

## Understanding the Legal Challenges to Executive Action

On November 20 and 21, 2014, President Barack Obama announced a series of administrative reforms of immigration policy, collectively called the Immigration Accountability Executive Action.<sup>1</sup> The centerpiece of these reforms is an expansion of the current Deferred Action for Childhood Arrivals (DACA) initiative and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiative for the parents of U.S. citizens and lawful permanent residents who meet certain criteria.<sup>2</sup> Together, these initiatives could provide as many as 5 million immigrants with temporary relief from deportation. Moreover, DAPA and expanded DACA is expected not only to keep families united, but also to increase U.S. gross domestic product, increase tax revenue, and raise wages.<sup>3</sup>

Like the original DACA initiative, both expanded DACA and DAPA derive from the executive branch's authority to exercise discretion in the prosecution and enforcement of immigration cases.<sup>4</sup> In both instances, the President has authorized the Department of Homeland Security (DHS) to defer for three years the deportation of qualified individuals who pose no threat to the United States in the hope that Congress will finally undertake more permanent, comprehensive immigration reform.

Within hours of the announcement, notorious Maricopa County, Arizona Sheriff Joe Arpaio challenged the President's plan to defer deportations in a Washington, D.C., federal court, in a case named *Arpaio v. Obama*.<sup>5</sup> Shortly thereafter, representatives of 17 states filed a similar case in a Brownsville, Texas, federal court,<sup>6</sup> with 9 other states later joining the lawsuit,<sup>7</sup> in a case named *Texas v. United States*. On the other hand, a broad spectrum of supporters—including 15 states and the District of Columbia<sup>8</sup>—filed “friend-of-the-court” briefs supporting the President's plan.

The U.S. Government opposed both lawsuits on the grounds that the President's actions were a lawful use of prosecutorial discretion, and that the plaintiffs lacked “standing” to bring their cases, since plaintiffs were not harmed.<sup>9</sup> Both arguments are supported by a wide range of law professors and experts.<sup>10</sup>

The Washington, D.C. federal court promptly dismissed Sheriff Arpaio's lawsuit.<sup>11</sup> That decision was upheld unanimously by a three-judge panel of the D.C. Circuit Court of Appeals on August 14, 2015.<sup>12</sup> Sheriff Arpaio asked the Supreme Court to review the case, but on January 19, 2016, the Supreme Court denied that request.<sup>13</sup>

Separately, the Texas federal court preliminarily blocked, on procedural grounds, the President's DAPA and expanded DACA initiatives (but not original DACA) on February 16, 2015.<sup>14</sup> The Department of Justice appealed this order,<sup>15</sup> and arguments were heard on July 10, 2015. On November 9, 2015, a divided panel of the Fifth Circuit Court of Appeals upheld the lower court's ruling in a 2-1 decision.<sup>16</sup> The following day, the Department of Justice announced its intention to seek Supreme Court review of the Fifth Circuit's decision.<sup>17</sup> On January 19, 2016, the Supreme Court granted certiorari (meaning, it agreed to take the case) and will likely hear

arguments in April, with a decision being announced in late June 2016.<sup>18</sup>

At the center of these cases is a policy dispute—Texas, 25 other states, and an Arizona sheriff disagree with the President’s policy on how the immigration agencies should use their limited enforcement resources. These cases are more political diatribe than legal argument, and are unlikely to succeed in the long run. Understanding the procedural steps and the nature of the arguments helps to put the cases in perspective.

## The Lawsuits

Both lawsuits seek to “enjoin,” meaning to block implementation of, DAPA and expanded DACA. They argue that the executive actions violate the “Take Care” clause of the Constitution because the President has allegedly changed the law rather than “tak[ing] care that the laws be faithfully executed.”<sup>19</sup> Initially, both lawsuits sought a “preliminary injunction”—a temporary block during the life of the lawsuit—which is an “extraordinary remedy.”<sup>20</sup> To grant a “preliminary injunction,” the court must find that four factors exist—(1) the challenger is likely to succeed on the merits, (2) the challenger is likely to suffer “irreparable harm” without the injunction, (3) the “balance of equities” supports the challenger, and (4) an injunction is in the “public interest.”<sup>21</sup>

