No. 14-10049

In the United States Court of Appeals for the Fifth Circuit

CHRISTOPHER L. CRANE; DAVID A. ENGLE; ANASTASIA MARIE CARROLL; RICARDO DIAZ; LORENZO GARZA; FELIX LUCIANO; TRE REBSTOCK; FERNANDO SILVA; SAMUEL MARTIN; JAMES D. DOEBLER; STATE OF MISSISSIPPI, BY AND THROUGH GOVERNOR PHIL BRYANT,
Plaintiffs-Appellants Cross-Appellees,

v.

JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; JOHN SANDWEG, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF IMMIGRATION & CUSTOMS ENFORCEMENT; LORI SCIALABBA, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,
Defendants-Appellees Cross-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, CIVIL NO. 3:12-CV-3247, HON. REED O'CONNOR

AMICUS CURIAE BRIEF OF ASSOCIATION OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF APPELLANTS/CROSS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The case number is 14-10049. The case is styled as *Crane v. Johnson.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Anastasia Marie Carroll,
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State of Mississippi, by and through Governor Phil Bryant,
Appellant and Cross-Appellee

Jeh Charles Johnson, in his official capacity as Secretary of the Department of Homeland Security,
Appellee and Cross-Appellant

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum") is a nonprofit organization having allied state chapters active in Mississippi, Texas and Louisiana. For more than thirty years, Eagle Forum and its allied state chapters have defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, they have consistently opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. Eagle Forum has long defended adherence to the Constitution in limiting federal power. For all these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Ten law-enforcement officers of U.S. Immigration & Customs Enforcement ("ICE") (collectively, hereinafter, the "ICE-officer Plaintiffs") and the State of Mississippi sue federal officers responsible for ICE and immigration policy (collectively, hereinafter, the "Administration") to enjoin the implementation of a June 2012 memorandum from the Department of Homeland Security ("DHS") on

[1] *Amicus* files this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for the *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

the Deferred Action for Childhood Arrivals ("DACA") as well as related agency action to implement the DACA program.

With respect to Mississippi, the District Court rejected as too speculative the state's claimed injuries from the additional costs imposed by more than a thousand illegal aliens who remain in the state under DACA, ROA.133-135, notwithstanding that the Performance Audit Division of the State Auditor's Office identified the *net* cost of Mississippi's 49,000 illegal aliens in 2006 at more than $25 million annually. ROA.113 (¶¶ 62-63). In so doing, the District Court did not indicate any reason to believe that illegal aliens had become a money-making affair for states in the intervening seven years, which appears unlikely given that many of the drivers of state costs (*e.g.*, welfare, public education, law enforcement) remain either unchanged or more expensive.[2]

With respect to the ICE-officer Plaintiffs, the District Court held that the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978) ("CSRA"), and the 2012 amendments[3] to the Whistleblower Protection Act of

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[2] The $25 million figure averaged over 49,000 illegal aliens equates to more than $500 per illegal alien, although that figure excludes some welfare cost. *Id.* The other, larger figure that Plaintiffs cite – almost $20,000 per illegal alien-headed household with children – likely better reflects the full social costs of illegal aliens. *See* Opening Br. at 12.

[3] Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

1989, Pub. L. No. 101-12, 103 Stat. 32 (1989) ("WPA"), impliedly preclude the ICE-officer Plaintiffs' resort to judicial review outside the review provided by the Merit Systems Protection Board ("MSPB"). In addition, the District Court also held that the exception to that type of preclusion that the Supreme Court recognized in *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958), does not apply here.

SUMMARY OF ARGUMENT

Because Plaintiffs' merits arguments under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and federal immigration law reinforce Plaintiffs' arguments for standing and the availability of review under the *Kyne* exception, *amicus* Eagle Forum shows that DACA's promulgation violated the APA's required notice-and-comment procedures (Section I.A), the substantive requirements of federal immigration law (Section I.B), and thus the separation-of-powers doctrine that underlies our Constitution (Section I.C).

