

No. 15-40238

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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

*Plaintiffs-Appellees,*

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY,  
DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKA, Commissioner of  
U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border  
Patrol, U.S. Customs and Border of Protection; SARAH R. SALDANA, Director of U.S.  
Immigration and Customs Enforcement; LEON RODRIGUEZ, Director of U.S. Citizenship and  
Immigration Services,

*Defendants-Appellants,*

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On Appeal from the United States District Court for the Southern District of Texas,  
Brownsville Division, No. 1:14-cv-254, The Honorable Andrew Hanen, Presiding Judge

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**BRIEF OF JANE DOE #1, JANE DOE #2, AND JANE DOE #3 AS *AMICUS CURIAE* IN  
SUPPORT OF APPELLANTS, SUPPORTING REVERSAL**

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NINA PERALES  
MEXICAN AMERICAN LEGAL DEFENSE AND  
EDUCATIONAL FUND  
110 Broadway, Ste. 300  
San Antonio, TX 78205  
(210) 224-5476

ADAM P. KOHSWEENEY  
GABRIEL MARKOFF  
O'MELVENY & MYERS LLP  
2 Embarcadero Center, 28th Floor  
San Francisco, CA 94111  
(415) 984-8700

LINDA SMITH  
DLA PIPER LLP  
2000 Avenue of the Stars, Ste. 400  
Los Angeles, CA 90067  
(310) 595-3038

*Counsel for Amicus Curiae*

## **SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES**

All current parties to this case, No. 15-40238, are governmental parties exempt from the certificate requirements of Fifth Circuit Rule 28.2.1. Pursuant to Fifth Circuit Rule 29.2, which requires “a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief,” undersigned counsel of record certifies that the following listed persons have an interest in this *amicus* brief. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

*Amicus curiae* with a direct interest in this brief are the following: Jane Doe #1, Jane Doe #2, and Jane Doe #3. The Jane Does are three undocumented immigrants who are longtime residents of the Rio Grande Valley of South Texas and mothers of U.S. citizen children. They were allowed to proceed under pseudonyms as *amici* in the district court, and request leave to do so here to protect themselves from intimidation, violence, and harassment.

Their counsel in this Court are the following: Nina Perales (Mexican American Legal Defense and Educational Fund); Adam P. KohSweeney and Gabriel Markoff (O’Melveny & Myers LLP); and Linda Smith (DLA Piper LLP). Counsel for *amici* in the district court also included: David Hinojosa (Mexican American Legal Defense and Educational Fund); J. Jorge deNeve (O’Melveny & Myers LLP); and Frank Costilla (Law Office of Frank Costilla, LP)

No party to this case or party's counsel authored this brief in whole or in part. No individual or organization other than *amici* and their counsel contributed money intended to fund preparing or submitting this brief.

/s/ Nina Perales  
Nina Perales  
Attorney of Record for  
*Amicus Curiae*

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## CONSENT TO FILING

Pursuant to Fed. R. App. P. 29(a), all parties to this appeal have consented to the filing of this *amicus curiae* brief.

## INTEREST OF *AMICUS CURIAE*

Jane Doe #1, Jane Doe #2, and Jane Doe #3 are undocumented immigrants, mothers of U.S. citizen children, and longtime residents of the Rio Grande Valley of South Texas. They moved to intervene as Defendants in the court below, and are currently appealing that court's denial of intervention to this Court in parallel case No. 15-40333. Their interest in this suit is to protect their eligibility for consideration for discretionary grants of deferred action under DAPA and/or expanded DACA, currently the only legal avenue available to them by which they can avoid deportation and remain in the United States with their children. *Amici* believe that participation as parties in this case is the only means by which they can protect their interests. However, because they have not yet been granted intervention, and because the brief of the United States ignores or underplays a number of critical points and takes positions hostile to the Jane Does' economic and personal interests, *amici* now submit this brief in an attempt to protect their interests, which the United States does not and cannot adequately represent.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The district court committed reversible error by finding standing and enjoining the implementation of the Department of Homeland Security's

November 20, 2014 Deferred Action Guidance Memorandum based on evidence of alleged injuries that were speculative at best and demonstrably incorrect at worst.<sup>1</sup> Only a few of the States submitted any evidence of injury in the district court, and that court's decision rested solely on Texas's claim that it would be injured because DAPA would cause it to expend money to issue additional driver's licenses. But the States came nowhere close to meeting their burden to prove this point, and they also failed to prove their alternative argument that DAPA would result in an increased drain on the social safety net. In fact, the reality is that DAPA is quite likely to increase the States' revenues, both in the Texas's driver's license program specifically and in the social safety net overall.

*First*, with regard to Texas's alleged costs for processing new driver's licenses, the States' only evidence for these costs is a single, conclusory, declaration filed below. However, Texas's publicly available official budgetary documents demonstrate that the declaration is either wrong or—at the very least—vastly oversimplified and overstated. Texas has apparently failed to consider the fact that the fees associated with drivers' license applications actually

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<sup>1</sup>*Amici* will collectively refer to the Deferred Action Guidance Memorandum as “DHS Memorandum” and the guidance it contains by their common acronyms: “DAPA,” short for Deferred Action for Parental Accountability, and “expanded DACA,” short for the provisions related to Deferred Action for Childhood Arrivals. *Amici* will collectively refer to these as “DAPA” except where there are differences between them meaningful to this brief.

allows Texas to generate a profit off of license applications in the aggregate. The Texas Department of Public Safety's official budgetary materials also flatly contradict Texas's allegations regarding the need to hire additional personnel to process driver's license applications, as well as the cost associated with hiring such personnel. Indeed, these materials demonstrate that the increased flow of license applications from DAPA grantees would actually benefit Texas—and that is without even considering the additional tangible and proven benefits that would result from DAPA, including increasing gas tax revenue, bringing unlicensed drivers into compliance with safety laws, and reducing the number of uninsured motorists on the roads.