Sheriff Arpaio’s complaint alleged harms based on crime. Specifically, Arpaio’s theory was that DACA and DAPA will cause a “flood” of “millions more illegal aliens,” and in turn a “crime wave”—because many “illegal aliens...are repeat offenders”—thus requiring additional expenditures of funds and resources by his law enforcement office. This argument is flatly contradicted by empirical evidence that higher immigration is associated with lower rates of crime.<sup>22</sup>

The states’ complaint similarly argued that expanded DACA and DAPA will trigger a “wave” of immigration—even larger than the alleged “flood” of Central American families to the United States caused by DACA<sup>23</sup> (ignoring the substantial evidence that fear of persecution and violence is driving Central Americans from their homes).<sup>24</sup> The states also alleged that this wave will “increase human trafficking” by drug cartels and thus “exacerbate the risks and dangers imposed on [states] by organized crime.”<sup>25</sup> In addition, the states alleged broader harms from the expenditures on law enforcement, health care, education, processing professional licenses, and other benefits.<sup>26</sup>

## Dismissal of Sheriff Arpaio’s Lawsuit (*Arpaio v. Obama*)

Washington, D.C. federal judge Beryl A. Howell dismissed Arpaio’s lawsuit one day after holding a hearing on it.<sup>27</sup> The court held that:

1. The plaintiff lacks “standing,” or legal capacity, to file his lawsuit. The Court found it was “not apparent exactly” what injury plaintiff had suffered because he had “no legal authority to enforce the immigration laws.”<sup>28</sup>
2. Any harms the plaintiff did suffer were “speculative.”<sup>29</sup> “The decision for any individual to migrate is a

complex decision with multiple factors, including factors entirely outside the United States' control, such as social, economic and political strife in a foreign country.”<sup>30</sup> Thus, the Court found it speculative that the President's deferred action initiatives—which do not apply to future immigrants—would result in immigrants unlawfully entering Maricopa County, Arizona or elsewhere in the United States.<sup>31</sup> Indeed, DHS' policies that focus enforcement resources on those who have committed crimes may actually “end up helping” the plaintiff.<sup>32</sup>

3. Additionally, the Court held that expanded DACA and DAPA do not “amount to unlawful legislation and/or rulemaking,” because Congress delegated authority to DHS to establish enforcement priorities, which DHS is exercising to target individuals who pose the greatest threat to the United States.<sup>33</sup>

Arpaio appealed the dismissal of his case to the higher federal court, the D.C. Circuit Court of Appeals. On August 14, 2015, the three-judge panel unanimously upheld the lower court's ruling that Arpaio lacked standing to bring suit.<sup>34</sup> In November, Arpaio sought review at the Supreme Court, but in January the Court denied that request.<sup>35</sup>

### **Preliminary Injunction in States' Lawsuit ( *Texas v. United States* )**

On February 16, 2015, Brownsville, Texas federal judge Andrew Hanen, of the U.S. District Court for the Southern District of Texas, temporarily enjoined DAPA and the planned expansion of DACA pending a higher court's contrary order or a trial on the merits.<sup>36</sup> Highlights of the court's reasoning include:

1. Texas has standing to bring this lawsuit because DAPA and expanded DACA will create a new class of individuals eligible to apply for state-subsidized driver's licenses, which would impose additional processing and issuance costs on the state.<sup>37</sup> The court did not address the offsetting economic benefits that states also would realize from DAPA and expanded DACA, including higher wages, increased tax revenue, and new jobs.<sup>38</sup> The court rejected other standing arguments by the plaintiffs, namely, that DAPA would impose indirect costs on states such as for public education and uncompensated medical care.<sup>39</sup>
2. Judge Hanen based his ruling on narrow procedural grounds—that the Government did not comply with certain technical requirements under the Administrative Procedure Act (APA), including notice-and-comment rulemaking.<sup>40</sup>

In reaching this conclusion, Judge Hanen found DAPA and expanded DACA to be substantive rules subject to notice-and-comment procedures, rather than general statements of policy.<sup>41</sup> However, as DHS pointed out, the expanded DACA and DAPA initiatives are policies, under which DHS must decide on a case-by-case basis whether to grant a particular individual's request.<sup>42</sup> DHS national procedures for officers reviewing DACA claims specifically allow discretionary denials. The procedures provide a form with a box permitting denials solely on the basis of discretion—even where eligibility guidelines are met, as well as another box permitting denial where a requestor “do[es] not warrant a favorable exercise of prosecutorial discretion because of national security or public safety concerns.”<sup>43</sup>

