v. United States, No. 1:14-cv-254, Brief for Amici Curiae the Mayors of New York and Los Angeles, the Mayors of Thirty-One Additional Cities, the United States Conference of Mayors, and the National League of Cities in Opposition to Plaintiffs’ Motion for Preliminary Injunction (S.D. Tex., filed January 27, 2015) (copy on file with the author).

<sup>6</sup> *See, e.g.*, Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015) (affirming the district court’s dismissal, for lack of standing, of a challenge to the Obama Administration’s deferred action initiatives brought by Sheriff Joe Arpaio of Maricopa County, Arizona, in both his personal and official capacities), *cert. denied*, 577 U.S. \_\_\_\_ (January 19, 2015); People of the State of Colorado *ex rel.* Suthers v. Gonzales, 558 F. Supp. 2d 1158 (D. Colo. 2007) (dismissing, in part on standing grounds, a challenge to the federal government’s alleged failure to “secure the nation’s borders against illegal immigration and to implement all of the requirements of the Intelligence Reform and Terrorism Prevention Act”); Sadowski v. Bush, 293 F. Supp. 2d 15 (D.D.C. 2003) (dismissing, in part on standing grounds, a challenge to the Executive’s alleged failure to “close” the U.S.-Mexico border and remove “suspected terrorists” from the country).

<sup>7</sup> *See, e.g.*, Rebecca L. Cook, et al., The Urban Institute, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994).

<sup>8</sup> Texas v. United States, 106 F.3d 661, 664 (5<sup>th</sup> Cir. 1997).

<sup>9</sup> For example, New Jersey, alone among the states, maintained on appeal a claim that federal officials’ alleged failure to enforce the immigration laws constituted a “taking” of state property in violation of the Fifth Amendment to the U.S. Constitution. *See* State v. New Jersey, 91 F.3d 463, 468 (3d Cir. 1996) (finding that New Jersey’s alleged interests in tax revenues were not “sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes”).

<sup>10</sup> *See* Texas, 106 F.3d at 664 (noting that the district court had dismissed Texas’s suit, in part, on standing grounds); Padavan v. United States, 82 F.3d 23, 25 (2d Cir. 1996) (noting questions as to standing); Chiles v. United States, 69 F.3d 1094, 1096 (11<sup>th</sup> Cir. 1995) (noting that the district court did not address the federal government’s argument that Florida lacked standing), *aff’g* 874 F. Supp. 1334 (S.D. Fla. 1994). Standing requirements derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual “Cases” and “Controversies.” U.S. Const., art. III, §2, cl. 1. The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving parties who have “a personal stake in the outcome of the controversy.” *Baker*, 369 U.S. at 186. Parties seeking judicial relief from an Article III court must generally show three things in order to demonstrate standing: (1) they have suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Additional requirements involving so-called “prudential standing” could also present issues. These requirements are (continued...)

The following sections discuss how the courts viewed the most notable arguments made in the 1990s litigation, including those based on the Naturalization, Guarantee, and Invasion Clauses of the U.S. Constitution; the Tenth Amendment; and provisions of the INA.

## Naturalization Clause

Several states claimed that the federal government’s alleged failure to enforce the immigration laws imposed disproportionate costs upon them, which the federal government was obligated to reimburse pursuant to the Naturalization Clause.<sup>12</sup> This clause—which has been recognized as one source of the federal government’s authority to regulate immigration<sup>13</sup>—expressly grants Congress the “Power ... [t]o establish a uniform Rule of Naturalization.”<sup>14</sup> The states’ reasoning appears to have been that, insofar as the rule of naturalization is to be “uniform,” the effects of immigration upon the states must also be uniform and, if they are not, the federal government has an affirmative duty to compensate those states that can be seen as disproportionately affected by immigration.<sup>15</sup> However, ignoring the question of whether Congress’s power over immigration is, in fact, co-extensive with its power over naturalization,<sup>16</sup> the U.S. Courts of Appeals for the Second, Third, and Ninth Circuits found that the Naturalization Clause imposes no obligation upon the federal government to reimburse the states for any costs arising from an alleged “invasion” by unauthorized aliens, or to protect the states from harm by “non-governmental third parties.”<sup>17</sup> To the contrary, as the Second Circuit noted, the Supreme Court has upheld the federal government’s exercise of its “plenary powers”—which include immigration<sup>18</sup>—“even though the effects of such exercises of power may be onerous to the states.”<sup>19</sup>

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reflected in the rule that plaintiffs must be “within the ‘zone of interests to be protected or regulated by the statute or constitutional guarantee’” that they allege to have been violated. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

<sup>11</sup> *See Texas*, 106 F.3d at 664 n.3 (“For purposes of today’s disposition we assume, without deciding, that the plaintiffs have standing.”); *Padavan*, 82 F.3d at 25 (“We assume, without deciding, that these plaintiffs have the requisite standing to bring this action ...”); *Chiles*, 69 F.3d at 1096 (court “[a]ssuming ... standing,” as well as the justiciability of Florida’s claims).

<sup>12</sup> *See Texas*, 106 F.3d at 664-65; *New Jersey*, 91 F.3d at 467; *Padavan*, 82 F.3d at 26-28.

<sup>13</sup> *See, e.g., Arizona v. United States*,—U.S.—, 132 S. Ct. 2492, 2498 (2012) (viewing federal authority to regulate immigration as deriving, in part, from Congress’s power to establish a uniform rule of naturalization).

<sup>14</sup> U.S. Const., art. I, §8, cl. 3.

<sup>15</sup> *Cf. New Jersey*, 91 F.3d at 467 (“[Because power over immigration matters has ... been delegated to the federal government, ‘the State of New Jersey is powerless to effectively resolve the economic problems caused by the invasion of illegal immigrants into the State,’ ... [and the] defendants, in failing to implement their laws and policies have ‘forced the State of New Jersey[] to bear the burden of a responsibility which is that of the Nation as a whole pursuant to the Naturalization Clause.’”).

<sup>16</sup> *Naturalization* refers to the process whereby aliens become U.S. citizens, and some have questioned whether Congress’s power over naturalization is to be seen as the basis for federal regulation of immigration. *See, e.g., The Passenger Cases*, 48 U.S. 283, 526-27 (1849) (Taney, C.J., dissenting).

<sup>17</sup> *New Jersey*, 91 F.3d at 467 (“[W]e see no ground on which we could read into the Naturalization Clause an affirmative duty on the part of the federal government ...”). *See also Texas*, 106 F.3d at 665 (“[W]e perceive no basis for reading into the [Naturalization] clause an affirmative duty ...”); *Padavan*, 82 F.3d at 26-27 (similar).

<sup>18</sup> For further discussion as to plenary power over immigration, see archived CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by (name redacted) and (name redacted) 4-5.

<sup>19</sup> *Padavan*, 82 F.3d at 26-27 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (“It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested (continued...)”).

## Guarantee Clause

The courts similarly rejected the states' claims that the federal government violated the Guarantee Clause by failing to compensate them for their "immigration-related expenditures."<sup>20</sup> The Guarantee Clause provides that the "United States shall guarantee to every State in this Union a Republican Form of Government,"<sup>21</sup> and the states' argument was essentially that the federal government deprived them of a republican form of government by "forcing" them to spend money on unauthorized aliens that they would not have had to spend if these aliens had been excluded or removed from the United States.<sup>22</sup> This argument was, however, uniformly rejected by the Second, Third, Fifth, Ninth, and Eleventh Circuits. In some cases, the courts did so by noting that the Supreme Court has generally viewed alleged violations of the Guarantee Clause as involving nonjusticiable "political questions,"<sup>23</sup> or questions which are committed to the executive and/or legislative branches, and which lack judicially discoverable and manageable standards for resolving.<sup>24</sup> In other cases, the courts noted that nothing in the state's complaint suggested that the state had been deprived of a republican form of government because the state's "form [and] method of functioning" remained unchanged, and the state's electorate had not been "deprived of the opportunity to hold state and federal officials accountable at the polls for their respective policy choices."<sup>25</sup>

## Invasion Clause

Claims that the federal government's alleged failure to enforce the immigration laws violated the Invasion Clause—which requires the federal government to protect the states "against Invasion"<sup>26</sup>—were similarly rejected by the Second, Third, Ninth, and Eleventh Circuits.<sup>27</sup> Most commonly, this was because the courts viewed the legislative and executive branches as having been tasked with determining how the immigration laws are to be enforced,<sup>28</sup> while the judicial

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in subordinate governments, as to exempt its own operations from their own influence.")).

<sup>20</sup> *Texas*, 106 F.3d at 664, 666-67. *See also* *California v. United States*, 104 F.3d 1086, 1091 (9<sup>th</sup> Cir. 1997); *Arizona v. United States*, 104 F.3d 1095, 1096 (9<sup>th</sup> Cir. 1997) (adopting the reasoning set forth in the *California* decision, previously cited); *New York*, 82 F.3d at 27-28; *Chiles*, 69 F.3d at 1097.

