IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The STATE OF TEXAS, et al., *Plaintiffs,* v. JOSEPH R. BIDEN JR., in his official capacity as President of the United States, *et al.*, *Defendants.*	Civil Action No. 3:22-cv-00780-M

DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Court should dismiss this case challenging part of the Central American Minors program ("CAM" or "the CAM program") under Federal Rules of Civil Procedure 12(b)(1) and (b)(6). First implemented in 2014, re-implemented in 2021, and then re-promulgated and expanded in an April 2023 Federal Register Notice (FRN), the CAM program provides an opportunity for certain children and other qualifying relatives from Guatemala, Honduras, and El Salvador to apply for refugee resettlement and humanitarian parole, and potentially reunite with their family members in the United States. Plaintiffs, Texas and thirteen other States, claim the CAM program's parole component violates the Administrative Procedure Act (APA) as contrary to law, arbitrary and capricious, and promulgated without notice and comment, and the Take Care Clause of the U.S. Constitution. Supp. Compl., ECF No. 110. The Court need not address the merits of Plaintiffs' claims, however, because jurisdiction is lacking, there is no review of these claims under the APA, and the Take Care Clause does not provide a cognizable claim for relief as a matter of law. In addition, the case should be dismissed as moot because the Amended Complaint, ECF No. 14, does not challenge the FRN, the operative agency action. A supplemental complaint, such as Plaintiffs filed in response to the FRN, can add new facts but not claims necessary to preserve jurisdiction.

First, Plaintiffs lack standing to challenge the CAM program. They allege that CAM injures them by increasing the number of noncitizens using their state services. However, even after months of discovery, Plaintiffs fail to establish any such injury, much less demonstrate a cognizable Article III injury in fact. *See United States v. Texas* (*"Priorities*"), 143 S. Ct. 1964 (2023). Further, they fail to causally connect any state costs to the CAM program or demonstrate the Court could provide adequate redress even if CAM were increasing state costs.

Second, Plaintiffs cannot obtain APA review. They challenge action committed to agency discretion by law, fail to challenge final agency action, and do not fall within the zone of interests of the parole statute, 8 U.S.C. § 1182(d)(5)(A). Jurisdictional statutes in the Immigration and Nationality Act (INA) also preclude judicial review. Finally, as multiple courts have found in similar circumstances, Plaintiffs' Take Care Clause allegations fail to state a claim upon which relief may be granted.

BACKGROUND

Central American Minors Program. The CAM program was first established in 2014. Since its inception, CAM provides a mechanism for unmarried children under age 21 who are nationals of Guatemala, Honduras, and El Salvador, and certain family members of those children, to receive refugee resettlement or humanitarian parole and reunite with their parents, legal guardians or other qualifying family members in the United States. U.S. Citizenship & Imm. Servs., "Central American Minors (CAM) Refugee and Parole Program," https://www.uscis.gov/CAM (last updated June 23, 2021). CAM permits petitions for access to the U.S. Refugee Admissions Program on behalf of such children by certain noncitizens present in the United States as lawful permanent residents, or through a grant of temporary protected status, parole, deferred action, deferred enforced departure, withholding of removal, or with pending asylum applications, pending U-visa petitions, or pending T-visa applications filed on or before April 11, 2023. *Id.* Those not found eligible for refugee resettlement are considered for humanitarian parole. *Id.*

For those CAM beneficiaries who qualify, parole is provided under 8 U.S.C. § 1182(d)(5)(A), *see* Bureau of Population, Refugees and Migration; Central American Minors Program, 88 Fed. Reg. 21694, 21696 (Apr. 11, 2023) ("CAM FRN"), which provides that the Secretary of Homeland Security may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian

reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A).

The primary goal of CAM is "to discourage children from making the long and dangerous journey from the Northern Triangle to the United States to try to reunite with their parents." *S.A. v. Trump*, No. 18-CV-03539-LB, 2019 WL 990680, at *1 (N.D. Cal. Mar. 1, 2019). The Program seeks "to achieve this goal by allowing applicant parents to apply for their beneficiary children while the children remained in their original countries." *Id.* "Protecting children and providing them with the stability of their families are the driving forces behind the CAM Program and what distinguishes it from many other available lawful pathways." 88 Fed. Reg. at 21695. "In establishing the CAM Program, the United States recognized that the dangers of irregular migration, including abuse and harm from transnational criminal organizations, are particularly acute for children." *Id.*

The 2014 CAM program was formally terminated in August 2017 as a "discretionary change in policy." 88 Fed. Reg. at 21703; *S.A.*, 2019 WL 990680, at *1. However, CAM sponsors and beneficiaries challenged the termination and rescission of prior approvals of conditional parole under CAM in a suit in the Northern District of California, and succeeded in obtaining a temporary injunction, later formalized in a settlement agreement, requiring "DHS to continue processing — under the DHS policies and procedures in place for processing beneficiaries before January 2017 — [some] 2,714 beneficiaries conditionally approved for parole" under CAM prior to its termination. *Id.* at *2.