1. The ruling did not address the constitutionality of President Obama’s initiatives. Indeed, the decision affirms the Secretary of Homeland Security’s authority to set the Department’s enforcement priorities and to marshal its resources accordingly.<sup>44</sup>
2. The court explicitly did not enjoin original DACA.<sup>45</sup> DHS reinforced this point, reminding that “individuals may continue to come forward and request initial grant of DACA or renewal of DACA pursuant to the guidelines established in 2012.”<sup>46</sup>
3. Regarding the public interest, the court found the cost of issuing drivers’ licenses and other benefits to prospective deferred action beneficiaries to be decisive.<sup>47</sup> This is contrary to evidence that President Obama’s policy helps, not harms, the public interest, as an [amicus brief](#) by the American Immigration Council and others argued.<sup>48</sup> Conversely, halting President Obama’s policy will harm the economy and affected individuals, who have significant ties in the United States.<sup>49</sup>

### **Fifth Circuit Appeal in States’ Lawsuit (*Texas v. United States*)**

The government subsequently appealed the lower court’s decision granting the preliminary injunction to the higher federal court, the Fifth Circuit Court of Appeals.<sup>50</sup> In addition, the government asked Judge Hanen to “stay” the injunction (i.e., stop the injunction from being in effect),<sup>51</sup> and then made the same request—on an emergency basis—to the Fifth Circuit when Judge Hanen did not rule quickly.<sup>52</sup>

A broad spectrum of states, municipalities, law enforcement agencies, legislators, and other organizations supported the federal government’s appeal with “friend of the court” or *amici* briefs. These *amici* include 15 states and the District of Columbia,<sup>53</sup> 73 U.S. mayors and county officials (led by New York, Los Angeles, Chicago, and Houston ),<sup>54</sup> over 30 heads of local law enforcement agencies,<sup>55</sup> 181 U.S. Representatives,<sup>56</sup> four U.S. Senators,<sup>57</sup> over 150 civil rights, labor, and immigrants’ rights groups,<sup>58</sup> 19 faith organizations,<sup>59</sup> organizations representing educators and children’s advocates,<sup>60</sup> and businesses and trade associations.<sup>61</sup> The cities supporting the President’s program contain more undocumented immigrants than the states opposing it.<sup>62</sup>

On May 26, 2015, a divided panel of the Fifth Circuit Court of Appeals [denied](#) the request for an emergency stay of the preliminary injunction, with the result that the hold on implementation of DAPA and expanded DACA remained in place while the Fifth Circuit considered the appeal of the preliminary injunction itself.<sup>63</sup> In his dissenting opinion, Judge Stephen A. Higginson called out the “political nature of this dispute” and argued that the courts have no role to play in reviewing the Administration’s policy choices.

On November 9, 2015, a divided panel of the Fifth Circuit Court of Appeals upheld the district court’s order granting the preliminary injunction.<sup>64</sup> The majority accepted the lower court’s findings that Texas has standing to bring this lawsuit based on the additional costs it would incur to issue driver’s licenses to beneficiaries of expanded DACA and DAPA.<sup>65</sup> The court acknowledged that judicial review is unavailable under the APA where a matter is committed to agency discretion and that the government’s immigration enforcement priorities fall squarely within this category; nonetheless, the majority also found that the plaintiff states were likely to prevail

on their claim that the federal government should have pursued notice-and-comment rulemaking because DAPA and expanded DACA determinations are non-discretionary.<sup>66</sup> In addition, the majority held that the new deferred action initiatives are arbitrary and capricious because the federal government did not have authority to promulgate them under the Immigration and Nationality Act.<sup>67</sup>

In her dissenting opinion, Judge Carolyn D. King characterized the majority's opinion as a "mistake" that "has been exacerbated by the extended delay that has occurred in deciding this 'expedited' appeal."<sup>68</sup> Other notable aspects of her lengthy opinion included:

- Deferred action decisions, which are made on a case-by-case basis pursuant to the proposed initiatives, are "quintessential exercises of prosecutorial discretion." Because federal courts cannot review matters involving prosecutorial discretion, the case should be dismissed.<sup>69</sup>
- The majority's "breathtaking expansion of state standing" would allow potentially limitless state intrusion into federal policy making.<sup>70</sup>
- The memorandum announcing DAPA and expanded DACA is "a general statement of policy" and thus exempt from notice-and-comment rulemaking under the APA.<sup>71</sup>
- DAPA does not violate any provision of the Immigration and Nationality Act and "appears to further DHS's mission of '[e]stablishing national immigration enforcement policies and priorities.'"<sup>72</sup>