<sup>21</sup> U.S. Const., art. IV, §4.

<sup>22</sup> *See, e.g., California*, 106 F.3d at 1091.

<sup>23</sup> *See Texas*, 106 F.3d at 666 ("The State suggests no manageable standards by which a court could decide the type and degree of immigration law enforcement that would suffice to comply with [the Guarantee Clause's] strictures."); *California*, 104 F.3d at 1091; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>24</sup> *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it [among other things].").

<sup>25</sup> *Texas*, 106 F.3d at 666. *See also California*, 104 F.3d at 1091; *New Jersey*, 91 F.3d at 468; *Padavan*, 82 F.3d at 28.

<sup>26</sup> U.S. Const., art. IV, §4.

<sup>27</sup> *California*, 104 F.3d at 1091; *New Jersey*, 91 F.3d at 468; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>28</sup> Notably, in the mid-1990s litigation, the states described *both* the legislative *and* executive branches as responsible for the federal government's alleged failure to enforce the immigration laws. *See, e.g., Texas*, 106 F.3d at 665 ("We are not aware of and have difficulty conceiving of any judicially discoverable standards for determining whether immigration control efforts by *Congress* are constitutionally adequate."); *California*, 104 F.3d at 1093 ("California contends that the costs of educating alien children stems from the *Federal Government's* ineffective policing of national borders."); *New Jersey*, 91 F.3d at 467 ("Neither the state's incarceration of illegal aliens nor its obligation to educate illegal aliens results from any command by *Congress*."); *Padavan*, 82 F.3d at 26 ("[T]he plaintiffs plead seven causes of action, claiming that the *federal government* had violated various statutory and constitutional provisions in (continued...)

branch was seen to lack manageable standards for determining whether or when the entry of unauthorized aliens constituted an “invasion.”<sup>29</sup> Several courts also found, in the alternative, that the Invasion Clause was inapplicable because the states were not threatened by incursions of foreign or domestic states.<sup>30</sup>

## Tenth Amendment

The states’ claims that the federal government violated the Tenth Amendment by “forcing” them to provide public benefits and services to unauthorized aliens were also uniformly rejected by the Second, Third, Fifth, Ninth, and Eleventh Circuits.<sup>31</sup> Here, the courts relied upon somewhat different reasoning as to each of the three main types of benefits and services which the states alleged that the federal government had “commandeered.” First, as to Medicaid spending, the courts found that the states had agreed to provide certain emergency medical services to unauthorized aliens as a condition of states’ receipt of federal funds.<sup>32</sup> Such conditions, in the courts’ view, represented a permissible exercise of Congress’s spending power, rather than impermissible commandeering.<sup>33</sup> Second, as to the costs of incarcerating unauthorized aliens, the courts noted that these aliens were jailed pursuant to state law, rather than any dictates of the federal government and, thus, they found no commandeering.<sup>34</sup> Third, and finally, as to elementary and secondary education, the courts noted that the states were obligated to provide such education to unauthorized alien children as a result of the Constitution, as construed by the Supreme Court in *Plyler v. Doe*, and not as the result of a command of the federal government.<sup>35</sup> Thus, in the courts’ view, this, too, did not represent commandeering.

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carrying out its immigration policy.”) (emphases added). It was not until the *Crane* litigation, discussed below, that the states began to frame the alleged failure to enforce the immigration laws in terms of the Executive’s failure to execute the statutes as they were written and intended by Congress and, thus, to make claims regarding violations of the Take Care Clause. See *supra* “Mississippi’s Claims in *Crane v. Napolitano*.”

<sup>29</sup> *California*, 104 F.3d at 1091; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>30</sup> *California*, 104 F.3d at 1091 (basing this conclusion, in part, on James Madison’s statement in *The Federalist* No. 43 that the Invasion Clause serves to protect a state from “foreign hostility” and “ambitious or vindictive enterprises” on the part of other states or foreign nations); *New Jersey*, 91 F.3d 468; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097.

<sup>31</sup> *Texas*, 106 F.3d at 665-66; *California*, 104 F.3d at 1091-93; *New Jersey*, 91 F.3d at 466-67; *Padavan*, 82 F.3d at 28-29; *Chiles*, 69 F.3d at 1097. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., amend. X.

<sup>32</sup> See, e.g., *California*, 104 F.3d at 1092.

<sup>33</sup> *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (upholding a statute wherein Congress conditioned access to highway funds on states establishing 21 years of age as the drinking age)). The Supreme Court’s 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius* elaborated upon the Court’s earlier holding in *South Dakota* by finding that compelling the states to participate in a “new grant program” or else face the possible loss of all federal funds under a current program was coercive and unconstitutional under the Tenth Amendment. See generally CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by (name redacted). However, the mid-1990s challenges did not claim that the federal government threatened the states with the loss of existing funding if the states did not adopt a new program, and the most recent state challenge, *Texas v. United States*, does not allege commandeering. See *infra* “*Texas v. United States* and the Challenge to DAPA and the DACA Expansion.”

<sup>34</sup> *California*, 104 F.3d at 1092-93.

<sup>35</sup> *Id.* at 1093. In *Plyler*, the Court found that Texas deprived unauthorized alien children of equal protection by denying them elementary and secondary education. The Court’s decision in *Plyler* is generally understood to reflect the unique facts of the case (i.e., denying “basic education” to minor children who were seen to be lawfully present as a result of their parents’ actions, not their own), rather than a view that unauthorized aliens constitute a “suspect classification” for (continued...)



## Statutory Provisions

The states' statutory claims—alleging that federal officials violated specific provisions of the INA or other statutes by failing to exclude or remove unauthorized aliens, or compensate the states for the costs associated with such aliens—were no more successful than their constitutional arguments. The states cited a number of provisions in support of these claims, including

- Section 103(a)(5) of the INA, which at that time tasked the Attorney General with the “duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens”;<sup>36</sup>
- the former Section 1252(a)(2)(A) of Title 8 of the *U.S. Code*, which called for the Attorney General to take any alien convicted of an aggravated felony into custody upon the alien’s release from state custody or supervision;<sup>37</sup>
- the former Section 1252(c) of Title 8 of the *U.S. Code*, which established a six-month period following the issuance of a final order of removal for federal officials to effectuate the alien’s departure from the United States;<sup>38</sup>
- the former Section 1252(l) of Title 8 of the *U.S. Code*, which directed the Attorney General to begin deportation proceedings for aliens convicted of deportable offenses “as expeditiously as possible after the date of conviction”;<sup>39</sup>
- Section 276 of the INA, which establishes criminal penalties for “illegal reentry” (i.e., unlawfully re-entering the United States after having been removed);<sup>40</sup> and
- Section 1365 of Title 8 of the *U.S. Code*, which provides for the reimbursement of costs incurred by the states for the imprisonment of unauthorized aliens or Cuban nationals who have been convicted of felonies.<sup>41</sup>

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equal protection purposes. *See generally* CRS Report R43447, *Unauthorized Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis*, by (name redacted).

<sup>36</sup> *Texas*, 106 F.3d at 667; *Padavan*, 82 F.3d at 29-30; *Chiles*, 69 F.3d at 1096. This responsibility has since been transferred to the Secretary of Homeland Security. *See* INA §103(a)(5), 8 U.S.C. §1103(a)(5) (“[The Secretary] shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.”).

<sup>37</sup> *California*, 104 F.3d at 1094. INA §238, 8 U.S.C. §1228, currently makes similar provisions for the “expedited removal” of aliens convicted of aggravated felonies, whose removal proceedings shall, among other things, be conducted in a “manner which eliminates the need for additional detention at any [DHS] processing center ... and in a manner which assures expeditious removal following the end of the alien’s incarceration for the underlying sentence.”

<sup>38</sup> *California*, 104 F.3d at 1094-95. INA §241(a)(1)(A), 8 U.S.C. §1231(a)(1)(A), currently states that “[e]xcept as otherwise provided in this section, when an alien is ordered removed, the [Secretary of Homeland Security] shall remove the alien from the United States within a period of 90 days.”

<sup>39</sup> *California*, 104 F.3d at 1094. Similar language is currently codified in INA §239(d)(1), 8 U.S.C. §1229(d)(1) (“In the case of an alien who is convicted of an offense which makes the alien deportable, the [Secretary of Homeland Security] shall begin any removal proceeding as expeditiously as possible after the date of the conviction.”).

<sup>40</sup> *California*, 104 F.3d at 1094. *See, e.g.*, 8 U.S.C. §1326(b)(1) (prescribing that aliens who illegally re-enter the United States after having been removed subsequent to a conviction for the commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony) “shall be fined under title 18, imprisoned not more than 10 years, or both”).

<sup>41</sup> *California*, 104 F.3d at 1093-94; *New Jersey*, 91 F.3d at 470. *See also* U.S.C. §1365(a) (“Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State.”).

