THE RISE OF THE 'IMMIGRANT-AS-INJURY' THEORY OF STATE STANDING

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Despite the Biden Administration's efforts to hold itself out as a humane alternative to the excesses of immigration enforcement during the Trump presidency, federal courts have prevented a number of immigration policy changes from going forward during the first half of the Biden era. States serve as the primary plaintiffs in these lawsuits, which have impacted cornerstone immigration policies such as the termination of exclusionary border policies, the restoration of Deferred Action for Childhood Arrivals (DACA), and the application of enforcement priorities. During the 2022–23 term, the Supreme Court will hear certain states' challenge to immigration enforcement priorities in United States v. Texas *and will address whether the states have standing to bring the lawsuits in the first instance. Guidance from the Court on the standing issue is overdue and poised to have widespread consequences throughout the administrative state and immigration bureaucracy.*

This Article interrogates the standing doctrine—what it calls the "immigrant-as-injury" standing doctrine—that has enabled the states and federal judiciary to intervene mightily on federal executive immigration policy. At bottom, the states' standing theories treat the existence of immigrants within the jurisdiction of a state as financial costs and threats to states' quasi-sovereign injuries. While the courts have long recognized financial injury for standing purposes, the treatment of immigrant existence as a cognizable injury merits critical attention,

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given its influence—and flaws. That doctrine infuses contested assumptions about migrant humanity with legal significance and forecloses meaningful opportunities to challenge the conclusion that the existence of immigrants imposes costs on the states. In doing so, the doctrine furthers the subordination of immigrants and stunts productive legal discourse about migration in the law. Furthermore, the story of the states as marginalized entities relies on blunt and misstated assumptions about the nature of federal power in the immigration sphere. Familiar but growing concerns about political polarization in the courts and society exacerbate concerns associated with the rise of the immigrant-as-injury standing doctrine. This Article encourages the Court to apply anti-solicitude principles to the immigrant-as-injury standing doctrine, which would require higher showings of injury, redressability, and causation in the standing analysis.

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INTRODUCTION

When President Joseph R. Biden took office, the administration sought to fulfill campaign promises to reverse various immigration policies enacted by his predecessor.[1] Deferred Action for Childhood Arrivals (DACA), the program providing temporary work permits and reprieves from deportation for young people brought to the United States as children, would return.[2] Construction of the border wall at the United States-Mexico border would cease.[3] The immigration enforcement system would rely on priorities in lieu of every undocumented person fearing the risk of deportation.[4] A humane system with fair processing of asylum seekers at the border would replace policies aimed at mass physical expulsion.[5] Of the various

1. *President Biden's Executive Actions on Immigration*, CTR. FOR MIGRATION STUD. (Feb. 2, 2021), https://cmsny.org/biden-immigration-executive-actions [https://perma.cc/S5LQ-BKNN] (explaining that President Biden "set forth an ambitious immigration agenda . . . committing both to reverse harmful policies implemented by the Trump administration and to revitalize the U.S. immigration system more broadly"). Researchers have identified hundreds of executive branch-level changes enacted by the Trump Administration to the immigration system. *See* IMMIGR. POL'Y TRACKING PROJECT, https://immpolicytracking.org [https://perma.cc/WH6A-KWG4] (documenting over 1,000 changes to the immigration system during Trump Administration); SARAH PIERCE & JESSICA BOLTER, MIGRATION POL'Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 1 (July 2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [https://perma.cc/Y5VX-RJDX] (identifying over 400 immigration-related executive actions from the start of 2017 until the summer of 2020).

2. Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 20, 2021).

3. Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

4. Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

5. *See* DAVID PEKOSKE, DEP'T OF HOMELAND SEC., REVIEW OF AND INTERIM REVISION TO CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL POLICIES AND PRIORITIES 1 (2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/X8D3-WYYU] (describing need to allocate

announcements, the 100-day moratorium on deportations[6] resonated as a particular victory by sectors of the immigrants' rights movement, for whom the deportation moratorium reflected a bold message regarding the potential reconfiguration of the goals of the federal immigration system.[7]

But as administrative law scholars well know, changing agency policy often requires more than Presidential transition alone.[8] The moratorium on deportations never went into effect, due to a federal court order in a lawsuit filed by the State of Texas.[9] In subsequent months, the Biden Administration issued revised memoranda on enforcement priorities directing the arrest, detention, and deportation decisions of frontline immigration officers,[10] which Texas and other states also challenged. The lower federal courts have split on the states' challenges, with the U.S. Court of Appeals for the Fifth Circuit upholding a Texas district court's vacatur of the enforcement priorities guidance and the U.S. Court of Appeals for the Sixth Circuit

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"resources to the border in order to ensure safe, legal and orderly processing" and "to rebuild fair and effective asylum procedures that respect human rights and due process").

6. *See id.*

7. A federal moratorium on deportations had long been a central demand amongst immigrants' rights organizers. *See* Jennifer J. Lee, *Immigration Disobedience*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 3–4, 14–15), https://ssrn.com/abstract=4079709 [https://perma.cc/2HWE-DLAC]; Kathryn Abrams, *Contentious Citizenship: Undocumented Activism in the Not1More Deportation Campaign*, 26 BERKELEY LA RAZA L.J. 46, 47–48, 51 (2016).

8. *See* Cristina M. Rodriguez, Foreword, *Regime Change*, 135 HARV. L. REV. 1, 7–9 (2021) (defining "regime change" as "the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another," and "defend[ing] the use of power to bring regime change about . . . with a view to cultivating institutions capable of making political and democratic change concrete").

9. Texas v. United States, 515 F. Supp. 3d 627, 639 (S.D. Tex. 2021); Texas v. United States, 524 F. Supp. 3d 598, 629–30, 667–68 (S.D. Tex. 2021).

10. TAE D. JOHNSON, U.S. IMMIGR. & CUSTOMS ENF'T, POL'Y NO. 11090.1, INTERIM GUIDANCE: CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL PRIORITIES 1–2 (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/V8BG-QYNY] (issuing revised enforcement guidelines); ALEJANDRO N. MAYORKAS, DEP'T OF HOMELAND SEC., GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW 2 (Sept. 30, 2021) [hereinafter *Mayorkas Memo*], https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/4DYJ-V9AC] (requiring more than the mere removability of a noncitizen as the basis of an enforcement action against them).

reversing an Ohio district court's injunction of the same.[11] The question of whether the states even have standing to bring the lawsuits has produced split views between the federal appeals courts as well.[12] The Supreme Court is considering the states' challenge to the administration's enforcement priorities during the 2022–23 term, and the Court's review will address the threshold question of whether the plaintiff states have standing to bring the lawsuit at all.[13]

The Court's long overdue intervention on the state standing question is poised to have widespread consequences throughout the administrative state, with outsized influence in the immigration context. In addition to the enforcement priorities, during the first two years of the Biden presidency, federal court orders prevented several other major executive immigration policies from going into effect.[14]

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11. Arizona v. Biden, 31 F.4th 469, 472 (6th Cir. 2022) (reversing district court injunction of *Mayorkas Memo*); Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022) (per curiam) (declining to issue stay of district court vacatur of *Mayorkas Memo*). Alabama, Florida, and Georgia also challenged the enforcement priorities in Alabama district court, but those proceedings were stayed pending resolution of the Texas litigation. Complaint at 3–4, Alabama v. Mayorkas, No. 4:22-cv-00418 (N.D. Ala. Apr. 4, 2022).

12. *Compare Arizona*, 31 F.4th at 474 (finding that neither Arizona, Montana, or Ohio meets the "substantially more difficult" standing threshold for federal government actions affecting third parties (i.e., non-citizens) because the allegation that that federal government's guidance prioritizing removal of non-citizens posing public safety risks will hinder efforts to remove other non-citizens is highly speculative and non-particularized with respect to each state), *with Texas*, 40 F.4th at 216–17 (finding that Texas, in particular, suffers injury from the guidance in that they will incur expenses for paroling and supervising non-citizens that are not detained or removed by federal immigration officials for lack of public safety risk).

13. In the Solicitor General's application for a stay of the Fifth Circuit's order allowing the vacatur of the *Mayorkas Memo* to go into effect, the Solicitor General suggested that the Court construe the application for stay as a petition for certiorari before judgment. The Court granted the petition for certiorari and denied the application for the stay without explanation, although Justices Sotomayor, Kagan, Barrett, and Jackson indicated that they would grant the stay application. United States v. Texas, 143 S. Ct. 51, 51 (2022).

14. I do not identify the federal courts as the sole explanation for the Biden Administration's inability to implement immigration policy change. Indeed, an arguable absence of political will, internal divisions amongst senior leadership, and litigation choices on the part of the Biden Administration also help explain immigration policy outcomes. *See, e.g.*, Jonathan Blitzer, *The Disillusionment of a Young Biden Official*, NEW YORKER (Jan. 28, 2022), https://www.newyorker.com/news/the-political-scene/the-disillusionment-of-a-young-biden-official [https://perma.cc/FZR2-C2AE] (describing tensions within the White House around border policy,

The processing of new applications for DACA has not gone forward as a result of a district court order upheld by the Fifth Circuit.[15] Two controversial border policies enacted by the Trump Administration that severely restricted the ability to seek asylum while exacting high human costs, the Migrant Protection Protocols ("MPP" or "Remain in Mexico")[16] and Title 42 expulsions,[17] likewise failed to promptly end.[18]

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including one former official's assessment of policy choices that the Biden Administration could have pursued as an alternative to full resumption of the MPP program following court decisions.)

15. Texas v. United States, 549 F. Supp. 3d 572, 576–77, 624 (S.D. Tex. 2021) (granting motion for summary judgment to enjoin DHS from granting new DACA applications on a nationwide basis), *aff'd in part, vacated in part*, 50 F.4th 498 (5th Cir. 2022). On August 30, 2022, DHS issued final regulations governing the issuance of DACA. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53152 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

16. *See generally* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs.; Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot.; & Ronald D. Vitiello, Deputy Dir., U.S. Immigr. & Customs Enf't (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/JG2W-AKYL]. The Supreme Court's June 30, 2022, decision in *Biden v. Texas* rejected the states' statutory challenge to the termination of MPP but did not rule on whether an agency memorandum issued on October 29, 2021, was arbitrary and capricious under the Administrative Procedure Act. 142 S. Ct. 2528, 2534–35, 2548 (2022); *see also* Peter Margulies, *Supreme Court Eases Biden's Way to Ending "Remain in Mexico" Program, but Termination Is Not a Done Deal*, LAWFARE BLOG (July 7, 2022, 8:01 AM), https://www.lawfareblog.com/supreme-court-eases-bidens-way-ending-remain-mexico-program-termination-not-done-deal [https://perma.cc/7DE9-HJMJ]. On December 15, 2022, district court Judge Matthew Kacsmaryk granted the states' request for a further stay of the termination of MPP on arbitrary and capricious grounds. Texas v. Biden, No. 2:21-CV-067-Z, 2022 WL 17718634, at *18 (N.D. Tex. Dec. 15, 2022).

17. 42 U.S.C. § 265; *see* Louisiana v. Ctrs. for Disease Control & Prevention, No. 6:22-CV-00885, 2022 WL 1604901, at *1, *23 (W.D. La. May 20, 2022) (enjoining Centers for Disease Control from implementing an April 1, 2022, order announcing plans to end the Title 42 program on May 23, 2022). A separate lawsuit challenges the exemption of certain children from the Title 42 expulsion program. Texas v. Biden, 589 F. Supp. 3d 595, 622–624 (N.D. Tex. 2022).

18. In addition, states have filed lawsuits challenging a wide range of immigration programs and practices, from the end of border wall construction to asylum application processing. *See* Complaint at 1–2, 4, 6, Indiana v. Biden, No. 1:22-cv-00192 (N.D. Ind. June 6, 2022) (challenging "[Biden's] border policies" of releasing individuals on own recognizance and issuing Notices to Report); Complaint at 2, Texas v. Mayorkas, No. 2:22-cv-00094 (N.D. Tex. Apr. 28, 2022) (challenging the interim final rule Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg.

As this Article goes to publication, the future of Title 42 continues to fluctuate despite federal efforts to terminate the program and concerns about the legality of the program itself.[19] In the final week of 2022, the Supreme Court granted the request of nineteen states to stay a lower court order vacating Title 42, and granted certiorari with respect to the states' ability to intervene in litigation brought by private plaintiffs against the border program—but then removed the oral argument from its calendar weeks later.[20]

That a single or small handful of states could effectively control nationwide immigration policy through the courts seems to contradict baseline assumptions long at the heart of immigration law.[21] After all, the courts have for centuries adhered to the principle that immigration law's proximity to foreign affairs and national security, as well as its deep connection to national sovereignty, place it beyond the

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18,078 (Mar. 29, 2022)); Complaint at 5, Texas v. Biden, No. 2:22-cv-00014-M (N.D. Tex. Jan. 28, 2022) (challenging Central American Minors (CAM) Refugee and Parole Program); Complaint at 2, Missouri v. Biden, No. 6:21-cv-00052 (S.D. Tex. Oct. 21, 2021) (challenging allocation of funds away from border wall construction). *But see* Arizona v. Mayorkas, 584 F. Supp. 3d 783, 794–97, 802 (D. Ariz. 2022) (rejecting state standing to challenge termination of border wall construction due to failure to establish causation), *appeal dismissed*, No. 22-15519, 2022 WL 6105386 (9th Cir. Sept. 12, 2022).

19. On November 15, 2022, in litigation brought by private plaintiffs against the original Title 42 program, district court Judge Emmet Sullivan vacated the program on Administrative Procedure Act grounds. Huisha-Huisha v. Mayorkas, No. 21-100 (EGS), 2022 WL 16948610, at *14–15 (D.D.C. Nov. 15, 2022). After the Court of Appeals for the District of Columbia denied a motion to intervene filed by Arizona and other states, those states sought an emergency stay from the Supreme Court and also requested that the Court construe the stay motion as a petition for certiorari. *See* Arizona v. Mayorkas, 143 S. Ct. 478, 478 (2022).

20. The Court's 5-4 decision to issue the stay elicited a noteworthy dissent from Justice Gorsuch, joined by Justice Jackson, which highlighted that the public health justification (COVID-19) for Title 42 no longer existed and that the Court should operate as "a court of law, not policymakers of last resort." *Arizona*, 143 S. Ct. at 479 (Gorsuch, J., dissenting); *see also* Adam Liptak, *Supreme Court Cancels Arguments in Title 42 Immigration Case*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/us/politics/supreme-court-title-42-immigration.html [https://perma.cc/6JPJ-7M28].

21. *See, e.g.*, Ahilan Arulanantham & Monica Y. Langarica, *The Supreme Court Should Stop Individual States From Dictating National Immigration Policy*, JUST SEC. (Apr. 25, 2022), https://www.justsecurity.org/81249/the-supreme-court-should-stop-individual-states-from-dictating-national-immigration-policy [https://perma.cc/57LD-CHFC] ("Does it sound odd that two states—one of which has no international border—got a single district judge to alter the entire country's federal immigration policy? It should.").

reach of judicial review—often to the great detriment of immigrants.[22] The primary authority of the federal political branches over immigration matters constitutes another foundational principle.[23] Despite the strength of that federal authority, states nonetheless have significant room to exert influence, flexibility, resistance, and experimentation on immigration.[24] But established balances of power—both as a matter of federalism and the separation of powers—are arguably upended by a system in which individual states and federal courts act as final arbiters of federal immigration policy.

The explosion of lawsuits filed by states against the federal government over the executive's enforcement of federal law is, of course, part of a broader cluster of separation of powers and administrative law questions making their way through the courts and not limited to immigration.[25] The Supreme Court's 2007 decision in *Massachusetts v. EPA*,[26] in which the Court suggested in a Clean Air Act

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22. *See* Chae Chan Ping v. United States, 130 U.S. 581, 599–601, 609–11 (1889) (establishing principle of judicial deference to plenary power of Congress to enact Chinese Exclusion laws). Scholars have raised extensive and longstanding critiques of the plenary power doctrine. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255–57 (explaining how the Supreme Court has often used the plenary power doctrine as justification for declining to review the constitutionality of federal immigration statutes passed by Congress); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 1 (1998) (critiquing plenary power doctrine on racial discrimination grounds). For a more recent critique, see Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1428–29 (2022) (describing plenary power doctrine as one that "so pervades the modern constitutional landscape that it is often assumed to be a natural feature" and suggesting that it is "less a product of principled constitutional analysis than of intentional racism and an unintentional judicial game of telephone").

23. *See* Arizona v. United States, 567 U.S. 387, 394–95 (2012) (describing the federal government's "broad, undoubted power over the subject of immigration and the status of aliens").

24. *See infra* Sections I.B and II.

25. As Chief Justice Roberts put it in *Arizona v. City and County of San Francisco*, where the Court dismissed the writ of certiorari as having been improvidently granted, Arizona's attempt to intervene in litigation to defend the public charge rule after the federal government refused to do so raised a "host of important questions," including standing in addition to administrative law compliance, mootness, vacatur, the propriety of nationwide injunctions, and notice-and-comment requirements. 142 S. Ct. 1926, 1926–28 (2022) (Roberts, C.J., concurring). The boundaries of the arbitrary and capricious doctrine, the line between appropriate executive governance and executive intrusion on the legislative role, and the growing politicization of the judiciary are also implicated.

26. 549 U.S. 497 (2007).

case that "States are not normal litigants for the purposes of invoking federal jurisdiction," ushered in a new era of state standing.[27] For over a decade since *Massachusetts*, states have sued the federal government with varying levels of success in a wide array of subject matter contexts ranging from the environment,[28] health care,[29] gender equality,[30] President Trump's business practices,[31] and, time and again, over multiple policies involving immigration law or deeply affecting the rights and interests of noncitizens.[32] One might wonder whether any limits on state standing should or do exist.[33]

But the standing questions currently before the Supreme Court in *United States v. Texas*,[34] the enforcement priorities litigation, have taken on a specific and particular form, and their history is worth recalling. The arguments find their origins in—and evaded resolution during—another lawsuit involving the federal government and the State of Texas. That case ("*Texas (DAPA)*")[35] took place in the mid-2010s and involved Texas's lawsuit against the Obama Administration over Deferred Action for Parental Accountability (DAPA), an immigration program that would have extended work authorization and protection from deportation to the parents of U.S. citizens and lawful permanent residents.[36] Prior to *Texas (DAPA)*, however, state efforts to use *litigation*

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27. *See id.* at 518.

28. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2594 (2022) (challenge to EPA rules by a coalition of states and private plaintiffs).

29. California v. Texas, 141 S. Ct. 2104, 2112 (2021) (challenge to minimum essential health coverage provision of Affordable Care Act brought by Texas and seventeen other states).

30. Texas v. United States, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016) (challenge to various federal agency rules regarding access to facilities that match individuals' gender identities brought by Texas and other states, state agencies, and school districts), *appeal dismissed*, No. 16–11534, 2017 WL 7000562 (5th Cir. 2017).

31. *In re* Trump, 958 F.3d 274, 280 (4th Cir. 2020) (en banc) (challenge by coalition of plaintiffs including District of Columbia and State of Maryland against former President Trump), *vacated sub nom.*, Trump v. District of Columbia, 141 S. Ct. 1262 (2021).

32. *See supra* notes 9, 11, 15, 16 and 19.

33. *See* Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1745 (2017) (explaining that the Court's creation of "special solicitude" for states has remained confused among a flurry litigation such that it is unclear what it requires).

34. Brief for Petitioners at I, United States v. Texas, No. 22-58 (U.S. Sept. 12, 2022).

35. United States v. Texas, 579 U.S. 547 (2016) (per curiam).

36. JEH CHARLES JOHNSON, DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS

against federal immigration policy, especially raising arguments about the costs borne by the states resulting from lax federal enforcement, had failed on multiple occasions—including for standing reasons.[37] Nonetheless, in *Texas (DAPA)*, the Fifth Circuit and district court found that the State of Texas had standing to sue based on financial injuries it would incur as a result of DAPA recipients' driver license applications.[38]

In 2015, the Supreme Court granted certiorari on the standing issue as well as the substantive claims in *Texas (DAPA)*. On the standing question, Judge King's dissent in *Texas (DAPA)* warned that the Fifth Circuit's standing analysis constituted a "breathtaking expansion of state standing [that] would inject the courts into far more federal-state disputes and review of the political branches,"[39] suffered from having "no principled limit,"[40] and would unleash the proverbial floodgates to "limitless state intrusion into exclusively federal matters."[41] But the Court evaded a full decision in *Texas (DAPA)*. Despite having been fully briefed and argued, with dozens of amicus briefs on both sides and potential impact on up to four million people, the Court failed to produce an opinion in the case.[42] Instead, in May 2016, with the stalled nomination of then-Judge Merrick Garland, an eight-member Supreme Court affirmed the Fifth Circuit's decision with a 4-4 vote and a single sentence per curiam order.[43] The election of Donald Trump in November 2016 effectively diffused the litigation over the merits of DAPA, given the widely shared expectation that President Trump would withdraw the DAPA program. While states filed extensive

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CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS 2–3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [https://perma.cc/899F-C5WN].

37. *See infra* Section I.B.

38. Texas v. United States, 86 F. Supp. 3d 591, 616–19 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016) (per curiam); *Texas*, 809 F.3d at 155.

39. *Texas*, 809 F.3d at 194 (King, J., dissenting).

40. *Id.* at 195 (quoting majority opinion).

41. *Id.* at 196.

42. *See* AM. IMMIGR. COUNCIL, DEFENDING DAPA AND EXPANDED DACA BEFORE THE SUPREME COURT: A GUIDE TO *UNITED STATES V. TEXAS* 4, 6, 11 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/defending_dapa_and_expanded_daca_before_scotus.pdf [https://perma.cc/58E6-L6MW] (describing the wide range and significant number of parties interested in *Texas (DAPA)* outcome).

43. United States v. Texas, 579 U.S. 547, 547 (2016) (per curiam).

litigation against Trump Administration immigration policies, standing doctrine did not shift in significant ways to accommodate those lawsuits, which were often accompanied by actions brought by non-state plaintiffs who also satisfied standing requirements.[44]

Less than a decade after the Supreme Court's nonintervention in *Texas (DAPA)*, lower courts—especially in the Fifth Circuit—have steadily, and in multiple immigration cases, developed a standing doctrine that replicates and expands the standing framework set forth in *Texas (DAPA)*, with extraordinary impact in the immigration context. This developing doctrine—what this Article refers to as the "immigrant-as-injury" standing doctrine—locates a state's injury-in-fact for standing purposes in the financial costs caused by the existence of certain immigrants (sometimes, but not necessarily, undocumented individuals) within their state boundaries. The states have alleged costs associated with a range of state services, especially the anticipated provision of driver licenses, public school education for children, emergency medical costs, and incarceration and other extensions of the criminal legal system.[45] The immigrant-as-injury standing doctrine rejects consideration of the benefits that might result from the presence of noncitizens or costs of immigration enforcement.[46] Moreover, the analysis relies on preemption being extended to the federal government in the immigration context, as well as the few Equal Protection-based constitutional rights of immigrants, as a rationale for state standing by presenting a narrative in which standing is necessary to counteract the states' relative powerlessness on immigration policy.[47] In doing so, the doctrine broadens states' claims to possess quasi-sovereign interests due to the alleged harm caused by immigrants, thereby enabling states to bolster their standing claims through assertions of special solicitude and *parens patriae* ("parent of the people") standing.[48] The current threads of the immigrant-as-injury standing doctrine emerge from a common spool: an assertion that noncitizens who could be deported or detained, but are present in a state's jurisdiction, constitute costs—and thus injuries—to the states, and that the costs associated with their existence, however slight,

44. *See infra* text accompanying note 195.
45. *See infra* Section II.A.
46. *See infra* note 242 and accompanying text.
47. *See infra* Part II.
48. *See infra* Section II.B.

satisfies the demands of the standing requirement. In other words, immigrants are the injuries.

The legal scholarship has not yet fully explored the rapid rise of the immigrant-as-injury doctrine in the current era. Standing doctrine generally remains relatively absent in immigration law scholarship. In fact, noncitizens' inability to assert standing to directly challenge immigration laws is often a foregone conclusion because, as immigration scholar Adam Cox has explained, the plenary power doctrine already deprives noncitizens of the ability to seek judicial review in many situations.[49]

Given the degree to which standing doctrine has become increasingly fragmented under the Roberts Court, law professor Richard Fallon has called on scholars to focus on the application of standing doctrine in specific contexts and subject matter areas.[50] This Article responds to that call and thus focuses its attention on the evolution of state standing in the immigration context.

With respect to *state* standing, scholars have offered thoughtful, politically neutral, and trans-substantive frameworks, with the bulk of the literature focused on the structural relationships embedded in federalism and separation of powers debates.[51] However critical those

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49. See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 375 (2004) (casting the plenary power doctrine as a form of standing and arguing for greater standing for U.S. citizens to challenge federal immigration laws in the absence of noncitizens' ability to raise litigation challenges directly).

50. *See id.*; Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061–63 (2015).

51. *See, e.g.*, Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 851 (2016) (arguing for state standing in order to protect state law but not to challenge federal agency implementation of federal law); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 637–38 (2016) (arguing for state standing "when the federal statute at issue contemplates an implementation role for state governments"); Bradford C. Mank, *State Standing in* United States v. Texas*: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 211–12, 215 (2018) (evaluating objections to *Texas (DAPA)* standing arguments and concluding that federalism interests are best advanced by permitting state standing, subject to requirement of substantial injury to states); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 201 (2017) (arguing for state standing where the federal government has preempted the states and has underenforced federal law); Ann Woolhandler & Michael G. Collins, *Reining In State Standing*, 94 NOTRE DAME L. REV. 2015, 2015–16 (2019) (favoring restrictions on state standing and focusing on cause of action, rather than injury-in-fact). This Article focuses on the immigrant-as-injury doctrine as it has developed at a particular moment in U.S. law and politics. As

structural debates remain, they arguably place concerns about humanity, equity, and subordination on the periphery.[52] But standing implicates questions of access and power. Indeed, scholars have long criticized *general* standing doctrine—separate from the question of state standing—for facilitating politicization and racial inequality.[53] The current state standing doctrine would benefit from rigorous scrutiny based on similar values. Indeed, courts have invoked anti-subordination and equality principles, as well as concerns about politicization, when resolving disputes involving the allocation of governmental power in immigration cases in the past.[54]

This Article seeks to fill these gaps in the immigration law and standing literature, and proceeds as follows. Part I describes how the immigrant-as-injury argument came to gain traction in the federal courts. After contextualizing the rules governing state standing, it shows how attempts by states to frame noncitizens as costs failed in a number of litigation efforts launched by states prior to and during parts of the Obama Administration. It then explains how the state standing terrain began to shift with *Texas (DAPA*) and describes the evolution of state lawsuits during the Trump era. Part II traces how the lower courts and arguments advanced by the State of Texas in the Fifth

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such, I do not seek to provide a positive account of standing to be applied across the administrative state, although my concerns about the states' use of preemption doctrine, the costs that flow from the existence of people, and politicization certainly have resonance for other contexts.

52. An exception is Seth Davis, *State Standing for Equality*, 79 LA. L. REV. 147, 148–50 (2018), discussed *infra* at text accompanying notes 109–11.

53. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–44 (1999) (arguing that legal doctrines, such as standing, "are merely tools that judges use to further their political and ideological agendas"); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (arguing that "[s]tanding cases, taken as a whole, reveal inadequate patterns of decision-making" and characterizing the injury standard as "unstable and inconsistent"); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1423–25 (1995) (critiquing the Court's standing approach as "racially suspicious" and suggesting that "case outcomes tend to correlate with the plaintiffs' racial interests in a way that would violate both Title VII and the Equal Protection Clause if these provisions applied to Supreme Court decisions"); Raymond H. Brescia, *The Shifting Frontiers of Standing: How Litigation Over Border Wall Funding Is Exposing Standing's Current Doctrinal Fault Lines*, 68 UCLA L. REV. DISCOURSE 94, 123 (2020) ("Perhaps what we will learn from the decisions in the border wall funding litigation is what some have feared all along: that standing is in the eye of the beholder, and courts will hear those cases that enable them to pursue their own political objectives and reject those that might, if heard, place the actions of their political allies under judicial scrutiny.").

54. *See infra* discussion accompanying notes 140–44.

Circuit, in particular, have built upon the standing analysis in *Texas (DAPA)* to develop the immigrant-as-injury theory of standing.

Part III critiques the immigrant-as-injury standing doctrine on anti-subordination, federalism, and democratic accountability grounds. First, the doctrine imbues contested assumptions about migrant humanity with legal significance and forecloses any opportunity to challenge the conclusion that the existence of immigrants constitutes injuries. In doing so, the doctrine furthers the subordination of immigrants in the law and stunts discourse about migration in legal doctrine.[55] Second, the theory of state disempowerment relies on blunt and misstated assumptions about the nature of federal power in the immigration sphere.[56] Third, familiar but growing concerns about political polarization in the courts and society exacerbate concerns with the immigrant-as-injury standing doctrine.[57] These three observations work independently and in combination with each other to advance a standing theory that casts states as disempowered entities for whom access to the federal courts is necessary even if unconstrained, but that in reality has an acutely disempowering—and dehumanizing—impact on those who stand to lose the most by the lawsuits.

In the Conclusion, the Article suggests that the Supreme Court apply an anti-solicitude principle to the immigrant-as-injury doctrine. When states seek to premise standing on injuries originating in the existence of people through broad invocations to federal preemption under conditions of intense political polarization, they should meet higher—not lower—standards of injury, causation, and redressability to establish Article III standing. Along similar lines, the Court should limit the ability of states to assert special solicitude and *parens patriae* standing based on the notion that immigrant existence damages states' quasi-sovereign interests. The Article also concludes with the question of what the emergence of the immigrant-as-injury doctrine tells us about the state of immigration law today, irrespective of the Court's ultimate assessment of the standing doctrine.

I. THE LANDSCAPE: STATE STANDING AND IMMIGRATION

After setting forth basic principles that govern state standing, this Section explains how for years, states had not succeeded in their efforts

55. *See infra* Section III.A.
56. *See infra* Section III.B.
57. *See infra* Section III.C.

to exert influence over immigration policy through litigation over injuries caused by the presence of noncitizens. Prior to *Texas (DAPA)*, the few litigation challenges brought by states as plaintiffs encountered skepticism from the courts, which rejected those challenges based on the well-settled understanding that states and the judiciary are improper vehicles for setting federal policy as well as standing concerns. The Fifth Circuit's approach to standing in *Texas (DAPA)*, however, set the stage for the current immigrant-as-injury standing doctrine and has exerted comparatively more influence than the state standing doctrine that developed during the Trump era.

A. State Standing: Basic Principles

The requirement that a party have standing to sue grows out of the Article III requirement that federal courts limit their activity to the adjudication of "[c]ases" or "[c]ontroversies."[58] Standing generally requires that any plaintiff demonstrate "injury-in-fact," meaning an injury which is concrete, imminent, and particularized. In addition, plaintiffs must satisfy requirements related to causation (that the challenged action caused the injury) and redressability (that the relief requested of the federal court can alleviate the injury).[59]

The Court has explained that Article III standing is "built on a single basic idea—the idea of separation of powers."[60] Standing seeks to limit the types of parties capable of bringing suit, and the types of disputes heard by the judicial branch.[61] A common refrain is that plaintiffs may not bring "generalized grievances," which in turn should avoid the adjudication of "abstract questions of wide public significance."[62] Standing aspires to preserve the institutional legitimacy of the judiciary, so that courts do not become "a vehicle for the vindication of the value interests of concerned bystanders"[63] or "publicly funded

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58. U.S. CONST. art. III, § 2.

59. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–62 (1992). Courts have also imposed prudential standing considerations, meaning that a party must assert their own legal rights and interests (as opposed to those of other parties) and statutory standing requirement, meaning that they fall within the "zone of interests" contemplated by a statute. *See id.*

60. Allen v. Wright, 468 U.S. 737, 752 (1984).

61. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (Article III standing "serves to prevent the judicial process from being used to usurp the powers of the political branches").

62. Warth v. Seldin, 422 U.S. 490, 499–500 (1975).

63. United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669, 687 (1973) (discussing Sierra Club v. Morton, 405 U.S. 727 (1972)).

forums for the ventilation of public grievances."[64] Standing doctrine's skepticism towards ideological injuries has a flip side: the treatment of financial injuries as the "paradigmatic" injury-in-fact.[65] The courts have suggested that even a "small amount of money,"[66] a "dollar of economic harm,"[67] or "a few pennies each"[68] amounts to a sufficiently concrete injury for private plaintiffs to allege standing. While the broad strokes of standing rules appear simple enough, scholars critique standing jurisprudence as inconsistent, incoherent, unpredictable, and subject to ideological influence abound.[69]

When it comes to states establishing standing to sue, similar—but not identical—standards apply.[70] Courts recognize that states, like private plaintiffs, should sue to redress concrete and particularized injuries and thus tend to readily recognize financial injuries.[71] States can allege financial injuries in a number of ways, for instance, by alleging a loss in revenue for the state's regulatory programs and services, general harm to the state's economy, or a loss to the state resulting from the provision of services.[72]

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64. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

65. Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005).

66. Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464 (2017).

67. Carpenters Indus. Council v. Zinke, 854 F.3d 1, 5 (D.C. Cir. 2017); Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801–02 (2021) (finding standing based on damages alleged to be $1).

68. Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1029 (8th Cir. 2014).

69. *See, e.g.*, Pierce, *supra* note 53, at 1744 (analyzing standing decisions from 1990s and asserting that the "pattern of decisionmaking demonstrates the high degree of doctrinal malleability and result-oriented doctrinal manipulation that characterizes modern standing law"); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 395 (1995) (describing the Supreme Court's injury-in-fact jurisprudence as incoherent); Fallon, *supra* note 50, at 1063 (describing "the mixture of complexity and lack of articulate explanation that characterizes much of current standing doctrine" as "regrettable from all perspectives"); William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 286–87 (2013) (suggesting that recent standing cases in the environmental context "respond to the Court's perception of political reality"); Spann, *supra* note 53, at 1495–96 (describing the Supreme Court's view of standing as "stingy" and arguing that this interpretation violates the Equal Protection Clause); Nichol, *supra* note 53, at 326 (arguing that a judge will grant standing more often when plaintiffs have suffered an injury with which the judge is familiar).

70. For a more detailed account of the history of state standing, see generally Woolhandler & Collins, *supra* note 69.

71. Wyoming v. Oklahoma, 502 U.S. 437, 447–48 (1992).

72. Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1247–50 (2019) (describing types of financial injuries generally alleged by states).

Unlike other entities, states may also assert injuries to their sovereign or quasi-sovereign interests, which if proven may obviate the need to make a separate injury-in-fact showing under traditional standards.[73] Establishing a claim of sovereign or quasi-sovereign interests gives rise to the state's ability to establish standing as *parens patriae*.[74] However, identifying sovereign and quasi-sovereign interests for standing purposes can be elusive.[75] Sovereign interests exist, for instance, when a lawsuit implicates a "state's interest in governing."[76] The prosecution of criminal cases under state law presents an easy example of a state exercising its sovereign interests.[77] Boundary disputes between states provide another easier example of sovereign interest standing.[78] Courts have found that states possess sovereignty interests when Congress legislates in an area exclusively reserved to the states.[79] The Supreme Court stated in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,[80] a leading case on *parens patriae* standing, that quasi-sovereign interests, while a "matter for case-by-development," might refer to the health and well-being of residents, the interest of states in avoiding discrimination in the federal system, and protecting the residents from ethnic and racial discrimination and its effects.[81]

State standing based on the protection of quasi-sovereign interests arguably becomes more complicated, however, when a state sues the federal government.[82] In *Massachusetts v. Mellon*,[83] the Supreme Court

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73. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600–602 (1982); *see also* F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAPMAN L. REV. 83, 90–91 (2018) (explaining standing of state to protect sovereign and quasi-sovereign interests); Woolhandler & Collins, *supra* note 69, at 392 (finding no standing problem when a state "prosecutes criminal and civil actions under its own laws in its own courts" as an example of the state exercising sovereign interests).