## **Current Status of the States' Case**

On January 19, 2016, the Supreme Court announced it will review the Fifth Circuit's decision.<sup>73</sup> This prompt action by the Supreme Court means the Justices will hear the case this spring—likely with oral arguments being held in April—and issue a decision before the term ends in June 2016. If that happens, it would be possible for the immigration agencies to implement DAPA and expanded DACA before the current Administration leaves office.

This case represents precisely the type of high-stakes conflict where review by the country's highest court is crucial. Texas and 25 other states have filed suit in an attempt to prevent implementation of the President's policy on immigration. Fifteen states and the District of Columbia, plus 73 U.S. mayors and county officials support the Administration's policies. Giving a single state the power to upend a nationwide federal program that is supported by many other states is a dangerous precedent.

This case also represents a departure from past precedent. Since at least 1956, [every U.S. President](#) has granted temporary immigration relief to one or more groups in need of assistance. The Supreme Court has repeatedly held that it is well within the executive's authority to decide how and when to enforce the law and

to exercise prosecutorial discretion. Plain and simple, the Fifth Circuit's decision is out of line with past precedent and should be reversed.

## Endnotes

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<sup>1</sup> American Immigration Council, *A Guide to the Immigration Accountability Executive Action* (November 2014), at <http://www.immigrationpolicy.org/special-reports/guide-immigration-accountability-executive-action>.

<sup>2</sup> U.S. Department of Homeland Security Secretary Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (November 20, 2014), at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

<sup>3</sup> American Immigration Council, *Only the Beginning: The Economic Potential of Executive Action on Immigration* (December 2014), at [http://www.immigrationpolicy.org/sites/default/files/docs/only\\_the\\_beginning-economic\\_potential\\_of\\_executive\\_action\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/only_the_beginning-economic_potential_of_executive_action_final.pdf).

<sup>4</sup> Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law* (August 2014), at <http://www.immigrationpolicy.org/perspectives/president%E2%80%99s-discretion-immigration-enforcement-and-rule-law>.

<sup>5</sup> *Arpaio v. Obama, et al.*, No. 14-cv-1966 (D.D.C.).

<sup>6</sup> *Texas, et al. v. United States, et al.*, No. 14-cv-254 (S.D. Tex.).

<sup>7</sup> The 24 states' amended complaint, filed December 9, 2014, is available at <https://www.texasattorneygeneral.gov/files/epress/files/ImmigrationStatesFirstAmendedLawsuit12092014.pdf> (hereinafter "States' Amended Complaint"). Those states are Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho (and the Idaho Governor), Indiana, Kansas, Louisiana, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin, as well as Michigan's attorney general and the Governors of Mississippi, Maine, and North Carolina. Additionally, two more states—Tennessee and Nevada—joined the lawsuit. Associated Press, *2 more states join Texas-led immigration lawsuit* (Jan. 26, 2015), at [http://hosted.ap.org/dynamic/stories/T/TX\\_IMMIGRATION\\_LAWSUIT\\_TNOL?SITE=TNSHE&SECTION=STATE&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/T/TX_IMMIGRATION_LAWSUIT_TNOL?SITE=TNSHE&SECTION=STATE&TEMPLATE=DEFAULT).

17 states initially filed the first complaint on December 3 (all but Arizona, Florida, Arkansas, Michigan's attorney general, North Dakota, Ohio, and Oklahoma).

<sup>8</sup> Brief of the Amicus States of Washington, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District of Columbia in Support of the United States, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015) (hereinafter "States' Appeals Court Amicus"), available at [http://www.legalactioncenter.org/sites/default/files/docs/lac/5th%20Cir%20Imm%20Amicus Attorneys%20General.pdf](http://www.legalactioncenter.org/sites/default/files/docs/lac/5th%20Cir%20Imm%20Amicus%20Attorneys%20General.pdf). See also *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #81 (S.D. Tex. Jan. 12, 2015) (hereinafter "States' District Court Amicus"), available at <http://www.atg.wa.gov/uploadedFiles/TexasUSAmicusBr.pdf>. All states but Delaware, Rhode Island, and Virginia also signed the district court *amicus* brief.

