No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF WEST VIRGINIA; STATE OF KANSAS; STATE OF MISSISSIPPI,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES,
Defendants-Appellants

ELIZABETH DIAZ; JOSE MAGANA-SALGADO; KARINA RUIZ DE DIAZ; JIN PARK; DENISE ROMERO; ANGEL SILVA; MOSES KAMAU CHEGE; HYO-WON JEON; BLANCA GONZALEZ; MARIA ROCHA; MARIA DIAZ; ELLY MARISOL ESTRADA; DARWIN VELASQUEZ; OSCAR ALVAREZ; LUIS A. RAFAEL; NANCI J. PALACIOS GODINEZ; JUNG WOO KIM; CARLOS AGUILAR GONZALEZ; STATE OF NEW JERSEY,
Intervenor Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Texas, Brownsville Division; No. 1:18-cv-68

REPLY BRIEF OF INTERVENOR DEFENDANT-APPELLANT STATE OF NEW JERSEY

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INTRODUCTION

The 2012 Deferred Action for Childhood Arrivals (DACA) Memorandum is rooted in the longstanding practice of deferred action, which both Congress and the Supreme Court have affirmed. The district court erred in invalidating DACA and in vacating the 2012 Memorandum and enjoining it nationwide.

In challenging DACA, Plaintiffs-Appellees directly attack the Department of Homeland Security's (DHS) authority to set deferred action frameworks, and to do so for individuals covered by the 2012 Memorandum in particular. But their cramped view of DHS's enforcement discretion is inconsistent with decades of practice, in which DHS established a range of deferred action criteria—from policies covering the victims of human trafficking to the Family Fairness policy. Plaintiffs-Appellees' claim that deferred action policies can never lawfully apply to otherwise-removable noncitizens thus requires rejecting more than 60 years of practice and Congressional support. And nothing in the Immigration and Nationality Act (INA) bars exercising enforcement discretion for this population. That leaves only Plaintiffs-Appellees' claim that *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) ("*Texas I*"), dictates the result here. But *Texas I* found Deferred Action for Parents of Americans (DAPA) invalid because of its size and scope, and because of specific statutory language in the INA respecting the covered population. DACA, by contrast, shares neither of these features, and instead fits within the historical tradition of deferred action.

Nor can Plaintiffs-Appellees identify record evidence supporting the relief the district court ordered below. As a threshold matter, vacatur is inappropriate given the extraordinary reliance interests that have developed in the past nine years, largely due to Plaintiffs-Appellees' delay in filing suit. The record establishes that vacating DACA while DHS completes its rulemaking would cause disruption for recipients, families, employers, schools, and state and local governments, especially if DHS does not finish that ongoing process during the pendency of this appeal. By contrast, Plaintiffs-Appellees have not developed any kind of record to support their demand for nationwide relief because they have failed to even allege that any State other than Texas is harmed, or that DACA's ongoing existence outside of Plaintiffs-Appellees' borders would harm any of them. Instead, Plaintiffs-Appellees contend that every successful challenge to an immigration policy justifies a nationwide injunction as of right. But nationwide injunctions must always be tied to the plaintiff's injuries, and any contrary approach would have tremendous repercussions.

ARGUMENT

I. THE 2012 DACA MEMORANDUM IS A LAWFUL EXERCISE OF DHS's LONGSTANDING ENFORCEMENT DISCRETION.

In seeking to invalidate DACA, Plaintiffs-Appellees lodge a sweeping attack on DHS's ability to forbear removal through deferred action. *See* Br. 34 (asserting that deferred action is never appropriate for "a group of aliens of [the Executive's]

choosing"). Their arguments are inconsistent with historical evidence, and any claim that *Texas I* compels Plaintiffs-Appellees' approach is simply mistaken.

1. The well-established history of deferred action is instructive. As Appellants explained, for more than 60 years, a central feature of DHS's discretionary removal authority has been deferred action—*i.e.*, the decision to temporarily forbear from pursuing removal of a noncitizen. *See* NJ Br. 14-28 (summarizing prior exercises of deferred action). Deferred action has never been limited to individual cases; instead, from the 1950s through the present, the Executive has maintained explicit policies to guide deferred action for large populations of removable immigrants. *See* NJ Br. 14; *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53,736, 53,746-47 (Sept. 28, 2021) (describing early policies); ROA.7614, 7617-19. Those granted deferred action have been able to apply for work authorization since the 1970s, a practice that was codified by regulation in 1981. *See* NJ Br. 14-15; ROA.7634; *Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole; Revision of Border Crossing Card Procedures*, 46 Fed. Reg. 25,081 (May 5, 1981); 8 C.F.R. § 274a.12(c)(14). That history of deferred action continued unbroken before and after passage of the Immigration Reform and Control Act of 1986 (IRCA). *See* NJ Br. 16-17.