However, all the states' claims were seen to involve matters that were committed to agency discretion as a matter of law and, thus, not reviewable by the courts.<sup>42</sup> Notably, all the statutes cited by the states in making these claims included the word "shall."<sup>43</sup> In no case, though, did an appellate court specifically address the statute's use of this word, or whether "shall" could be construed to indicate mandatory agency action, in its published decision. This was so even when the provision of immigration law in question did not, in itself, include language which clearly evidenced that federal officials had some discretion in enforcing the law.<sup>44</sup>

It should also be noted that, in three of the six cases, the appellate court expressly rejected the suggestion that federal officials' alleged failure to enforce the immigration laws could be seen as an "abdication" of their statutory responsibilities. The Supreme Court's 1985 decision in *Heckler v. Chaney* expressly recognized an exception to the presumption that agency decisions not to undertake enforcement actions are "committed to agency discretion by law" and, thus, immune from judicial review under the Administrative Procedure Act (APA).<sup>45</sup> This exception would permit review when "the agency has 'consciously and expressly adopted a general policy' [of nonenforcement] that is so extreme as to amount to an abdication of its statutory responsibilities."<sup>46</sup> However, the federal courts of appeals found that the federal government's immigration enforcement policies in the mid-1990s did not constitute such an abdication,<sup>47</sup> apparently because the states could not allege that the federal government was "doing nothing" to enforce the immigration laws.<sup>48</sup> Instead, in the courts' view, the states' questioned the effectiveness of federal policies and practices, and "[r]eal or perceived inadequate enforcement of immigration law does not constitute a reviewable abdication of duty."<sup>49</sup>

## Arizona's Counterclaims in the S.B. 1070 Litigation

In 2011, over a decade after the mid-1990s litigation, Arizona asserted counterclaims challenging the federal government's alleged failure to enforce the immigration laws in the litigation over Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (commonly known as

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<sup>42</sup> See *Texas*, 106 F.3d at 667; *California*, 104 F.3d at 1094-95; *New Jersey*, 91 F.3d at 470; *Padavan*, 82 F.3d at 29-30; *Chiles*, 69 F.3d at 1096.

<sup>43</sup> As discussed later in this report (see "Mississippi's Claims in *Crane v. Napolitano*"), *shall* has been construed to indicate mandatory agency action in some cases. See, e.g., *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' in [Section] 3621(e)(2)(B) contrasts with the legislators' use of a mandatory 'shall' in the very same section."). However, in other cases, agencies have been seen to have discretion in determining whether to enforce particular statutes that use the word *shall*. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (describing a statute which stated that certain food, drugs, or cosmetics "shall be liable to be proceeded against" as "framed in the permissive").

<sup>44</sup> For example, Section 103(a) of the INA expressly provides that the appointment of employees for purposes of controlling and guarding U.S. borders is at the Secretary of Homeland Security's discretion. See *supra* note 36.

<sup>45</sup> *Heckler*, 470 U.S. at 838 (quoting and discussing 5 U.S.C. §701(a)(2)). Agency action is, in turn, generally seen as committed to agency discretion where there are "no judicially manageable standards ... available for judging how and when an agency should exercise its discretion." *Id.* at 830.

<sup>46</sup> *Id.* at 833 n.4.

<sup>47</sup> See *Texas*, 106 F.3d at 667 ("We reject out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty."); *California*, 104 F.3d at 1094 ("[T]he allegations asserted in the instant Complaint do not rise to a level that would indicate such an abdication."); *Chiles*, 69 F.3d at 1096 n.5 ("The part of the statute relied on by Florida would not justify even an allegation of complete abdication of statutory duties to go to trial.")

<sup>48</sup> *Texas*, 106 F.3d at 667.

<sup>49</sup> *Id.*

“S.B. 1070”).<sup>50</sup> Arizona had adopted S.B. 1070 in 2010 in an attempt to deter unauthorized aliens from settling in the state by requiring that state and local police check the immigration status of all persons whom they stop, arrest, or detain. S.B. 1070 also made it a state crime to engage in certain conduct thought to facilitate the presence of unauthorized aliens within the state.<sup>51</sup> The federal government sought to enjoin enforcement of S.B. 1070 on the grounds that it was preempted by federal law. Arizona responded, in part, by alleging that federal policies and practices as to immigration enforcement ran afoul of various provisions of the Constitution and federal statute. In particular, Arizona alleged that federal officials had violated the Invasion and Domestic Violence Clauses, as well as the Tenth Amendment, by, respectively, failing to protect Arizona from “invasion” by aliens unlawfully entering the United States and “refusing” to reimburse the state for the “costs and damages associated with illegal immigration in Arizona.”<sup>52</sup> Arizona also alleged that federal officials had failed to comply with statutory mandates to achieve and maintain “operational control” of the Arizona-Mexico border, pursue and effectuate the removal of unauthorized aliens who are found within the interior of the United States, and reimburse states for the costs of detaining “criminal aliens” pursuant to the State Criminal Alien Assistance Program (SCAAP).<sup>53</sup>

The federal government challenged Arizona’s standing to raise all of these claims other than that as to reimbursement pursuant to SCAAP.<sup>54</sup> However, the reviewing federal district court “presum[ed]” that Arizona had standing because (1) the federal government did not question whether “illegal immigration” constituted an injury in fact; (2) Arizona had alleged facts indicating that unauthorized aliens’ conduct and choices in crossing into Arizona were directly influenced by federal policies and practices; and (3) ordering the federal government to “deploy ... temporary measures” to secure the border would provide Arizona “some relief.”<sup>55</sup>

Arizona did not fare as well on the merits of its arguments. The reviewing federal district court first found that Arizona’s claims as to the Invasion Clause and the Tenth Amendment were precluded by the litigation in the mid-1990s,<sup>56</sup> or, alternatively, settled in the federal government’s

<sup>50</sup> For further discussion of this litigation, see generally archived CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by (name redacted) and (name redacted).

<sup>51</sup> S.B. 1070, as amended by H.B. 2162 (copy on file with the author).

<sup>52</sup> See *United States v. Arizona*, No. 2:10-cv-01413-SRB, The State of Arizona and Governor Janice K. Brewer’s Answer and Counterclaims, at 16-17 (D. Az., filed February 10, 2011) (copy on file with the author).

<sup>53</sup> *Id.* at 16-17. See especially *id.* at 17 (“The federal government is not enforcing the immigration laws within the United States. The current policy of the executive branch of the United States government is to take *no* action regarding the vast majority of aliens who are unlawfully present in the United States.”). For more on the meaning of the term “criminal alien,” see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted), at 2-3.

<sup>54</sup> See *United States v. Arizona*, No. CV 10-1413-PHX-SRB, Order (D. Az., filed October 21, 2011). The United States did not dispute that “Arizona had alleged an injury in fact arising from illegal immigration,” given Arizona’s claims that it faced increased costs as a “direct result” of unauthorized migration into the state. *Id.* at 3. However, the federal government did contest whether Arizona’s alleged injury is fairly traceable to the challenged actions of federal officials, and whether any remedy is available. *Id.* For further discussion of standing, see *supra* note 10.

<sup>55</sup> See Order, *supra* note 54, at 4-5. For the specific types of injunctive relief requested by Arizona, see Answer and Counterclaims, *supra* note 52, at 40-55.

<sup>56</sup> Order, *supra* note 54, at 5-8. The doctrine of issue preclusion, also known as collateral estoppel, bars relitigation “of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,” even if the issue recurs in the context of a different claim.” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)). While issue preclusion may not apply to bar relitigation where “controlling facts or legal principles have changed significantly since the prior judgment,” or where “other special circumstances warrant an exception,” the federal district court reviewing Arizona’s counterclaims found no such changes or special circumstances. Order, *supra* note 54, at 6-7 (quoting *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, (continued...))

favor by Ninth Circuit precedent.<sup>57</sup> The court similarly found that Arizona’s remaining constitutional claim—alleging a violation of the Domestic Violence Clause that had not been raised in the mid-1990s litigation—was also settled by Ninth Circuit precedent finding that the clause applies only to “insurrections, riots, and other forms of civil disorder,” and not “ordinary crimes.”<sup>58</sup> The court also viewed the Domestic Violence Clause as implicating nonjusticiable political questions.<sup>59</sup>

The reviewing federal district court then found that Arizona’s various statutory claims involved actions that were committed to agency discretion by law and, thus, were not subject to review by the courts. In so finding, the court specifically looked at provisions of immigration law that

- direct the Secretary of Homeland Security to “take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control” over the U.S. border within 18 months after the enactment of the Secure Fence Act of 2006;<sup>60</sup>
- prioritize the incarceration of unauthorized “criminal aliens” and reimburse states through SCAAP for the costs of incarcerating such aliens;<sup>61</sup>
- establish procedures for removing unauthorized aliens apprehended in the interior of the United States; and
- bar federal, state, and local officials from restricting the sharing of information regarding persons’ citizenship or immigration status.<sup>62</sup>

However, the court concluded that each provision involved actions that are committed to agency discretion by law.<sup>63</sup> In some cases, the court reached this conclusion because the statute provided no standard by which the court could judge the propriety of federal officials’ actions, as with the construction of the border fence, where “no deadline mandates completion of the fencing and infrastructure developments or any required discrete action by a specified time.”<sup>64</sup> In other cases, the court noted that the statutes themselves grant federal officials “substantial discretion,” as was the case with “determining where to build fencing, where to use alternative infrastructure improvements rather than fencing, and how best to develop a comprehensive program to prevent illegal immigration.”<sup>65</sup> In no case did the court, in its published opinion, note the use of “shall” in

(...continued)

885 (9<sup>th</sup> Cir. 2000)).