<sup>9</sup> Brief for the Appellants, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. March 30, 2015) (hereinafter "Gov't Appeal Brief," available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/30/immigration\\_ca5\\_us\\_pi\\_brief.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/30/immigration_ca5_us_pi_brief.pdf)); Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #38 (S.D. Tex. Dec. 24, 2014) (hereinafter "Gov't District Court Opp."), available at <http://www.scribd.com/doc/252049849/Texas-v-United-States-Response-of-United-States-Defendants-Sur-Reply-in-Opposition-to-Plaintiffs-Motion-for-Preliminary-Injunction>, *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #38 (S.D. Tex. Jan. 30, 2015) (hereinafter "Gov't District Court Sur-Reply"), available at <http://www.scribd.com/doc/254323502/Texas-v-United-States-Government-Surreply#scribd>.

<sup>10</sup> See Brief of Immigration Law Professors as Amici Curiae in Support of Reversal, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at <http://lawprofessors.typepad.com/files/immigration-law-professors-brief-filed.pdf>; Lynne Rambo, *States' Lawsuit Against Executive Action More Politics Than Substance*, Immigration Impact (Jan. 13, 2015) (summarizing standing arguments), available at <http://immigrationimpact.com/2015/01/13/states-lawsuit-against-executive-action-more-politics-than-substance/#sthash.d8AEPKv6.dpuf>.

<sup>11</sup> *Arpaio v. Obama, et al.*, No. 14-cv-1966, Dkt #23, 2014 WL 7278815 (D.D.C. Dec. 23, 2014) (hereinafter "Arpaio Opinion"), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2014cv1966-23](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1966-23).