Crucially, Congress itself has passed statutes that recognize DHS's decades-long approach to deferred action. *See, e.g.*, NJ Br. 15-17. Immediately after IRCA's

passage, the Reagan Administration announced the Family Fairness policy to make children and spouses of individuals in the process of obtaining lawful status eligible for deferred removal and work authorization. When Congress subsequently codified those protections, it explained that these individuals would still receive relief under the "existing family fairness program" until the new federal statute took effect. Pub. L. No. 101-649, Tit. III, § 301. Nor was that the only time Congress cited deferred action with approval; in the past 20 years, Congress made relatives of certain non-citizens killed in combat eligible for deferred action, Pub. L. No. 108-136, § 1703(c)-(d), as well as certain petitioners under the Violence Against Women Act, 8 U.S.C. § 1154(a)(1)(D)(i); *see* 8 U.S.C. § 1227(d) (expanding visa eligibility for victims of human trafficking but ensuring process would not "preclude the alien from applying for … deferred action"). And the REAL ID Act of 2005 authorized States to issue driver licenses to those individuals with "approved deferred action status." Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313.

Plaintiffs-Appellees claim this long history does not support deferred action generally, but none of their arguments hold up. *See* Br. 43-45. For one, although Plaintiffs-Appellees argue that history "does not, by itself, create power," Br. 43, 44 (citing *Texas I,* 809 F.3d at 184), they fail to grapple with the real issue in this case. The question is not whether DHS's practice *creates* authority. The question is whether more than 60 years of practice is relevant to *understanding* what authority

DHS maintains under immigration law. *See FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438 (1986) (interpreting law in part based on agency's "contemporaneous understanding" reflected in the agency's "behavior over the following decades"); *Davis v. United States*, 495 U.S. 472, 484 (1990) (same). That Plaintiffs-Appellees' reading requires finding more than 60 years of practice unlawful suggests that they are not likely correct. The fact that their claim contradicts Congress's recognition of deferred action policies is the final nail in the coffin.

Plaintiffs-Appellees further attack the idea that historical practice can support *any* deferred action framework by dismissing as irrelevant pre-1986 evidence. *See* Br. 43 ("[H]istorical practice before IRCA cannot support DACA's grant of work authorization because before IRCA there was no general federal ban on hiring unauthorized aliens."). But Congress regularly legislates against the backdrop of the law then in effect, including established agency rules. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). And here, Congress declined to upset DHS's approach to deferred action, which allowed those with deferred action to seek work authorization under separate regulations. Indeed, Congress excluded from IRCA's ban individuals "authorized to be so employed by [the INA] or by the Attorney General." 8 U.S.C. § 1324a(h)(3). Plaintiffs-Appellees offer no explanation for what "authorized … by the Attorney General" means other than deferred action, and in light of the pre-1986

history, that is how INS understood it. *See Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46,092 (Dec. 4, 1987); *Davis*, 495 U.S. at 484 (giving "considerable weight" to agency interpretations that "involve the contemporaneous construction of a statute"); *cf. PDR Network, LLC v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051, 2060 (2019) (Kavanaugh, J., concurring) (citing Attorney General's reading of the APA from "1947, the year after [it] was enacted," as persuasive).

Plaintiffs-Appellees' response is puzzling. They do not give this provision an alternative meaning; instead, they say it deserves limited weight as a "definitional" provision. Br. 42-43 (quoting *Texas I*, 809 F.3d at 183). But definitional provisions regularly inform the meaning of a statute. *See, e.g.*, *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020) (applying RFRA's expansive definition of "government"); *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776-77 (2018) (applying Dodd-Frank Act's definition of "whistleblower" to anti-retaliation provisions, and reasoning that if "'a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning") (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008)). And in this case, it makes sense subsection (h)(3) would play a role. This is not a subsidiary definition; it is how IRCA defines "unauthorized aliens" in the first place. In short, in a statute to "mak[e] employment of unauthorized aliens unlawful," 8 U.S.C. § 1324a, it matters that Congress chose to exclude all individuals authorized to work by the Attorney General from the scope of "unauthorized alien."