<sup>57</sup> Order, *supra* note 54, at 8-13.

<sup>58</sup> Under the INA, unlawful entry is a crime. INA §275, 8 U.S.C. §1325. Unlawful presence, absent additional factors, is not a crime, although it is a ground for removal. INA §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i).

<sup>59</sup> Order, *supra* note 54, at 10. The Domestic Violence Clause provides that “The United States shall ... on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) [protect each State] against domestic Violence.” U.S. Const., art. IV, §4.

<sup>60</sup> Order, *supra* note 54, at 14-17.

<sup>61</sup> *Id.* at 19-33.

<sup>62</sup> *Id.* at 17-19.

<sup>63</sup> See, e.g., *id.* at 16 (“[T]he Acts [regarding border fencing] do not mandate any discrete agency action with the clarity to support a judicial order compelling agency action ...”); *id.* at 18 (“The Court cannot properly review the enforcement decisions challenged by Arizona in [its claims regarding interior immigration enforcement].”); *id.* at 20 (“Under SCAAP, the calculation of the average cost of incarceration is explicitly committed to the discretion of the Attorney General.”).

<sup>64</sup> *Id.* at 16. For further discussion of the requirements as to border fencing, see generally CRS Report R43975, *Barriers Along the U.S. Borders: Key Authorities and Requirements*, by (name redacted).

<sup>65</sup> Order, *supra* note 54, at 16.

any of these statutes, or discuss whether this word could be construed to indicate mandatory action.

The court further found the specific actions challenged by Arizona—which included prioritizing certain enforcement efforts and “considering changes in the interpretation and enforcement of immigration laws that would ‘result in meaningful immigration reform absent legislative action’”—did not constitute an abdication of the Executive’s statutory responsibilities. The court did so, in part, because Arizona conceded that federal officials “continue to enforce federal immigration laws in accordance with priorities established by the federal government.”<sup>66</sup> Thus, according to the court, while Arizona “disagrees” with federal enforcement priorities, its “allegations do not give rise to a claim that [federal officials] have abdicated their statutory responsibilities.”<sup>67</sup>

## Mississippi’s Claims in *Crane v. Napolitano*

One year later, in 2012, Mississippi raised similar claims about federal officials’ alleged failure to enforce the immigration laws when it joined a challenge brought by some U.S. Immigration and Customs Enforcement (ICE) agents to the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) initiative.<sup>68</sup> This challenge arose from the Administration’s decision to grant some “unauthorized aliens”<sup>69</sup> who had been brought to the United States as children and raised here deferred action—one type of relief from removal—and, in many cases, work authorization.<sup>70</sup> The ICE agents and Mississippi asserted that this initiative violates the Take Care

<sup>66</sup> *Id.* at 19. The court also noted, in discussing the allegations of abdication, that it “cannot properly review the enforcement decisions challenged by Arizona” because these decisions are committed to immigration officials’ discretion by law. This perhaps suggests that this court, at least, would be disinclined to find abdication where an agency’s actions—however “extreme” they might be said to be—could be seen as within the agency’s discretion.

<sup>67</sup> *Id.* Arizona also appears to have asserted that federal enforcement policies were reviewable because they had been modified. However, the reviewing district court took the view that this change in policy, per se, did not permit review where agency enforcement decisions—“including the decisions to prioritize agency resources and act on agency determined priorities”—are committed to agency discretion as a matter of law. *Id.* at 19 n.6.

<sup>68</sup> See *Crane v. Napolitano*, No. 3:12-cv-03247-O, Amended Complaint (N.D. Tex., filed October 12, 2012) (copy on file with the author). Subsequently, Arizona also alleged that the DACA initiative was beyond the Executive’s authority in defending its own policy of denying driver’s licenses to aliens granted deferred action through DACA. See generally CRS Report R43452, *Unlawfully Present Aliens, Driver’s Licenses, and Other State-Issued ID: Select Legal Issues*, by (name redacted) and (name redacted). The federal government was not a party to this litigation, although it did, at the Ninth Circuit’s request, file an amicus brief in which it supported the plaintiffs’ argument that Arizona may not deny driver’s licenses to DACA beneficiaries. See *Brewer v. Az. Dream Act Coalition*, No. 14A625, Application to Stay the Mandate of the United States Court of Appeals for the Ninth Circuit Pending Disposition of a Petition for Writ of Certiorari, at 13 (S. Ct., filed December 11, 2014). The Supreme Court denied this application for a stay, in an order which did not address the Obama Administration’s deferred action initiatives. See *Brewer v. Az. Dream Act Coalition*, No. 14A625, Order in Pending Case (S. Ct., December 17, 2014) (copy on file with the author). The federal government’s arguments in support of the DACA beneficiaries seeking Arizona driver’s licenses in this case played a role in federal district and appeals court decisions finding that Texas, in particular, has standing to challenge DAPA and the DACA expansion, as discussed below. See *infra* “Fifth Circuit’s Affirmance of the District Court on Standing, Reviewability, and Rulemaking.”

<sup>69</sup> As used here, the term “unauthorized alien” connotes an alien who either entered or remained in the United States in violation of federal immigration law and lacks a legal immigration status.

<sup>70</sup> DHS Secretary Janet Napolitano, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012 (copy on file with the author). The determination as to whether to grant deferred action to individual aliens has historically been seen as within immigration officials’ prosecutorial or enforcement discretion. See, e.g., *Hotel & Rest. Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9<sup>th</sup> Cir. 2001); *Johnson v. INS*, 962 F.2d 574, 579 (7<sup>th</sup> Cir. 1992); *Carmona Martinez v. Ashcroft*, 118 Fed. App’x 238, 239 (9<sup>th</sup> Cir. 2004); *Matter of Yauri*, (continued...)

Clause, impinges upon Congress’s legislative powers, and contradicts certain provisions in Section 235 of the INA which some assert require that unauthorized aliens be placed in removal proceedings.<sup>71</sup> They also alleged that it runs afoul of the Administrative Procedure Act (APA) because the Obama Administration did not promulgate regulations before making deferred action—which the plaintiffs viewed as a “benefit,” not an exercise of prosecutorial discretion—available to unauthorized aliens who had been brought to the United States as children.<sup>72</sup>

The ICE agents were found to have standing to raise these challenges<sup>73</sup> and, at least initially, prevailed before the reviewing federal district court on their claim that DACA runs afoul of three purportedly “interlocking” provisions in Section 235 of the INA which state that

1. any alien present in the United States who has not been admitted *shall* be deemed an applicant for admission;
2. applicants for admission *shall* be inspected by immigration officers; and
3. in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for removal proceedings.<sup>74</sup>

In particular, the court noted that each of the three provisions includes the word “shall,” and took the view that “shall” indicates mandatory agency action.<sup>75</sup> However, this same court later found

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25 I. & N. December 103 (BIA 2009); *Matter of Singh*, 21 I. & N. December 427 (BIA 1996); *Matter of Luviano-Rodriguez*, 21 I. & N. December 235 (BIA 1996); *Matter of Quintero*, 18 I. & N. December 348 (BIA 1982). However, in none of these cases had the federal government expressly adopted a practice of granting deferred action to most, if not all, aliens who meet prescribed requirements. DHS regulations provide that aliens granted deferred action may be granted work authorization upon showing an “economic necessity for employment.” 8 C.F.R. §274a.12(c)(14). The INA bars employers from knowingly hiring or continuing to employ an alien who lacks such authorization. INA §274A, 8 U.S.C. §1324a.

<sup>71</sup> For further discussion of these INA provisions, see *infra* note 74 and accompanying text.

<sup>72</sup> Amended Complaint, *supra* note 68, at 15-23.

<sup>73</sup> *Crane v. Napolitano*, 920 F. Supp. 2d 724, 738-40 (N.D. Tex. 2013) [hereinafter “*Crane I*”].