74. Hessick & Marshall, *supra* note 73, at 90–91; *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 600.

75. Hessick & Marshall, *supra* note 73, at 90 (describing quasi-sovereign interests as "less well defined"); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11.1 (3d ed. 2022) (describing quasi-sovereign interests as "admittedly vague").

76. Roesler, *supra* note 51, at 680.

77. Hessick & Marshall, *supra* note 73, at 90.

78. *See, e,g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 726–27 (1838).

79. Woolhandler & Collins, *supra* note 69, at 410–11.

80. 458 U.S. 592 (1982).

81. *Id.* at 607.

82. Historically, the Supreme Court has been reluctant to recognize sovereignty interests of states against the federal government. Woolhandler & Collins, *supra* note 69, at 410.

83. 262 U.S. 447 (1923).

suggested that a state lacks *parens patriae* standing to challenge the actions of the federal government based on the state's quasi-sovereign interests.[84] The logic of the so-called "*Mellon* bar" reflects the assumption that the federal government already protects the interests of all citizens, including state citizens.[85] At first blush, the *Mellon* bar would seem to preclude states from establishing standing to sue the federal government—and for many years, it did.[86] However, some courts have limited the *Mellon* bar in recent years,[87] for instance by framing the state's *parens patriae* standing as a vindication of the state's interest in compelling the federal government *to enforce* federal law, as opposed to protecting its citizens *from* the operation of federal law.[88]

Whatever the alleged injury, the argument that the states *qua* states merit special solicitude in the standing analysis has gained further traction since the Supreme Court's 2007 decision in *Massachusetts v. EPA*.[89] In finding that Massachusetts had standing to challenge the EPA's denial of a rulemaking petition, the 5-4 majority highlighted "the special position and interest of Massachusetts" and emphasized the "considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual."[90] The majority suggested that to warrant such solicitude, a state must establish (1) a procedural right granted by statute and (2) a quasi-sovereign interest.[91] With respect to the procedural right, the Court pointed to a specific provision of the Clean Air Act that authorized challenges to EPA action with respect to air quality, emissions, and related standards—including agency action unlawfully withheld.[92] The Court noted the "critical

84. *Id.* at 485–86.

85. *Id.*

86. Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1304 (2019) (describing *Mellon* as having "curtailed the reach of *parens patriae* standing" and discussing the impact of *Massachusetts v. EPA*).

87. At least one court has suggested that "[t]here is . . . no *Mellon* bar against the plaintiff states' suit in their sovereign and quasi-sovereign capacities." Kentucky v. Biden, 23 F.4th 585, 598 (6th Cir. 2022).

88. *See* Aziz Z. Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2141 (2019) (describing doctrinal divide over *Mellon* and describing "*parens patriae* as an area of abiding doctrinal uncertainty"); Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1747 (2017) (distinguishing between state suing to protect rights of citizens, barred by *Mellon*, and suing to protect rights as a state *qua* state, permitted under *Massachusetts v. EPA*).

89. 549 U.S. 497 (2007).

90. *Id.* at 518.

91. *Id.* at 520.

92. *Id.* at 517.

importance to the standing inquiry"[93] of Congress providing a procedural right, explaining that the availability of the procedural right would relax the requirements typically associated with redressability and immediacy.[94]

Regarding quasi-sovereign interests, the majority pointed out that Massachusetts "does in fact own a great deal of the 'territory alleged to be affected,'" citing a 1907 case in which Georgia's interest "in all the earth and air within its domain" supported federal jurisdiction.[95] The Court also drew attention to federalism in its discussion of state sovereignty, explaining that the states "surrender certain sovereign prerogatives" to the federal government within the authority of the EPA.[96] In other words, the Court relaxed the standing requirements for Massachusetts to bring suit against the federal government because Massachusetts relied on the EPA to "protect Massachusetts (among others)" through its regulation of the environment.[97]

Massachusetts v. EPA has prompted considerable debate over its meaning and merits. As scholars have noted, the precise basis for the Court's holding that Massachusetts had standing remains unclear.[98] Chief Justice Roberts' dissent—joined by Justices Scalia, Thomas, and Alito—criticized the petitioners for seeking to rush climate change reforms through the judiciary, and suggested that the majority's standing analysis transgressed separation of powers norms animating standing doctrine.[99] The dissenting justices questioned the validity of special solicitude standing, asserting that it "has no basis in our jurisprudence"[100] and opining that *parens patriae* standing based on

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93. *Id.* at 516.

94. *Id.* at 517–18.

95. *Id.* at 518–19 (citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

96. *Id.* at 519.

97. *Id.* The Court emphasized that "Massachusetts cannot invade Rhode Island to force reductions in [its] greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted." *Id.*

98. *See* Davis, *supra* note 72, at 1240 (discussing the lack of clarity around relationship between financial injury and special solicitude, and noting that "[i]t is not clear, however, that Massachusetts needed special solicitude to sue on that basis" of financial injuries).

99. *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting) ("This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts." (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992))).

100. *Id.* at 536.

quasi-sovereign interests should "make[] the required showing here harder, not easier."[101] And in critiquing prior relaxations of standing by the Court, the dissenters warned that standing is "utterly manipulable . . . if not taken seriously as a matter of judicial self-restraint."[102]

Since *Massachusetts v. EPA*'s declaration of special solicitude for the states, state lawsuits against the federal government have exploded. A robust scholarly literature on state litigation against the federal government has emerged in light of these lawsuits. Some explain the role of states as a welcome check on ever-broadening executive power. Under this account, states help represent the interests of Congress to ensure that the Executive does not overstep into the domain of the legislative branch.[103] Additionally, scholars have highlighted how the federal courts and litigation provide a critical forum in which states can present their interests vis-à-vis the federal executive, particularly when the traditional means by which the states are represented in the federal government—through the Senate—fails to produce results.[104] Along similar lines, some have suggested that states should receive greater solicitude when challenging federal assertions of preemption, arguably consistent with *Massachusetts v. EPA*'s language regarding the surrender of state sovereignty to the federal government.[105] Others have supported broad recognition of sovereign and quasi-sovereign interests, thereby enabling states to potentially establish standing even where traditional Article III standing analysis would fall short.[106]

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101. *Id.* at 538.

102. *Id.* at 548 (discussing United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669 (1973)).

103. *See, e.g.*, Bulman-Pozen, *supra* note 88 (emphasizing states' framing of roles as defenders of Congress in disputes against the federal executive); Jonathan David Shaub, *Delegation Enforcement by State Attorneys General*, 52 U. RICH. L. REV. 653 (2018) (arguing in favor of state standing as a check on federal executive); Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937 (2022) (framing standing and other expansions of judicial power as a necessary check on expanding executive power).

104. *See* Nash, *supra* note 51, at 235 (noting that "while the states enjoy some effective representation in the selection of the President, that representation pales in comparison to the state's effective representation in and influence over Congress").

105. *See id.* (proposing special solicitude for states where claims of underenforcement and preemption exist); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073 (2010) (same).

106. *See, e.g.*, Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1437–40 (2013) (suggesting that institutional plaintiffs, such as states, are just as well-

While focusing on the separation of powers implications of the lawsuits, scholars have not ignored the politics and partisanship often at stake. Professor Jessica Bulman-Pozen aptly describes the dynamics of "partisan federalism" resulting from the ways in which dissonance between the party of the White House and the party of the state litigants has become a critical dimension of the rise in such litigation and in federalism more broadly.[107] Similarly, the institutional nature of the State Attorneys General Offices typically bringing the lawsuits matters, both in the sense of their politicization (due to the political aspirations of those holding such positions) and the constraints on their activity (through arguable accountability to state electorates).[108]

Amidst the plentiful scholarship on state standing, the literature tends to focus on questions of constitutional structure and the design of standing guidelines that are trans-substantive and politically resilient. While immigration cases comprise a meaningful portion of the cases raising novel questions of standing, scholars have not interrogated the relationship between evolving trends in standing against the substantive field of immigration law itself. Largely silent is the impact of state standing on values such as equality, humanity, and anti-subordination, despite a national history in which the call of "states' rights" has often facilitated hostility to civil rights and

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suited as individual plaintiffs to bring cases on behalf of its citizens regarding constitutional grievances); Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) (detailing how courts should relax standing requirements for states because they have a quasi-sovereign interest in their citizens' health, welfare, and natural resources); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 252 (2009) (concluding that under *Massachusetts v. EPA* states may bring claims on behalf of their citizens if the issue is rooted entirely in federal law).

107. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014).

108. *See, e.g.*, Grove, *supra* note 51, at 897 (asserting that state attorneys general have "strong political incentives to respond to the preferences of state constituents"); Davis, *supra* note 72, at 1257–59 (detailing how state attorneys general can be incentivized to bring suit on behalf of constituents when federal funding is threatened and use lawsuits for political sway); Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2144–45 (2015) (noting that state attorneys general can pursue their own agenda while fulfilling their duties by filing high profile cases that promote their legal policy preferences); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 729–30 (2011) (noting that attorneys general have incentive to show voters their legal progress and wins by taking certain issues over others); Hessick & Marshall, *supra* note 73, at 105 (identifying factors that make states well-situated to exercise political accountability when suing federal government).

equality.[109] Professor Seth Davis is a notable exception, who has suggested that state standing can advance equality interests and anti-subordination norms.[110] But if some standing arguments can reflect principles of equality,[111] then opposite results can emerge. Some versions of standing doctrine can perpetuate inequality, necessitate the denial of humanity to some people, and further the subordination of powerless groups.[112] The immigrant-as-injury standing doctrine serves as an example.

B. State Standing in Immigration Cases: Before DAPA

States are not passive actors when it comes to immigration.[113] Immigration scholars have thoroughly debated the constitutionality and desirability of immigration federalism, particularly during a rise in state and local regulation in the 2000s.[114] In 2012, the Supreme Court

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109. *See* Davis, *supra* note 52, at 148 ("In a typical telling, state sovereignty is a barrier to achieving equal protection.").

110. *See id.* at 157 (emphasizing that in *Snapp*, Puerto Rico had sued Virginia apple growers for discriminating against Puerto Rican workers and argued that the state had a quasi-sovereign interest in protecting "residents from the harmful effects of discrimination" (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 609 (1982))).

111. *See id.* at 149 n. 11 (explaining that "[c]ourts in [the Third Circuit] have long recognized that [a state] may bring a parens patriae action in the United States district courts to enforce the fourteenth amendment" (quoting Pennsylvania v. Porter, 659 F.2d 306, 317 (3d Cir. 1981))); Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 97 (D. Mass. 1998) ("It seems indisputable that a state has a quasi-sovereign interest in preventing racial discrimination of its citizens.").

112. Scholars have called for the incorporation of antisubordination principles and critical theory into separation of powers, federalism, and administrative law scholarship. *See, e.g.*, Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 88 (2021) ("call[ing] for the incorporation of antisubordination into separation-of-powers analysis" in light of disproportionate harm typically imposed on marginalized groups in the application of separation of powers principles); Bijal Shah, *Toward a Critical Theory of Administrative Law*, 45 YALE J. ON REG. 10 (2020) (asserting that administrative law scholarship often fails to acknowledge or thoroughly consider critical theory the perspectives of marginalized groups).

113. *See* Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1342 (2013) (explaining state policymaking in immigration through the framework of "venue-shifting," in which states exert influence and "shape policy outcomes in ways that may require them to step outside their legal authority as lawmakers or even their institutional competence as regulators").

114. *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 791–92 (2008) (challenging view that federal government enjoys preemption over entire field of immigration law, and advocating for a view of "shared

in *Arizona v. United States*[115] held that federal law preempted most sections of an Arizona law that sought to empower state and local law enforcement to enforce immigration restrictions.[116] Many have correctly read *Arizona* as a strong affirmation of the role of the federal government as the central source of immigration power.[117] But the case by no means put an end to states' ability to exert influence over immigration and the lives of immigrants. States continue to pass legislation with close proximity to immigration,[118] enter into voluntary partnerships with federal immigration enforcement authorities,[119] operate criminal legal systems that possess strong entanglements with federal immigration law,[120] and shape on-the-ground enforcement—and policing—practices at the local, state, and regional levels.[121]

Despite robust levels of state activity around immigration, for most of modern history, state efforts to use *litigation* to direct the federal government over immigration have been relatively rare. When

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authority" between the federal and state legislation and regulation); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1581–1600 (2008) (analyzing the evolution of state and federal immigration law through changing legislation as states gained more control over immigration laws).

115. 567 U.S. 387 (2012).

116. *Id.* at 416.

117. *See id.* at 394.

118. *See, e.g.*, Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 132–41 (2019) (describing the Immigrant Climate Index developed by authors, tracing subfederal immigration regulation from 2005 on and reflecting the range of policy positions); Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 848–50 (2019) (describing rise of state laws aimed at requiring participation of local officials in federal immigration enforcement).

119. *See, e.g.*, Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L. REV. 463, 468–77 (2022) (describing the history of 287(g) agreements that deputize state or local law enforcement agencies with authority typically reserved for federal immigration enforcement).

120. *See, e.g.*, Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1711–21 (2021) (discussing practice of federal authorities screening jailhouses for immigration enforcement purposes through Secure Communities); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1459 (2011) (discussing role of immigration status "at almost every stage of the criminal process"); Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267, 267–68 (2019) (describing categorical analysis to determining immigration consequences of largely state criminal convictions).

121. *See* Pham & Van, *supra* note 119, at 482–88 (describing impact of 287(g) agreements on policing practices in North Carolina and South Carolina); Jain, *supra* note 120, at 1703 (critiquing jailhouse screening from racial equity perspective).

deployed, those litigation efforts have often not succeeded.[122] In the mid-1990s, a coalition of states with high immigrant populations filed lawsuits against the federal government in district courts around the country. The complaints raised a host of constitutional and statutory claims that generally coalesced around a common theory: the states suffered financial injury due to an "invasion" of noncitizens caused by the federal government's abdication of its responsibility to enforce the immigration laws.[123] The states raised unprecedented and novel claims, based for instance on the Constitution's Invasion Clause, Guarantee Clause, and Naturalization Clause.[124] The lawsuits emphasized the educational, medical, and incarceration costs imposed on the states as a result of unauthorized migration, citing the size of their undocumented populations and money spent on services provided.[125]

On the merits, the lawsuits failed at every stage.[126] The courts invoked the longstanding prohibition on judicial review of federal action in areas implicating foreign affairs as well as sovereign immunity principles.[127] Many of the courts' responses suggested deep skepticism about the appropriateness of the lawsuits from a justiciability perspective. The Fifth Circuit concluded, for instance, that Texas "raise[d] questions of policy rather than colorable claims of constitutional or statutory violations."[128] To the extent the courts

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122. To be sure, some states have long raised the argument—in political debate and in popular discourse—that immigrants impose a fiscal burden on the states. But that argument did not either constitute or facilitate the states' ability to raise a legally cognizable claim in federal court.

123. *See, e.g.*, California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997).

124. *Id.* at 1090–91; *see* U.S. CONST. art. 4, § 4 (Invasion and Guarantee Clauses); U.S. CONST. art. 1, § 8, cl. 4 (Naturalization Clause).

125. For instance, California alone sought a $10.4 billion reimbursement from the federal government. William Branigin, *Court Dismisses States' Claims for Costs of Illegal Immigration 'Invasion'*, WASH. POST. (Jan. 9, 1997), https://www.washingtonpost.com/archive/politics/1997/01/09/court-dismisses-states-claims-for-costs-of-illegal-immigration-invasion/c4ed42ae-ad7e-4c66-a1da-368abe442d1e [https://perma.cc/2UJ7-MDLL].

126. Every district court ruled against the states at the motion to dismiss stage, the appeals courts affirmed each of the dismissals, and the Supreme Court denied all the petitions for certiorari. Texas v. United States, 106 F.3d 661, 662 (5th Cir. 1997); *California*, 104 F.3d at 1089; Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997); New Jersey v. United States, 91 F.3d 463, 463 (3d Cir. 1996); Padavan v. United States, 82 F.3d 23, 23–24 (2d Cir. 1996) (New York officials); Chiles v. United States, 69 F.3d 1094, 1094–95 (11th Cir. 1995) (Florida officials), *cert. denied*, 517 U.S. 1188 (1996).

127. *See, e.g.*, *California*, 104 F.3d at 1091.

128. *Texas*, 106 F.3d at 664.

engaged with standing doctrine, their analysis was cursory.[129] The courts' consistent rejection of the states' claims appeared to make meaningful engagement with standing doctrine unnecessary, though. Indeed, the mid-1990s litigation suggested that federal government action (or inaction) in immigration based on financial costs to the states could not give rise to judicial intervention, even if they did not squarely analyze the standing issues.[130]

After the dismissal of the states' lawsuits in the mid-1990s, states did not attempt to use litigation against the federal government with great frequency. Instead, they enacted legislation and regulations that sought to impose burdens on undocumented immigrants or engaged in cooperative enforcement ventures with the federal government. When states did rely on litigation as a strategy to influence federal immigration policy, standing concerns precluded those efforts. For instance, in 2006, the State of Colorado filed a lawsuit alleging failures by the Bush Administration to adequately secure the borders and prevent unauthorized migration.[131] The district court found that the state failed to meet both Article III and prudential standing requirements.[132] On injury-in-fact, the state's injury of "protection against invasion by . . . international terrorists" failed to meet the requirements of imminence, particularity, or causation.[133] Furthermore, the court declined to apply special solicitude under

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129. Chiles v. United States, 874 F. Supp. 1334, 1344 n.21 (S.D. Fla. 1994) ("As the Court has determined that this action is barred by the political question doctrine, the Court need not address Defendants' additional arguments."), *aff'd*, 69 F.3d 1094 (11th Cir. 1995). In the litigation brought by Florida in which the district court acknowledged but did not assess standing, the Eleventh Circuit found that Florida did have standing in a brief paragraph that noted the redressability requirement and found that the court would "suppose" standing to be satisfied because a court order "would offer some relief to Florida." *Chiles*, 69 F.3d at 1096. Two other appeals courts assumed, without deciding, standing. *Texas*, 106 F.3d at 664 n.2; *Padavan*, 82 F.3d at 25. Other courts' focus on the doctrinal basis for denying the lawsuits on the merits appeared to do away with the need to address standing. *See Texas*, 106 F.3d at 665; *California*, 104 F.3d at 1090; *Arizona*, 104 F.3d at 1096; *New Jersey*, 91 F.3d at 467.