*Second*, as is shown in Part II of this brief with regard to the social safety net generally, the facts demonstrate that DAPA grantees will pay the same taxes as U.S. citizens into the various programs that comprise the social safety net, but will be almost entirely cut off from actually drawing benefits from these programs. The unfairness of this fact to DAPA grantees aside, it is indisputable that DAPA will accordingly have a net positive effect on the financial health of these programs. Commensurately, DAPA will allow currently undocumented workers to participate more openly and officially in the economy by virtue of legal employment. This will pump more money into the economy and increase the Gross Domestic Product, will assist—rather than hinder—the employment

prospects of full citizens, and will allow DAPA grantees to obtain private health insurance, thereby further reducing the strain on emergency medical care and related services.

Even if this Court ultimately finds DAPA’s many benefits to be unproven at this stage in the case, the strong possibility that they will be proven with further discovery and at trial is enough to reverse the district court’s order and dissolve the injunction. The burden of proof is not on the Defendant-Appellant United States nor the undersigned *amici* to prove that DAPA will have the effects described above. Rather, the burden is on the *Plaintiff-Appellee States* to prove that they will suffer the irreparable injuries they allege. Because they have not done so, and cannot do so, the preliminary injunction must be dissolved.

### **ARGUMENT**

None of the harms the States allege will befall them if DAPA is implemented are sufficient to either demonstrate an Article III injury-in-fact, as required to show standing, or the likelihood of an irreparable injury, as necessary to support a preliminary injunction. To establish Article III standing, an alleged future injury must be not only “concrete, particularized, and actual or imminent,” but also “certainly impending.” *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1147-48 (2013). Additionally, to support a preliminary injunction, a plaintiff must prove “that irreparable injury is *likely* in the absence of an injunction. . . . Issuing a

preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008) (emphasis original).

**I. THE STATES’ ASSERTED INJURIES FROM DAPA ARE SPECULATIVE AT BEST, AND THUS THEY CAN NEITHER DEMONSTRATE STANDING NOR SHOW IRREPARABLE INJURY**

**A. Texas’s Asserted Financial Costs From Issuing Driver’s Licenses Are Contradicted By Its Own Budget And Will Almost Certainly Be Offset From Increased Gas Tax Revenue And Other Benefits**

Texas’s alleged injury is simply neither concrete nor plausible enough at this stage of the litigation to serve as a basis for injury-in-fact or irreparable injury. Even if the States’ legal arguments regarding what constitutes Article III standing are correct, Texas’s own budgetary documents demonstrate that its factual arguments are false. Texas’s publicly available budget documents show that it completely recoups all processing expenses through the \$25 application fees it charges each applicant.<sup>2</sup> Its claims that it will suffer enormous financial injury appear to be entirely based on the unsupported assumption that the Texas Department of Public Safety would need to hire hundreds of new employees and

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<sup>2</sup> The district court calculated this fee as \$24, but the DPS website indicates it is \$25. See <https://txapps.texas.gov/tolapp/txdl/>.



open significant new office space to process a mere 8.5% increase in driver's license applications due to DAPA. This type of naked speculation cannot be a basis for standing, and it is certainly not the type of concrete injury that is necessary to support a preliminary injunction. Texas's allegations have yet to be tested through discovery and will likely prove to be radically overstated or completely baseless, thus leaving the States with no provable injury at all.

Moreover, though the district court impliedly admitted that only the *net* cost to Texas's budget could be considered an injury, it failed to consider that increasing the pool of driver's license holders is likely to substantially *increase* tax revenues and bring unlicensed drivers into compliance with Texas's driving laws, two facts that will more than offset whatever costs Texas may incur processing applications.

*i. Texas's Allegations Of Financial Harm Conflict With Its Official Budget Documents And Will Likely Be Disproved In Discovery As This Case Proceeds*

The district court's sole basis for finding injury-in-fact and irreparable injury was its conclusory ruling that Texas would suffer a net loss of between \$130.89 and \$174.73 every time it processed a DAPA recipient's driver's license application. *See* Order at 22, 115, ECF No. 145. This ruling, however, was based on a single declaration submitted by Plaintiff-Appellee Texas. In that declaration, Texas speculated that DAPA would cause the Texas Department of Public Safety

(“DPS”) to have to spend between \$154.89 to \$198.73 for each new driver’s license application it processed, for a high-end total of \$103 million over two years, to hire 640 new employees and add 168,000 square feet of office space. *See* ECF No. 64-43 at 1-5. In calculating injury, the district court accepted the declaration amounts without question and then offset the “per license” figure by the application fee each driver’s license applicant must pay. *See* Order at 22.

Texas’s official budgetary publications, however, indicate that its average costs for issuing licenses are less than \$21 per license at most, and that it actually generates a *profit* on driver’s license fees. In 2008, DPS estimated that it processed over 5 million driver’s license transactions “for an average revenue of \$95 million each year.” Tex. Dep’t of Pub. Safety, *Agency Strategic Plan 2009-2013* 58 (2008).<sup>3</sup> And in 2014, DPS’s projected budget showed it processing 6.1 million license transactions and obtaining over \$125 million in driver’s license fees. *See* Tex. Dep’t of Pub. Safety, *Operating Budget, Fiscal Year 2014* [hereinafter *DPS Operating Budget*] III.A.38; IV.D.5 (2013).<sup>4</sup> Yet that same year, DPS’s total budget for the “driver license” category, which includes both “driver license services” and “driving and motor vehicle safety” was slightly less than

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<sup>3</sup> <http://www.dps.texas.gov/dpsStrategicPlan/2009-2013/entire0913asp.pdf#01cover>

<sup>4</sup> <https://www.dps.texas.gov/LBB/operatingBudget.pdf>.

\$124 million. *Id.* at II.A.2. Even assuming that the entire \$124 million in that department was spent on processing driver's license applications and doing nothing else, that works out to an average cost to Texas of less than \$21 per license.<sup>5</sup> This indicates that processing licenses actually generates a profit for the State.