With respect to standing, Mississippi has standing not only because it provided ample evidence of financial injury and federal courts owe states "special solicitude in standing analysis" under *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), but also because Mississippi was entitled to the general inferences that its complaint embraces at the motion-to-dismiss phase (Section II.B.1) and to relaxed showings of immediacy and redressability as a procedural-rights plaintiff under the APA notice-and-comment requirements (Section II.B.2) and the Constitution's

separation-of-powers doctrine (Section II.B.3).

With respect to the CSRA's and WPA's purportedly displacing judicial review in 1978 and 2012, respectively, the APA requires that post-APA preclusion-of-review statutes displace APA review *expressly* (Section III.A.2). Here, APA and even pre-APA equity review were available (Sections III.A.1-III.A.2), which also places the Administration's interpretation at odds with the canon against construing subsequent statutes to repeal prior ones by implication, which applies with particular strength to judicial review (Section III.A.3). Finally, in the event that the CSRA or WPA precluded review (they do not), the *Kyne* exception would nonetheless allow review for the reasons argued by Plaintiffs, with particular emphasis on the lack of the remedy of rescinding DACA in any proceeding before the MSPB (Section III.B).

ARGUMENT

I. THE ADMINISTRATION'S ACTIONS ARE PROCEDURALLY AND SUBSTANTIVELY *ULTRA VIRES*

Except for "wholly insubstantial or frivolous" claims, federal courts have jurisdiction if "the right of the [plaintiff] to recover under [the] complaint will be sustained if the ... laws of the United States are given one construction," even if the plaintiff's right "will be defeated if they are given another." *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963) (*quoting Bell v. Hood*, 327 U.S. 678, 685 (1946)). In the typical case, therefore, federal courts resolve jurisdictional issues before they

resolve merits issues. Indeed, a court generally should assume *the plaintiff's* merits views in evaluating the court's jurisdiction to hear the plaintiff's claims: "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"). But plaintiffs cannot make "wholly insubstantial or frivolous" claims solely to secure federal jurisdiction. *Bell*, 327 U.S. at 683. Here, Plaintiffs' merits arguments actually *reinforce* the jurisdictional arguments in several respects. *See* Sections II.A (zone of interest for *ultra vires* agency action), II.B.1 (procedural-rights standing), III.B (*Kyne* exception for *ultra vires* actions), *infra*. For these reasons – and to emphasize the grave constitutional issues present here – *amicus* Eagle Forum inverts the usual order of analysis.

A. The Administration's Actions Violate the APA

DACA violates the APA's rulemaking requirements as a legislative rule[4] issued without meeting the APA's notice-and-comment requirements, 5 U.S.C. §553(b), and without eligibility for any APA exceptions to those requirements. *Id.*

[4] "Generally speaking, it seems to be established that regulations, substantive rules, or legislative rules are those which create law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means." *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (internal quotations omitted). DACA in no way interprets other statutes or rules, but instead creates new rules.

at §553(b)(A)-(B). As such, DACA is void ab *initio.*

Even if DACA were *substantively* consistent with federal immigration law, *but see* Section I.B, *infra,* its promulgation nonetheless would violate the APA notice-and-comment requirements. The APA exemptions for policy statements and interpretive rules do not apply when agency action narrows the discretion otherwise available to agency staff, *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2001); *General Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002), cannot be used to promulgate the regulatory basis on which to confer benefits, *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 908 (5th Cir. 1983) ("Legislative rules ... grant rights, impose obligations, or produce other significant effects on private interests") (interior quotations omitted, alteration in original); *Mercy Hosp. of Laredo v. Heckler,* 777 F.2d 1028, 1032 (5th Cir. 1985); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (defining a "substantive rule – or a legislative-type rule – as one affecting individual rights and obligations") (internal quotations omitted), and cannot be used to promulgate new rules that effectively amend existing rules. *Am. Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993); 5 U.S.C. §551(5) (defining "rule making" as the "agency process for formulating, *amending*, or repealing a rule") (emphasis added); *Shell Offshore*, 238 F.3d at 629 ("the APA requires an agency to provide an opportunity for notice and comment

before substantially altering a [well-established] regulatory interpretation"). DACA cannot meet these tests.