130. Of course, the states might have claimed a broader political victory, given that in 1996, Congress passed sweeping overhauls to the immigration enforcement system. Still, that change came through legislative intervention. *See* ADAM COX & CRISTINA RODRIGUEZ, THE PRESIDENT AND IMMIGRATION LAW 156 (2020) (describing state efforts to litigate against the federal government on immigration policy).

131. Colorado *ex rel.* Suthers v. Gonzales, 558 F. Supp. 2d 1158, 1160 (D. Colo. 2007).

132. *Id.* at 1164–65.

133. *Id.* at 1162.

Massachusetts v. EPA (issued while the case was pending), finding that no procedural right provided by statute comparable to the Clean Air Act in *Massachusetts* existed, and applying the *Mellon* bar as part of the prudential standing analysis.[134]

Various states again returned to the use of litigation against the federal government during President Obama's second term. But with the exception of the DAPA litigation—discussed in more detail in the following Section—the states' efforts stalled at relatively early stages. In the aftermath of a coordinated series of terrorist attacks in Paris in late 2015, over thirty states announced that they would refuse to allow Syrian refugees to resettle in their states.[135] Two lawsuits followed, in Texas and Indiana. In both cases, the states argued that Syrian refugees posed a threat to residents of their states because those refugees might potentially be terrorists.[136] In Texas, where the state initiated a lawsuit against the federal government and a nonprofit refugee resettlement agency to prohibit the resettlement of six Syrian refugees,[137] the district court denied all requests for injunctive relief and ruled against Texas at the motion to dismiss stage.[138] Texas appeared to premise standing on its sovereign interests and "duty to protect the safety of its residents," as opposed to fiscal impact.[139] As with the coordinated state lawsuits from the 1990s, the court treated the merits of the lawsuit as so unsubstantiated that it became unnecessary to address the standing issues. The court suggested that the litigation cut fundamentally against the structural allocation of power in the immigration system and rang of partisanship.[140] "In our country, . . . it is the federal executive that is charged with assessing and mitigating [the] risk

134. *Id.* at 1165.

135. *See* Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. U. L. REV. 353 (2016) (describing efforts by states to prevent resettlement of Syrian refugees); COX & RODRIGUEZ, *supra* note 130, at 155–56 (describing the legal claims reflected in state proclamations regarding refusal to resettle Syrian refugees as "border[ing] on the preposterous," but nonetheless serving as "highly public symbols of dissent").

136. Tex. Health & Hum. Servs. Comm'n v. United States, 166 F. Supp. 3d 706, 711 (N.D. Tex. 2016); Exodus Refugee Immigr., Inc. v. Pence, 838 F.3d 902, 903 (7th Cir. 2016).

137. *Tex. Health & Hum. Servs. Comm'n*, 166 F. Supp. 3d at 706–07.

138. *Id.* at 714 (denying preliminary injunction); Tex. Health & Hum. Servs. Comm'n v. United States, 193 F. Supp. 3d 733, 745 (N.D. Tex. 2016) (granting motion to dismiss).

139. Complaint at 4, Tex. Health & Hum. Servs. Comm'n v. United States, No. 3:15-cv-3851 (Dec. 2, 2015).

140. *Tex. Health & Hum. Servs. Comm'n*, 166 F. Supp. 3d at 710.

[posed by refugees], not the states and not the courts," wrote the district court, which also found it "ironic[]" that "Texas, . . . the reddest of red states, asks a federal court to stick its judicial nose into this political morass" of foreign policy, national security, federalism, and separation of powers.[141]

A related suit involved the State of Indiana, in which a refugee resettlement nonprofit obtained a preliminary injunction against then-Governor Mike Pence for refusing to reimburse the nonprofit for the cost of providing social services to Syrian refugees.[142] Although the state's status as the defendant made a discussion of state standing irrelevant, the U.S. Court of Appeals for the Seventh Circuit cast serious doubt on the legitimacy of the state's asserted interests in the suit altogether. In particular, the appeals court highlighted the equal protection concerns implicated by the state's position that Syrian nationals posed a potential threat to the state.[143] In doing so, the court invoked anti-subordination and equality norms. The court observed that the then-governor's logic was "the equivalent of his saying (not that he does say) that he wants to forbid [B]lack people to settle in Indiana not because they're [B]lack but because he's afraid of them, and since race is therefore not his motive he isn't discriminating."[144]

For many years, the judiciary has expressed deep skepticism towards litigation in which states sought to direct federal immigration policy. To the extent that states have raised the argument that the burdens associated with undocumented migration harm the states, courts strongly rejected those claims. Courts relied on the notion that the states and judiciary were the improper institutional venues in which to challenge the executive's discretion over immigration and also identified equality and antisubordination values at stake. That skepticism shifted, however, in the mid-2010s with the litigation over DAPA.

C. The Rise of Standing: The Litigation Over DACA and DAPA

Standing issues came to the forefront in litigation challenges to the use of categorical grants of deferred action to shield significant swaths of the undocumented population from deportation, a signature part of the Obama Administration's immigration policy. Under President

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141. *Id.* at 710, 714.
142. Exodus Refugee Immigr., Inc. v. Pence, 838 F.3d 902, 902 (7th Cir. 2016).
143. *Id.* at 904.
144. *Id.* at 904–05.

Obama, the federal government announced two main programs: the 2012 DACA program for young people brought to the United States as children, and the 2014 DAPA initiative for parents of U.S. citizens and lawful permanent residents, as well as an expanded version of DACA.[145] As this Section will show, standing questions raised by the lawsuits challenging DACA and DAPA remain influential but unresolved today.

1. Standing as an obstacle in challenges to DACA and DAPA: Crane v. Napolitano *and* Arpaio v. Obama

Standing problems initially led to the dismissal of lawsuits challenging the legality of programmatic deferred action. Shortly after the first DACA announcement in 2012, the State of Mississippi and Immigration & Customs Enforement (ICE) agents filed *Crane v. Napolitano*.[146] Deploying an early version of the immigrant-as-injury standing theory, Mississippi pointed to its financial injuries and asserted that the DACA guidance would increase the number of otherwise removable individuals expected to remain in the state. Their eligibility for certain services would impose education, health care, and law enforcement costs and cause the state to lose tax revenue.[147] The district court concluded that the state's alleged injury-in-fact was "purely speculative," due to insufficient evidence provided in support of its claims of fiscal injury.[148] After all, the main report upon which Mississippi relied, a state audit report released six years prior to the challenged governmental action, included disclaimers about the lack of comprehensive data and difficulty of "accurately quantify[ing] the costs of illegal immigrants."[149] After oral argument on appeal, Mississippi attempted to submit evidence regarding the cost of processing driver licenses, but the court found the driver license argument waived due to Mississippi's failure to raise it earlier in the proceedings.[150] The state did not argue that it was entitled to special solicitude in the standing analysis. The Fifth Circuit also found that the

145. *See* JOHNSON, *supra* note 36, at 3.

146. 920 F. Supp. 2d 724 (N.D. Tex. 2013), *aff'd sub nom.*, Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015).

147. *Id.* at 731.

148. *Id.* at 743–44.

149. *Id.* at 744 (citation omitted). Mississippi had also submitted statistical data regarding the number of DACA applications granted and affidavits from ICE agent plaintiffs attesting to a lack of observed increases in removals in specific offices, both of which the court found insufficient to cure the evidentiary deficiencies. *Id.* at 745.

150. *Johnson*, 783 F.3d at 252–53 n.34.

ICE agent plaintiffs had failed to establish injury-in-fact, such that standing requirements prevented the lawsuit from progressing on the merits.[151]

Hours after the 2014 DAPA policy was announced, Maricopa County, Arizona Sheriff Joe Arpaio—already well-known for allegations of widespread racial profiling and harsh enforcement practices against immigrants[152]—filed a lawsuit challenging both the 2012 and 2014 programs.[153] While not a challenge brought by the State of Arizona, the standing analysis raised in *Arpaio v. Obama* helps explain the evolution of state standing arguments in subsequent immigration cases. Similar to Mississippi, Arpaio's standing argument alleged anticipated financial injuries, although he also premised standing upon the supposed criminality of immigrants.[154] Arpaio argued that granting deferred action would increase the number of undocumented people in Maricopa County, resulting in increases in crime, and thereby requiring greater financial expenditures on policing and jails.[155] The district court found that Arpaio failed on each of the three Article III standing requirements of injury-in-fact, causation, and redressability.[156] Furthermore, because Arpaio brought the suit in his personal capacity and as a County Sheriff—but not a state—he could not benefit from special solicitude arguments. Both the district and appeals court found deep deficiencies in his standing argument.[157] As the appeals court put it, Arpaio's claims regarding increased crime were "unduly speculative," "rest[ed] on chains of supposition[,] and contradict[ed] acknowledged realities."[158]

Concerns about upsetting the existing balance of power, which favored the federal government (over the states) and executive power (over the judiciary), also appeared to influence the district and appeals courts' standing analysis in *Arpaio*. Both expressed skepticism about the federal judiciary's capacity to serve as the appropriate venue in

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151. *Id.* at 254.

152. *E.g.*, Melendres v. Arpaio, 989 F. Supp. 2d 822, 905 (D. Ariz. 2013) (finding that Sheriff Arpaio and his officers racially profiled Latino occupants of motor vehicles), *aff'd*, 784 F.3d 1254 (9th Cir. 2015).

153. Arpaio v. Obama, 27 F. Supp. 3d 185 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015).

154. *Id.* at 201.

155. *Id.*

156. *Id.* at 199–200.

157. *Id.* at 202; *Arpaio*, 797 F.3d at 19.

158. *Arpaio*, 797 F.3d at 14–15.

which to hear national debates over immigration policy, particularly given the federal government's dominant role in immigration and the executive branch's discretion to implement immigration laws.[159] Furthermore, the *Arpaio* courts expressed concern with the consequences of allowing standing in future suits. As the district court put it, finding that Arpaio could satisfy standing requirements here "would permit nearly all state officials to challenge a host of Federal laws simply because they disagree with how many—or how few—Federal resources are brought to bear on local interests."[160]

However, a lengthy concurrence by Circuit Judge Janice Rogers Brown in *Arpaio* expressed broad concerns about a "myopic and constrained notion of standing" in much of the modern doctrine.[161] In a detailed discussion of *Massachusetts v. EPA*, Judge Brown suggested that had a state (say, Arizona) brought the lawsuit, Arpaio's standing arguments may not have faltered.[162] She further warned that overly restrictive standing analysis would insulate executive action from valid claims of unconstitutional executive overreaching, citing to several prominent scholarly critiques of the legality of DACA.[163] Judge Brown's opinion thus invited future courts to reconsider previously held assumptions with respect to state litigants.

By the time of the D.C. Circuit Court of Appeal's decision in *Arpaio*, the Fifth Circuit had already endorsed a significantly more permissive vision of standing advanced by a coalition of states, led by the State of Texas, in their challenge to DAPA and the expanded DACA. *Crane* found that Mississippi's standing argument lacked the requisite evidence to support its claims of financial injury and treated the state's special solicitude arguments as waived in the litigation.[164] *Arpaio* found Sheriff Arpaio's standing arguments unduly speculative and likewise

159. *Arpaio*, 27 F. Supp. 3d at 192–93; *Arpaio*, 797 F.3d at 16.

160. *Arpaio*, 27 F. Supp. 3d at 202.

161. *Arpaio*, 797 F.3d at 25 (Brown, J., concurring).

162. *Id.* at 26–27.

163. *Id.* at 30–31 (expressing concern that denying standing "undermines democratic accountability" where questions about executive overreach exist because "concerns about the efficacy of separation of powers principles can be dismissed as 'generalized grievances' no one has standing to challenge," and citing Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014) and Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 850–56 (2013)).

164. *See supra* discussion accompanying notes 146–151.

did not extend special solicitude to Arpaio.[165] *Texas (DAPA)*, however, marked the beginning of a major shift in the judiciary's response to state standing when challenging federal executive immigration policy.

2. State standing unleashed: Texas v. United States

State standing was at the front and center of *Texas (DAPA)*, which resulted in a federal court injunction against the implementation of DAPA and expanded DACA.[166] Just days after Arpaio filed his lawsuit, a broad coalition of states and state representatives challenged DAPA and expanded DACA. The states' primary standing argument—upheld by the Fifth Circuit—hinged on its claims of financial injury.[167] For example, Texas emphasized that beneficiaries of DAPA would become eligible for Texas driver licenses, thereby imposing a financial cost on states due to the cost of processing each driver license.[168] Indeed, the U.S. Court of Appeals for the Ninth Circuit had separately held that federal law preempted an Arizona state law seeking to deny driver licenses to deferred action beneficiaries, depriving Texas of the option to deny licenses to future DAPA recipients altogether.[169] Given the insufficiency of evidence presented by Mississippi in the *Crane* litigation, Texas was equipped with statistics: Texas state law chose to set the driver license application fee at $24,[170] but the net cost to the state of processing driver licenses was $174.73 per license (assuming

165. *See supra* discussion accompanying notes 153–158.

166. The injunction was based on the agency's failure to use notice-and-comment procedures. Texas v. United States, 809 F. 3d 134, 149 (5th Cir. 2015), *aff'd by an equally divided court,* 579 U.S. 547 (2016) (per curiam). For a critique of the merits, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration,* 63 UCLA L. REV. DISCOURSE 58 (2015).

167. In addition, Texas claimed it separately had standing based on a *parens patriae* theory to protect the economic interests of state residents who would be harmed by employers who might opt to hire DAPA recipients over residents. Texas v. United States, 86 F. Supp. 3d 591, 627 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016). The state also invoked *Massachusetts v. EPA* as an independent basis for standing, and put forth a novel "abdication standing" theory based on the premise that when a state alleges that the federal government has abdicated a constitutional duty, that claim gives rise to state standing. *Id.* at 625, 627–28. Although the district court expressed support for the abdication theory, the Fifth Circuit based its holding on financial injury along with special solicitude standing. *Id.* at 636; *Texas*, 809 F.3d at 154–56.

168. *Texas*, 86 F. Supp. 3d at 616–17.

169. Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1071 (9th Cir. 2014).

170. *Id.* at 617 (citing Tex. Transp. Code Ann. § 521.421 (West 2021)).

the majority of DACA recipients of driving age were to apply), placing the state's losses in the millions of dollars.[171]

Before assessing the merits of the financial injury, the Fifth Circuit held that Texas was entitled to special solicitude in the standing analysis, based on *Massachusetts v. EPA*.[172] In finding that Texas had a quasi-sovereign interest that would justify special solicitude, the court relied on language from *Massachusetts* regarding the surrender of state interests to the federal government.[173] The court reasoned that Texas had no choice but to rely on the federal government's immigration scheme since it could not create its own immigrant classifications, deny driver licenses to DAPA recipients, or negotiate a treaty with a foreign country.[174] Texas's relative powerlessness vis-à-vis the federal government, coupled with the fact that the only way for the state to avoid financial injury was for it to change its own laws regarding state subsidies for driver licenses, meant that the DAPA program damaged Texas's quasi-sovereign interests.[175] This quasi-sovereign injury, in addition to the court's finding of a procedural right located in the Administrative Procedure Act (APA), led to a finding of special solicitude.[176]

Standing doctrine's traditional treatment of financial injury as a classic injury-in-fact favored Texas's framing of its financial injury. But the Fifth Circuit bolstered the strength of Texas's financial injury claim by rejecting two prominent arguments advanced by the federal government. First, the Obama Administration raised an "offset" theory, under which the benefits of DAPA would ultimately offset any discrete fiscal costs associated with processing driver license applications.[177] The government's theory reflected broader themes embodied by the DAPA program itself: that undocumented immigrants were members of communities with valuable contributions to make, and enabling people to step "out of the shadows" would create extensive benefits for the economy and social fabric.[178] In the context of driver licenses, the offset theory pointed specifically to the

171. *Id.*
172. *Texas*, 809 F. 3d at 151.
173. *Id.* at 153–54 (citations omitted).
174. *Id.*
175. *Id.*
176. *Id.* at 162 ("Without 'special solicitude,' it would be difficult for a state to establish standing.").
177. *Id.* at 155–56.
178. *Id.* at 155 (majority opinion), 189 (King, J., dissenting).

benefits of DAPA recipients acquiring driver licenses (and thereby reducing the number of unlicensed drivers on the road), purchasing auto insurance, and registering vehicles.[179] But the Fifth Circuit summarily rejected the offset theory, quoting a federal practice treatise to state that assessing financial injury for standing purposes is not intended to be an "accounting exercise."[180]

The administration also advanced the argument that the state had inflicted the fiscal injury on itself, given that Texas chose to adopt a driver license processing scheme at a net loss and had the option to change its cost scheme for driver licenses under state law.[181] But the court had already conveyed, in its special solicitude analysis, its view that requiring a state to change its law in order to avoid injury constituted a violation of the state's quasi-sovereign interests.[182] The court thus rejected the federal government's claims of self-inflicted injury.[183] The benefits and value of undocumented persons lives were, in the standing analysis, reduced to the cost they would impose on a state for a service that the state had chosen to incur.

Although federalism and separation of powers concerns had previously suggested that the courts were the wrong branch in which to decide questions of immigration policy, especially in lawsuits brought by the states, the tides shifted in the DAPA litigation. In that lawsuit, federalism and separation of powers instead became justifications for state standing. The *Texas (DAPA)* district court repeatedly emphasized the powerlessness of the states in comparison to the federal government in the area of immigration.[184] Furthermore, the district court framed the federal government as owing a special

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179. *Id.* at 155 (majority opinion).