And the substantive prohibitions likewise reference this definition. *See* 8 U.S.C. § 1324a(1)(A) ("It is unlawful for a person or other entity—(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is *an unauthorized alien (as defined in subsection (h)(3))* with respect to such employment….") (emphasis added). Especially in conjunction with the pre-1986 history, this supports INS's—and now DHS's—exercise of deferred action.

Plaintiffs-Appellees' challenge to post-1986 history fares no better. Plaintiffs-Appellees say that this historical practice cannot establish Congress's acquiescence because Congress "never amended" subsection (h)(3)'s definition of "unauthorized alien" or removed the "federal ban on hiring unauthorized aliens." Br. 43. But that is the point. Notwithstanding the Executive's immediate interpretation of IRCA as authorizing deferred action policies and preexisting work authorization regulations, Congress never saw fit to change course—even as it made other changes to federal immigration law. *See Sebelius*, 568 U.S. at 159 ("when Congress revisits a statute giving rise to a long-standing administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress").[1] And Congress

[1] It is irrelevant that Congress has since authorized employment for *other* categories of immigrants without including DACA recipients. Because Congress has ratified DHS's authority to allow recipients of deferred action to seek work authorization, a separate express grant of congressional authority was not required for them.

did not merely acquiesce; it enacted laws that presumed—and endorsed—deferred action. *See* Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313; 8 U.S.C. § 1227(d). While Plaintiffs-Appellees believe deferred action frameworks can never be appropriate after 1986, the evidence is to the contrary.

2. Because this history supports DHS's discretion to maintain deferred action generally, Plaintiffs-Appellees argue that DACA is different. Their arguments both misunderstand the previous exercises of deferred action and misconstrue the 2012 DACA Memorandum itself.

Plaintiffs-Appellees first claim, relying on *Texas I*, that prior deferred action policies have been "on a country-specific basis, usually in response to war, civil unrest, or natural disasters." Br. 44 (quoting *Texas I*, 809 F.3d at 184). But nothing in the INA draws a line between country- or disaster-specific deferred action on the one hand and DACA on the other. In any event, their argument is wrong on the facts: multiple prior deferred action policies were not tied to country-specific events or to disasters. *See, e.g.*, 8 C.F.R. §§ 214.11(j) (establishing deferred action for victims of certain crimes while awaiting adjudication of T nonimmigrant status application), 214.14(d)(2) (same, for U nonimmigrant status petitioners); 28 C.F.R. § 1100.35(b) (same, for trafficking victims); ROA.6605, 6608 (surviving spouses and children of U.S. citizens, with no country limitation).

Plaintiffs-Appellees' efforts to distinguish Family Fairness as "interstitial" to a statutory scheme also falls short. *See* Br. 44-45. It is true that this Court in *Texas I* called Family Fairness "interstitial," 809 F.3d at 185, but this Court did not claim—as Plaintiffs-Appellees now do—that this was a dispositive legal criterion. After all, whether any particular deferred action memorandum proves interstitial is something only known with hindsight. Indeed, the Reagan Administration did not know when it announced Family Fairness that Congress would later codify its approach. For that reason, requiring that deferred action be interstitial is not workable in practice. This case is a good example: the U.S. House passed legislation granting DACA recipients legal status, and if the Senate follows suit, DACA will appear interstitial in retrospect as well. *See* H.R. 6, 117th Cong. (Mar. 18, 2021). To treat exercises of deferred action as permissible only if they are "interstitial" thus requires our courts to engage in *ex ante* guesswork about what legislation will later pass.

Not only do Plaintiffs-Appellees misunderstand prior deferred action policies, but they misunderstand the 2012 DACA Memorandum as well. For one, Plaintiffs-Appellees treat DACA as a mandatory policy that sets "fixed criteria" to dictate the reviewing DHS officer's analysis. *See* Br. 34. But significant evidence—unavailable to the *Texas I* court—reveals that DACA requests have been denied on discretionary grounds other than those identified in the 2012 Memorandum, like suspected gang affiliation or immigration fraud. *See* NJ Br. 20; *see also, e.g.*, ROA.7705 (internal

DHS email describing officers' need to review "the totality of the circumstances in each" DACA request). Moreover, the fact that denial rates increased markedly from 2014 to 2020 provides strong evidence of discretion. *See* NJ Br. 20-21.