Under the APA, DACA plainly required notice-and-comment rulemaking. For example, employment authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. §274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. §274a.12(a)(1)-(16), none of which apply to the across-the-board DACA program. *Cf. U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DACA qualifies as a legislative rule, which agencies cannot issue by memoranda or interpretation.

Procedurally infirm rules are a nullity, *Avoyelles Sportsmen's League*, 715 F.2d 897, 909-10; *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *State of Ohio Dep't of Human Serv. v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin.*, 862 F.2d 1228, 1237 (6th Cir. 1988); *North Am. Coal Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 854 F.2d 386, 388 (10th Cir. 1988), even if they would have been substantively valid if promulgated via notice-and-comment rulemaking. Thus, DACA is a nullity.

B. The Administration's Actions Violate Federal Immigration Law

As the District Court found and as Plaintiffs argue convincingly here,

Opening Br. at 43-47, DACA violates the requirements of federal immigration law. Through DACA, a non-enforcement agency purports to channel aliens into deferred-action under prosecutorial discretion, without initiating the statutorily mandated removal proceeding. That is *ultra vires* and thus void. Specifically, under 8 U.S.C. §1225(a)(1), "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." That designation triggers 8 U.S.C. §1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers," which triggers 8 U.S.C. §1225(b)(2)(A)'s mandate that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a of this title." In essence, DACA jumps aliens to a favorable possible result of the removal process, without the statutorily required process that must precede that outcome.

C. The Administration's Actions Violate the Constitution

Although the more typically contested procedural issues arise under the APA – and the Administration's failure to comply with the APA – this Court should not forget the underlying *constitutional* issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). In this action, the Administration purports to rely on exceptions to

congressional lawmaking that Congress itself enacted in the APA. *See* 5 U.S.C. §553(b). But failure to follow those APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp.*, 441 U.S. at 303; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). In essence, when an agency fails to follow the procedures ordained by Congress – in its APA delegation of lawmaking power – the resulting rule violates the core constitutional requirements for making law, which "are *integral* parts of the constitutional design for the separation of powers." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (emphasis added). Valid laws, of course, "must satisfy bicameralism and presentment requirements, which 'represent[] the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" *Medical Ctr. Pharm. v. Mukasey*, 536 F.3d 383, 401 (5th Cir. 2008) (*quoting Chadha*, 462 U.S. at 951) (alteration in *Mukasey*). Within the APA, the Administration is on solid ground. Outside it, the Administration attempts to usurp congressional power.

Our quadrennial elections do not select a temporary despot. Instead, the Constitution requires presidents to faithfully execute the laws that Congress has passed. U.S. CONST. art. II, §3. Thus, if the Administration failed to comply with the APA and federal immigration law, the Administration's attempt to make law

violates not only the APA, but also the Constitution.[5]

II. PLAINTIFFS HAVE STANDING

To establish standing, a plaintiff must show an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Defenders of Wildlife,* 504 U.S. at 561-62. For injuries directly caused by government action, a plaintiff can show an injury in fact with "little question" of causation or redressability; by contrast, when the government causes third parties to inflict injury, the plaintiff must show more to establish causation and redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Here, Plaintiffs suffer their injuries directly from DACA's allegedly unconstitutional requirements, which makes causation and redressability obvious: enjoin enforcement of DACA, and Plaintiffs' injuries will cease (in the case of the ICE-officer Plaintiffs) or *at least* lessen (in the case of Mississippi). Moreover, while cognizable injury includes

[5] The question of whether the Administration violated Articles I and II of the Constitution is different from the question of who has the right under Article III to enjoin the Administration's actions. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 576-77 (1992); Section II.B, *infra.*

both actual and threatened injury, *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983), Plaintiffs' injuries here are ongoing.