180. *Id.* at 155–56 (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2015) and NCAA v. Governor of N.J., 730 F.3d 208, 223 (3d Cir. 2013)). For a critique of the offset theory, see Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1915–16 (2019).

181. *Texas*, 809 F. 3d at 157.

182. *Id.* at 151–53.

183. *Id.* at 158.

184. Texas v. United States, 86 F. Supp. 3d 591, 637 (S.D. Tx. 2015) (describing *Arizona v. United States*, 567 U.S. 387 (2012), as holding that "states are virtually powerless to protect themselves from the effects of illegal immigration"), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016) (per curiam); *id.* at 650 (emphasizing, in zone of interests analysis, that federal government "has the duty to protect the states, which are powerless to protect themselves, by enforcing the immigration statutes").

obligation to protect the states in its administration of immigration law.[185] According to the district court, federal preemption exists in the field of immigration law because the federal government is meant "to provide a uniform system of protection to the states."[186] The fact that the state alleged a failure on the part of the executive to fulfill its statutory obligations thus became a basis upon which the states could claim injury.[187] If protecting the states from the injuries resulting from immigration constituted a fundamental goal of the immigration statute and executive action, then the states became the ideal party to require that the executive enforce the immigration statutes.

At the Fifth Circuit, Judge Carolyn King's dissent raised various objections to the panel majority's decision on both standing and the merits—objections that have arguably become more salient in the current era. In addition to expressing doubt regarding the panel's reliance on the APA as the source of Texas's procedural right for special solicitude purposes,[188] Judge King raised structural concerns about state standing. These included the problem of potential judicial aggrandizement, a principal concern with standing doctrine in general.[189] She also expressed concern that the state's standing theory appeared to have no principled limit to guide future lawsuits brought by individual states against the federal government.[190] The dissenting Judge expressed "serious misgivings about any theory of standing that appears to allow limitless state intrusion into exclusively federal matters—effectively enabling the states, through the courts, to second-guess federal policy decisions."[191] The panel majority, in response to Judge King's concerns, effectively asserted that her misgivings were overstated, and that other requirements—such as the cause of action requirement, basic Article III standing requirements, and procedural right requirement for special solicitude—would prevent Judge King's so-called "parade of horribles" from coming to fruition without sufficient evidence.[192]

The Supreme Court avoided addressing any of the standing questions raised by the highly anticipated case. At oral argument, the

185. *Id.* at 624.
186. *Id.*
187. *Id.*
188. *Texas*, 809 F. 3d at 194 (King, J., dissenting).
189. *Id.*
190. *Id.* at 195–96.
191. *Id.* at 196.
192. *Id.* at 161–62 (majority opinion).

four liberal Justices then on the Court—Kagan, Sotomayor, Breyer and Ginsburg—appeared particularly skeptical of Texas's claims.[193] Chief Justice Roberts might have been a fifth vote against Texas on standing, particularly given his dissent in *Massachusetts v. EPA* and prior writing on standing.[194] In June 2016, an eight-member Supreme Court released a 4-4, single sentence per curiam opinion, which allowed the Fifth Circuit's opinion to stand.[195] Five months later, after campaigning heavily on the demonization of immigrants and promises to "build a wall," Donald Trump declared victory in the presidential election, signaling drastic changes in immigration policy to come.[196]

As Section II demonstrates, *Texas (DAPA)* has become a model for state standing under the Biden Administration, and lower federal courts have extended and expanded upon the case to recognize new iterations of injuries flowing from the existence of immigrants. Before discussing state standing in the Biden era, however, the next section acknowledges the growth in state litigation against the federal government during the Trump presidency.

D. State Challenges to Immigration Policy Under Trump

During the Trump era, state lawsuits against the federal government exploded.[197] Nonetheless, state standing doctrine remained relatively

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193. *See* Lyle Denniston, *Argument Analysis: Search for a Fifth Vote on Immigration*, ScotusBlog, (Apr. 18, 2016, 2:17 PM), https://www.scotusblog.com/2016/04/argument-analysis-search-for-a-fifth-vote-on-immigration [https://perma.cc/58N8-UBQS] (describing questions posed by Justices on standing).

194. *See* Amanda Frost, *Symposium: Second Thoughts on Standing*, SCOTUSBLOG (June 24, 2016, 7:28 AM), https://www.scotusblog.com/2016/06/symposium-second-thoughts-on-standing [https://perma.cc/F276-EUTC] (discussing Chief Justice Robert's views on the necessity of standing to merit judicial intervention); *Massachusetts v. EPA*, 549 U.S. 487, 547 (2007) (Roberts, C.J., dissenting) (explaining that the court should not be a "forum for policy debates").

195. United States v. Texas, 579 U.S. 547, 548 (2016) (per curiam).

196. Sarah Pierce & Randy Capps, *As Trump Takes Office, Immigration Enforcement and Policy Poised to Undergo Major Changes*, MIGRATION POL'Y INST., (Dec. 19, 2016), https://www.migrationpolicy.org/article/trump-takes-office-immigration-enforcement-and-policy-poised-undergo-major-changes [https://perma.cc/R4W7-NQ49].

197. Estimates suggest that no less than 156 lawsuits involving more than one state were filed during Trump's presidency. By way of comparison, during the eight years of the Obama Administration, Republican attorneys general filed forty-six such multistate suits. *Multistate Lawsuits Against the Federal Government During the Trump Administration*, BALLOTPEDIA https://ballotpedia.org/Multistate_lawsuits_against_the_federal_government_during_the_Trump_administration [https://perma.cc/B2UV-675A].

static in the immigration context. While blue states challenged an array of immigration (and other) policies enacted by the Trump Administration, a range of plaintiffs (such as individuals, organizations, localities, and elected officials) often joined the states in challenging those same policies.[198] Even without state standing, the courts would likely have heard many of the challenged policies. And while states sometimes relied on *Texas (DAPA)* to support standing, standing doctrine nonetheless remained relatively static.

Standing disputes certainly arose during the Trump era. Nonetheless, courts typically found that the states satisfied the injury-in-fact requirement under Article III without resorting to arguments grounded in special solicitude or sovereign interests. In New York's challenge to the citizenship question on the census, the Supreme Court recognized the potential loss of federal funds that the state claimed would result from an undercounting of New York's population.[199] The states' standing arguments varied with respect to how they framed noncitizens as sources of costs.[200] At times, states framed the *loss* of noncitizens as a source of injury. In the travel ban

198. For example, advocacy organizations and individuals challenged the travel ban, *see* Int'l Refugee Assistance Project v. Trump, 373 F. Supp. 3d 650 (D. Md. 2019), *rev'd*, 961 F.3d 635 (4th Cir. 2020); a non-profit challenged the public charge rule, *see* CASA de Maryland, Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019), *rev'd*, 971 F.3d 220 (4th Cir. 2020); and individuals and organizations challenged the rescission of DACA. *See, e.g.*, Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *vacated sub nom.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

199. Dep't of Com. v. New York, 139 S. Ct. 2551, 2565 (2019) ("Several state respondents here have shown that if noncitizen households are undercounted by as little as 2%—lower than the District Court's 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population."); *see also* Washington v. Trump, 441 F. Supp. 3d 1101, 1114–15 (W.D. Wa. 2020) (finding diversion of $88.96 million from naval base in Washington State to construction of border wall sufficient to constitute injury-in-fact for Washington to have standing).

200. A critique of the immigrant-as-injury doctrine might flip the other way in a future political era, in that blue states during a presidency hostile to immigrants might assert standing arguments before federal judges in immigrant-friendly jurisdictions by framing the loss of immigrants as injuries to the states, similar to arguments challenging the travel bans or elimination of DACA during the Trump presidency. Along similar lines, states in such a scenario might wish to claim special solicitude based on claims of the relinquishment of state sovereignty to the federal immigration authorities. This Article leaves questions of how standing doctrine should accommodate claims of the *absence* of immigrants as injuries to the future, and maintains that shifts in ideology, politics, and inequality necessitate a separate analysis should such a scenario exist.

cases, the Ninth Circuit recognized proprietary injuries incurred by Washington and Hawaii due to the loss of students to pay tuition, faculty to teach, and students to comprise part of a "diverse student body."[201] The widely challenged "public charge" rule sought to expand the range of situations in which the government could deny lawful immigration status to noncitizens based on their receipt of public benefits. New York's standing argument in its challenge to that rule alleged injuries to the state because noncitizen residents would likely forego public benefits as a result of the rule.[202] Such harms, New York argued, would include both decreased federal transfers of funds to the states as well as the increased cost of health care and "general economic harm."[203]

States occasionally raised—and some courts accepted—arguments grounded in special solicitude, sovereignty, and *parens patriae* arguments. In Hawaii's challenge to the travel ban, the Ninth Circuit accepted Hawaii's argument that the state had a sovereign interest in facilitating refugee resettlement and "protecting equal rights, barring discrimination, and fostering diversity," and that the travel ban sufficiently undermined those efforts and interests.[204] In finding state standing to sue over the rescission of DACA based on harm to employers and universities from the loss of students, one district court also applied special solicitude to those proprietary interests.[205] However, that court also rejected the states' claim of *parens patriae* standing, citing *Massachusetts v. Mellon*'s prohibition on state standing to protect citizens from the application of federal law.[206] Instead, the courts generally applied traditional Article III injury analysis to find standing, at least in the immigration context. State standing to

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201. Hawaii v. Trump, 859 F. 3d 741, 764–66 (9th Cir. 2017) (finding injury to both proprietary and sovereign interests), *rev'd on other grounds*, 138 S. Ct. 377 (2017); Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam) (finding traditional Article III injury based on proprietary interests); *see also* Batalla Vidal v. Duke, 295 F. Supp. 3d 127, 158 (E.D.N.Y. 2017) (finding state standing based on the harm to state universities that would lose DACA students as well as employers who would suffer a loss from the elimination of DACA), *aff'd in part sub nom.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

202. New York v. U.S. Dep't Homeland Sec., 969 F.3d 42, 56 (2d Cir. 2020).

203. *Id.* at 59.

204. *Hawaii*, 859 F. 3d at 765–67.

205. *Duke*, 295 F. Supp. 3d at 158 ("State Plaintiffs . . . amply alleged and documented that the rescission of DACA would harm the states' proprietary interests as employers and in the operation of state-run colleges and universities.").

206. *Id.* at 161–62.

challenge the Biden Administration's immigration policies, by contrast, has rapidly expanded and evolved.

II. IMMIGRANTS AS INJURIES: STATE-LED LITIGATION CHALLENGING FEDERAL IMMIGRATION POLICY UNDER THE BIDEN ADMINISTRATION

This Part shows how the lower courts, especially arguments advanced by Texas in the Fifth Circuit, have built upon the standing analysis in *Texas (DAPA)* to develop the immigrant-as-injury doctrine. Courts have extended the prototypical financial injury beyond driver licenses, and into an array of state-funded services and programs such as primary school education, emergency medical care, and the operation of the criminal legal system. Courts have also liberally defined the states' quasi-sovereign interests, leading to the ready enlargement of special solicitude as well as a growing recognition of *parens patriae* standing as a separate basis for standing. The lower courts' receptivity to the immigrant-as-injury standing arguments has resulted in a body of doctrine with precedential effect within the Fifth Circuit which shares a common set of propositions: that the existence of a person within a state's jurisdiction, when that person could be deported or detained, amounts to an injury to the state that is sufficient for standing purposes.

Many of the challenged policies implicate fundamental rights. The lawsuits impact basic questions of how to regulate the border and the right to seek asylum, including whether to physically exclude people pending the adjudication of their asylum claims or to categorically preclude the assertion of asylum claims at all. They also include the question of how to treat over 800,000 DACA or DACA-eligible individuals who cannot obtain lawful immigration status but who have nevertheless lived in the United States since childhood.[207] Enforcement priorities in the immigration context affect how immigration agents interact with undocumented persons and impact the risk of arrest, detention, and deportation for over eleven million people without status.[208] Most of the lawsuits involve reversals of

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207. Anna Giaritelli, *Biden Finalizes Rules to Fortify DACA from Future Lawsuits*, WASH. EXAMINER (Aug. 24, 2022, 6:33 PM) https://www.washingtonexaminer.com/policy/immigration/biden-finalizes-rules-fortify-daca-from-lawsuits [https://perma.cc/YU2X-T6P2].

208. *See* Eileen Sullivan, *Biden Guidelines Direct ICE to Focus on Immigrants Who Pose Safety Threat*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/09/30/us/politics/biden-ice-immigration.html [https://perma.cc/SJ8C-HHCB].

policies put in place by the Trump Administration—including policy initiatives that federal courts have found unlawful. Take the MPP/Remain in Mexico and Title 42 programs, which revolutionized the treatment of people seeking asylum at the border by prohibiting physical entry to the United States altogether as part of a broader series of steps undertaken to eliminate asylum protections and access to the immigration courts.[209] Human rights advocates have widely condemned both programs, pointing to examples of torture, kidnapping, murder, and death experienced by vulnerable migrants for whom physical safety in Mexico was not possible, and the proliferation of migrant camps and related humanitarian crises in Mexico.[210] Indeed, during the Trump Administration, federal courts enjoined MPP based on likely violations of the international treaty principle of non-refoulement as well as the immigration statute's guarantee of the right to request asylum at the border,[211] although a

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209. *See* Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 121 (2020) (describing the asylum system as having been under "four years of systematic attack" under the Trump Administration); Sarah Sherman-Stokes, *Public Health and the Power to Exclude: Immigrant Expulsions at the Border*, 36 GEO. IMMIGR. L.J. 261 (2021) (critiquing Title 42 expulsions on human rights grounds); Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 50–51 (2020) (describing executive actions developed during first half of Trump Administration to preclude access to immigration courts).

210. *See, e.g.*, HUMAN RIGHTS FIRST, FATALLY FLAWED: "REMAIN IN MEXICO" POLICY SHOULD NEVER BE REVIVED 6 (Sept. 2022), https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf [https://perma.cc/6JRX-MFBF] (identifying "at least 1,544 publicly reported cases of kidnappings, murder, torture, rape and other violent attacks against people returned to Mexico" pursuant to MPP); KATHRYN HAMPTON, MICHELE HEISLER, RANIT MISHORI, JOANNA NAPLES-MITCHELL, ELSA RAKER, REBECCA LONG ET AL., PHYSICIANS FOR HUM. RTS., FORCED INTO DANGER: HUMAN RIGHTS VIOLATIONS RESULTING FROM THE U.S. MIGRANT PROTECTION PROTOCOLS 3 (Jan. 2021), https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf [https://perma.cc/6423-C4UQ] (detailing harms inflicted on migrants subjected to MPP, "including physical violence, sexual violence, kidnapping, theft, extortion, threats, and harm to family members"); JULIA NEUSNER & KENNJI KIZUKA, HUMAN RIGHTS FIRST, EXTENDING TITLE 42 WOULD ESCALATE DANGERS, EXACERBATE DISORDER, AND MAGNIFY DISCRIMINATION 2 (Apr. 2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/ExtendingTitle42.pdf [https://perma.cc/AZ98-ULCL] (identifying over 10,000 reports of "murder, kidnapping, rape, torture and other violent attacks against migrants and asylum seekers blocked in or expelled to Mexico due to Title 42 since the Biden administration took office").

211. Innovation L. Lab v. Nielsen, 366 F. Supp. 3d 1110, 1126, 1130 (N.D. Cal. 2019), *aff'd sub nom.*, Innovation L. Lab v. Wolf, 951 F.3d 1073 (9th Cir. 2020). The

decision from the Supreme Court's "shadow docket" stayed that injunction.[212] On November 15, 2022, several months after a federal district court in Louisiana enjoined the termination of Title 42, District of Columbia Court Judge Emmett Sullivan vacated the program on arbitrary and capricious grounds because, among other things, the agency ignored the acute harm to migrants caused by Title 42.[213] While the Supreme Court has not ruled on the substantive legality of DACA, the Court's decision in *Department of Homeland Security v. Regents of the University of California*[214] relied on arbitrary and capricious review to restrict the Trump Administration's ability to eliminate the program.[215] Furthermore, the existence of enforcement priorities is arguably necessary—perhaps even constitutionally mandated—to restrain the otherwise unbridled discretion of immigration enforcement officers.[216]

Supreme Court subsequently stayed the injunction and granted certiorari, but then vacated the case in light of the changed policies of the Biden Administration. Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842, 2842 (2021).

212. Wolf v. Innovation L. Lab, 140 S. Ct. 1564 (2020). In the MPP termination litigation during the Biden Administration, the district court issued a nationwide injunction prohibiting the federal government from terminating MPP based on the agency's first rescission memo. Texas v. Biden, 554 F. Supp. 3d 818, 857–58 (N.D. Tex. 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022). Both the Fifth Circuit and the Supreme Court declined to issue a stay of the injunction. Texas v. Biden, 10 F.4th 538, 560 (5th Cir. 2021); Biden v. Texas, 142 S. Ct. 926, 926–27 (2021). The Supreme Court's order allowing the nationwide injunction to stand evoked particular criticism given concerns over the Court's willingness to stay federal court orders in the Trump Administration litigation against MPP. *See* Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Has Let a Lone Trump Judge Take Over Biden's Foreign Policy*, SLATE (Aug. 25, 2021, 4:47 PM), https://slate.com/news-and-politics/2021/08/supreme-court-remain-in-mexico-trump-judge-biden-policy.html [https://perma.cc/DFK2-P669] (describing the Court's order allowing district court injunction to stand as "one of the most radical orders in recent memory"). For a broader critique of the shadow docket, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

213. Huisha-Huisha v. Mayorkas, No. 21-100 (EGS), 2022 WL 16948610, at *29–30 (D.D.C. Nov. 15, 2022). As noted in the Introduction, the Supreme Court stayed the district court's order at the end of 2022. *See supra* notes 18–20 and accompanying text. Earlier in the *Huisha-Huisha* litigation, federal courts had found that the original implementation of Title 42 violated the INA. *See* Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146, 166–67, 171 (D.D.C. 2021), *aff'd in part*, 27 F.4th 719 (D.C. Cir. 2022).