For another, Plaintiffs-Appellees misapprehend the consequences of DACA. DACA is a memorandum that guides the discretion of DHS officers in reviewing requests for deferred action. DACA does not provide for "cancellation of removal," Appellees' Br. 36; a grant of deferred action provides no "statutory defense against removal based on the reprieve itself," and recipients present in violation of the INA remain removable. ROA.14541. DACA also does not make anyone automatically "eligible for advance parole," Appellees' Br. 41-42; instead, DHS can grant advance parole to "any alien" "on a case-by-case basis for urgent humanitarian reasons or significant public benefit," 8 U.S.C. § 1182(d)(5)(A), a separate law that Plaintiffs-Appellees do not challenge. Plaintiffs-Appellees do not cite evidence (whether in the record or anywhere else) to establish that DACA recipients were granted advance parole outside the confines of that statute.[2]

[2] Plaintiffs-Appellees' argument that DACA recipients are subject to the unlawful presence bar, *see* Br. 42, 47, is incorrect. Plaintiffs-Appellees overlook that Congress specifically excluded recipients of deferred action from the definition of "unlawfully present." *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (clarifying an alien is unlawfully present "if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General"). Nothing in the INA requires DACA recipients be treated differently than other recipients of deferred action who can seek advance parole in the normal course.

3. Further, while the heart of Plaintiffs-Appellees' brief is that their victory is foreordained by *Texas I*'s invalidation of DAPA, they have no persuasive responses to the differences between DACA and DAPA. First, Plaintiffs-Appellees do not (and cannot) deny that the size and scope of DAPA differ dramatically; they just argue it does not matter. But Plaintiffs-Appellees' brief is inconsistent on this, arguing that *Texas I* "did not turn on the size of the [DAPA] program," while in the same breath acknowledging DAPA's "sheer scope and significance" were among its cited flaws. Br. 38. Indeed, the latter is the only way to read *Texas I*; the Court relied on the size and scope of DAPA to distinguish it from the historical tradition of deferred action, 809 F.3d at 181-84, 186 n. 202, and to reject the U.S. Government's reading of the INA, *id.* at 181, 184. And because DACA is smaller—with the eligible population approximately the same size as the one eligible for deferred action under the Family Fairness policy[3]—it falls within the forbearance authority that Congress has already accepted, and does not implicate the same major questions that DAPA did.

Second, unlike with DAPA, Plaintiffs-Appellees cannot identify any statutory provision that forecloses deferred action for DACA recipients. In light of that failure, Plaintiffs-Appellees point to more general INA provisions to bar relief. *See* Br. 39 (acknowledging "Congress has made no specific provision" speaking to the DACA

[3] As explained in New Jersey's opening brief, 814,000 individuals were granted DACA as of 2018. ROA.25167. That number is lower today. *See* 86 Fed. Reg. 53,753 n.139 (estimating there are 636,410 "active DACA recipients").

population and "the general rules apply"), 40 (contending that because the "DACA-eligible population is removable," it is not eligible for deferred action absent some "other special provision"). That sleight-of-hand matters: because every noncitizen eligible for forbearance is necessarily removable, every exercise of deferred action would be unlawful by this logic. If that was what *Texas I* meant, it would have said so, and it would not have taken pains to contrast DAPA with prior deferred action policies or to emphasize how the INA's scheme specifically foreclosed DAPA alone. *See* 809 F.3d at 809 F.3d at 179-80, 184-85, 186. *Texas I* did not so hold, at least in part because the Supreme Court and Congress have upheld DHS's general authority to grant deferred action to individuals who are otherwise removable under the INA. *See, e.g.*, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 417, 484 (1999); *Arizona v. United States*, 567 U.S. 387, 396 (2012); *supra* at 3-7.[4]

4. Finally, Plaintiffs-Appellees' argument that DACA violates the Take Care Clause fails for the same reasons as their statutory arguments. In particular,

[4] Plaintiffs-Appellees run into the same issues with their claim that Congress made deferred action available to *certain* removable immigrants, but not to the individuals covered by DACA. Br. 35, 40. This prohibition-by-implication argument produces the same broad consequences—that Executive deferred action is never appropriate, notwithstanding its history and Congressional ratification. *Supra* at 4-7. Further, this claim ignores the settled principle that when Congress sets the eligibility of some categories of immigrants for one form of relief, that "does not in itself conclusively prove that the [agency] cannot" make eligible "other categories by regulation." *Zheng v. Gonzales*, 422 F.3d 98, 116 (3d Cir. 2005) (citing *Lopez v. Davis*, 531 U.S. 230 (2001)). Plaintiffs-Appellees provide no answer to this.