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- <sup>12</sup> *Arpaio v. Obama, et al.*, No. 14-5325, (D.C. Cir. 2015), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/D4C4C6269EE9758585257EA10052EE62/\\$file/14-5325-1567834.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/D4C4C6269EE9758585257EA10052EE62/$file/14-5325-1567834.pdf). Judge Brown wrote a concurring opinion; *Arpaio v. Obama, et al.*, No. 14-5325, (D.C. Cir. 2015), *petition for cert. filed*, (Nov. 12, 2015) (No. 15-643) available at <http://www.freedomwatchusa.org/pdf/151112-PetitionWritCertiorariArpaiovObamaUSSC.pdf>.
- <sup>13</sup> *Arpaio v. Obama, et al.*, No. 14-5325, (D.C. Cir. 2015), *cert denied*, (U.S. Jan. 19, 2016) (No. 15-643), available at [http://www.supremecourt.gov/orders/courtorders/011916zor\\_l5gm.pdf](http://www.supremecourt.gov/orders/courtorders/011916zor_l5gm.pdf).
- <sup>14</sup> *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #145 (S.D. Tex. Feb. 16, 2015) (hereinafter “Hanen Opinion”), at [http://www.txs.uscourts.gov/notablecases/1-14-cv-254\\_145X20977588\\_0.pdf](http://www.txs.uscourts.gov/notablecases/1-14-cv-254_145X20977588_0.pdf).
- <sup>15</sup> Defendants’ Notice of Appeal, *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #149 (S.D. Tex. Feb. 23, 2015), at <http://www.scribd.com/doc/256670421/Texas-v-United-States-Notice-of-Appeal>.
- <sup>16</sup> *Texas v. United States*, No. 15-40238, (5th Cir. Tex. Nov. 9, 2015) available at <http://www.ca5.uscourts.gov/opinions/pub/15/15-40238-CV0.pdf>
- <sup>17</sup> Ariane de Vogue, *Obama Administration Wants Supreme Court to Approve its Immigration Plans*, CNN, (Nov. 10, 2015), available at <http://www.cnn.com/2015/11/09/politics/obama-immigration-appeals-court-ruling/>.
- <sup>18</sup> Joshua Gerstein, *Supreme Court to Rule on Obama’s Immigration Orders*, Politico, (Jan. 19, 2016), available at <http://www.politico.com/story/2016/01/supreme-court-to-rule-on-obama-immigration-orders-217860>; *Texas v. United States*, No. 15-40238, (5th Cir. Tex. Nov. 9, 2015), *cert. granted*, (U.S. January 19, 2016) (No. 15-674), available at [http://www.supremecourt.gov/orders/courtorders/011916zor\\_l5gm.pdf](http://www.supremecourt.gov/orders/courtorders/011916zor_l5gm.pdf).
- <sup>19</sup> U.S. Const., Art. II, § 3.
- <sup>20</sup> *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008).
- <sup>21</sup> See Arpaio Opinion, note 19, at 20.
- <sup>22</sup> American Immigration Council, *The Criminalization of Immigration in the United States* (July 2015), at [http://immigrationpolicy.org/sites/default/files/docs/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states\\_final.pdf](http://immigrationpolicy.org/sites/default/files/docs/the_criminalization_of_immigration_in_the_united_states_final.pdf).
- <sup>23</sup> See States’ Amended Complaint, note 6, at ¶¶ 31-43.
- <sup>24</sup> American Immigration Council, *Children in Danger: A Guide to the Humanitarian Crisis at the Border* (July 2014), p. 2, at [http://www.immigrationpolicy.org/sites/default/files/docs/children\\_in\\_danger\\_a\\_guide\\_to\\_the\\_humanitarian\\_challenge\\_at\\_the\\_border\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/children_in_danger_a_guide_to_the_humanitarian_challenge_at_the_border_final.pdf); Elizabeth Kennedy, *No Childhood Here: Why Central American Children are Fleeing Their Homes* (July 2014), at [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).
- <sup>25</sup> States’ Amended Complaint, note 6, at ¶ 63.
- <sup>26</sup> *Id.*, ¶¶ 64-68.
- <sup>27</sup> See Arpaio Opinion, *supra* note 19.
- <sup>28</sup> *Id.* at p. 20.
- <sup>29</sup> The Government pointed out that no evidence supports Arpaio’s “speculation about the crime rate.” *Arpaio v. Obama*, Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction, No. 14-cv-1966 (D.D.C.) (Dec. 15, 2014), available at <https://www.scribd.com/doc/250247927/Arpaio-v-Obama-et-al-Gov-t-Response>.
- <sup>30</sup> See Arpaio Opinion, *supra* note 19, at p. 21.
- <sup>31</sup> *Id.* at p. 21-22.
- <sup>32</sup> *Id.* at p. 24.
- <sup>33</sup> *Id.* at p. 32 n. 14, citing 6 U.S.C. 202(5); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).
- <sup>34</sup> *Arpaio v. Obama, et al.*, No. 14-5325 (D.C. Cir. 2015), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/D4C4C6269EE9758585257EA10052EE62/\\$file/14-5325-1567834.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/D4C4C6269EE9758585257EA10052EE62/$file/14-5325-1567834.pdf).
- <sup>35</sup> *Arpaio v. Obama, et al.*, No. 14-5325, (D.C. Cir. 2015), *cert denied*, (U.S. Jan. 19, 2016) (No. 15-643), available at [http://www.supremecourt.gov/orders/courtorders/011916zor\\_l5gm.pdf](http://www.supremecourt.gov/orders/courtorders/011916zor_l5gm.pdf).
- <sup>36</sup> See Hanen Opinion, note 21.
- <sup>37</sup> *Id.* at 22-27; see also Plaintiffs’ Reply In Support of Motion for Preliminary Injunction, *Texas, et al. v. United States et al.*, No. 1:14-cv-254, Dkt #64 (S.D. Tex. Jan. 7, 2015) (on file with American Immigration Council).

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<sup>38</sup> See Gov't District Court Sur-Reply, note 17, at p. 10; States' District Court Amicus, note 7, at pp. 5-7, 12-13; *Amici Curiae* Brief of American Immigration Council, American Immigration Lawyers Association, Define American, National Immigrant Justice Center, National Immigration Law Center, New Orleans Workers' Center For Racial Justice, Service Employees International Union, Southern Poverty Law Center, and United We Dream in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #39 (S.D. Tex. Dec. 29, 2014) (hereinafter "Council District Court Amicus"), pp. 3-6, at <http://www.legalactioncenter.org/sites/default/files/Texas%20v.%20US%20amicus%20brief.pdf>.

<sup>39</sup> Hanen Opinion, note 21, at pp. 43-56.

<sup>40</sup> *Id.* at pp. 81-87, citing 5 USC § 701(a)(2); see also pp. 102-112.

<sup>41</sup> *Id.* at pp. 102-112.