Though it apparently cost Texas less than \$21 to process a license application in 2014, it now claims that adding 520,000 projected license applications from DAPA (a moderate increase of 8.5% over the 6.1 million license transactions in 2014) will cost it an additional \$103 million, at an average cost of \$198.73 per license. *See* Order at 22 (citing ECF No. 64-43 at 3-4). Yet Texas gives no explanation why a DAPA recipient's application should be exponentially more expensive than anyone else's application. And indeed, many of the calculations contained in Texas's declaration in this suit are not consistent with the *DPS Operating Budget*. For example, Texas claims in this suit that it would need to hire 2.03 new employees for each 1,750 DAPA recipients who apply for licenses—one employee for every 875 applications—while the *DPS Operating Budget* seems to indicate that in 2014 each employee could handle over 2,500 driver's license transactions. *Compare* ECF No. 64-43 at 3-4, *with* *DPS Operating*

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<sup>5</sup> If Texas's costs are limited to the \$22.9 million in the "driver license services" sub-category, then this rate falls to less than \$4 a license.

*Budget* at III.A.38. All told, Texas claims that the two-year cost just to hire new employees to handle 520,000 DAPA driver’s license applications would be almost \$80 million, \$40 million a year. This makes little sense in light of the fact that the *total* salary and wage cost for DPS’s driver’s license division in 2014 was slightly more than \$70 million, and DPS somehow handled 6.1 million license applications during that time. *DPS Operating Budget* at III.A.38, 40.

To be sure, discovery may bring more facts to light and complicate both this and Texas’s own analysis, and it is not impossible that Texas may have some legitimate calculations to support its claim that each driver’s license application under DAPA will cost it nearly \$175 net of fees. But the critical point is that the self-interested declaration Texas has put forward at this point in the litigation is not sufficient to support its claim of injury. On its face, that sworn declaration seems entirely inconsistent with its own official budgetary documents. Texas’s alleged financial losses—far from being “concrete, particularized, and actual or imminent” enough to support standing, let alone an irreparable injury sufficient for a preliminary injunction—are likely pure speculation. At the very least, they should be subject to vigorous discovery before providing the sole basis for an injunction.

ii. *Revenues For Processing Driver's Licenses Come From Gas Taxes And Usage-Based Fees, Which Are Likely To Increase Under DAPA*

Even taking Texas's declaration on its face, issuing driver's licenses to DAPA grantees will not cause Texas harm "in excess of several million dollars," Order at 22, because, in the aggregate, issuing licenses to DAPA recipients is likely to result in an increase in gas tax revenues and other usage-based revenues large enough to offset the entire cost of processing new driver's licenses. The district court failed to consider the likelihood of increased gas tax revenues at all in its opinion, thereby rendering Texas's supposed "net loss" from processing driver's license applications entirely speculative.

As noted, in 2014, the Texas DPS budgeted approximately \$124 million total to its driver's license division, of which \$22.9 million was for driver license services. *See DPS Operating Budget* at III.A.38, 40. Of the total amount, \$106 million came from Texas's State Highway Fund, which is almost entirely derived from state gas and lubricant taxes, vehicle registration fees, and matching federal funds from federal fuel taxes. *See Tex. Comptroller of Pub. Accounts, Biennial Revenue Estimate 2014–2015: Sources of State Highway Fund Revenue*, 34 (2014) [hereinafter *Biennial Revenue Estimate 2014–2015*] (stating the \$8.5 billion funding for the State Highway Fund in 2015 includes \$4.3 billion from state gas

and lubricant taxes and \$4.1 billion in federal funds)<sup>6</sup>; Tex. Legislative Budget Board, *Tex. Highway Funding Legislative Primer 2-3* (March 2013).<sup>7</sup>

Texas's gas tax revenues—and thus the State Highway Fund that funds the vast bulk of driver's license services—would only be likely to increase under DAPA. The district court failed to consider this common-sense point, despite it being no more speculative than Texas's own unsupported claims of financial harm. Texas imposes a \$0.20 per gallon tax on the sale of gasoline and similar fuel products. *See* Tex. Comptroller of Public Accounts, *Texas Taxes and Tax Rates* (2015).<sup>8</sup> In 2011, the per-capita consumption of motor fuel gasoline in Texas was 464 gallons. *See* Dep't of Energy, *Energy Consumption by Transportation Fuel in Texas* (2015).<sup>9</sup> Some other studies, which examine consumption on a per-licensed-driver rate, find significantly higher figures. *See* Michael Sivak, Univ. of Mich. Transp. Research Inst., *Has Motorization in the U.S. Peaked? Part 3: Fuel Consumed By Light Duty Vehicles* 10 (Nov. 2013) (estimated nationwide gasoline

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<sup>6</sup> [http://www.texasparency.org/State\\_Finance/Budget\\_Finance/Reports/Biennial\\_Revenue\\_Estimate/bre2014/BRE\\_2014-15.pdf](http://www.texasparency.org/State_Finance/Budget_Finance/Reports/Biennial_Revenue_Estimate/bre2014/BRE_2014-15.pdf).

<sup>7</sup> [http://www.lbb.state.tx.us/Documents/Publications/Primer/238\\_TexasHighwayFunding\\_LegislativePrimer\\_ThirdEdition2013.pdf](http://www.lbb.state.tx.us/Documents/Publications/Primer/238_TexasHighwayFunding_LegislativePrimer_ThirdEdition2013.pdf).

<sup>8</sup> <http://www.window.state.tx.us/taxinfo/taxrates.html>.

<sup>9</sup> <http://apps1.eere.energy.gov/states/transportation.cfm/state=TX#motor>.

consumption per licensed driver to be 585 gallons in 2011).<sup>10</sup> Even taking the lower of these figures, the average DAPA recipient in Texas is likely to pay \$278.40 in gasoline taxes over the three-year period of deferred action, more than reimbursing the State for the cost of processing her driver's license application, even assuming Texas is right that each license application will result in a net loss to the State of \$175. And the actual amount Texas gains is likely to be higher, for this does not even consider Texas's other revenue streams that will be bolstered by an influx of new driver's license applicants, such as vehicle registration fees, title fees, usage-based lubricants taxes, and other sources. *See Biennial Revenue Estimate 2014–2015, supra*, at 34-35.