Plaintiffs-Appellees overlook that prosecutorial discretion, far from violating the Take Care Clause, "lies at the core of the Executive's duty to see to the faithful execution of the laws." *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Hayes*, 589 F.2d 811, 819 n.3 (5th Cir. 1979); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc). If "Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action." ROA.1531. Because DHS acted consistent with its statutory authority in implementing DACA, it necessarily satisfied the Executive's Take Care obligation.

II. PLAINTIFFS-APPELLEES HAVE FAILED TO JUSTIFY VACATUR AND A NATIONWIDE INJUNCTION.

On the record before this Court, Plaintiffs-Appellees have failed to justify the remedies that they demand: vacatur and a nationwide injunction. As to the former, only remand without vacatur avoids enormous disruption for DACA recipients, their families, employers, schools, and state and local governments—who have relied on DACA for over nine years—while DHS finishes its ongoing rulemaking. *See* NJ Br. 29-35. As to the latter, Plaintiffs-Appellees fail to identify *any* harm from DACA's continued existence outside of Texas, making a nationwide injunction inappropriate.

NJ Br. 38-47. Plaintiffs-Appellees' claim that immigration cases inherently demand nationwide relief is inconsistent with logic and precedent.[5]

A. Plaintiffs-Appellees Have Failed To Establish That Vacatur Is Appropriate.

Although Plaintiffs-Appellees acknowledge the legal test governing whether to vacate agency action, they fail to fully grapple with its two prongs—first, whether vacating will cause disruption, and second, whether the agency can "substantiate its decision" or make conforming changes in response to the court. *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *see also Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), *cert. granted*, No. 21-954, 2022 WL 497412 (U.S. Feb. 18, 2022) ("*Texas MPP*"); *Texas I*, 787 F.3d at 768 n.128; *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Notwithstanding Plaintiffs-Appellees' claim that vacatur is justified as a matter of course, *see* Br. 48-49, this is not the "rare circumstance[]" in which vacatur is the "appropriate solution" despite ongoing rulemaking. *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th

[5] Notably, Plaintiffs-Appellees did not appeal from—and do not disagree with—the district court's order staying its injunction pending further appeal. For good reason. The stay analysis is aimed at preventing harm while an appeal is ongoing, *see, e.g., Nken v. Holder*, 556 U.S. 418, 434-35 (2009), and DACA's immediate cessation would inflict much greater harm on recipients than a temporary stay would cause to Plaintiffs-Appellees, who waited six years to challenge DACA. Indeed, Plaintiffs-Appellees have made clear they do not seek immediate termination of DACA. *See* ROA.22424 (Plaintiffs-Appellees supporting two-year stay of court order).

Cir. 2021). To the contrary, given the far-reaching disruption vacatur would cause amidst DHS's ongoing process, remand without vacatur is the better course.

While Plaintiffs-Appellees acknowledge that the disruptive consequences of vacatur are central to the vacatur decision, Br. 49, their brief all but ignores those impacts. As the record shows, however, DACA recipients and States like New Jersey rely on DACA and have so relied for almost a decade. *See* ROA.7290-95. Vacating DACA would leave critical services and industries in flux, as thousands of health care workers, members of the military, and employees in hard-to-fill roles would become ineligible to work. NJ Br. 32-34. Vacatur would simultaneously disrupt law enforcement, public education, and other governmental operations, which likewise rely on the contributions of DACA recipients to function smoothly. *See* ROA.7311-12, ROA.7488-89; ROA.7322, ROA.7624; ROA.7460-63. And terminating DACA would increase public healthcare expenditures, while depriving all States of critical income and tax revenues. *See* ROA.7375-76, ROA.7381-82; ROA.7446; *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020). Plaintiffs-Appellees cannot disprove any of these consequences, and so they do not attempt to do so before this Court.