214. 140 S. Ct. 1891 (2020).

215. *Id.* at 1910.

216. *See* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325 (2021) (arguing that failure by the President to establish enforcement priorities in immigration law amounts to abdication of duty to faithfully execute law).

The Biden era lawsuits have raised recurring substantive claims: allegations of arbitrary and capricious agency conduct; failure to adhere to notice-and-comment rulemaking procedures; statutory violations of the INA; and separation of powers challenges under the Take Care Clause. On the statutory claims, the states have advanced a vision of the statute that compels maximum enforcement of the statute's detention provisions—or at least a level of enforcement no less than conducted under the Trump Administration.[217] The arbitrary and capricious claims appear especially malleable in light of the Court's rulings in *Regents* and *Department of Commerce v. New York*.[218] The immigrant-as-injury standing theory thus attaches to a common set of claims, such that we might gain, as Professor Fallon puts it, "clarity if we ask which [standing] rules apply to particular plaintiffs seeking particular forms of relief under particular constitutional or statutory provisions."[219]

Finally, the judiciary's active use of nationwide injunctions has inflated the influence of these lawsuits, although the availability of injunctive relief in immigration cases may abate in the future.[220] Standing and injunctive relief reflect different ends of the litigation process, with standing acting as a front-end restriction and the availability of injunctive relief as a midpoint. However, they both share an injury analysis.[221] Thus, how courts conceptualize injuries for

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217. *See, e.g.*, Texas v. United States, 555 F. Supp. 3d 351, 363 (S.D. Tex. 2021) ("Put simply, the Government has instructed federal officials that 'shall detain' certain aliens means 'may detain' when it unambiguously means *must* detain.") (emphasis in original), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (5th Cir. 2022); Brief for Respondents 2–5, United States v. Texas, No. 22-58 (emphasizing absence of discretion envisioned by Congress in enacting mandatory detention provisions).

218. 139 S. Ct. 2551 (2019). *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021) (discussing arbitrary and capricious review after *Regents* and *New York* through the lens of political accountability).

219. Fallon, *supra* note 50, at 1063.

220. The use of nationwide injunctions has elicited a prominent academic debate. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (arguing against nationwide injunctions); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (defending nationwide injunctions, while identifying downsides); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68–71 (2019) (describing the debate over nationwide injunctions).

221. The requirement of irreparable injury for injunctive relief purposes may repeat the injury analysis for standing purposes. *See, e.g.*, Louisiana v. Ctrs. for Disease

standing purposes affects how they view the urgency of preventing injury during the injunctive relief analysis. The Supreme Court's June 30, 2022, decision in *Biden v. Texas*,[222] which invalidated the nationwide injunction issued by a district court against the termination of MPP, issued an important ruling on the judiciary's capacity to issue injunctive relief in the immigration context.[223] The Court read a statutory provision in the Immigration and Nationality Act (INA) as barring the lower courts from issuing classwide injunctive relief,[224] which could potentially diffuse the impact of state lawsuits against the federal government on immigration matters in the future. But questions remain regarding the judiciary's capacity to issue non-injunctive relief, including vacatur, against the immigration agency.[225] As such, state standing remains a critical, unresolved issue.

A. Beyond Driver Licenses: Expanding Financial Injuries

The following discussion shows how the logic of *Texas (DAPA)* has supported the expansion of state standing. In the absence of Supreme Court intervention in *Texas (DAPA)*, some lower courts have embraced the driver license theory of standing and have extended its rationale to an array of issues—such as public school education, emergency medical services, and criminal law enforcement—in order to challenge a broader range of immigration policies. With increasingly detailed and diverse evidence, the states have emphasized their inability to avoid incurring such costs. In response, the lower courts have widely adopted a narrative in which each noncitizen present in a given state's jurisdiction is the functional equivalent of a likely cost, and have

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Control & Prevention, No. 6:22-CV-00885, 2022 WL 1604901, at *11, *22 (W.D. La. May 20, 2022) (basing injury-in-fact analysis for standing, and irreparable harm for injunctive relief, on anticipated rise in border crossings anticipated by termination of Title 42).

222. 142 S. Ct. 2528 (2022).

223. *Id.* at 2540.

224. *Id.* (holding that a provision of the immigration statute "no doubt deprives the lower courts of 'jurisdiction' to grant classwide injunctive relief"). The Court did not address whether its holding would extend to other judicial remedies, such as declaratory relief and the authority to compel or vacate agency action under section 706 of the APA. *Id.* at 2540 n.4; *see also id.* at 2562 (Barrett, J., dissenting) (observing that the majority opinion "reserves the question whether § 1252(f)(1) bars declaratory relief" or whether it "prevents a lower court from vacating or setting aside an agency action under the Administrative Procedure Act").

225. *Id.* at 2540 (majority decision).

rejected efforts to consider the benefits that might result from the existence of noncitizens in those states.

Some of the initial lawsuits filed against the Biden Administration closely mimicked *Texas (DAPA)*'s financial injury theory, highlighting driver licenses as the primary source of injury. The lead lawsuit challenging the termination of MPP came from Texas and Missouri, which argued on the merits that the statute compelled the federal government to either detain every single person seeking asylum or, in the absence of such detention capacity, resume the program.[226] The Supreme Court repudiated the states' mandatory detention argument, but did not address standing.[227] Before the lower courts, the states' injury theory stated that because the termination of MPP would result in people entering Texas or Missouri—rather than being incarcerated or required to remain in Mexico—the state would suffer costs.[228] According to the Fifth Circuit, the *likelihood* of even some paroled noncitizens applying for a driver license in the future was high enough that Texas need not demonstrate that those individuals had indeed sought driver licenses,[229] especially since the evidence produced by the state appeared stronger than what Mississippi had shown in *Crane*.[230]

Standing theories premised mainly on eligibility for driver licenses soon dropped out of focus, with an array of state services that persons living in the state *might* use becoming grounds for standing. In *Louisiana v. Centers for Disease Control & Prevention*,[231] although the state included driver licenses in its complaint challenging the termination of Title 42, the district court found standing based on the costs of providing health care and education to immigrants whose presence in the state might result from lifting the border exclusion program.[232] The *Louisiana* court expressed skepticism over the evidence presented

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226. Texas v. Biden, 20 F.4th 928, 996 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022).

227. *See Texas*, 142 S. Ct. 2528.

228. *Texas*, 20 F.4th at 965–69; Texas v. Biden, 554 F. Supp. 3d 818, 837–39 (N.D. Tex. 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022).

229. *Texas*, 20 F.4th at 971 (emphasizing that "it's impossible to imagine how the Government could terminate MPP *without* costing Texas any money.").

230. *Id.*

231. No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 20, 2022).

232. *Id.* at *13–14.

by the state for its criminal law enforcement standing theory, but did not repudiate the argument.[233]

Other lower courts found state standing claims based on the cost to state carceral and surveillance systems persuasive. In the multistate lawsuit led by Texas against the enforcement priorities guidelines, the district court shifted away from a theory of financial harm grounded in driver licenses and towards financial harm grounded in *any* additional costs of state criminal incarceration.[234] The states' rationale emphasized that the enforcement priorities perpetrated a harm on the states by not deporting or detaining all *deportable* and *detainable* noncitizens, due to the costs associated with the potential future crimes those individuals might commit.[235] "If even one alien not detained due to the Memoranda recidivates, Texas's costs 'will increase' in accordance with its current cost per inmate," stated the court.[236] In other words, despite standing doctrine's longstanding requirement of traceability, the possibility of one noncitizen being subject to state criminal law enforcement in lieu of federal immigration enforcement constituted enough harm to give the state standing under Article III.[237] In a subsequent order, the district court vacated the enforcement priorities, finding standing because the policies caused a decrease in immigration enforcement levels.[238] According to the court, lower deportation and detention numbers led the state to incur incarceration, educational, and emergency medical costs from a population it repeatedly referred to as "criminal aliens."[239] The court

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233. *Id.* at *15. While the district court did not contest the possibility of costs constituting an injury, it contended that the state had not produced enough evidence to establish traceability with respect to the state's argument that allowing people to cross the border and seek asylum would lead to increases in the trafficking in drugs and persons. *Id.*

234. Texas v. United States, 555 F. Supp. 3d 351, 374–76 (S.D. Tex. 2021), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (5th Cir. 2022).

235. *Id.* at 373. The court emphasized evidence put forth by Texas that "during just the first two months following the issuance of the January 20 Memorandum, ICE rescinded detainers for 68 aliens housed within Texas's detention facilities . . . . That's 68 more rescinded detainers than during the same period the year prior." *Id.*

236. *Id.* at 375–76.

237. *See id.* at 375–76, 383.

238. Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204, at *12–13 (S.D. Tex. June 10, 2022), *cert. granted*, 143 S. Ct. 51 (2022).

239. *Id.* at *13–15; *see also* Emily C. Torstveit Ngara, *Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 389, 420–23 (2016) (discussing political influence and problems associated with use of phrase "criminal alien" and suggesting alternatives).

affirmed the state's financial and *parens patriae* injuries, finding that the evidence "showed that aliens who are subject to mandatory detention, but that ICE declined to detain, have already committed, and are committing, more crimes in Texas."[240]

As noted, the enforcement priorities litigation's approach to state standing has produced a circuit split that the Supreme Court will review during the 2022–23 term.[241] At the Fifth Circuit, the appeals court pointed to declines in the number of detainers issued and the state's recidivism statistics, which at times relied on fewer than 150 inmates or emphasized the charges filed against single individuals.[242] The Fifth Circuit also emphasized Texas's apparent lack of choice to protect itself from injury. In its analysis of traceability, the court emphasized that the state would incur costs irrespective of whether noncitizens with prior convictions were incarcerated (thereby causing the state to incur injury through the cost of detention) or lived in freedom (thereby causing the state to incur injury through the cost of health care or education).[243]

In *Arizona v. Biden*,[244] the case producing the split in the Sixth Circuit, the district court found similar financial injuries as those alleged by Texas,[245] likewise concluding that the fewer detentions and deportations, the more harm to the state.[246] The Sixth Circuit, however, has sharply questioned the states' injury, special solicitude, and federalism arguments. Chief Judge Sutton's panel opinion focused, first, on the speculative nature of the states' alleged injury, particularly given that the enforcement priorities memo does not directly regulate the states and that the costs flow from the actions of

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240. *Texas*, 2022 WL 2109204 at *17.

241. *See* Arizona v. Biden, 40 F.4th 375, 393–94 (6th Cir. 2022); Texas v. United States, 40 F.4th 205, 229 (5th Cir. 2022) (per curiam). The Fifth Circuit emphasized that Texas's evidence was stronger than that produced in *Arizona* and that the circuit had already generated its own body of binding precedent, citing *Texas (DAPA)*. *Texas*, 40 F.4th at 229. The Fifth Circuit further asserted that Supreme Court intervention would be required for any change in the circuit's approach to standing and related issues to take place. *Id.* at 230.

242. *Texas*, 40 F.4th at 216.

243. *Id.* at 218.

244. 593 F. Supp. 3d 676 (S.D. Ohio 2022*), rev'd*, 40 F.4th 375 (6th Cir. 2022).

245. *Id.* at 705.

246. *Id.* ("Fewer detentions and removals increase the number of noncitizens eligible to receive state assistance"); *id.* at 706 ("When DHS pulls back immigration enforcement, the States pick up some of the cost" such that traceability is established).

third parties.[247] Relatedly, the opinion questioned whether the guidance memos were actually responsible for the evidence of decreased immigration enforcement cited by the states.[248] Second, the appeals court refused to extend special solicitude to the states, given that the states had alleged what the court viewed as "indirect fiscal burdens" and not the quasi-sovereign interests required for special solicitude.[249] As the opinion put it, "[m]ost regulations have costs."[250] Third, the Sixth Circuit relied on the federal government's favored role in immigration to reject special solicitude for the states.[251] "The States have distinctly less, not more, solicitude" in the area of immigration given that the "key sovereign" entitled to solicitude is the federal government, explained the court.[252] Finally, the Sixth Circuit—echoing Judge King's dissent in *Texas (DAPA)*—emphasized that the Fifth Circuit's theory of standing, which it characterized as "boundless," has no limits.[253] In the Sixth Circuit's view, the states' standing theory "would make a mockery . . . of the constitutional requirement of case or controversy" if "all peripheral costs imposed on States by actions of the President create a cognizable Article III injury."[254]

Immigrant existence as an injury was fully on display in the litigation against the reinstatement of DACA ("*Texas (DACA)*"). Texas's standing arguments shifted away from an emphasis on driver licenses and embraced injuries based on educational, emergency medical, and social service costs.[255] Because many DACA recipients already resided in Texas, the court explained that the state need not prove future

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247. Arizona v. Biden, 40 F.4th 375, 387 (6th Cir. 2022) ("A theory of injury grounded in rising crime rates seems like it would 'hinge' on third parties committing more crimes."). As Chief Judge Sutton explained, those third parties also include "individual officers' discretionary enforcement choices, noncitizens' actions in response to those choices, the States' own crime-and-punishment decisions, and the States' other social-welfare policy choices." *Id.* at 386.

248. *See id.* at 387 ("How can we assume that prioritizing apprehension of immigrants who pose a threat to public safety will drive up the States' criminal populations?").

249. *Id.* at 386.

250. *Id.*

251. *Id.* at 386–87.

252. *Id.*

253. *See id.* at 386.

254. *Id.* (citation omitted).

255. Texas v. United States, 549 F. Supp. 3d 572, 593–94 (S.D. Tex. 2021*), aff'd in part, vacated in part*, 50 F.4th 498 (5th Cir. 2022).

injuries.[256] "They are incurring costs right now," asserted district Judge Andrew Hanen, who had also authored the *Texas (DAPA)* district court opinion.[257] The *Texas (DACA)* district court order especially emphasized the state's powerlessness in opting to not provide certain benefits to DACA recipients, such as the Supreme Court's holding in *Plyler v. Doe*[258] that prohibiting children from enrolling in public school based on their immigration status violates the Equal Protection Clause.[259] The Fifth Circuit upheld the lower court's finding that the state had standing, and on injury found that the alternative to reinstituting DACA—the loss of DACA—would cause some recipients and even their children (which would inevitably include U.S citizen children) to leave the United States, to the presumed benefit of the state.[260] Under the court's logic, if the federal government could cause at least one DACA recipient to leave the United States by *refusing* to restore DACA, then its decision *to restore* DACA was a potential cause of injury.[261]

In finding injury to the states, the lower courts have steadfastly rejected any consideration of the benefits that avoiding incarceration, providing protection from deportation, or conferring work authorization might bring, consistent with the Fifth Circuit's "no accounting" approach set forth in *Texas (DAPA)*.[262] In the various lawsuits involving DAPA and DACA, parties and amici have emphasized the economic, social, cultural and community benefits of

256. *Id.* at 594.

257. *Id.*

258. 457 U.S. 202 (1982).

259. *Texas*, 549 F. Supp. 3d at 593–94; *Plyler*, 457 U.S. at 230. Texas Governor Greg Abbott has expressed his belief that the Supreme Court should overturn *Plyler*. Bill Chappell, *Texas Governor Says the State may Contest a Supreme Court Ruling on Migrant Education*, NPR (May 6, 2022, 3:56 PM), https://www.npr.org/2022/05/06/1097178468/texas-governor-says-the-state-may-contest-a-supreme-court-ruling-on-migrant-educ [https://perma.cc/GA47-92RF].

260. Texas v. United States, 50 F.4th 498, 518 (5th Cir. 2022) (describing the "cost savings—health care *and educational*" benefits from the departure of some DACA recipients, as "Texas would no longer be required to educate those who depart or the children who depart with them") (emphasis in original).

261. *See Texas*, 549 F. Supp. 3d at 596 ("Defendant-Intervenors have not argued, nor could they, that no DACA recipients would leave the United States should DACA be terminated.").

262. *See* Texas v. United States, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd by equally divided court*, 579 U.S. 547 (2016).

deferred action.[263] In the Title 42 and MPP litigation, amici have detailed the extreme, life-or-death consequences of the policies.[264] The courts have ignored such evidence in the standing analysis. At the same time, the states have documented their injuries with increasingly granular detail and a widening array of evidence, with the courts readily accepting the states' evidence. In addition to extensive statistics on the costs associated with undocumented migration, courts have relied on affidavits submitted by state and local officials, some of which have included arguable hearsay evidence about the impact of federal immigration policy.[265] In Texas's lawsuit challenging the exemption of children from the Title 42 program, the district court cited to two local Texas county declarations that expressed concern about the entry of immigrants released into the counties as evidence of its injuries.[266] Indeed, the State of Texas has emphasized the superiority of its evidence of the costs imposed by immigrants in comparison to other states (such as Ohio and Missouri before the Sixth Circuit).[267] At times, the actual number of people implicated in Texas's recitation of its injuries is quite small—in the enforcement priorities suit, for instance, the district court cited to sixty-eight individuals for whom ICE dropped its request for the state to detain, noting that six had final orders of removal.[268] But so long as a state can identify concrete and detailed evidence of even a marginal number of immigrants causing the state to potentially incur costs, certain lower courts have appeared willing to accept that evidence as sufficient.

B. Parens Patriae Standing and Special Solicitude: Broadening Quasi-

263. *See, e.g.*, Brief of United We Dream and 50 Organizations as Amici Curiae in Support of Respondents at 3, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588 and 18-589) (Oct. 2, 2019).

264. *See* Brief of Amici Curiae 58 Legal Service and Advocacy Organizations in Opposition to Plaintiffs' Motion for Preliminary Injunction at 6–9, Louisiana v. Ctrs. for Disease Control & Prevention, No. 6:22-cv-00885 (W.D. La. May 5, 2022).

265. *See* Texas v. United States, 555 F. Supp. 3d 351, 373 & n.16 (S.D. Tex. 2021) (discussing statement of unidentified ICE officials that "'attribute' the Government's sharp decline in maintaining detainers 'to the new enforcement priorities'" but acknowledging that "[i]t is unclear whether the 'ICE officials' quoted by the Chief of Staff made this statement in a capacity excluding the statement from the rule against hearsay."), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (5th Cir. 2022).