Granted, these figures are themselves estimates, and they could be overstated with respect to potential DAPA recipients who are currently forced to drive illegally, without licenses, and so are already paying gas taxes. But if it is speculative to make the common-sense point that adding new driver's license holders will lead to increased fuel consumption and higher gas tax revenues, it is certainly no more speculative than are Texas's allegations about its costs. Moreover, it is the States, as the Plaintiffs below, who have the burden of showing injury. In ruling on Texas's claim that it was harmed, the district court failed to

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<sup>10</sup> <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/100360/102974.pdf>.

account for the increased gas tax revenues Texas would enjoy as a result of DAPA. For this reason as well, the court's ruling was unsupported at this early stage of the litigation and cannot serve as the basis for finding standing or irreparable injury.

*iii. The Financial Costs Of Issuing Licenses Must Be Balanced Against The Benefit Of Bringing Unregulated Drivers Into Compliance With Texas's Laws*

Last, Texas's argument for injury also completely disregards the immediate economic and social gains that issuing licenses to DAPA recipients would bring to the entire population of Texas. In Texas, 80 percent of people drive to work. U.S. Census Bureau, *American Community Surveys, Means of Transportation to Work 2009-2013* (2015).<sup>11</sup> Faced with the choice of driving without licenses and being unable to work, undocumented workers in Texas often have no choice but to drive without licenses. Partially as a result of this fact, as of 2012, 13 percent of Texas drivers were uninsured. See The Insurance Information Institute, *Uninsured Motorists* (2015).<sup>12</sup> Allowing DAPA recipients to obtain driver's licenses would make Texas's roads safer and reduce the number of drivers without auto insurance. These positive effects must be balanced against Texas's alleged injury.

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[http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13\\_5YR/S0802/0400000US48](http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/S0802/0400000US48)

<sup>12</sup> <http://www.iii.org/fact-statistic/uninsured-motorists>.



Licensing would make Texas's roads safer. Between 2007 and 2009, 18.2 percent of all fatal crashes involved a driver without a valid license. The AAA Foundation for Traffic Safety, *Unlicensed to Kill* 13 (Nov. 2011).<sup>13</sup> Texas requires driver's license applicants to pass knowledge and driving tests, as well as a vision examination. *See* 37 Tex. Admin. Code § 15.51-.53. DAPA-eligible immigrants who are currently forced to drive without a license do so without meeting these basic safety requirements. As the experience with DACA since 2012 has shown, implementing DAPA would lead to eligible individuals obtaining licenses and passing these safety requirements. Fifty-seven percent of DACA grantees obtained a driver's license in the first 16 months of the program. *See* Roberto G. Gonzales and Angie M. Bautista-Chavez, American Immigration Council, *Two Years and Counting: Assessing the Growing Power of DACA* 3 (Jun. 2014).<sup>14</sup> While it is not clear how many of these individuals had previously been driving illegally, it is likely both that at least some of them had been, and that a similar number of DAPA recipients who are already driving would apply for and obtain licenses. Licensing would bring them into compliance with Texas's driving laws and safety

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<sup>13</sup> <https://www.aaafoundation.org/sites/default/files/2011Unlicensed2Kill.pdf>.

<sup>14</sup> [http://www.immigrationpolicy.org/sites/default/files/docs/two\\_years\\_and\\_counting\\_assessing\\_the\\_growing\\_power\\_of\\_daca\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf).

requirements, making the roadways safer for everyone—immigrant and native-born.

Moreover, because Texas would be required to issue driver's licenses to DAPA recipients, DAPA is likely to decrease the number of uninsured drivers on Texas roads, significantly increasing public safety and reducing auto insurance premiums for all Texas residents. States that have allowed undocumented immigrants to obtain driver's licenses thereafter see remarkable declines in the proportion of drivers who go without auto insurance. *See* Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 Md. L. Rev. 931, 963-64 (2013) (noting, *inter alia*, the experience in New Mexico, where the uninsured driver rate dropped from 33% to 10.6% in four years after undocumented immigrants were allowed to obtain driver's licenses). This is likely to occur in Texas as well, since proof of insurance is required to register vehicles. *See* Tex. Transp. Code § 502.046(e). A drop in the uninsured driver rate would be likely to have very positive economic effects, which must be set off against Texas's alleged injuries. *See* D'Ottavio, *supra*, at 963-64.

**B. The States' Other Arguments For Harm Are Without Merit, Since Immigrants Receiving Deferred Action Under DAPA Will Not Receive Benefits From Social Services**

The court below rejected the States' argument that, because undocumented immigrants consume social services, DAPA will harm the states by increasing the costs to social services programs. *See* Order at 51-52. The States had argued that "DAPA recipients will be more likely to 'come out of the shadows' and to seek state services and benefits because they will no longer fear deportation. Thus, the States' resources will be taxed even more than they were before the promulgation of DAPA." Order at 52-53. Although the States' theory of indirect injury is speculative at best and the district court properly rejected it, *amici* emphasize two reasons why these injuries are nonexistent, using the case of Texas as an example: first, DAPA will not change anyone's eligibility for social services benefits; and, second, DAPA will actually result in greatly increased tax contributions to state and federal social services programs.

*i. Medicaid And State Health Benefits*

DAPA is no threat to the funds in Texas' health care programs. As discussed herein, Texas already denies medical care to people who have been granted deferred action and DAPA, if anything, would actually *lower* Texas's liability for uninsured care.