Plaintiffs-Appellees also entirely ignore the role their litigation tactics played in the accrual of these reliance interests, the precise opposite of the situation in *Texas I*. Instead of challenging DACA immediately—as they did with DAPA—Plaintiffs-

Appellees delayed and then sought to disrupt what had already been the status quo for *six years* (now nine) by requesting vacatur. Because Plaintiffs-Appellees' delay produced strong reliance interests for recipients, their families, employers, schools, and state and local governments, all of which were recognized by the Supreme Court in *Regents*, Plaintiffs-Appellees may not obtain the equitable remedy of vacatur. *See Texas MPP*, 20 F.4th at 942 (stressing the equitable nature of vacatur). Instead, the striking reliance interests the Supreme Court identified justify remand alone. *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015). Plaintiffs-Appellees respond to none of this.

Plaintiffs-Appellees' sole response on disruption falls short. In their view, the district court's decision to stay its order pending appeal entirely resolves any risk of disruption from vacatur. *See* Br. 49. But they misunderstand—and fail to address—the important differences between the two. For one, a stay pending appeal lasts only until resolution of litigation, ROA.25243-44; remand without vacatur would avoid disruption until DHS issues a new rule in a process that is already underway. If the former concludes before the latter, then the consequences described in New Jersey's brief would come to pass. And there are many cases in which an appeal concludes before an agency acts; an agency, after all, might wait for further guidance from the appellate tribunal to ensure its regulation is responsive to the court's concerns. For another, disruption in this specific case is more than "hypothetical." Appellees' Br.

49. The district court's order is subject to revision at any time if "the Government fails to take appropriate steps to remedy the shortfalls in DACA within a reasonable time." ROA.25244. Because the stay is of uncertain duration, Plaintiffs-Appellees' refusal to acknowledge any disruption is particularly surprising.

Plaintiffs-Appellees have little more to say when addressing the second factor in the vacatur analysis. *See Tex. Ass'n of Mfrs.*, 989 F.3d at 389 (asking if there is "a serious possibility" that the agency "will be able to remedy its failures" on remand). Plaintiffs-Appellees' sole argument on this score is that although DHS could remedy DACA's alleged procedural defects, it cannot remedy its "substantive defects." Br. 49. But Plaintiffs-Appellees ignore the Supreme Court's directive in *Regents* that a range of policy options remain available to DHS—and that the agency retains broad discretion in assessing them—even assuming the 2012 Memorandum is unlawful. *See Regents*, 140 S. Ct. at 1910 (holding that "deciding how best to address a finding of illegality moving forward can involve important policy choices" and that "[t]hose policy choices are for DHS"); *id*. at 1914 (noting "DHS has considerable flexibility in carrying out its responsibility"). Remand without vacatur would enable DHS to make the policy choices the Supreme Court already said fall within its purview—and to do so without significant disruption in the interim.

To make matters worse, Plaintiffs-Appellees brush aside that DHS is *already* engaged in promulgating a related regulation. But DHS's ongoing action is a crucial

component of the vacatur analysis because it suggests the agency is making "active attempts to improve on [its] work." *Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019); *see Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1382 (S.D. Ga. 2019) (refusing vacatur if "an order vacating the Rule may cause disruptive consequences to the ongoing administrative process"). Moreover, it is premature to assume that any new policy would be unlawful "so long as it retains its current form," Appellees' Br. 49, especially because some form of forbearance lies "squarely within [DHS's] discretion." *Regents*, 140 S. Ct. at 1912. It thus makes no sense to second-guess the results of a rulemaking process when a range of options remain available—and when vacatur would lead to disruptive consequences for the recipients and the States that have relied on DACA for nine years.

B. Plaintiffs-Appellees Have Failed To Establish That A Nationwide Injunction Is Appropriate.

Plaintiffs-Appellees make no effort on appeal to demonstrate that nationwide injunctive relief is necessary to remedy any harm that they suffer. Instead, Plaintiffs-Appellees advance the sweeping and novel claim that nationwide injunctions must always be granted in immigration cases, regardless of the facts and equities involved. Br. 50. Plaintiffs-Appellees' arguments do not meet their burden.