A. The Zone of Interests Test Does Not Pose Any Limits

The "zone of interest" prong of standing is a prudential doctrine that asks "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected… by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998) (interior quotations omitted, emphasis and alteration in original). Because standing assumes the plaintiffs' merits views – here, that the Administration lacks substantive and procedural authority for DACA – either the zone-of-interest test is inapplicable or it applies the zone from the overarching constitutional issues raised by lawless agency action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987); *Chiles v. Thornburgh*, 865 F.2d 1197, 1211 (11th Cir. 1989) (same). By acting outside its constitutional power and delegation, the Administration purports to make law

without the constitutional process for doing so.[6]

B. Mississippi Has Standing

The District Court's rejection of Mississippi's standing at the motion-to-dismiss phase is difficult to understand, given the evidence that Mississippi presented of the economic burden that illegal aliens impose on the state, to say nothing of the "special solicitude in standing analysis" that a federal court must accord to states "protecting [their] quasi-sovereign interests" in federal court. *Massachusetts,* 549 U.S. at 520. Plaintiffs obviously have standing to challenge actions that negatively impact them economically, *Diamond v. Charles,* 476 U.S. 54, 66 (1986), and the burden need not be crushing: an "identifiable trifle" suffices. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,* 73 F.3d 546, 557 (5th Cir.

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[6] In defending similar federal overreach, the U.S. Department of Justice often cites *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101 n.11 (1984), for the proposition that "[a] claim of error in the exercise of [delegated] power is … not sufficient" to allege *ultra vires* action. Because it involved an agency delegated "broad discretion to provide *'adequate'* mental health services" and plaintiffs who argued "that [officers] have not provided such services *adequately,*" 465 U.S. at 102 (emphasis added), *Pennhurst* could not erase the bright line that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949). The Supreme Court recently clarified that there are no sliding scales of *ultra vires* conduct: "Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires.*" *City of Arlington v. FCC,* 133 S. Ct. 1863, 1869 (2013) (emphasis added). The Administration's DACA program is no mere mistaken exercise of delegated power. It is a wholesale power grab.

1996). The District Court's rejection of Mississippi's standing is, therefore, surprising, and evidences the need to heed Justice Harlan warning against "reduc[ing] constitutional standing to a word game played by secret rules." *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting). Although the Plaintiffs' brief (like the Plaintiffs' showing in District Court) ably demonstrates Mississippi's standing, *amicus* Eagle Forum respectfully submits that the case for standing is even stronger for three additional reasons.

1. The District Court Should Not Have Disregarded Evidence of Past Costs Associated with Illegal Aliens

The fact that illegal aliens cost Mississippi a net average of over $500 annually in state support circa 2006, *see* note 2, *supra;* Opening Br. at 12, should not have been so easily sidestepped: "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton,* 414 U.S. 488, 496 (1974). To be sure, past injuries can be sufficiently unusual – such as entanglements with the police that result in chokeholds – that they do not support prospective injunctive relief. "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects.'" *Lyons,* 461 U.S. at 102 (*quoting Littleton*, 414 U.S. at 495-96). On the other hand, past injuries also *can* support prospective injunctive relief. *Blum v. Yaretsky*, 457 U.S. 991, 1000-01 (1982) (*citing Littleton,* 414 U.S. at 496). The question is *whether* the average

annual cost of illegal aliens in 2006 has any bearing on this motion to dismiss.

Given that the drivers of government costs for illegal aliens (*e.g.*, law enforcement, public education, welfare) have certainly not decreased since 2006, it is not clear why costs circa 2006 are too speculative. Certainly, there is no reason to think that illegal aliens became cash-positive investments for states in the years since 2006. In that respect, it would not matter whether Mississippi's average injury today were $500 or $5 per person: an "identifiable trifle" suffices, *Cedar Point Oil*, 73 F.3d at 557, and courts "have allowed important interests to be vindicated by plaintiffs with no more at stake … than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (citations omitted). The District Court's holding also misunderstands the law of standing in two fundamental respects relevant here.