Federal law, and thus Texas law, does not allow undocumented immigrants to receive health care through Medicaid, although the federal government does contribute toward the cost of providing emergency care for undocumented immigrants. 1 Tex. Admin. Code §§ 358.203, 358.205; 42 C.F.R. § 440.255. Generally, only “qualified aliens” permanently residing in the United States are eligible for Medicaid benefits—a category that does not include deferred action grantees, whether under DAPA or otherwise. *See* 8 U.S.C. §§ 1611(a); 1641; *but see* 8 U.S.C. § 1611(b)(1)(A). Grantees cannot participate in the state or federal health insurance marketplaces, even with their own money. 42 U.S.C. § 18032(f)(1), (f)(3). The State’s only obligations are to provide stabilizing care for people with emergency medical conditions or in active labor, regardless of their immigration status, and to cover costs of such care for those who cannot afford it. Tex. Admin. Code § 358.205; *see also* 8 U.S.C. § 1611(b)(1)(A); 42 U.S.C. § 1395dd, § 1396a(a); 42 C.F.R. §§ 440.220(c), 442.255. But DAPA does not itself have any effect on eligibility for emergency care since that depends solely on financial and medical need, not on whether the individual in question has received a grant of deferred action.

That is why, contrary to the States’ contentions, DAPA will *save* money for Texas’ taxpayers and health care system. Even if “in 2008, Texas incurred \$716,800,000 in uncompensated medical care provided to illegal aliens,” Order at

46, that amount will *decrease* under DAPA. When prospective grantees in Texas gain work authorization, they will be better able to seek and hold down jobs with employer-offered health insurance benefits. *See infra*, II(B)(i)-(ii). A projected increase in grantees' earning power also means that fewer grantees will depend on uncompensated emergency care provided by hospitals, and that grantees will be able to purchase private health insurance. More grantees would be able to afford preventive and primary care with or without insurance, and those options both cost less and promote better long-term health outcomes than emergency intervention alone. *See* Michael V. Maciosek, et al., *Greater Use of Preventive Services in U.S. Health Care Could Save Lives at Little or No Cost*, 29 HEALTH AFFAIRS 1656 (2010)<sup>15</sup>; *see also, e.g.*, Nat'l Ass'n Comm. Health Ctrs., *The Impact of Community Health Centers & Community-Affiliated Health Plans on Emergency Department Use 2* (Apr. 2007) (regarding high relative costs of emergency room care for injuries or diseases).<sup>16</sup>

Texas is justified in being concerned about the costs of health care in its borders, but DAPA cannot possibly exacerbate those costs. The concern falls far

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<sup>15</sup> [http://www.floridahealth.gov/alternatesites/kidcare/council/12-3-10/12-3-10\\_kcc-agenda.pdf](http://www.floridahealth.gov/alternatesites/kidcare/council/12-3-10/12-3-10_kcc-agenda.pdf).

<sup>16</sup> [http://www.nachc.com/client/documents/research/ED\\_Report\\_4.07.pdf](http://www.nachc.com/client/documents/research/ED_Report_4.07.pdf)

short of being an injury that creates Article III standing, and there is no rational causal connection between DAPA and any increase in costs.

*ii. Social Security And Medicare*

Recipients of deferred action are assigned social security numbers when they receive work authorization, so that they can pay taxes on their earnings, but they are generally ineligible for Social Security benefits. *See Soc. Security Admin., Social Security Number and Card — Deferred Action for Childhood Arrivals* (2015).<sup>17</sup> Although individuals who have received grants of deferred action could theoretically receive Social Security retirement benefits, it is very unlikely that any DAPA recipients will be able to do so unless they later gain permanent immigration status.

Congress has allowed recipients of deferred action to be eligible for Old-Age, Survivor, and Disability Insurance (“OASDI”) benefits, which include what are colloquially known as “retirement” and “disability” benefits. *See* 8 U.S.C. § 1611(b)(2); 42 U.S.C. § 402(y); 8 C.F.R. § 1.3. However, like everyone who pays into the Social Security trust fund, recipients of deferred action can only obtain OASDI coverage by earning it, by paying taxes into the trust fund over the course of at least 40 qualifying quarters—10 full years of employment. 42 U.S.C. §§ 414(a)(1), (a)(2); 42 U.S.C. § 423(c)(1)(A) (requiring same for disability

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<sup>17</sup> [http://www.socialsecurity.gov/pubs/deferred\\_action.pdf](http://www.socialsecurity.gov/pubs/deferred_action.pdf).

coverage). Like everyone else, they cannot receive earned benefits until they have fully paid into the system.

A DAPA grantee's chances of actually seeing retirement benefits are slim. One reason for this is that they are not guaranteed 10 years of residence, given that deferred action grants last only three years and can be revoked at any time. *See* DHS Memorandum at 3–5, ECF No. 38-7. Another reason is that the grantee would have to reach retirement age before she could take benefits. 42 U.S.C. § 402(a). And if a grantee eventually *is* deported, her earned benefits are cut off, along with the benefits of any non-citizen survivor or spouse outside the country, unless and until she returns as a lawful permanent resident. 42 U.S.C. § 402(n). Likewise, for Medicare, although they can enroll, 8 U.S.C. § 1611(b)(3), grantees will be ineligible until they have earned OASDI coverage. *See* 42 U.S.C. § 426.

In addition to being ineligible for retirement benefits as a practical matter, DAPA grantees are categorically barred from receiving means-based benefits under the Social Security Act. Grantees are, for example, cut off from Supplemental Security Income (SSI), the social security program that provides supplemental payments to low-income aged, blind, or disabled. *See* 42 U.S.C. § 1381 *et seq.* An SSI applicant must be a citizen, a lawful permanent resident, or “permanently residing in the United States under color of law.” 20 C.F.R. § 416.202(b). The “color of law” clause does not apply to recipients of deferred

action, whether under DAPA, expanded DACA or otherwise. 20 C.F.R.

§ 416.1618(b).