<sup>74</sup> *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788 (N.D. Tex., April 23, 2013) [hereinafter “*Crane II*”] (citing INA §235(a)(1), (a)(3), & (b)(2)(A), 8 U.S.C. §1225(a)(1), (a)(3), & (b)(2)(A)). It is important to note that, while the ICE agents and the reviewing federal district court interpreted these provisions as requiring immigration officials to place unauthorized aliens in removal proceedings, federal officials have historically interpreted the relevant provisions of the INA in a somewhat different manner. Both federal officials and those who claim immigration officers lack discretion construe the first two provisions of Section 235 of the INA noted above—aliens present without admission being deemed applicants for admission, and applicants for admission being inspected—as applying to both (1) “arriving aliens” at a port-of-entry and (2) aliens who are present in the United States without inspection. However, federal officials have differed from proponents of the view that immigration officers lack discretion in that federal officials have construed the third provision—regarding detention of certain aliens seeking admission—as applicable only to arriving aliens, and not to aliens who are present without inspection. This difference appears to have arisen, in part, because federal officials have emphasized the phrase “aliens seeking admission” in the third provision, and reasoned that only arriving aliens at ports-of-entry can be said to be seeking admission. See, e.g., Immigration and Naturalization Service (INS), Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10357 (March 6, 1997) (codified at 8 C.F.R. §235.3(c)); INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 444-46 (January 3, 1997). The reviewing federal district court in *Crane*, however, rejected federal officials’ interpretation, in part, because the court viewed it as contrary to the statutory language. *Crane II*, 2013 U.S. Dist. LEXIS 57788, at \*21-\*27.

<sup>75</sup> *Crane II*, 2013 U.S. Dist. LEXIS 57788, at \*27-\*39.

that it lacked jurisdiction over the ICE agents' claims.<sup>76</sup> This finding was affirmed on appeal by the Fifth Circuit in a decision which suggests—but does not directly hold—that the Fifth Circuit may not view Section 235 of the INA as barring the Executive from granting deferred action to unauthorized aliens.<sup>77</sup>

Mississippi, in contrast, was found not to have standing because the reviewing court viewed its alleged injury as “conjectural and based on speculation” and, thus, insufficiently concrete to satisfy the constitutional requirements of standing.<sup>78</sup> This injury consisted of the fiscal costs associated with unauthorized aliens residing in the state who were allegedly enabled to remain there as a result of DACA and Obama Administration guidance regarding the exercise of prosecutorial discretion in civil immigration enforcement.<sup>79</sup> The federal government did not contest that the expenditure of state funds could qualify as an invasion of a legally protected interest sufficient to establish standing under the “proper circumstances.”<sup>80</sup> Rather, the federal government argued that such circumstances were not present in the instant case because Mississippi relied upon a 2006 report—which pre-dated DACA—to show the costs it incurred as the result of the Obama Administration's actions.<sup>81</sup> The district court agreed, and also noted that Mississippi had offered only “conclusory allegations” that the unauthorized aliens granted deferred action would have been removed but for the DACA initiative, or that DACA had resulted in a decrease in the total number of aliens removed by the federal government.<sup>82</sup>

The district court's decision as to Mississippi's standing was affirmed by the Fifth Circuit on appeal.<sup>83</sup> In so doing, the Fifth Circuit noted that it viewed Mississippi's alleged injury as “purely speculative” because it “is not supported by any facts” showing that Mississippi's costs increased,

<sup>76</sup> The district court found that the Merit Systems Protection Board (MSPB), rather than the court, has jurisdiction over the ICE agents' claims that they face adverse employment consequences if they fail to comply with the Administration's DACA program. *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 187005 (July 31, 2013) [hereinafter “*Crane III*”].

<sup>77</sup> See *Crane v. Johnson*, No. 14-10049, 2015 U.S. App. LEXIS 5573 (5<sup>th</sup> Cir., April 7, 2015) [hereinafter *Crane IV*], *aff'g, on other grounds, Crane III*, 2013 U.S. Dist. LEXIS 187005. In this decision, the Fifth Circuit opines that Section 235 of the INA, at most, “directs” immigration agents to “detain” aliens for the purpose of placing them in removal proceedings. *Crane*, 2015 U.S. App. LEXIS 5573 at \*8. “It does not limit the authority of [the Department of Homeland Security] to determine whether to pursue the removal” of aliens once they have been so detained, according to the Fifth Circuit. *Id.* The court's language here comes from its “background” discussion of the immigration laws, and is not the subject of specific holdings or findings. However, this language—coupled with the Fifth Circuit's citations to Supreme Court precedents which, among other things, describe “the broad discretion exercised by immigration officials” as a “principal feature of the removal system”—suggests it may be unlikely to find that Section 235 of the INA bars immigration officials from granting deferred action. *Id.* at \*4-\*5 (quoting *Arizona v. United States*,—U.S.—, 132 S. Ct. 2492, 2499 (2012)).

<sup>78</sup> *Crane I*, 920 F. Supp. 3d at 743, 746.

<sup>79</sup> *Id.* at 743. The guidance regarding civil enforcement priorities challenged in *Crane* was that given by then-ICE Director John Morton in two memoranda issued in 2011, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, and *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*. These memoranda were rescinded and superseded by new guidance issued by the Obama Administration on November 20, 2014. See DHS Secretary Jeh Charles Johnson, Memorandum, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, November 20, 2014 (copies on file with the author).

<sup>80</sup> *Crane I*, 920 F. Supp. 3d at 743.

<sup>81</sup> *Id.* at 744-45 (“[B]ecause it was written six years prior to the issuance of the Morton Memorand[a] and the [DACA] Directive, the report cannot provide any support for Mississippi's contention that the Directive and the Morton Memorand[a] result in an *increased* fiscal burden on the state.”).

<sup>82</sup> *Id.* at 745.

<sup>83</sup> *Crane IV*, 2015 U.S. App. LEXIS 5573, at \*15-\*18.

or will increase, as a result of DACA.<sup>84</sup> One judge did, however, issue a concurring opinion which emphasized that concrete evidence that an injury has occurred or will occur is not necessary for standing for certain types of claims, but did not view Mississippi as making such claims.<sup>85</sup>

## ***Texas v. United States* and the Challenge to DAPA and the DACA Expansion**

Most recently, in December 2014, over 25 states or state officials<sup>86</sup> filed suit challenging the Obama Administration’s announcement that it is expanding the DACA program to cover additional aliens who had been brought to the United States as children, and creating a DACA-like program for unauthorized aliens who are the parents of U.S. citizens or LPRs (commonly known as DAPA).<sup>87</sup> In particular, the states assert that these new programs violate the Take Care Clause and separation of powers principles of the Constitution, federal immigration law, and substantive and procedural requirements of the APA.<sup>88</sup> The federal government disputes these assertions. It also maintains that the plaintiffs lack standing, and that the challenged programs represent an exercise of enforcement discretion and, as such, are immune from judicial review.<sup>89</sup>

In a decision issued on February 16, 2015, the U.S. District Court for the Southern District of Texas found that the states have standing to challenge DAPA and the DACA expansion, and that

<sup>84</sup> *Id.* at \*17 (“Article III standing, however, mandates that Mississippi show a ‘concrete and particularized’ injury that is ‘fairly traceable’ to DACA. To do that, Mississippi was required to demonstrate that the state will incur costs because of the DACA program.”).

<sup>85</sup> *Id.* at \*25-\*26 (Owen, J., concurring) (citing *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160-61 (1981) (finding that California had standing to challenge the Secretary of the Interior’s refusal to experiment with non-cash-bonus bidding systems, in part, because the Court “share[d] California’s confidence that, after experimentation, the Secretary would use the most successful bidding system on all suitable ... lease tracts, including those off the California coast”)).

<sup>86</sup> Other states and local governments have supported the Obama Administration’s most recent deferred action programs. *See supra* note 5.

<sup>87</sup> *Texas v. United States*, No. 1:14-cv-00254, Complaint for Declaratory and Injunctive Relief, at 11-15 (S.D. Tex., filed December 3, 2014) (copy on file with the author) (alleging that the deferred actions programs and other Administration policies as to immigration enforcement “have had and continue to have dire consequences” for the plaintiff states by “substantially increas[ing]” the number of unauthorized aliens in the state, “triggering” unauthorized migration, increasing human trafficking, and “requiring” states to provide various public benefits and services). Other challenges to the Obama Administration’s November 20, 2014, actions have also been made. *See, e.g.*, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015). *See also* *United States v. Juarez-Escobar*, 2014 U.S. Dist. LEXIS 173350, at \*33 (W.D. Pa., December 16, 2014) (federal district court judge opining, on his own initiative and without having been requested to address the issue by the parties to the litigation, that DAPA and the DACA expansion “violate[] the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, [are] unconstitutional.”).

<sup>88</sup> Complaint, *supra* note 87, at 26-28. The states further note that they are essentially barred from taking action to avoid the adverse consequences of DAPA and the DACA expansion because “the Supreme Court has held that authority over immigration is largely lodged in the federal government.” *Id.* at 24-26 (citing *Arizona v. United States*, — U.S.—, 132 S. Ct. 2492 (2012)). In other words, in the states’ view, they are generally preempted from taking actions that would deter unauthorized aliens from entering or remaining within their jurisdiction, while the federal government declines to take action to remove such aliens.