First, the District Court's suggestion that Mississippi may have received a boon in having extra-expensive illegal aliens removed – as the result of DACA's freeing resources that might not have been available without DACA – misunderstands Plaintiffs' claims that DACA is *ultra vires* and the prospective nature of relief sought. The Administration has not argued that, if a court vacates DACA, the Administration will track down and return to the United States all of the extra-expensive illegal aliens removed thanks to DACA. As such, Mississippi's

prospective request to vacate DACA and begin removal proceedings for the affected illegal aliens will result in *even more* savings to the state.[7]

Second, the District Court did not pay sufficient attention to the phase of the proceedings: "each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997) (*quoting Defenders of Wildlife*, 462 U.S. at 561). While "specific facts" are required to support summary judgment, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" because courts at that stage "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 168 (internal quotations omitted). Given that the costs of government services available to illegal aliens have stayed constant or gone up since 2006, it is easy to presume that Mississippi could prove its standing at the summary-judgment phase, which is all that the pleadings stage asks.

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[7] As Plaintiffs explain, the Administration's arguments about DACA-induced savings from other removals is fiction. Opening Br. at 17-18. *Amicus* Eagle Forum merely adds that, for this to be *relevant* fiction, the Administration would also need to claim that it will return all those allegedly removed aliens to the United States if DACA is vacated. Simply put, this is not the either-or proposition that the District Court and Administration contend.

2. Courts Relax Article III's Immediacy Requirements for Procedural-Rights Violations Like DACA

Significantly, Plaintiffs press not only substantive violations of federal law but also violations of procedural requirements under the APA and the Constitution. *See* Sections I.A, I.C. *supra*. "The history of liberty has largely been the history of observance of procedural safeguards." *Corley v. U.S.*, 556 U.S. 303, 321 (2009) (interior quotations omitted). For procedural injuries, Article III's redressability and immediacy requirements apply to the *present procedural violation* (which may someday injure a concrete interest) rather than to the concrete future injury. *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7; *U.S. v. Johnson*, 632 F.3d 912, 921 (5th Cir. 2011); *cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006) ("once a litigant has standing to request invalidation of a particular [government] action, [the litigant] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate"); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing). For these reasons, Mississippi's injuries are obviously sufficiently imminent for Article III, particularly at the motion-to-dismiss phase.

In addition, Mississippi does not need to show that the Administration's conducting the required notice-and-comment rulemaking would result in a rule more to Mississippi's liking: "If a party claiming the deprivation of a right to

notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). Instead, *vacatur* would put the parties back in the position they should have been in all along, which provides enough redress even if the Administration *potentially could* take action on remand that would leave Plaintiffs no better off. Remand redresses the injury "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998). Again, when weighed with a due regard for the procedural nature of her injuries, Mississippi clearly has standing.

3. DACA's Promulgation Procedurally and Substantively Violates the Separation of Powers, which Mississippi Has Standing to Challenge

The Constitution's separation of powers is not a mere technicality – it is an indispensable bulwark against executive tyranny. The Founders regarded the Constitution's "separation of governmental powers into three coordinate Branches [as] *essential* to the preservation of liberty." *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989) (emphasis added). By decentralizing power among the three branches (and between the House and the Senate within the legislative branch), the Founders intended separation of powers to protect liberty. *U.S. v. Munoz-Flores*, 495 U.S.

385, 394-96 (1990). While "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others," "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. U.S.*, 131 S.Ct. 2355, 2365 (2011). The "aim of [the separation of powers] is to protect … *the whole people* from improvident laws," *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991) (emphasis added), not merely to protect the institutional prerogatives of the respective branches. Provided that parties who seek to assert separation-of-powers injuries have otherwise justiciable claims, *Bond*, 131 S.Ct. at 2366, they may assert the procedural injuries from separation-of-powers violations.