<sup>42</sup> Gov't District Court Sur-Reply, note 17, at pp. 39-43; Council District Court Amicus, note 48, at pp. 1-2.

<sup>43</sup> Council District Court Amicus, note 48, at p. 2, citing U.S. DHS, *National Standard Operating Procedures (SOP), Deferred Action for Childhood Arrivals (DACA), (Form I-821D and Form I-765)* (Apr. 4, 2013), Appendix F, p. 249, at <http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf>; see also Declaration of Donald W. Neufeld, *Texas, et al. v. United States, et al.*, No. 14-cv-254, (S.D. Tex. Jan. 30, 2015), ¶¶ 10-24, at <https://ecf.txsd.uscourts.gov/doc1/179122474614>.

<sup>44</sup> Hanen Opinion, note 21, at p. 70, 123.

<sup>45</sup> Hanen Opinion, note 21, at p. 5, p. 123.

<sup>46</sup> U.S. DHS, *Statement by Secretary Jeh C. Johnson Concerning the District Court's Ruling Concerning DAPA and DACA* (Feb. 17, 2015), at <http://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa>.

<sup>47</sup> Hanen Opinion, note 21, at pp. 22-32.

<sup>48</sup> Council District Court Amicus, note 48, at pp. 3-8.

<sup>49</sup> *Id.* at pp. 9-15.

<sup>50</sup> Defendants' Notice of Appeal, *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #149 (S.D. Tex. Feb. 23, 2015), at <http://www.scribd.com/doc/256670421/Texas-v-United-States-Notice-of-Appeal>.

<sup>51</sup> Defendants' Emergency Expedited Motion to Stay the Court's February 16, 2015 Order Pending Appeal and Supporting Memorandum, *Texas, et al. v. United States, et al.*, No. 1:14-cv-254 (S.D. Tex. Feb. 23, 2015), available at <http://immigrationimpact.com/wp-content/uploads/2015/02/150-Ds-Emergency-Expedited-Motion-to-Stay-the-Courts-February-16-2015-Order-Pending-Appeal-and-Supporting-Memorandum.pdf>. The government indicated that if the district court did not rule by a date certain (Feb. 25, 2015), it might seek relief from the Fifth Circuit. *Id.* at p. 3. After three weeks had passed and Judge Hanen had not ruled, the government turned to the appellate court, seeking the same relief it sought from Judge Hanen; namely, an emergency stay, or, alternatively, limitation of the injunction only to Texas or only to the states suing the government. Gov't Appeal Brief at pp. 54-56.

<sup>52</sup> Appellants' Emergency Motion for Stay Pending Appeal, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Mar. 12, 2015), available at <http://crimmigration.com/wp-content/uploads/2015/03/03-12-2015-stay-mx-5th-cir.pdf>; see also Wendy Feliz, *DOJ Files Emergency Appeal In Immigration Executive Action Case*, Immigration Impact (Mar. 12, 2015), at <http://immigrationimpact.com/2015/03/12/doj-files-emergency-appeal-in-immigration-executive-action-case/>.

<sup>53</sup> Brief of the Amicus States of Washington, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District of Columbia in Support of the United States, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015) (hereinafter "States' Appeals Court Amicus"), available at [http://www.legalactioncenter.org/sites/default/files/docs/lac/5th%20Cir%20Imm%20Amicus\\_Attorneys%20General.pdf](http://www.legalactioncenter.org/sites/default/files/docs/lac/5th%20Cir%20Imm%20Amicus_Attorneys%20General.pdf). See also *Texas, et al. v. United States, et al.*, No. 14-cv-254, Dkt #81 (S.D. Tex. Jan. 12, 2015) (hereinafter "States' District Court Amicus"), available at <http://www.atg.wa.gov/uploadedFiles/TexasvUSAmicusBr.pdf>. All states but Delaware, Rhode Island, and Virginia also signed the district court *amicus* brief.

<sup>55</sup> *Amici Curiae* Brief of Major Cities Chiefs Association, Police Executive Research Forum, and Individual Sheriffs and Police Chiefs in Support of Defendants-Appellants, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at [www.nilc.org/document.html?id=1228](http://www.nilc.org/document.html?id=1228). Twenty-seven of these law enforcement leaders, and the organizations, also filed a brief in the district court. See *Amici Curiae* Brief of Major Cities Chiefs Association, Police Executive Research Forum, and Individual Sheriffs and Police Chiefs in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Texas, et al. v. United*

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*States, et al.*, No. 14-cv-254, Dkt #83 (S.D. Tex. Jan. 12, 2015), available at <http://archive.azcentral.com/ic/news/Law-Enforcement-Amicus-2015-01-12.pdf>.