<sup>89</sup> *See, e.g.*, *Texas v. United States*, No. 1:14-CV-254, Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction (S.D. Tex., filed December 24, 2014). For further discussion of prosecutorial or enforcement discretion in the immigration context, see generally archived CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by (name redacted) and (name redacted).



the challenged programs are judicially reviewable.<sup>90</sup> It also enjoined implementation of these programs after finding that the states are likely to prevail on the merits of their argument that the memorandum establishing the programs constitutes a substantive rule, but was issued without compliance with the notice-and-comment procedures required for such rules under the APA.

The federal government filed an emergency expedited motion to stay the injunction with the district court, which was denied because the district court viewed its “original findings and rulings” as “correct.”<sup>91</sup> The federal government also appealed the district court’s decision regarding standing, reviewability, and the procedural requirements of the APA to the Fifth Circuit. The government requested that the Fifth Circuit stay the injunction pending resolution of this appeal. On May 26, 2015, the Fifth Circuit issued a decision rejecting, by a vote of 2 to 1, the federal government’s request for the stay because it viewed the federal government as failing to make the requisite showing that it was likely to succeed on the merits of its arguments that (1) the states lack standing; (2) DAPA and the DACA expansion are not subject to judicial review; and (3) the memorandum establishing the challenged programs constitutes an interpretative rule, not a substantive one.<sup>92</sup> Subsequently, on November 9, 2015, the Fifth Circuit denied, again by a vote of 2 to 1, the government’s appeal, in part, because it agreed with the district court’s reasoning in finding that the states have standing to challenge DAPA and the DACA expansion, the programs are judicially reviewable, and their establishment represents a substantive rule that should have been subject to notice-and-comment rulemaking.<sup>93</sup> However, the Fifth Circuit also went beyond the district court’s analysis in finding that DAPA and the DACA expansion are impermissible because they conflict with provisions of the INA or, alternatively, represent unreasonable interpretations of the INA.<sup>94</sup>

The following sections provide an overview of the Fifth Circuit’s decision on appeal, as well as the government’s subsequent petition asking the Supreme Court to review the case, which the Court granted on January 19, 2016.<sup>95</sup>

## **Fifth Circuit’s Affirmance of the District Court on Standing, Reviewability, and Rulemaking**

In affirming the district court on the questions of standing, reviewability, and the need for rulemaking, the majority of the Fifth Circuit did not significantly add to or alter the district court’s analysis. In particular, as to standing, the majority noted that Texas satisfied the requirements for constitutional, Article III standing, as well as those for prudential standing—an

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<sup>90</sup> In a subsequent decision, the court clarified its view that the court may exercise jurisdiction so long as it finds that at least one plaintiff state demonstrates standing. *See Texas v. United States*, No. B-14-254, 2015 U.S. Dist. LEXIS 45483, at \*10-\*13 (S.D. Tex., April 7, 2015).

<sup>91</sup> *See generally id.* at \*10. The district court did, however, respond to arguments that it characterized as “either new or ... not necessarily emphasized during the prior hearing.” *Id.* In so doing, the court rejected the federal government’s arguments (1) that implementation of DAPA and the DACA expansion should be enjoined only in Texas and not in other states, and (2) that immediate implementation of these programs is necessary to secure the border, among other things. *Id.* \*11-\*12, \*26-\*28, & \*28-\*29.

<sup>92</sup> *See Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657 (5<sup>th</sup> Cir., May 26, 2015). For further discussion of this decision, see generally CRS Legal Sidebar WSLG1273, *Implementation of DAPA and the DACA Expansion Remain Barred After Fifth Circuit Decision*, by (name redacted).

<sup>93</sup> *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 19725, at \*21-\*95 (5<sup>th</sup> Cir., November 9, 2015).

<sup>94</sup> *Id.* at \*95-\*116.

<sup>95</sup> *United States v. Texas*, 2016 U.S. LEXIS 841 (January 19, 2016).

additional hurdle for claims brought under the APA.<sup>96</sup> Relying on *Massachusetts v. EPA*, the majority first noted that the plaintiff-states are entitled to “special solicitude” in the court’s standing inquiry.<sup>97</sup> As for constitutional standing, the majority concluded, that if DAPA, in particular, were implemented, Texas would suffer a concrete injury because the state would incur “significant costs” by having to issue state-subsidized driver’s licenses to DAPA beneficiaries.<sup>98</sup> With regard to prudential standing, the majority concluded that Texas’s interest in denying public benefits to “illegal aliens”—something which Congress generally requires, absent the enactment of a state law that expressly provides for their eligibility<sup>99</sup>—falls within the “zone of interests” regulated by the INA.<sup>100</sup> The dissent, however, characterized the majority’s standing analysis as “deeply troublesome,” noting, in particular, separation of powers concerns because, in the dissenting judge’s view, the majority ruling would “inject courts into far more federal-state disputes and review of the political branches.”<sup>101</sup>

Concerning the court’s authority to review DAPA and the DACA expansion, the majority recognized that there are limitations to judicial review of specific decisions of the Secretary of Homeland Security, but concluded that none of those limitations pertains to the decision to grant “lawful presence” to millions of aliens.<sup>102</sup> The majority also concluded that it can review DAPA and the DACA expansion to determine whether the Executive exceeded its statutory powers because these programs affirmatively confer lawful presence on aliens who entered or remained in the United States in violation of the immigration laws,<sup>103</sup> as well as permit them to receive

<sup>96</sup> *Texas*, 2015 U.S. App. LEXIS 19725, at \*21-\*53.

<sup>97</sup> *Id.* at \*22-\*31 (discussing and applying the precedent of *Massachusetts v. EPA*, 549 U.S. 497 (2007)). In particular, the majority noted language in that case stating that “States are not normal litigants for the purposes of invoking federal jurisdiction,” and found that the same considerations which had promoted the Court to afford “special solicitude” to Massachusetts in the standing analysis in that case were also present in *Texas*. Namely, (1) the parties’ dispute “turns on the proper construction of a congressional statute,” and Congress can be seen to have authorized this type of challenge in the APA; and (2) the executive agency’s actions had affected 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.” *Id.* at \*25.

<sup>98</sup> *Id.* at \*32-\*36. In so doing, the majority noted the district court’s finding that Texas would have to expend a minimum of \$130.89 on each license it issued to a DAPA beneficiary, given its current subsidization of the costs of issuing driver’s licenses. *See generally* *Texas v. United States*, 86 F. Supp. 3d 591, 617 (S.D. Tex. 2015).

<sup>99</sup> *See generally* 8 U.S.C. §1621(d) (“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 ... only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”); CRS Report R43221, *Noncitizen Eligibility for Public Benefits: Legal Issues*, by (name redacted).

<sup>100</sup> *Texas*, 2015 U.S. App. LEXIS 19725, at \*52-\*54 (citing and quoting, among other things, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (“[Plaintiffs suing under the APA] must satisfy not only Article III’s standing requirements, but an additional test: The interest [they] assert[] must be ‘arguably within the zone of interest to be protected or regulated by the statute’ that [they] say[] was violated.”).

<sup>101</sup> *Id.* at \*157, \*160 (King, J., dissenting).

<sup>102</sup> *Id.* at \*56-\*74. Among other things, the majority noted the government’s reliance on Section 1252(g) of Title 8 of the *U.S. Code* for “the proposition that the INA expressly prohibits judicial review.” However, the majority rejected this argument on the grounds that this provision is not a “general jurisdictional limitation,” but rather applies to immigration officials’ “‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders’”—none of which the majority viewed as implicated in the instant case. *Id.* at \*56-\*57.