1. Tellingly, Plaintiffs-Appellees never attempt to establish that a nationwide injunction is necessary on these facts. As Appellants explained, when analyzing the scope of any injunction, the central issue is usually the relief needed to remedy the

plaintiff's injuries. *See Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (limiting scope of injunction where relief is not "necessary to remedy the wrong"); *Roho, Inc. v. Marquis*, 902 F.2d 356, 361 (5th Cir. 1990) (same). That is particularly true when a plaintiff demands relief that would bind the entire Nation. *See, e.g., Louisiana v. Becerra*, 20 F.4th 260, 263-264 (5th Cir. 2021) (issuing injunction only to 14 States because there was "little justification" for a nationwide injunction). Notwithstanding that burden, Plaintiffs-Appellees introduced *no evidence* in the record to support that they suffer injuries based on DACA's existence anywhere outside of Texas. *See* NJ Br. 42-44; ROA.22396-98 (alleging costs solely as to Texas in summary judgment briefing); ROA.22959 ¶8 (declaration laying out "estimated cost to the State for the provision of Emergency Medicaid services to undocumented immigrants *residing in Texas*"); ROA.25191 & ROA.23020 ¶3 (laying out the "increased education costs" associated with DACA recipients *in Texas*) (emphases added).

On appeal, Plaintiffs-Appellees confirm that none of their alleged harms flow from DACA's existence outside of Texas, let alone outside their borders. In arguing for standing—their only discussion of injury—Plaintiffs-Appellees emphasize that they need only show standing for Texas, and make no effort to demonstrate injury from DACA's existence in any other State, *see* Br. 15, an admission that governs the injunction's proper scope. And more to the point, even Texas could not identify any injury that would justify enjoining DACA beyond its borders. To the contrary, Texas

alleges it must "provide emergency Medicaid services" to DACA recipients within its borders; "educate all children," including DACA recipients, in Texas; and "bear[] hundreds of millions of dollars in costs in providing social services" to recipients in Texas. *See* Appellees' Br. 17. It does not identify Texas-based healthcare, education, or social-service costs from DACA continuing to exist in New Jersey or in the 41 States that have never challenged DACA—a noteworthy failure given that DACA has existed for more than nine years. The same is true of Plaintiffs-Appellees' claim that an injunction is needed to protect Texas workers. *See* Br. 24-26. Appellants have noted that the job-market allegations in the record are specific to DACA recipients in Texas, *see* ROA.22882 ¶13 (alleging "the addition of ... 114,000 [work-eligible individuals] in Texas, will, other things equal, put downward pressure on wages"), a point to which Plaintiffs-Appellees do not respond. There is nothing in the record below or in briefing to this Court to justify a nationwide injunction.

Plaintiffs-Appellees' failure to identify any actual harms that require granting a nationwide injunction is especially notable given the harms that such an order will cause. As Appellants have explained, hundreds of thousands of DACA recipients, families, employers, schools, and state and local governments all across the Nation rely on DACA—and have done so for more than nine years. *See* NJ Br. 31-35, 45 (detailing reliance interests); Amicus Br. for 22 States and the District of Columbia 9-21 (describing States' reliance); *Regents*, 140 S. Ct. at 1915 (given the significant

length of DACA's existence, requiring DHS "to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns" (cleaned up)). Plaintiffs-Appellees do not deny this. Moreover, as explained above, these reliance interests developed as a result of Plaintiffs-Appellees' decision to delay suit. *See Alcatel USA v. DGI Techs., Inc.*, 166 F.3d 772, 794 (5th Cir. 1999) ("It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted with unclean hands.") (cleaned up); *Texas MPP*, 20 F.4th at 942. Given Plaintiffs-Appellees' delay and failure to show sufficient injury, in contrast to the significant harms a nationwide injunction would impose on the 41 States that have never challenged DACA, their demand for nationwide relief should be rejected.[6]

2. Absent any showing of harm, Plaintiffs-Appellees press the unprecedented rule that nationwide injunctions must issue in all successful immigration challenges. Most obviously, this blanket requirement of nationwide injunctions in immigration

[6] Once again, a stay pending appeal does not eliminate the disruptive consequences of a nationwide injunction. A stay is, by definition, time-limited and does not provide certainty to litigants or the affected population. *See, e.g.*, *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 2011) (noting that a stay only "affords *interim* relief where relative harm and the uncertainty of final disposition justify it") (emphasis added). Rather, a stay "is preventative or protective in that it seeks to maintain the status quo pending a final determination." *Id.* At that point, the consequences of a nationwide injunction would be felt by DACA recipients, families, employers, schools, and state and local governments. *See supra* at 16. Further, Plaintiffs-Appellees' argument proves too much, as it suggests every court can issue nationwide relief—no matter whether the record supports doing so—so long as it stays the order pending appeal.

cases—regardless of the harm that a plaintiff shows—is inconsistent with hornbook remedies law. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2020) (reciting the traditional four factors that govern injunctive relief); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing "commonplace considerations" that courts weigh before granting an injunction, which reflect "several hundred years of history"). Plaintiffs-Appellees cannot identify a single case granting a nationwide injunction "as of right"—that is, regardless of the traditional equitable factors.