Despite the limitations on grantees' benefits, grantees and their employers still have to pay withholding tax to the Social Security Trust Fund for every single paycheck. 26 U.S.C. §§ 3101, 3102. Given this fact, the Social Security Administration's Chief Actuary projects that "the long term actuarial balance for the combined Old-Age and Survivors Insurance (OASI) and Disability Insurance (DI) Trust Funds will be improved slightly by the 2014 executive actions." *See Deferred Action on Immigration: Implications and Unanswered Questions*, Hearing Before the Senate Committee on Homeland Security and Governmental Affairs, 114 Cong. \_\_\_\_ (Feb. 4, 2015) (testimony of Stephen C. Goss, Chief Actuary, Social Security Administration).<sup>18</sup> Far from threatening U.S. citizens' and legal permanent residents' expected benefits, DAPA contributes to securing their future.

*iii. Education, Unemployment, And Other Benefits*

In their filings below, the States also raised the specter of undocumented immigrants somehow taking advantage of states' education and unemployment programs. But DAPA and expanded DACA grantees cannot possibly cost the States any additional education funds. While the States do indeed have the

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<sup>18</sup> [http://www.ssa.gov/oact/testimony/SenateHomeSec\\_20150204.pdf](http://www.ssa.gov/oact/testimony/SenateHomeSec_20150204.pdf), at 2.



obligation to educate undocumented immigrant children in their public K-12 schools, that obligation arises under the Supreme Court's opinion in *Plyler v. Doe*, 457 U.S. 202 (1982). DAPA and expanded DACA will not increase the States' obligations in this regard.

DAPA grantees also will not be a drain on Texas's unemployment insurance funds. While DAPA grantees may be able to qualify for unemployment insurance benefits, *see* Tex. Lab. Code § 207.043, they will only be able to draw upon these benefits if they meet the eligibility requirements that apply to all native-born Texans, including having worked in the year prior to drawing benefits and having earned a certain baseline amount. *See* Tex. Workforce Comm'n, *Eligibility & Benefits Amounts* (2015).<sup>19</sup> And even so, their employers will still be paying unemployment taxes on their behalf, in an amount that rises as new positions are added. *See* Tex. Lab. Code §§ 201.011(10), 204.002-.003; Tex. Workforce Comm'n, *Your Tax Rates* (2015).<sup>20</sup> As more undocumented immigrants obtain deferred action and work authorization and subsequently receive better-paying, longer-term employment, more taxes will be paid into the unemployment system. The simple truth is that Texas's unemployment insurance funds will not only not be harmed by DAPA, but are actually likely to be better off.

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<sup>19</sup> <http://www.twc.state.tx.us/jobseekers/eligibility-benefit-amounts>.

<sup>20</sup> <http://www.twc.state.tx.us/businesses/your-tax-rates>.

DAPA grantees will also remain ineligible for any federal needs-based benefits programs. These include bedrock safety-net institutions like Temporary Assistance to Needy Families (TANF, colloquially known as welfare), State Children’s Health Insurance Program (CHIP),<sup>21</sup> and the Supplemental Nutritional Assistance Program (SNAP, also known as food stamps). As with Medicaid, only “qualified aliens” can receive these federal public benefits, and DAPA grantees do not count as such. 8 U.S.C. § 1611(a), (c)(1)(B); 7 C.F.R. § 273.4(a)(6) (clarifying that only qualifying aliens can participate in SNAP); Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41658, 41660 (Aug. 4, 1998) (clarifying that Medicare, non-emergency Medicaid, TANF, and CHIP are “federal public benefits” within the meaning of 8 U.S.C § 1611). DAPA grantees also would not be eligible for federal student aid. *See* Dep’t of Education, *Questions and Answers: Financial Aid and Undocumented Students* 1 (2015).<sup>22</sup>

To summarize, DAPA grantees will pay into the social safety net but will not benefit from it—at least not to the same extent that others do. Accordingly, the

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<sup>21</sup> At least one child of every prospective DAPA grantee is already eligible for CHIP, of course, by being a citizen or legal permanent resident (assuming the family meets income requirements), but their eligibility will not be affected by DAPA.

<sup>22</sup> <https://studentaid.ed.gov/sites/default/files/financial-aid-and-undocumented-students.pdf>.

States' claims that they are harmed by DAPA grantees' use of social services benefits is indisputably wrong.

**II. RATHER THAN HARMING THE STATES, DAPA WILL GREATLY BENEFIT THEM BY GROWING THE ECONOMY, INCREASING DIRECT TAX REVENUES, AND REDUCING UNDOCUMENTED IMMIGRANTS' USE OF SOCIAL BENEFITS**

DAPA will be an economic boon to the Plaintiff-Appellee States and the nation as a whole. The consensus among economists is that immigration—by both documented and undocumented individuals—benefits the economy on both state and national levels. *See* Adam Davidson, *Do Illegal Immigrants Actually Hurt the U.S. Economy?*, N.Y. TIMES MAGAZINE, Feb. 12, 2013.<sup>23</sup> Keeping undocumented immigrants in the shadow economy actually hinders the potential they can offer, while increased integration of the undocumented immigrant population bolsters the benefits already provided by undocumented workers. *See* Robert Lynch and Patrick Oakford, Center for American Progress, *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants 2* (Mar. 20, 2013).<sup>24</sup> Moreover, DAPA will keep young U.S. citizens in stable families without the fear

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<sup>23</sup> <http://www.nytimes.com/2013/02/17/magazine/do-illegal-immigrants-actually-hurt-the-us-economy.html?pagewanted=1&pagewanted=all>.

<sup>24</sup> <https://cdn.americanprogress.org/wp-content/uploads/2013/03/EconomicEffectsCitizenship-1.pdf>.

and stress that deportation could destroy their families, thereby providing immeasurable social benefits as well.

**A. Undocumented Immigrants Have A Positive Effect On Economic Growth And Contribute Billions Of Dollars In Tax Revenue**

Undocumented immigrants make the American economy stronger. Despite being confined to the shadow economy, undocumented workers complement, rather than compete with, skilled, native-born workers, and they contribute to the Gross Domestic Product (“GDP”). *See Davidson, supra* (noting that, between 1990 and 2007, undocumented workers increased the pay of legal workers in complimentary jobs by up to 10 percent). They pay billions in taxes without expectation of receiving benefits in return and, the more integrated immigrants are into the economy and society, the greater the benefits they contribute. *See Lynch and Oakford, supra* at 2; Institute on Taxation and Economic Policy, *Undocumented Immigrants’ State and Local Contributions* 1 (Jul. 2013).<sup>25</sup> Moreover, research suggests that granting work authorization would not adversely affect native employment rates because undocumented workers are already employed in complementary jobs. *See David Madland and Nick Bunter, Center*

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<sup>25</sup> <http://www.itep.org/pdf/undocumentedtaxes.pdf>.