<sup>103</sup> *Id.* at \*62 (“Deferred action ... is much more than nonenforcement: It would affirmatively confer ‘lawful presence’ and associated benefits on a class of unlawfully present aliens.”). Aliens granted deferred action have historically not been seen as accruing additional days of unlawful presence in the United States during the time in which they have deferred action status pursuant to the provisions of Section 212(a)(9)(B)(ii) of the INA, which provides aliens are to be deemed as unlawfully present for certain purposes under federal immigration law if they are present in the United States after the period of stay authorized by the Secretary of Homeland Security.

authorization to work in the United States.<sup>104</sup> These programs are thus not tantamount to agency decisions not to take enforcement action, in the majority's view.<sup>105</sup> The dissent, though, disagreed that this was a basis for review, reasoning that the ability of deferred action beneficiaries to apply for work authorization is not a function of DAPA but of decades-old regulations whose permissibility was not challenged by the plaintiff-states.<sup>106</sup>

The majority also affirmed the district court's ruling that DAPA and the DACA expansion should have been implemented through notice-and-comment rulemaking pursuant to the APA.<sup>107</sup> The majority did so, in part, because it viewed the programs as legally binding, not as a policy statement.<sup>108</sup> It found no error in the lower court's factual finding that, although the memorandum announcing DAPA and the DACA expansion "facially purports to confer discretion," that discretion is "merely pretext," given the low rate of rejection in the 2012 DACA program and the provisions made for handling DAPA applications (a conclusion which the dissenting judge would have found clearly erroneous).<sup>109</sup> The majority similarly found that DAPA is not a procedural rule, since it establishes substantive standards by which applications for deferred action are evaluated.<sup>110</sup>

## Fifth Circuit Goes Beyond the District Court in Addressing Substantive Issues

The majority went beyond the district court's ruling, however, in finding that DAPA and the DACA expansion violate the APA substantively, as well as procedurally, because they are "not in accordance with the law" and "in excess of statutory ... authority."<sup>111</sup> In so doing, the majority noted Fifth Circuit precedent that it "may affirm a district court's judgment on any grounds

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<sup>104</sup> *Id.* ("Though revocable, that change in designation [from unlawfully present to lawfully present] would trigger ... eligibility for federal benefits—for example, under title II and XVIII of the Social Security Act—and state benefits—for example, driver's licenses and unemployment insurance—that would not otherwise be available to illegal aliens."). Since at least 1987, federal regulations implementing the INA have provided for the issuance of work authorization to aliens granted deferred action who can show an "economic necessity for employment." See Dep't of Justice, Immigr. & Naturalization Serv., Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (December 4, 1987) (codified at 8 C.F.R. §274a.12(c)(14)). The "basic criteria" for establishing economic necessity are the federal poverty guidelines. See generally 8 C.F.R. §274a.12(e).

<sup>105</sup> *Texas*, 2015 U.S. App. LEXIS 19725, at \*61-\*62.

<sup>106</sup> *Id.* at \*171-\*172.

<sup>107</sup> *Id.* at \*74-\*95.

<sup>108</sup> *Id.* at \*76.

<sup>109</sup> Compare *id.* at \*89 ("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.") with *Texas*, 2015 U.S. App. LEXIS 19725, at \*184 (King, J., dissenting) ("I would hold that the Memorandum [establishing DAPA and the DACA expansion] is nothing more than a general statement of policy and that the district court's findings cannot stand, even under clear error review."). In particular, the majority and the dissent disagreed over what, if any, role the high rate at which applications for deferred action were approved under the 2012 DACA program should play in determining whether immigration officials would have discretion under the DAPA memorandum. The majority viewed the high rate of approvals with DACA as indicating that immigration officials were effectively required to grant deferred action to applicants who met the eligibility requirements. However, the dissenting justice argued that this high approval rate was misleading because only aliens who met DACA's eligibility requirements were likely to apply for relief, and the DAPA memorandum provided additional grounds for the exercise of discretion than were provided for in the 2012 DACA memorandum.

<sup>110</sup> *Id.* at \*90-\*91.

<sup>111</sup> *Id.* at \*95.

supported by the record.”<sup>112</sup> It further noted that it assumed that the permissibility of DAPA and the DACA expansion should be addressed under the precedent of *Chevron USA, Inc. v. Natural Resources Defense Council*, which calls for courts to defer to agency interpretations of their governing statutes where Congress has not “directly spoken to the precise question at issue,” and the agency’s interpretation of an ambiguous statute is a reasonable one.<sup>113</sup>

The majority found, however, that Congress has spoken to the precise questions at issue here in such a way as to preclude DAPA and the DACA expansion.<sup>114</sup> In particular, it pointed to the INA’s provisions regarding (1) which aliens may lawfully enter and remain in the United States, (2) discretionary relief from removal, and (3) work authorization.<sup>115</sup> For example, it noted that DAPA would treat aliens who entered or remained in the United States in violation of federal immigration law and are the parents of U.S. citizen or LPRs as “lawfully present,” while the INA permits “illegal aliens to derive a lawful immigration classification from their children’s immigration status” only if the child is a U.S. citizen (not an LPR) who is at least 21 years of age, and the alien leaves the United States and waits at least 10 years before applying for one of a limited number of family-preference visas.<sup>116</sup> Alternatively, the majority found that even if Congress is not seen to have spoken on the precise questions at issue, the Executive’s interpretation is “unreasonable” because it is “manifestly contrary” to the INA provisions previously noted.<sup>117</sup> The majority further noted the “major policy” exception to *Chevron* deference—which is based on the view that Congress does not intend to delegate policy decisions “of economic and political magnitude to an administrative agency” when enacting an ambiguous statute—in finding DAPA and the DACA expansion impermissible.<sup>118</sup> It also rejected the view that DAPA and the DACA expansion are grounded in historical practices to which Congress can be seen to have acquiesced by not taking action to bar the practices.<sup>119</sup>

The dissenting judge, in contrast, would not have reached the question of whether DAPA and the DACA expansion substantially violate the APA, given that the district court had “expressly

<sup>112</sup> *Id.* (citing *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5<sup>th</sup> Cir. 2009)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at \*95-96 (“Assuming *arguendo* that *Chevron* applies, we first ask whether Congress has directly addressed the precise question at issue. It has. ... 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 ...”) (internal quotations omitted).

<sup>115</sup> *Id.* at \*97-103.

<sup>116</sup> *Id.* at \*99.

<sup>117</sup> *Id.* at \*106 n.185 (“[E]ven assuming the government had survived *Chevron* Step One [in that Congress is not seen to have directly spoken on the precise question at issue], we would strike down DAPA as manifestly contrary to the INA under Step Two [because it constitutes an unreasonable interpretation of the governing statutes, insofar as these statutes are seen as ambiguous].”).

<sup>118</sup> *Id.* at \*103-104 (citing, among other sources, *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The majority explained its reasoning here by noting that “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. DAPA undoubtedly implicates ‘questions 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.’”). *Id.*

<sup>119</sup> *Id.* at \*112-115. The majority particularly took issue with the view that the “Family Fairness” programs of the Reagan and George H.W. Bush Administrations are to be seen as comparable to DAPA and the DACA expansion on the grounds that these programs were “interstitial to a statutory legalization scheme” that Congress had adopted. *Id.* at \*113.

declined” to do so, and the Fifth Circuit had received what the dissenting judge viewed as “limited briefing” on the issue.<sup>120</sup>

## Petition for Supreme Court Review Granted

Following the Fifth Circuit’s decision, the federal government petitioned the Supreme Court to grant certiorari in the case.<sup>121</sup> This petition was granted on January 19, 2016.<sup>122</sup> In accepting the petition, the Court indicated that it would hear arguments on the plaintiffs’ Take Care Clause claims, as well as the questions addressed in the Fifth Circuit’s decision.<sup>123</sup> The Court’s decision seems likely to have significant implications not only for the proposed implementation of the DAPA program and the DAPA expansion, but also for the permissibility of the 2012 DACA program, because the provisions of the INA noted by the Fifth Circuit in *Texas* could be similarly construed to bar the granting of deferred action and work authorization to aliens brought to the United States as children and raised here. The 2012 DACA program was not at issue in *Texas*, but had previously been the subject of unsuccessful legal challenges, including one involving the State of Mississippi, previously noted.<sup>124</sup> See “Mississippi’s Claims in *Crane v. Napolitano*.”<sup>125</sup>

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<sup>120</sup> *Texas*, 2015 U.S. App. LEXIS 19725, at \*219-\*220 (King, J., dissenting).

<sup>121</sup> *United States v. Texas*, No. 15-674, Petition for a Writ of Certiorari, filed November 20, 2015, at pg. 2, available at <http://www.scotusblog.com/wp-content/uploads/2015/11/us-v-texas-petition.pdf> (“The questions presented are: 1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 et seq., to challenge the Guidance because it will lead to more aliens having deferred action. 2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law. 3. Whether the Guidance was subject to the APA’s notice-and-comment procedures.”).

<sup>122</sup> *United States v. Texas*, 2016 U.S. LEXIS 841 (January 19, 2016).

<sup>123</sup> *Id.* (“The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, §3.’”). In their decisions in *Texas*, neither the district court nor the Fifth Circuit addressed the plaintiff-states’ Take Care Clause claims. However, one federal district court has addressed this issue. See *United States v. Juarez-Escobar*, 2014 U.S. Dist. LEXIS 173350, at \*33 (W.D. Pa., December 16, 2014) (federal district court judge opining, on his own initiative and without the request of the parties, that DAPA and the DACA expansion “violate[] the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, [are] unconstitutional.”). However, the reasoning that supports this conclusion by the *Juarez-Escobar* court appears to be primarily concerned with separation of powers issues (i.e., the Executive is “legislating,” rather than exercising prosecutorial discretion, by (1) providing a “systematic and rigid process by which a broad group of individuals will be treated differently than others based on arbitrary classifications,” and (2) allowing unauthorized aliens who fall within these categories “to obtain substantive rights”).

<sup>124</sup> At least two other suits challenging DACA were dismissed because the plaintiffs lacked standing. See *Peterson v. President of the United States*, No. 1:2012cv00257, Order Granting Motion to Dismiss (D.N.H., October 22, 2012); *Dutkiewicz v. Napolitano*, No. 8:2012cv01447, Order Granting Motion to Dismiss (M.D. Fla., November 9, 2012) (copies on file with the author).