C. The ICE-Officer Plaintiffs Have Standing

The ICE-officer Plaintiffs plainly have Article III standing, both because DACA burdens them and also for some of the same reasons that Mississippi has standing. *See* Sections II.B.2-II.B.3 (procedural-rights violations have relaxed showings for immediacy and redressability); II.A (zone of interests test is interpreted broadly for *ultra vires* actions), *supra*. For an injury in fact, it suffices that DACA burdens the ICE-officer Plaintiffs administratively, which "[c]learly… me[e]t the constitutional requirements" for injury such that a plaintiff can assert the "right to be free of arbitrary or irrational [government] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Thus, the ICE-

officer Plaintiffs also have standing.

III. CIVIL-SERVICE LAWS DO NOT PRECLUDE REVIEW

Contrary to the District Court's holding and the Administration's arguments, the nation's civil-service laws do not preclude judicial review by the ICE-officer Plaintiffs for two independent reasons. First, those laws do not preclude judicial review of systemic rules like DACA prior to the initiation of any particular personnel-related action. Second, even if the civil-service laws otherwise precluded review, the *Kyne* exception would apply here. As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.,* 424 U.S. 800, 817 (1976). Accordingly, this Court must reverse the District Court's erroneous rejection of jurisdiction over the ICE-officer Plaintiffs' claims.

A. The CSRA's Preclusion Principles Do Not Apply to Systemic Challenges to Agency Rules

The ICE-officer Plaintiffs' dispute with the Administration is not the type of personnel-related action covered by CSRA review before the MSPB. As Plaintiffs explain, courts often allow review in circumstances like those presented here. *See* Opening Br. at 22-24, 25-27 (collecting cases). Indeed, it is entirely normal for

statutes that require the *application* of federal standards to be heard in a specialized forum to nonetheless allow APA review of the systemic lawfulness of the federal standards in federal district court:

> While the Act vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended § 2311(d) to deprive federal district courts of subject-matter jurisdiction under [28 U. S. C. §1331] to hear statutory or constitutional challenges to the federal guidelines themselves.

Int'l Union v. Brock, 477 U.S. 274, 285 (1986). In any event, the District Court's narrow view of judicial review is belied both by the availability of judicial review under the circumstances here before and after APA's enactment and by the lack of an express repeal of that review in either the CSRA or WPA.

1. Pre-APA Equity Review Would Be Available, Even if Congress Had Never Enacted the APA

Even before the original APA provided a cause of action or the APA's 1976 amendments waived federal sovereign immunity, judicial review was available in equity suits against federal officers: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689; *Ex parte Young*, 209 U.S. 123, 160 (1908); *U.S. v. Lee*, 106 U.S. 196, 213 (1882). Unlike the agencies for which they work, the individual Administration officials lack sovereign immunity here.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Significantly, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace that relief. *See* Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946); *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("Nothing in the [APA's] enactment … altered the *McAnnulty* doctrine of review …. It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*"); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* for the proposition that "generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). "Under the longstanding officer suit fiction …, … suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002). Thus, provided that a plaintiff alleges an ongoing violation of federal law, longstanding equity practice

allows suing federal officers who act beyond their lawful authority.

In equity, a plaintiff threatened with *future* injury need not await an alternate legal remedy before filing suit in equity, and a *subsequent* legal remedy would not displace equity review: the "settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). Thus, even before the APA's enactment in 1946, Plaintiffs could have had injunctive or declaratory relief against DACA, without waiting for the remedy provided by Congress to materialize in the future.

2. The Pre-CSRA APA Would Have Allowed Review, and CSRA Did Not Expressly Displace that Review

Nothing in the 1946 version of the APA would have denied review of DACA that Plaintiffs could have had in equity before 1946. Moreover, neither the CSRA in 1978 nor the WPA amendments in 2012 expressly precluded resort to APA review, which the APA requires for post-APA statutes to remove otherwise-applicable APA review. 5 U.S.C. §559. Accordingly, this Court must reject the District Court's holding that the CSRA and WPA deny APA review here.