For American Progress Action Fund, *Legal Status for Undocumented Workers is Good for American Workers* (Mar. 20, 2013).<sup>26</sup>

In addition, undocumented workers contribute enormous amounts in tax revenue to the states and federal governments while receiving fewer benefits than citizens. In 2010, undocumented immigrants contributed \$10.6 billion to state and local taxes nationwide. *See Undocumented Immigrants' State and Local Contributions, supra*. At the federal level, Stephen Goss, Chief Actuary for the Social Security Administration, estimates that undocumented workers contribute about \$15 billion a year to Social Security through payroll taxes, but only take back \$1 billion in benefits because so few are eligible. Davidson, *supra*. The overwhelming majority of undocumented workers who pay into Social Security will never see a return on that money. In total, undocumented workers have contributed up to \$300 billion, or nearly 10 percent of, the Social Security Trust Fund. *See Davidson, supra*.

**B. DAPA Will Further Increase These Positive Economic Effects, And Will Have Positive Social Effects As Well**

The economic benefits already provided by undocumented immigrants will be bolstered by providing them with work authorization and freeing them from the fear of deportation. When undocumented immigrants are kept in hiding or

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<sup>26</sup> <https://www.americanprogressaction.org/issues/labor/news/2013/03/20/57354>.

working without authorization, they cannot fully participate in the economy or their communities' social institutions. This lack of integration fragments society and prevents these immigrants from contributing their full potential. DAPA would integrate grantees, producing enormous social benefits and drastically improving the lives of many young U.S. citizens.

*i. Work Authorization Will Allow Undocumented Immigrants Access To Better-Paying, Legal Work, With Corresponding Economic Growth And Increased Tax Revenues*

The potential benefits that undocumented immigrants could bring to the economy are stymied by their lack of legal status. Unable to obtain legal employment, undocumented workers earn less, pay less in taxes, and contribute less than they otherwise would. Granting legal status to the entire undocumented population would increase the GDP by \$832 billion over 10 years, increase the wages of all workers by \$470 billion, and add 121,000 jobs per year. *See* Lynch and Oakford, *supra* at 2, 10. The wages of undocumented workers would rise by 15.1% in five years. *Id.* at 2, 8. This expanded tax base would add \$109 billion in taxes over 10 years—\$69 billion in federal taxes and \$40 billion at the state level. *Id.* at 10. In California alone, granting authorization to the undocumented Latino population would boost Social Security and Medicare with an additional \$2.2 billion annually. Manuel Pastor, Justin Scoggins, Jennifer Tran, and Rhonda Ortiz,

Center for the Study of Immigration Integration, *The Economic Benefit of Immigrant Authorization in California* 9 (Jan. 2010).<sup>27</sup>

Indeed, although both the States' briefing and the court below portrayed undocumented immigrants as nothing but a drain on the public fisc, Texas, in particular, enjoys real and robust economic benefits from its undocumented population. It takes in far more money in tax revenue from undocumented workers than it expends on them. In 2005, undocumented workers contributed close to \$1.6 billion in taxes to Texas. *See* Office of the Comptroller of Tex., *Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy* 20 (Dec. 2006).<sup>28</sup> But, because Texas only spent about \$1.2 billion on undocumented workers, those immigrants created a net surplus of \$425 million for the State to enjoy. *Id.* Without the 1.4 million undocumented immigrants in Texas that year, it would have lost \$17.7 billion in Gross State Product. *Id.* Far from harming Texas, undocumented immigrants provide a strong boost to its fiscal health.

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<sup>27</sup> [http://dornsife.usc.edu/assets/sites/731/docs/chirla\\_v10\\_small.pdf](http://dornsife.usc.edu/assets/sites/731/docs/chirla_v10_small.pdf).

<sup>28</sup> <http://www.coloradoimmigrant.org/downloads/TX%2520Study%2520on%20Undocumented%2520Immigrants%20and%20Economy.pdf>.

ii. *The Experience Of DACA Shows That The Benefits Of DAPA, Unlike The States' Illusory Harms, Will Be Real*

The financial successes of DACA suggest that DAPA's implementation will have similarly tangible benefits. As of March 2014, 673,417 people have applied for DACA and 553,197 have been approved. Gonzales *et al.*, *supra*, at 2. Nearly 60 percent of DACA grantees have obtained a new job, 49 percent have opened a new bank account, 21 percent obtained healthcare, and 45 percent have increased their earnings. *Id.* at 3. DACA has allowed young people to enter mainstream American life and start realizing their full potential.

DAPA itself is projected to bring robust economic benefits. By conservative estimates, DAPA will raise the GDP by 0.4 percent over ten years. *See* The White House Council of Economic Advisors, *The Economic Effects of Administrative Action on Immigration*, 6 (Nov. 2014).<sup>29</sup> This would be the equivalent of adding \$90 billion in real GDP by 2024. *Id.* However, this benefit would not be confined to the grantees. *Id.* Native-born workers would see their wages rise as well, and the deficit would decrease by \$25 billion over the same time frame. *Id.* at 12. The most optimistic projections for DAPA's effect on the economy state it will increase the GDP by 0.9 percent in ten years and cut \$60 billion from the deficit. *Id.*

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<sup>29</sup> [https://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](https://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf).