<sup>125</sup> The Court’s decision could also have implications for the long-standing executive branch practice of granting work authorization to aliens not expressly authorized to work in the INA. Like its predecessors, the Obama Administration has relied on the reference to aliens “authorized to be ... employed ... by the Attorney General [currently, Secretary of Homeland Security]” in the INA’s definition of “unauthorized alien” in claiming broad authority to grant work authorization to aliens whose employment is not directly addressed by the INA. See generally CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by (name redacted) and (name redacted), at “Work Authorization.” The Fifth Circuit majority, in contrast, viewed this “miscellaneous definitional provision” as an inadequate basis for the Executive’s granting of work authorization to large numbers of aliens given “Congress’s stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country.” *Texas*, 2015 U.S. App. LEXIS 19725, at \*103. It also noted that Congress could not have intended the Executive to have discretion over such major policy decisions. *Id.* at \*103-\*104.

## Conclusion

It remains to be seen how the Supreme Court may rule on the issues that will be argued before it in *Texas v. United States*. However, even assuming that the decisions of the lower courts in this case withstand appeal, states' ability to challenge alleged federal "failures" to enforce the immigration laws in the future may be more limited than it might first appear. The 2015 *Texas* decision does mark the first time that a state has obtained a court order directing the federal government to take certain actions (i.e., delaying implementation of DAPA and the DACA expansion) in response to state allegations that the federal government is failing to enforce the INA. On the other hand, the facts and circumstances involved in the 2015 *Texas* decision are arguably distinguishable from those in earlier cases and, thus, potentially limit this decision's relevance to any future state challenges to federal enforcement of the immigration laws.

First, there are the specific facts and circumstances which prompted the reviewing courts to find that Texas, in particular, has Article III standing to challenge DAPA and the DACA expansion. This finding was based, in part, on Texas's documentation of the costs it would incur in issuing driver's licenses to DAPA beneficiaries.<sup>126</sup> Moreover, because the federal government had advocated a position in prior litigation over the issuance of driver's licenses to *DACA beneficiaries* that Texas asserted would result in the federal government requiring it to issue driver's licenses to *DAPA beneficiaries*, Texas could counter the argument that these costs arose due to state law or the Constitution, and not the federal government's actions. Both factors were arguably significant, particularly to the district court.<sup>127</sup> Mississippi's alleged injury in *Crane*, for example, was seen as inadequate for standing because Mississippi did not show that the implementation of DACA had increased, or would increase, its costs.<sup>128</sup> Certain claims in the mid-1990s litigation similarly failed because the states were seen as incurring specific costs associated with unauthorized aliens because of grant conditions (to which the state had agreed), state laws, or constitutional requirements, and not the dictates of the federal government.<sup>129</sup>

Second, and relatedly, there is the specific form that the federal government's alleged failure to enforce the immigration laws took in the 2015 *Texas* decision. Namely, the Obama Administration proposal to grant deferred action (one type of relief from removal) to certain unauthorized aliens, a proposal which could result in those aliens becoming eligible for certain "benefits" under existing law (e.g., work authorization, Social Security numbers).<sup>130</sup> In finding

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<sup>126</sup> See *Texas*, 2015 U.S. Dist. LEXIS 18551, at \*39-\*40, *aff'd*, 2015 U.S. App. LEXIS 8657, at \*21-\*22.

<sup>127</sup> See *Texas*, 2015 U.S. Dist. LEXIS 18551, at \*39-\*40. The Fifth Circuit placed less weight on this factor than the district court. See 2015 U.S. App. LEXIS 8657, at \*23 ("Although *Arizona DREAM Act* supports Texas's position that it cannot legally deny licenses to DAPA beneficiaries, it is not dispositive. Even if we were bound by the decision of another circuit, that court said nothing about subsidizing licenses, and Texas could avoid financial injury by raising its application fees to cover the full cost of issuing and administering a license."). However, the Fifth Circuit noted that "that does not resolve the matter." *Id.* Note, however, that in its petition for certiorari, the federal government puts forth the view that "[n]othing in the Guidance [regarding DAPA and the DACA expansion] affects Texas's freedom to alter or eliminate its [driver's license] subsidy at any time." See Petition for a Writ of Certiorari, *supra* note 121, at 16.

<sup>128</sup> See *supra* "Mississippi's Claims in *Crane v. Napolitano*."

<sup>129</sup> See *supra* "Litigation in the Mid-1990s" and "Tenth Amendment." The states' claims in the mid-1990s were based on federal commandeering. However, similar concerns about whether particular costs are due to federal actions in not removing unauthorized aliens have been raised in discussions of standing in other cases. See, e.g., *Arpaio*, 27 F. Supp. 3d at 201-205, *aff'd*, 797 F.3d 11 (D.C. Cir. 2015).

<sup>130</sup> See generally 8 C.F.R. §274a.12(c)(14) (providing for the issuance of work authorization to aliens granted deferred action who can show an "economic necessity for employment"); 8 C.F.R. §1.3(a)(4)(vi) (providing that aliens granted deferred action are "lawfully present" "for purposes of applying for Social Security benefits").

that this particular form of nonenforcement of the immigration laws is subject to judicial review, both the district court and the majority of the Fifth Circuit emphasized that they view the granting of deferred action as involving an “affirmative action” on the Executive’s part,<sup>131</sup> and not simply a matter of an agency’s enforcement priorities,<sup>132</sup> or nonenforcement of the laws as to individual aliens and groups of aliens.<sup>133</sup> Both of these (i.e., enforcement priorities, nonenforcement as to individuals) would appear to be within the Executive’s discretion, in the courts’ view, and thus not subject to judicial review.<sup>134</sup> Indeed, the district court even suggested, in denying the federal government’s emergency expedited motion to stay the injunction, that immigration officials could achieve their purpose of designating potential DAPA beneficiaries as “low priorities” for removal by giving them written documentation to this effect, so long as this documentation does not involve a grant of deferred action.<sup>135</sup>

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<sup>131</sup> *Texas*, 2015 U.S. Dist. LEXIS 18551, at \*144, *aff’d*, 2015 U.S. App. LEXIS, at \*45 (“DAPA’s version of deferred action ... is more than nonenforcement: it is the affirmative act of conferring ‘lawful presence’ on a class of unlawfully present aliens. Though revocable, that new designation triggers eligibility for federal and state benefits that would not otherwise be available.”). *See also Texas*, 2015 U.S. App. LEXIS 19725, at \*62 (“Deferred action ... is much more than nonenforcement: It would affirmatively confer ‘lawful presence’ and associated benefits on a class of unlawfully present aliens.”).

<sup>132</sup> *Texas*, 2015 U.S. App. LEXIS 19725, at \*61-\*62 (“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 aliens. But importantly, the states have not challenged the priority levels he has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary ... to alter his enforcement priorities.”); *Texas*, 2015 U.S. Dist. LEXIS 18551, at \*118-\*120 (similar).

<sup>133</sup> *Texas*, 2015 U.S. App. LEXIS 19725, at \*62 (noting that the preliminary injunction would not require DHS to “remove any alien”); *Texas*, 2015 U.S. Dist. LEXIS 18551, at \*45 (“The DHS [Department of Homeland Security] has not instructed its officers to merely refrain from arresting, ordering the removal of, or prosecuting unlawfully-present aliens. Indeed, by the very terms of DAPA, that is what the DHS has been doing for these recipients for the last five years—whether that was because the DHS could not track down the millions of individuals they now deem eligible for deferred action, or because they were prioritizing removals according to limited resources, applying humanitarian considerations, or just not removing these individuals for ‘administrative convenience.’ Had the States complained only of the DHS’ mere failure to (or decision not to) prosecute and/or remove such individuals in these preceding years, any conclusion drawn in that situation would have been based on the inaction of the agency in its refusal to enforce. In such a case, the Court may have been without any ‘focus for judicial review.’”), *aff’d*, 2015 U.S. App. LEXIS, at \*45 (“Some features of DAPA are similar to prosecutorial discretion: DAPA amounts to 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 aliens. If that were all DAPA involved, we would have a different case.”).

<sup>134</sup> In taking the view that the Executive’s actions might not have been reviewable had it continued as it had as to the potential DAPA beneficiaries (i.e., not removing them, but not granting them deferred action), the court could be seen as taking the view that the number of aliens as to whom the INA is allegedly not enforced is not dispositive in determining whether the action is judicially reviewable or permissible.

<sup>135</sup> *Texas*, 2015 U.S. Dist. LEXIS 45483, at \*29 (“The DHS could conduct the same investigation and provide ... documentation designating certain illegal immigrants as low-priority law enforcement targets without additionally awarding legal status and the other benefits previously described in detail. (In fact, the DHS has always had the ability to do this. This Court’s injunction does not affect this ability.”).

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