Although the APA – as enacted – did not override any pre-APA statute that *expressly or impliedly* denied review, 5 U.S.C. §702 ("[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"), post-APA statutes must deny review

expressly. 5 U.S.C. §559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly"); *Dickinson v. Zurko,* 527 U.S. 150, 154-55 (1999). Similarly, the APA's 1976 amendments did not expand the APA's preclusion of review. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (*citing* 5 U.S.C. §559 and *Zurko*). For the same reasons, nothing in the CSRA or WPA expressly (or even impliedly) removes APA review.

3. Repeals by Implication Are Disfavored, Especially for Judicial Review

The canon against repeals by implication provides a similar basis to reject the District Court's view that the 1978 or 2012 statutes impliedly eliminated whatever APA review existed prior to 1978 and 2012: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) (alteration in original, interior quotations and citations omitted). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) (internal quotations omitted).

Under that same clear-and-manifest standard, "[w]hen the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Here,

the CSRA and WPA are readily amenable to Plaintiffs' no-preclusion interpretation of those statutes. For that reason, under *Home Builders,* this Court should adopt the no-preclusion interpretation.

B. The *Kyne* Exception Would Allow Review, Even If the CSRA Precluded Review

Although resort to the *Kyne* exception to preclusion is unnecessary here because neither the CSRA nor the WPA precludes review, the *Kyne* exception would provide review *even if* the CSRA or WPA impliedly denied review. Plaintiffs' powerful demonstration of the availability of the *Kyne* exception (if preclusion applied) makes it unnecessary for *amicus* Eagle Forum to brief *Kyne* in detail here. *See* Opening Br. at 29-47. *Amicus* Eagle Forum adds to Plaintiffs' arguments only with respect to the lack of an adequate alternate remedy under *Kyne.*

In *Board of Governors of the Federal Reserve System v. MCorp Financial,* 502 U.S. 32, 43 (1991), the Supreme Court upheld the "familiar proposition" underlying *Kyne* review: namely, that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 502 U.S. at 44 (*quoting Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967)). Because the *MCorp* statute *expressly* prohibited judicial review of the regulations at issue and *expressly* authorized a challenge to them only in an enforcement action, the Supreme Court withheld the *Kyne* action. 502 U.S. at

43-44. Significantly, *MCorp* found the statutory review adequate, 502 U.S. at 43 ("[t]he cases before us today are entirely different from *Kyne* because [the *MCorp* statute] expressly provides MCorp with a meaningful and adequate opportunity for judicial review"), which removes *MCorp* from any relevance here.

The ICE-officer Plaintiffs' potential relief before the MSPB is inadequate to displace APA review because the MSPB's review would not include the remedy of rescinding DACA.[8] Piecemeal "[l]itigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties" and instead requires systemic relief under the APA. *Am. Trucking Ass'ns v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982); *see also Bowen v. Massachusetts*, 487 U.S. 879, 882 (1988) ("the doubtful and limited relief available in the Claims Court under the Tucker Act is not an adequate substitute for district court review"); *Transohio Savings Bank v. O.T.S.*, 967 F.2d 598, 906 (D.C. Cir. 1992) (alternate relief inadequate to displace APA review if rescission remedy is not available); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (APA provides judicial review of agency's final order, even if plaintiff has subsequent judicial remedies). These additional authorities simply reinforce the already-strong showing that the ICE-officer Plaintiffs make that they would lack a sufficiently adequate remedy to

[8] It borders on the surreal for the Administration to argue that MSPB review is available when the MSPB itself already has ruled that such review is not available. *See* Opening Br. at 39-40.

displace *Kyne* review in the event that the CSRA or WPA displaced review.

CONCLUSION

For the foregoing reasons and those argued by Plaintiffs, *amicus* Eagle Forum respectfully submits that the Court should reverse the District Court with respect both to Mississippi's standing and to CSRA preclusion.

Dated: May 23, 2014

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CERTIFICATE OF COMPLIANCE

No. 14-10049, *Crane v. Johnson.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6.049 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 23, 2014

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Dated: May 28, 2014

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No. 14-10049, *Crane v. Johnson.*

I hereby certify that, on May 23, 2014, I electronically filed the foregoing brief 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 CM/ECF system.

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