By allowing undocumented workers to fully participate in the economy, many would also start contributing payroll taxes for the first time. *See* Patrick Oakford, Center for American Progress, *Administrative Action on Immigration Reform: The Fiscal Benefits of Temporary Work Permits*, 2 (Sep. 2014).<sup>30</sup> This spike in payroll tax contributions would be realized in the first year of implementation. *Id.* at 12. All told, DAPA would add \$41 billion over 10 years to Social Security with few initial costs. *See* Letter from Stephen C. Goss, Chief Actuary of the Social Security Administration, to Senator Ron Johnson, 2 (Feb. 2, 2015).<sup>31</sup>

The economic benefits of DAPA will not be limited to the federal government. In fact, states like Texas will receive substantial benefits that outweigh any asserted harm. Currently, Texas is home to some 594,000 DAPA-eligible parents. Center for American Progress, *Executive Action on Immigration Will Benefit Texas's Economy* (November 2014).<sup>32</sup> Granting work authorization to this population would increase Texas's tax revenues by \$338 million, while on average allowing working DAPA recipients to take home close to an additional

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<sup>30</sup> <https://cdn.americanprogress.org/wp-content/uploads/2014/09/OakfordAdminRelief.pdf>.

<sup>31</sup> [http://www.ssa.gov/OACT/solvency/BObama\\_20150202.pdf](http://www.ssa.gov/OACT/solvency/BObama_20150202.pdf).

<sup>32</sup> <http://www.scribd.com/doc/248188359/Economic-Benefits-of-Executive-Action-for-Texas>.

\$1,900 each year. *Id.* On the whole, this additional income would likely be returned to the economy fairly quickly, as undocumented immigrants, like most workers employed in relatively low-wage jobs, are forced to spend much of their earnings to make ends meet. Davidson, *supra*.

*iii. DAPA Will Also Bring Enormous Social Benefits To American Families*

In addition to directly impacting the legal presence of undocumented immigrants themselves, DAPA will also hugely benefit those immigrants' families, including their U.S. citizen children. See Manuel Pastor, Jared Sanchez, and Vanessa Carter, Center for the Study of Immigrant Integration, *The Kids Aren't Alright – But They Could Be: The Impact of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) on Children*, 1 (March 2015) [hereinafter *The Kids Aren't Alright*].<sup>33</sup> By granting legal status to the parents of American citizens and legal permanent residents, DAPA strengthens American families and communities. Average grantees would see their earnings increase on average by about 8.5 percent, leading to greater take-home pay to provide for their citizen children. See *Executive Action on Immigration Will Benefit Texas's Economy*, *supra*. Around 6.3 million children have a DAPA eligible parent in their household, and 5.5 million of those children are U.S. citizens. *The Kids Aren't*

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<sup>33</sup> [http://dornsife.usc.edu/assets/sites/731/docs/DAPA\\_Impact\\_on\\_Children\\_CSII\\_Brief\\_Final\\_01.pdf](http://dornsife.usc.edu/assets/sites/731/docs/DAPA_Impact_on_Children_CSII_Brief_Final_01.pdf).

*Alright, supra*, at 2. In California alone, DAPA could lift as many as 40,000 children above the poverty line. *Id.* at 4.

Additionally, DAPA will erase the constant stress and fear of having a family split apart by detention or deportation. In the first six months of 2011, 46,000 parents of U.S. citizens were deported. Joanna Dreby, Center for American Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View From the Ground 1* (Aug. 2012).<sup>34</sup>

Deportation devastates families and is particularly scarring for children, who are often placed in foster care or are raised by single parents, with a corresponding increase in poverty levels. *Id.* at 9–10. Nationwide, children in single parent homes are more than four times more likely to live in poverty than children with married parents. *Id.* at 9. And in 2012 alone, there were 5,100 children in foster care who could not be reunited with their families because a parent had been deported or detained. *Id.* at 10.

Moreover, even when their U.S. citizen children are eligible, undocumented parents are often reluctant to use available social services out of fear of having to disclose their immigration status. *Id.* at 17. Research shows that undocumented parents do not enroll in programs such as preschool and community health

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<sup>34</sup> <https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

services. *Id.* Access to these programs at a young age leads to better educational and career outcomes later in life for these U.S. citizen children. *Id.*

The harms caused by this fear ripple out from the family across the larger community. Undocumented immigrants often are too scared to interact with police for fear of their immigration status being discovered. *Id.* at 21. They are less likely to report crimes or cooperate with investigations, which hinders efforts to keep our communities safe. *Id.* at 24. By mitigating that fear of detention or deportation, DAPA will strengthen the families of grantees and make communities safer for everyone.

### **CONCLUSION**

For the foregoing reasons, *amici* respectfully request that this Court reverse the order of the district court and dissolve the preliminary injunction.

Respectfully submitted,

By: /s/ Nina Perales

NINA PERALES  
MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND  
110 Broadway, Ste. 300  
San Antonio, TX 78205  
(210) 224-5476

ADAM P. KOHSWEENEY  
GABRIEL MARKOFF  
O'MELVENY & MYERS LLP  
2 Embarcadero Center, 28th  
Floor  
San Francisco, CA 94111  
(415) 984-8700

LINDA SMITH  
DLA PIPER LLP  
2000 Avenue of the Stars, Ste. 400  
Los Angeles, CA 90067  
(310) 595-3038

*Counsel for Amicus Curiae*

### CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that the following counsel for the parties were served by next-day FedEx and email:

Counsel for Plaintiffs-Appellees: J. Campbell Barker  
Deputy Solicitor General  
Office of the Attorney General  
209 W. 14th Street  
Austin, TX 78711-2548  
cam.barker@texasattorneygeneral.com

Counsel for Defendants: Scott R. McIntosh  
Appellate Staff, Civil Division  
Department of Justice, Room 7259  
950 Pennsylvania Avenue NW  
Washington, DC 20530  
Scott.McIntosh@usdoj.gov

/s/ Nina Perales  
Nina Perales

### CERTIFICATE OF COMPLIANCE

1. I certify that on April 6, 2015, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's electronic-document filing system.

2. I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic copy is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial anti-virus software and was reported free of viruses.

3. This motion complies with the page type volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because it contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

4. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Nina Perales  
Nina Perales