While Plaintiffs-Appellees read *Texas I* as requiring nationwide injunctions in every successful immigration challenge, they are mistaken. As this Court recently explained, *Texas I* "does not hold that nationwide injunctions are required or even the norm." *Louisiana*, 20 F.4th at 263. Instead, any nationwide injunction "must be justified based on the circumstances." *Id.* (citing *Texas I*, 809 F.3d at 188) (endorsing a geographically-limited injunction where the record contained insufficient support that nationwide relief was necessary to remedy plaintiffs' harms). In other words, a district court is never entitled to "make a binding judgment for the entire country" automatically, but must justify its decision based on record evidence demonstrating that such relief is needed to remedy the plaintiffs' harm. *Id.* at 263; *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018) (a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established").

Even on its face, *Texas I* is simply not as broad as Plaintiffs-Appellees claim. It is true, as New Jersey already acknowledged, that *Texas I* found nationwide relief has particular benefits in immigration cases because it promotes uniformity. *See* NJ Br. 47 & n.6 (citing *Texas I*, 809 F.3d at 187-88); *Louisiana*, 20 F.4th at 263. But other factors supported this Court's decision to affirm such broad relief: that 26 States representing 50 percent of the population challenged DAPA and sought to introduce evidence of their injuries, *see Texas I*, 809 F.3d at 146, 186, and that "the nationwide relief preserved the status quo, 'an important equitable consideration,'" *Louisiana*, 20 F.4th at 263. Here, those other factors point in precisely the opposite direction. Unlike in *Texas I*, only nine states are challenging DACA, and Texas alone sought to introduce evidence of harm. *See supra* at 19-20. And here, unlike in *Texas I*, Plaintiffs-Appellees are trying to upend what has been the status quo for more than nine years. *See supra* at 15-16, 20; *Louisiana*, 20 F.4th at 263 (rejecting nationwide relief because "the many states that have not brought suit may well have accepted and even endorsed the [challenged] rule"). Far from supporting Plaintiffs-Appellees, *Texas I* confirms that a nationwide injunction is inappropriate.

Indeed, basing a nationwide injunction *solely* on the idea that immigration law is supposed to be "uniform" would have dramatic consequences. *See* Appellees' Br. 50. For one, it would be hard to cabin this mandate to immigration cases alone, as the vast majority of federal law seeks to apply uniformly throughout the country. *See*

CASA de Md., Inc. v. Trump, 971 F.3d 220, 262 (4th Cir. 2020), *reh'g granted*, 981 F.3d 311 (2020) (finding that tying a nationwide injunction to "a general interest" in uniformity in an immigration case "lacks any limiting principle" and "would justify such a remedy in all cases when federal law is implicated"). But even if limited to immigration, the consequences would be shocking. *See E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (explaining why nationwide injunctions are inappropriate where district court fails to consider whether such expansive scope is necessary to remedy plaintiffs' harms). Every decision enjoining any immigration policy (or statute or rule) in Texas would bind New Jersey, but so too every decision enjoining any immigration policy in New Jersey would do the same in reverse, even when New Jersey could show no harm sufficient to justify binding Texas. *See CASA de Md.*, 971 F.3d at 262. This Court has never endorsed such an approach.[7]

In short, plaintiffs demanding nationwide injunctions must establish that such relief is needed to remedy their injury—even in an immigration dispute. That is fatal here, because Plaintiffs-Appellees provided no record evidence (and offered nothing on appeal) to support enjoining DACA nationally, including in the 41 States that have not challenged DACA throughout its more than nine-year existence.

[7] Below, Plaintiffs-Appellees also argued that nationwide injunctions are justified as a matter of course in APA cases under 5 U.S.C. § 706(2). Appellants rebutted that argument, *see* NJ Br. 40-41, and Plaintiffs-Appellees do not press it on appeal.

CONCLUSION

This Court should reverse the decision below, or in the alternative, vacate or modify the district court's injunction.

Respectfully submitted,

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Dated: March 30, 2022

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I hereby certify that on March 30, 2022, I filed the foregoing Reply Brief of Intervenor Defendant-Appellant State of New Jersey with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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