266. *See* Texas v. Biden, 589 F. Supp. 3d 595, 612 (N.D. Tex. 2022) (citing "disaster declarations" passed by Hidalgo County and Webb County, Texas).

267. *See* Texas v. United States, 40 F.4th 205, 229 (5th Cir. 2022) (per curiam).

268. *Texas*, 555 F. Supp. 3d at 373.

Sovereign Interests

In addition to expanding the types of financial injuries for which the states can claim injury-in-fact, the lower courts have also broadened the scope of cognizable quasi-sovereign interests. Finding that a state has quasi-sovereign interests has two doctrinal implications, as discussed earlier.[269] First, quasi-sovereign interests can provide an independent basis for standing in the form of *parens patriae* standing. Second, when the court concludes that a state has a quasi-sovereign interest, that finding—along with the existence of a procedural right—allows courts to extend special solicitude to the states in the traditional injury-in-fact analysis.

In the states' lawsuits against the Biden Administration, the lower courts have increasingly found both *parens patriae* standing and special solicitude by widening the range of situations in which quasi-sovereign interests exist. The Fifth Circuit in *Texas (DAPA)* located the state's quasi-sovereign interests in the pressure to change its laws governing driver license processing to grant special solicitude.[270] That pressure, along with the state's surrender of its authority to regulate immigration to the federal government, led the Fifth Circuit in the MPP rescission litigation to extend special solicitude to Texas.[271] More recently, the Fifth Circuit in the DACA litigation suggested that the existence of dominant federal power in the immigration sphere gave rise to a quasi-sovereign interest for Texas, upon which it did not specify apparent limits.[272]

The district courts in both Ohio and Texas in the enforcement priorities litigation found quasi-sovereign interests at stake on a theory that was arguably more narrowly focused but also more pernicious due to its reliance on stereotypes about immigrant criminality. The states argued that they had a quasi-sovereign interest in preventing the anticipated criminal activity by noncitizens who might experience freedom from detention due to not being an enforcement priority under the federal memorandum, despite the existence of immigration

269. *See supra* notes 73–91 and accompanying discussion.

270. Texas v. United States, 809 F.3d 134, 153 (5th Cir. 2015*), aff'd by equally divided court*, 579 U.S. 547 (2016).

271. Texas v. Biden, 20 F.4th 928, 969–70 (5th Cir. 2021) (regarding special solicitude, suggesting that "[t]his case is no different" from the DAPA lawsuit), *rev'd*, 142 S. Ct. 2528 (2022).

272. Texas v. United States, 50 F.4th 498, 516 (5th Cir. 2022).

statutes that would ordinarily mandate their incarceration by ICE.[273] The Texas court looked to immigration federalism for its bold finding regarding quasi-sovereign interests.[274] As the Texas court put it, "the States seek protection from an effect of a federal immigration policy that the States possess no constitutional authority to change."[275] The states' lack of control over the immigration detention system, then, bolstered their case for standing. Whereas the court's reliance on immigration federalism as a rationale for granting state standing was not new, its use to justify *parens patriae* standing constituted another expansion of standing for the states.[276]

One additional point about special solicitude standing merits attention, which involves the requirement of a procedural right. *Massachusetts v. EPA* located Massachusetts' procedural right in a provision of the Clean Air Act that specifically authorized suit.[277] But in the cases described here, the lower courts have consistently located the states' procedural right in the APA, which applies in some degree to every federal administrative agency. Some courts have pointed to the APA with little discussion, other than citations to the DAPA and MPP cases.[278] To the extent that they have explained why the APA serves as a source of procedural right rather than the immigration agency's organic statute (the INA), they have suggested that a procedural right need only exist in the agency's organic statute where the state challenges governmental *failure* to regulate.[279] The states have thus

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273. Texas v. United States, 555 F. Supp. 3d 351, 370–71, 378–80 (S.D. Tex. 2021), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (5th Cir. 2022); Arizona v. Biden, 593 F. Supp. 3d 676, 702–03 (S.D. Ohio 2022), *rev'd*, 40 F.4th 375 (6th Cir. 2022).

274. The court also relied on a Fifth Circuit case arising outside of immigration, which located a quasi-sovereign interest of the state in compelling the incarceration of certain parole violators following a district court order that allowed a county Sheriff to reduce the jail population by refusing to detain certain parole violators. *Texas*, 555 F. Supp. 3d at 378 (citing Castillo v. Cameron County, 238 F.3d 339, 351 (5th Cir. 2001)).

275. *Id.* at 378–79.

276. *Arizona*, 593 F. Supp. 3d at 702–03 (focusing on states' role in "detention and removal of criminal aliens" through the interaction of state criminal law and enforcement with federal immigration enforcement); *id.* at 703 (describing imposition of state imprisonment paid for by state prior to DHS custody).

277. 549 U.S. 497, 519–20 (2007).

278. *See, e.g.*, Texas v. United States, 40 F.4th 205, 216 n.4 (5th Cir. 2022) (per curiam); Louisiana v. Ctrs. for Disease Control & Prevention, No. 6:22-CV-00885, 2022 WL 1604901, *12 (W.D. La. May 20, 2022).

279. *See, e.g.*, Texas v. United States, 549 F. Supp. 3d 572, 586 (S.D. Tex. 2021) (citing *Texas (DAPA)* and explaining location of procedural right in APA), *aff'd in part, vacated in part*, 50 F.4th 498 (2022).

explained that because they challenge federal action (as with the decision to reimplement DACA), locating the procedural right in the APA suffices. This argument seems inconsistent, however, with the courts' rationale that the *Mellon* bar does not apply because a given lawsuit challenges the government's failure to enforce federal law.[280] The broader point is that the courts have employed a range of tools enabling the expansion of the immigrant-as-injury standing doctrine, and appear to have relaxed multiple requirements along the way.

III. QUESTIONING THE IMMIGRANT AS INJURY STANDING DOCTRINE

This Part sets forth three concerns about the Fifth Circuit's expansion of state standing. First, the immigrant-as-injury standing doctrine elevates any cost associated with immigrant existence as a cognizable injury for state standing purposes, thereby stunting legal discourse about migration and contributing to the ongoing subordination of immigrants in the law. Second, the immigrant-as-injury standing doctrine portrays the states as powerless entities vis-à-vis the federal government by citing to Supreme Court pronouncements about federal preemption of state immigration law or equal protection. However, this framing overlooks the multiple ways in which states do, in fact, exert authority, and influence the creation and implementation of federal immigration policy. Third, the standing doctrine reflects a series of broader concerns about politicization, polarization, and the legitimacy of the judiciary that are both unique to and extend beyond the immigration context.

A. The Costs of Immigrant Existence and Injury to the States

Judges have already expressed the concern that the immigrant-as-injury standing theory appears to have no logical stopping point.[281] Separation of powers has provided a lens for the critique, insofar as overbroad state standing undermines standing doctrine's traditional function of preventing the judiciary from excessive intrusions into matters best left to the political branches. The absence of limits on the standing theory extends further, and into consideration of how courts evaluate the costs created by noncitizens and how those costs count. *Texas (DAPA)* initially grounded the standing theory in costs associated

280. *See supra* notes 84–88 and accompanying text.

281. *See supra* discussion accompanying notes 188–192 (discussing Judge King's dissent in *Texas (DAPA)*).

with driver license applications.[282] As the states' lawsuits have challenged a greater array of federal executive actions, driver license applications have been an insufficient source of cost. The enforcement priorities guidance, for instance, seemed unlikely to make a new population of persons eligible for driver licenses. But courts have since accepted (and the states have readily alleged) costs grounded in other services—emergency health care, public school education for children, and criminal law enforcement. Quasi-sovereign interests, too, have emerged due to the injuries allegedly caused by immigrants as economic competitors or as perpetrators of crime.

The courts have also emphasized that *any* cost is sufficient, while claiming to find traceability and redressability satisfied. *Texas (DAPA)* early on rejected the government's "offset theory," which would have enabled the courts to consider the cumulative benefits of immigrant presence.[283] Instead, the doctrine incentivizes the states to extract and amplify the cost of any given group of noncitizens.[284] The resulting logic allows courts to evaluate a given group of people—DACA recipients, persons permitted to reside in the United States outside of detention as they pursue claims to asylum, persons considered low enforcement priorities—and to identify any subset amongst that group that is likely to cause the state to incur a cost, however small. Those costs, then, become a rationale for the states to access the federal courts in order to upend the entire program.

Some might question why a cost logic poses problems at all, given standing doctrine's traditional prioritization of financial costs. Relatedly, one might say (as the Fifth Circuit did in *Texas (DAPA)*) that the concern is overblown, in that standing doctrine operates only to grant access to the courts and that the states must nevertheless possess a cognizable claim upon which the court may grant relief.[285] But the injuries recognized by the courts for standing purposes often become

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282. Texas v. United States, 809 F.3d 134, 155 (5th Cir. 2015*), aff'd by equally divided court*, 579 U.S. 547 (2016).

283. *See id.* at 155–56 (determining that the inquiry into whether the costs of injury are offset by the benefits of the program is only appropriate when the costs and benefits arise out of the same transaction).

284. *See id.* at 156–57 (explaining that states could avoid injury by raising taxes and fees for noncitizen applicants).

285. *See* Young, *supra* note 180, at 1915–16 ("Certainly an offsetting benefits inquiry would make it nearly impossible to resolve standing at the motion to dismiss or summary judgment stage, as that sort of argument will nearly always implicate factual disputes.").

the injuries that courts apply when assessing injury for other purposes, such as measuring the likelihood of harm to occur in deciding whether to grant relief.[286] And to the extent that standing doctrine operates as a gateway towards access to the courts, the navigation of power, and assessments of legitimacy, then principles of humanity, insubordination, and equality compel discomfort with a doctrine that locates cognizable injury in the existence of people.

Others may take issue with this Article's characterization of the states' standing arguments as an "immigrant-as-injury" theory by arguing that the states' principal concern lies with the existence of *undocumented* immigrants—persons whose very presence is already impermissible, and a condition that arguably changes the tenor of the critique. But the standing theories set forth by the states do not set forth any principled distinction between documented and undocumented immigrants. The Fifth Circuit's citation to the children of DACA recipients attending school as a potential injury serves as an example of the lack of distinction.[287] Similarly, the enforcement priorities apply to lawful residents whose interactions with the criminal system might subject them to immigration enforcement.[288] Furthermore, the very characterization of large swaths of people as definitively "undocumented" or "unauthorized" is an elusive task. In most cases, the very people whose presence is deemed an injury—DACA recipients or asylum-seekers, for instance—may well receive lawful status in the near future. Unauthorized immigration status is fluid, shifting, and legally complex.[289] Pointing to the arguable undocumented status of persons causing the states' alleged injury thus does little to change the critique of the doctrine.

The immigrant-as-injury doctrine as it has evolved today obscures the ability to have nuanced discourse in the courts about the nature of immigration enforcement, undocumented status, and migration management today. In particular, the doctrine limits the parameters of the debate about costs by foreclosing meaningful consideration of the positive contributions of immigrants (irrespective of their formal

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286. *See supra* note 221 (discussing injury analysis in Louisiana v. CDC, No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 20, 2022)).

287. *See supra* text accompanying note 255.

288. The INA subjects lawfully admitted noncitizens to potential enforcement action through the grounds of deportability at 8 U.S.C. § 1227(a), and the enforcement priorities memo identifies some but not all of those statutory provisions as interim priorities. *See* JOHNSON, *supra* note 10, at 4.

289. *See supra* note 40.

status) and the costs of enforcement. A strong empirical argument about the benefits—including the financial benefits—of migration exists, especially amongst economists.[290] The costs of excessive immigration enforcement have been amply documented, both in terms of financial cost as well as human costs in the form of family separation, loss of breadwinners, psychological trauma, and (in the case of border policy) death, rape, kidnapping and torture,[291] structural costs to society resulting from long-term surveillance of immigrant populations,[292] and the costs to the government resulting from the massive growth of the immigration enforcement bureaucracy.[293] So long as the state can allege and document the costs of immigrant existence, they can establish standing; however, the doctrine forbids consideration of the benefits of federal immigration policies.[294] The standing doctrine not only minimizes the costs of mass detention, deportation and expulsion; it erases them as legally irrelevant. My goal here is not to make the cost-benefit case for greater migration or minimized immigration enforcement. But productive

290. Jennifer M. Chacon, *Recounting: An Optimistic Account of Migration*, 110 CAL. L. REV. 1041, 1042 n.1 (noting that "economists generally view migration as economically beneficial for those who move *and* for the places to which they move."). The American Immigration Council has released dozens of fact sheets and reports detailing the economic contributions of immigrants in various states. *See, e.g.*, *The Economic Contributions of Immigrants in Texas*, AM. IMMIGR. COUNCIL 1–4 (July 11, 2022), https://www.americanimmigrationcouncil.org/research/economic-contributions-immigrants-texas [https://perma.cc/K2YE-ZRHZ] (illustrating how Texas's immigrant population has strengthened its labor force).

291. *See supra* note 210 (detailing the harms of MPP and Title 42).

292. *See, e.g.*, Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1500–01 (2019) (arguing that immigration enforcement in the interior United States imposes widespread structural costs similar to criminal law enforcement, such as system avoidance and law enforcement tradeoffs); Angelica Chazaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1071–72 (2021) (arguing that deportation constitutes a form of violence and calling for deportation abolition).

293. *See* Jennifer Lee Koh, *Downsizing the Deportation State*, 16 HARV. L. & POL'Y REV. 85, 91–98 (2021) (describing expansion of ICE and CBP budgets and resources from Clinton through Trump Administrations).

294. *See* Texas v. United States, 809 F.3d 134, 155–56 (5th Cir. 2015) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2015) (footnote omitted) ("'Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the [state] has enjoyed from the relationship with the [federal government].'"), *aff'd by equally divided court*, 579 U.S. 547 (2016); *see also* Young, *supra* note 180, at 1915 (contending that standing is a threshold question and examining the benefits of a federal law would likely result in postponing the resolution of the standing issue until trial).

legal discourse about immigration requires acknowledging the cost argument is contested and worthy of consideration from multiple perspectives. The legal significance extended to the costs created by immigrants inherent in the immigrant-as-injury standing analysis prevents further inquiry from taking place at all. By infusing otherwise contested assumptions about migrant humanity and the costs of immigrants with legal power, the doctrine stunts the development of legal discourse around migration.

Portraying immigrants as costs, empowering the judiciary's perception of those costs, and leaving immigrants out of the conversation while developing legal doctrine is not a new phenomenon. Justice Scalia's dissent in *Arizona*, for instance, emphasized the Arizona citizens who "feel themselves under siege" and "invade[d]" by undocumented immigrants.[295] As Professor Jennifer Chacon puts it, "[u]nsubstantiated assumptions of the costs that migrants impose on society have worked their way firmly into U.S. legal doctrine assessing the appropriate powers to be accorded to the government in policing migration."[296] Those assumptions about costs "often echo age-old, racist tropes about who is assimilable, who is desirable, who fits, and who belongs,"[297] and thereby constitute harms with respect to discourse, while further foreclosing possible policy solutions.[298] Indeed, even framing the value of immigrants in terms of costs and benefits can elide more fundamental questions of humanity.[299] But when courts speak—with the power and consequences of law—they multiply the harms that flow from treating certain groups of people's existence as costs and injuries.

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295. Arizona v. United States, 567 U.S. 387, 436 (2012) (Scalia, J., concurring in part and dissenting in part). Justice Scalia's contention elicited sharp critique from Judge Richard Posner, who emphasized the empirical support otherwise. *See* Richard A. Posner, *Supreme Court Year in Review: Justice Scalia Offers No Evidence to Back Up His Claims About Illegal Immigration*, SLATE (June 27, 2012), https://slate.com/news-and-politics/2012/06/supreme-court-year-in-review-justice-scalia-offers-no-evidence-to-back-up-his-claims-about-illegal-immigration.html [https://perma.cc/442M-4V6R] (pointing to the economic benefits of illegal immigrant workers); *see also* Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J. LAW & SOC. CHANGE 49, 55–56 (2013) (discussing Posner's critique of Scalia's dissent).

296. Chacon, *supra* note 290, at 1053.

297. *Id.* at 1054–55.

298. *Id.* at 1045–46.

299. *See* Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDOZO L. REV. 1893, 1929, 1932 (2021) (calling for more emphasis on moral claims to support humanity of undocumented workers, over economic claims).

B. Overstating the Federal Role in Immigration Federalism

The immigrant-as-injury standing doctrine has leveraged the conventional wisdom about the federal government's primary role in the field of immigration by portraying the states as disempowered actors whose voices require judicial intervention. By rooting their lawsuits in statutory mandates, the states have portrayed themselves as aligned with the interests of Congress against an otherwise rogue federal executive.[300] As noted, to further develop the theory of state disempowerment, states have emphasized that limited constitutional protections for noncitizens—such as the equal protection right to public school education—deprive states of the option to avoid costs.[301]

This theory of state standing based on federal preemption has some intuitive appeal. Portions of *Massachusetts v. EPA* suggest that the imperative for special solicitude grows where federal preemption exists, based on the notion that the state has surrendered its sovereign interests to the government.[302] Indeed, several scholars have suggested that courts look to the existence of federal preemption as a factor weighing in favor of state standing.[303] When the federal government flexes its preemptive power, and especially when the federal government refuses to enforce federal law to the benefit of the states, the argument asserts that states' access to the federal courts becomes particularly necessary.[304] In part, the states' claim to suffer loss flows

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300. The district court's discussion of special solicitude in *Texas (DACA)* relied particularly heavily on the preemptive effect of federal immigration law, explaining that the states are "[u]nable to pass their own laws regarding immigration status or policy," such that they "are hamstrung by the federal government's action or inaction." Texas v. United States, 549 F. Supp. 3d 572, 587 n.15 (S.D. Tex. 2021), *aff'd in part, vacated in part*, 50 F.4th 498 (2022). As Judge Hanen put it, "[t]he states gave up certain rights when they joined the union in return for the promise of the federal government to abide by the Constitution and duly-enacted laws" but where the executive refuses to adhere to the statute, then courts are "the only avenue for redress." *Id.* at 590.