<sup>56</sup> Brief for 181 Members of the United States House of Representatives as Amici Curiae in Support of Defendants-Appellants, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at <http://www.democraticleader.gov/newsroom/181-house-members-file-amicus-brief-in-court-to-support-president-obamas-immigration-executive-actions/>. All but 12 House Democrats signed the brief. See Cristina Marcos, *Dems: Immigration actions are legal*, The Hill (Apr. 6, 2015), at <http://thehill.com/blogs/blog-briefing-room/news/238012-house-dems-side-with-obama-in-immigration-court-case>.

<sup>57</sup> Brief of Amici Curiae Members of United States Senate in Support of Defendants-Appellants, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at [www.nilc.org/document.html?id=1226](http://www.nilc.org/document.html?id=1226). The four Senators were Senator Richard Blumenthal, Senator Christopher A. Coons, Senator Mazie Hirono, and Senator Sheldon Whitehouse.

<sup>58</sup> Amici Curiae Brief of American Immigration Council, National Immigration Law Center, Service Employees International Union and Others in Support of Appellant United States Seeking Reversal Of Preliminary Injunction, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015) (hereinafter “Council Appeals Court Amicus”), available at [http://www.legalactioncenter.org/sites/default/files/docs/lac/5th%20Cir%20Imm%20Amicus\\_final.pdf](http://www.legalactioncenter.org/sites/default/files/docs/lac/5th%20Cir%20Imm%20Amicus_final.pdf).

<sup>59</sup> Brief of Faith-Based Organizations as Amici Curiae in Support of Appellants on the Public Interest Issue and Supporting Reversal, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at <http://www.interfaithimmigration.org/wp-content/uploads/2015/04/Faith-Amicus-Brief.pdf>.

<sup>60</sup> Brief of Educators and Children’s Advocates as Amici Curiae in Support of Defendants-Appellants, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at [www.nilc.org/document.html?id=1230](http://www.nilc.org/document.html?id=1230). The organizations are the American Federation of Teachers, First Focus, the National Education Association, ASPIRA, Educators for Fair Consideration, The Hispanic Association of Colleges and Universities, Pomona College, and the Scholarship Foundation of St. Louis.

<sup>61</sup> Brief for Amici Curiae Businesses in Support of Respondents-Appellants and in Support of Reversal, *Texas, et al. v. United States, et al.*, No. 15-40238 (5th Cir. Apr. 6, 2015), available at [www.nilc.org/document.html?id=1231](http://www.nilc.org/document.html?id=1231). The businesses and associations are American Apparel, Inc., Capital City Fruit, Inc., Farmers Investment Co., Latin-American Chamber of Commerce of Utah, Marek Brothers Construction, Inc., New Solutions Group, LLC, and the Nisei Farmers League.

<sup>63</sup> *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657 (5th Cir. May 26, 2015) available at <http://wfc2.wiredforchange.com/dia/track.jsp?v=2&c=p5rvXqyZ8SErMkbXZVzYR%2BeKfJrgA%2Bmh>.

<sup>64</sup> *Texas v. United States*, No. 15-40238, (5th Cir. Tex. Nov. 9, 2015) available at, <http://www.ca5.uscourts.gov/opinions/pub/15/15-40238-CV0.pdf>.

<sup>65</sup> *Id.* at 19.

<sup>66</sup> *Id.* at 30-44.

<sup>67</sup> *Id.* at 54-66.

<sup>68</sup> *Id.* at 124.

<sup>69</sup> *Id.* at 72.

<sup>70</sup> *Id.* at 80.

<sup>71</sup> *Id.* at 94-95.

<sup>72</sup> *Id.* at 123-124.

<sup>73</sup> *Texas v. United States*, No. 15-40238, (5th Cir. Tex. Nov. 9, 2015), cert. granted, (U.S. January 19, 2016) (No. 15-674), available at, [http://www.supremecourt.gov/orders/courtorders/011916zor\\_l5gm.pdf](http://www.supremecourt.gov/orders/courtorders/011916zor_l5gm.pdf).