301. *See supra* discussion accompanying note 258 (discussing *Plyler*).

302. *See* Nash, *supra* note 51, at 203–04 ("Despite the Court's recitation of sovereignty as a factor in its analysis, the Court, in the end, emphasized Massachusetts's ownership of coastal property—property that would disappear if the predicted effects of climate change came to pass—as the basis for finding that Massachusetts had standing.").

303. *See, e.g.*, *id.* at 252–53 (arguing for state standing where state raises claim of executive underenforcement of federal law, in area where federal preemption of state law is "obvious and clear").

304. *See id.* at 207.

because their ability to rely on other lawmaking avenues—namely representation in Congress and state legislation—is weakened.[305]

But the theory of state marginalization, while no doubt applicable in some contexts, overlooks the more nuanced reality associated with immigration federalism today. While the federal government does enjoy preemption over certain aspects of immigration policy, the immigrant-as-injury standing doctrine characterizes that preemption as far more powerful than warranted. The courts' description of immigration preemption relies heavily on *Arizona v. United States*, in which the Court found three out of four provisions of Arizona's S.B. 1070 preempted, and applied each section to its own independent preemption analysis.[306] However, the Court did not hold—and has never found—that the federal government enjoys unrestricted field preemption over the entirety of immigration law.[307] In fact, the year before *Arizona*, the Supreme Court upheld an Arizona law aimed at prohibiting the employment of unauthorized workers against a preemption challenge.[308] Locating the precise role of the states in relation to the federal government is an ongoing project that involves nuance and on which various questions remain open.[309]

From both ends of the immigration debate, states are imagining and shaping immigration law in meaningful, conflicting, and dynamic ways. Professors Adam Cox and Cristina Rodriguez have described a

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305. *See id.* at 206–07 (pointing out that preemption of state law alone does not give a state standing when both the state and federal government act as *parens patriae*).

306. Arizona v. United States, 567 U.S. 387, 416 (2012)

307. The Court found only one of the four sections—Section 3, regarding alien registration requirements–subject to field preemption and specified that its holding applied to "the field of alien registration." *Id.* at 401.

308. Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 611 (2011).

309. *See, e.g.*, Pratheepan Gulasekarem, *Immigration Enforcement Preemption*, 84 OHIO STATE L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077307 [https://perma.cc/8FWF-AYYT] (defending Court's treatment of executive enforcement practices as having preemptive effect); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. OF CONST. L. & PUB. POL'Y 82, 83–84 (2013) (arguing that federal legislative, not executive, action should enjoy preemption in immigration); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 173–74 (2016) (arguing for integration of analysis between federal-state relationship and legislative-executive power in assessing immigration policy); Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 694 (2014) (suggesting that federal executive preemption depend on "the extent to which the decisionmaking [sic] process mitigates the institutional concerns associated with administrative preemption").

"deep integration of state and local law enforcement agencies into the federal bureaucracy"[310] through a range of federal immigration enforcement programs that intentionally, though selectively, rely on state and local actors in order to carry out federal goals.[311] Scholars continue to uncover various ways in which state or regional institutions, politics, and culture shape the nature of federal immigration enforcement and our understanding of how state and federal law interact to both the benefit and detriment of noncitizens,[312] at times invoking areas of law outside of immigration.[313] Professor Fatma Marouf draws attention to sharp variations in enforcement across regional ICE field offices, which have produced a system in which each region is "applying *their own versions* of federal immigration policies, which are influenced by the state and local policies in their region."[314] The immigration federalism scholarship as a whole "demonstrates that states and localities have long had the ability to act in significant, albeit legally constrained, ways to moderate or amplify the effects of federal immigration policy on their residents."[315] States work both cooperatively and uncooperatively in a federal system, even one in which claims of federal preemption exist.[316] The narrative of states as powerless entities requiring access to the federal courts to impose their

310. COX & RODRIGUEZ, *supra* note 130, at 158.

311. *See supra* notes 118–121.

312. *See, e.g.*, Fatma Marouf, *Regional Immigration Enforcement*, 99 WASH. U. L. REV. 1593, 1598–99 (2022) (discussing regional variation in enforcement levels across federal ICE offices and suggesting influence of state and regional culture and politics).

313. *See, e.g.*, Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1561 (2019) (identifying "emerging forms of financial immigration federalism," including state expansion of tax credits, lending and other financial credits for certain noncitizens otherwise not permitted under federal law).

314. Marouf, *supra* note 312, at 1599.

315. Jennifer M. Chacon, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1336 (2020).

316. *See, e.g.*, Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance and Privacy*, 74 OHIO STATE L.J. 1105, 1115–19 (2013) (identifying examples of cooperative federalism in immigration policing); Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1094 (2014) (discussing potential for states to advance inclusive immigration policies through cooperative federalism). Jessica Bulman-Pozen and Heather K. Gerken have identified the trend of uncooperative federalism, in which states use the regulatory power bestowed upon them by the federal government to nonetheless resist federal policy. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009).

visions of immigration policy are thus not supported by the realities governing immigration federalism today.[317]

The role of the states as litigants constitutes a relevant dimension of the immigration federalism literature.[318] Indeed, situations may exist in which excessive federal usurpations of immigration power give rise to reasonable assertions of state standing. However, today's immigrant-as-injury standing doctrine relies on blunt and overstated assumptions about the role of the federal government, and fails to account for the multiple ways in which states across the political spectrum can and do influence immigration policy and enforcement.

C. Judicial Legitimacy in an Era of Polarization and Politicization

Concerns about political polarization and judicial legitimacy, both generally and in the context of state standing, are common but especially pronounced in the immigration setting. The office of the State Attorney General has become a stepping stone for politically ambitious individuals who seek career advancement, such that expansive state standing and multistate litigation against the federal government (from the opposing political party) provides an ideal opportunity.[319] Both the progressive and conservative legal movements have relied on "cause lawyers inside the state" to pursue their

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317. *See generally* Su, *supra* note 113, at 1344–54 (detailing the ways in which states can be effective means for accomplishing policy goals that are traditionally not of state concern).

318. Cox & Rodriguez, *supra* note 130, at 157 ("[T]he immigration federalism cases arising today continue to prompt development and realignment of the doctrines governing federal-state relations. But the arguments from federalism made by each side primarily serve their respective visions of immigration enforcement rather than a principled conception of the proper structure of . . . government."); Gulasekaram & Ramakrishnan, *supra* note 309, at 173–74 (describing role of "states and localities [as] important players in their own right—as responsive or resistive policy makers in federalism frameworks, critical mediators in power struggles between the President and Congress, or as political partisans—in immigration policy").

319. *See* Huq, *supra* note 88, at 2156 ("Expanding state standing increases the opportunities . . . to use the power to file suit on the state's behalf as an instrument for personal or partisan advancement."); Grove, *supra* note 51, at 897 (citing research that "suggests that state attorneys general often bring lawsuits that are likely to curry favor with state voters"); Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 616 (2006) (drawing conclusions about citizen ideology and in-state interest groups influence on litigation choices of state attorneys general in context of empirical study of consumer litigation); Devins & Prakash, *supra* note 108, at 2145 ("[A]mbitious attorneys general have proven adept at expanding their base by launching high-visibility legal challenges.").

agendas.[320] Indeed, state attorney general offices have exercised arguably special influence of the conservative agenda before the courts.[321] The dynamics of partisan federalism—in which strong political positions from states provide a means of identity formation of solidarity with people outside the state who share ideological leanings—have attracted national interest and financial contributions.[322]

In addition to the institutional partisanship of state attorneys general, uneasiness about partisanship amongst the federal judiciary—both amongst the lower courts and at the Supreme Court—has increased significantly in recent years.[323] The organization of some states' federal district courts may allow state litigants to effectively hand-pick judges through filing choices. Troubling concerns about judge-shopping, particularly by the Texas Attorney General's Office, have persisted since the filing of the *Texas (DAPA)* litigation, where observers shared broad suspicions that the state had filed the case in the Brownsville division due to the likelihood of the case being assigned a judge whose expressed preferences regarding immigration made them likely to rule against DAPA.[324] According to an amicus brief filed by Professor Stephen Vladeck to the Supreme Court in the enforcement priorities litigation, this practice has increased under the Biden Administration.[325]

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320. Davis, *supra* note 72, at 1254–55 (citing Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 655 (2012)).

321. *See id.* at 1255–56 (attributing expanded state standing to legal mobilization outside the courts).

322. Bulman-Pozen, *supra* note 107, at 1117–18.

323. *See* Hessick & Marshall, *supra* note 73, 108–09 (advocating that states make showing of bipartisan support in suits against federal executive).

324. *See* Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300–08 (2018) (describing concerns regarding judge-shopping by Texas during Obama Administration in *Texas (DAPA)* and cases involving transgender rights and labor regulations and acknowledging that "[i]t is impossible to be certain that Texas chose the venue in these three cases purely for judge-shopping reasons," but that "judge-shopping still seems to be the most likely explanation for the venue decisions").

325. Motion for Leave to File Amicus Curiae Brief and Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants at 3–4, 14, United States v. Texas, 40 F.4th 205 (5th Cir. 2022), *petition for cert. filed*, No. 22-40367 (U.S. July 13, 2022) (describing how Texas Attorney General had filed twenty-seven lawsuits against Biden Administration, nineteen of which were filed in Texas district courts—only one of which was not assigned to a Republican-appointed judge, and arguing that Court should consider Texas's judge-shopping conduct in determining whether public interest favors a stay of enforcement priorities vacatur).

Concerns about politicization take on heightened urgency and influence in the immigration context, in which the dynamics of democratic accountability take on particularized forms. Defenders of expansive state standing have suggested that the institutional nature of state attorneys general offices does provide accountability, insofar as state offices are unlikely to spend resources on litigating cases that fail to garner support from the state electorate.[326] It is unclear whether this supposition holds true in light of the personal career motives of attorney generals discussed above. In the immigration context, democratic accountability to state voters is even less likely to act as a limiting principle. Already, the absence of voting rights as well as broader barriers to political participation for noncitizens raise questions of threshold political disempowerment.[327]

Moreover, peculiar pathologies governing voter behavior appear to attach to pro- and anti-immigrant sentiments. Various polls suggest that large swaths of the U.S. electorate are generally pro-immigrant, in that they favor creating pathways to legalization for persons currently without status.[328] However, voters hostile to the integration of immigrants tend to be disproportionately visible and responsive. Indeed, a recent empirical study contends that U.S. voters with explicitly anti-immigrant sentiments are significantly more vocal with respect to their ideological preferences.[329] If immigration tends to

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326. *See* Massey, *supra* note 106, at 279 (arguing that state political process restrains attorneys general from engaging in excessive challenges to federal authority); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 71–72 (2011) (offering political accountability rationale for state litigation).

327. *See* Morales, *supra* note 295, at 51 (identifying lack of voting rights for noncitizens as factor in producing harsh immigration laws); *see also* Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715, 747 (2021)(discussing political participation barriers for noncitizens, naturalized citizens and Asian and Latinx voters); Ming H. Chen, *The Political (Mis)representation of Immigrants in the Census*, 96 N.Y.U. L. REV. 901, 903–06 (2021) (discussing barriers to inclusion in 2020 census and resulting harms).

328. *See Welcoming Immigration Policies Remain Popular, But Immigration is Not a Critical Issue for Most Americans*, PRRI 3–4, 18 (Feb. 3, 2022), https://www.prri.org/research/welcoming-immigration-policies-remain-popular-but-immigration-is-not-a-critical-issue-for-most-americans [https://perma.cc/8RFK-J5G4] (detailing the results of a poll conducted by PPRI using survey methodology); Rafael Bernal, *Poll: 70 Percent of Americans Support a Path to Citizenship*, HILL (Feb. 16, 2022), https://thehill.com/latino/594625-poll-70-percent-of-americans-support-a-path-to-citizenship [https://perma.cc/C6CU-CJQ5] (describing results of the NewsNation poll).

329. Alexander Kustov, *Do Anti-immigration Voters Care More? Documenting the Issue Importance Asymmetry of Immigration Attitudes*, BRITISH J. POL. SCI., Oct. 2022, at 1, 4.

embolden a vocal fringe, but only the enforcement-oriented side of the fringe, then relying on state voters to constrain state litigation choices would produce asymmetrical results that disfavor immigrants and implicate the democratic accountability rationales offered in support of state standing.

CONCLUSION

This Article has highlighted the rise of the immigrant-as-injury standing doctrine, which the Supreme Court will evaluate in the upcoming term in various states' challenge to the Biden Administration's immigration enforcement priorities. This doctrine has roots in Texas' litigation against DAPA during the Obama era, particularly its treatment of immigrants as injuries due to the costs that states would incur in the form of driver license applications. The immigrant-as-injury theory of state standing has expanded rapidly over the first two years of the Biden Administration, growing to include claims of injury due to the cost of providing public school education, emergency medical care, and criminal law enforcement. The states have broadened the definition of quasi-sovereign interests, thereby bolstering their claims to special solicitude and to *parens patriae* standing. At bottom, the states' standing theory rests on the assumption that immigrants are injuries.

In critiquing the evolution of state standing arguments in the immigration context, this Article does not seek to repudiate state standing altogether. In light of the dehumanizing and subordinating effect of the immigrant-as-standing theory, the misconstrued framing of immigration federalism principles, and political polarization at stake, the Court should reject the immigrant-as-injury standing doctrine. The Court can do so by applying anti-solicitude principles to this particular doctrine, such that states must meet higher—not lower—elements of the traditional Article III requirements of injury, causation, and redressability to establish standing. Along similar lines, the Court should refuse to extend special solicitude and *parens patriae* standing based on the notion that immigrant existence damages states' quasi-sovereign interests. States might still receive the benefit of special solicitude when they serve as plaintiffs in litigation against federal immigration policy so long as the executive action causes cognizable injury that is distinct from the mere existence of immigrants within the state. The presence of private plaintiffs who can demonstrate injury, too, might facilitate the ability of a state to establish standing. Locating a private plaintiff capable of establishing standing because a given

federal policy is likely to increase the number of immigrants in a state may, absent other showings of injury, face significant obstacles.

Irrespective of how the Court ultimately rules, the evolution and influence of the immigrant-as-injury doctrine in litigation against the Biden Administration reveals several insights about the immigration system today. Two brief observations follow, building upon the critiques raised above. First, regarding migrant humanity and discourse over immigration, the disconnect between debates taking place before the judiciary and those unfolding in social movements across the country for change may be growing starker. While the immigrant-as-injury doctrine treats immigrant existence as a cost, movements for immigrant justice in the United States are arguably shifting away from seeking to convince broad sectors of the American public that immigrants deserve fair treatment and humanity or advancing incremental change to the legal frameworks governing immigration. Instead, the frontlines of the immigrants' rights movement have increasingly gravitated towards a deeper questioning of the legitimacy of the immigration enforcement itself, drawing upon abolitionist frameworks.[330] This is by no means a new development. The federal courts have long been slow to reflect social change, and legal claims often fail to resonate with visions of justice or equality. Perhaps the federal courts will increasingly serve as sites of defensive work from an immigrant justice perspective.

Second, with respect to immigration federalism and political polarization, a new era of right-wing activism around immigration appears to be underway. To be clear, state assertions of influence over federal immigration policy have long existed. But the rise of movements for right-wing nationalism across the country has uncovered intensified levels of activism on the part of state leaders seeking to deepen political hostility against immigrants. In addition to expanding state standing theories in litigation, the State of Texas has pursued enhanced criminal trespassing charges against migrants along

330. *See, e.g.*, Chazaro *supra* note 292, 1046–47 ("At the heart of deportation abolition is the notion that deportation only expands . . . indefensible and illegitimate use of state force and should end"); Laila Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. 1597, 1650 (2022) (arguing force use of the "legal practice to challenge the carceral immigration system's legitimacy"); Lee, *supra* note 7 (defining immigration disobedience and calling for a different kind of immigration system that abolishes surveillance of immigrant communities).

the Southern border through Operation Lonestar.[331] In August and September 2022, officials from Texas and Florida attracted national attention after placing hundreds of migrants on buses from border areas into cities like New York, Washington, D.C., and Martha's Vineyard, reportedly without necessarily providing notice or obtaining consent.[332] It is possible that the states' efforts simply mimic past efforts by states to critique and influence the federal government. It seems, however, that a greater disregard for humanity and a quicker inclination to demonize immigrants, particularly nonwhite immigrants, may be afoot.

Numerous challenges lie ahead for the country in developing immigration policies during a time of national division and disagreement. Envisioning humane and workable immigration policies for the future no doubt requires a balance of competing and difficult considerations. This Article holds out hope that those solutions can arise out of common ground regarding baseline considerations of humanity.

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331. *See* Emily Hernandez, *What is Operation Lone Star? Gov. Greg Abbott's Controversial Border Mission, Explained*, TEX. TRIB. (Mar. 30, 2022, 5:00 AM), https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained [https://perma.cc/ZBH8-PK7A] (reporting that 208,000 migrants were arrested by the Texas National Guard, and nearly 12,000 were criminal charged, over 9,300 of which were felony charges.

332. *See GOP Governors Sent Buses of Migrants to D.C. and NYC—With No Plan for What's Next*, NPR (Aug. 6, 2022, 10:04 AM), https://www.npr.org/2022/08/05/1115479280/migration-border-greg-abbott-texas-bus-dc-nyc-mayors [https://perma.cc/HU4D-AYKH] (covering the arrival of more than 6,100 immigrants in D.C. from Texas); Patricia Mazzei, Remy Tumin & Elicia Fawcett, *Florida Flies 2 Planeloads of Migrants to Martha's Vineyard*, N.Y. TIMES (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/us/desantis-florida-migrants-marthas-vineyard.html [https://perma.cc/SZ2X-6K77] (detailing the surprise arrival of immigrants from Florida to Martha's Vineyard).