In an executive order issued on February 2, 2021, the President directed the Secretary of Homeland Security to "consider taking all appropriate actions to reverse the 2017 decision rescinding the Central American Minors (CAM) parole policy and terminating the CAM Parole

Program" including to "reinstitute and improve upon the CAM Parole Program." E.O. 14010, 88 Fed. Reg. 8267, 8269 (Feb. 2, 2021). Consistent with this presidential directive, on March 10, 2021, the U.S. Department of Homeland Security (DHS) and U.S. Department of State (DOS) announced the reopening of the CAM program in two phases. 88 Fed. Reg. at 21694. In the first phase, the Government focused on reopening and processing eligible cases that were closed when the CAM program was terminated in 2018. Restarting the Central American Minors Program, DOS (Mar. 10, 2021), *available at*: https://www.state.gov/restarting-the-central-americanminors-program/. In the second phase, jointly announced on June 15, 2021, DOS and DHS expanded eligibility for the CAM program to permit petitions by legal guardians in qualifying categories generally and by U.S.-based parents or legal guardians who have a pending asylum application or a pending U-visa petition filed before May 15, 2021. 88 Fed. Reg. at 21694; Office of the Spokesperson, "Joint Statement by the U.S. Department of State and U.S. Department of Homeland Security on the Expansion of Access to the Central American Minors Program," June 15, 2021, *available at* https://www.state.gov/joint-statement-by-the-u-s-department-of-state-and-u-s-department-of-homeland-security-on-the-expansion-of-access-to-the-central-american-minors-program/. On September 13, 2021, DOS and DHS jointly announced that new CAM applications would be accepted beginning September 14, 2021. "Joint Department of State and Department of Homeland Security Rollout of the Application Process for the Central American Minors (CAM) Program," Sept. 13, 2021, *available at* https://www.state.gov/joint-department-of-state-and-department-of-homeland-security-rollout-of-the-application-process-for-the-central-american-minors-cam-program/.

On April 11, 2023, DHS's U.S. Citizenship and Immigration Services (USCIS) and DOS's Bureau of Population, Refugees, and Migration published a notice "look[ing] afresh" at the CAM

program and announcing enhancements in the Federal Register. CAM FRN, 88 Fed Reg. at 21694-21704. The implemented changes to the CAM program include the following: First, USCIS will, if needed, gather additional information to verify the relationship between a qualifying individual, such as a stepparent who filed an Affidavit of Relationship (AOR) for a minor child but is not the child's biological or adoptive parent or legal guardian, and the minor child. 88 Fed. Reg. at 21701-02. Requested information is also used to confirm the qualifying individual's intention to remain available in the United States to provide for the child's care and physical custody. *Id.* Second, USCIS may review or re-review parole for those CAM applicants interviewed by USCIS before February 2018. *Id.* at 21702. This includes individuals who were previously considered eligible for refugee status, and USCIS either refrained from assessing parole eligibility or did not issue a parole authorization document prior to the 2017 termination. *Id.* Third, to improve operational efficiency for initial CAM parole considerations where evidence of financial support is required, under the new program, USCIS will allow financial supporters to provide a sworn statement or other evidence of financial support as an alternative to completing Form I–134, Declaration of Financial Support. *Id.* Fourth, the deadline was extended to request access to the CAM program for qualifying parents and legal guardians with pending applications for asylum, T-visa and U-visa petitions filed on or before April 11, 2023. *Id.*

As part of the FRN's "look afresh" at the CAM program, the agencies "considered alternative approaches" to proceeding with the CAM program, "including ending the parole component of the CAM Program, continuing to operate it as currently constituted, making some or all of the changes described in th[e] notice, or further expanding eligibility … including the benefits and drawbacks associated with each path." *Id.* The FRN noted that the CAM program

was exempt from the APA's notice-and-comment requirement because it constituted a general statement of policy" and involved a foreign affairs function. *Id.* at 21703.

The Present Case. Plaintiffs initially filed suit on January 28, 2022, and filed an amended complaint adding additional State plaintiffs on March 14, 2022. ECF Nos. 1, 14. Following the publication of the FRN, Plaintiffs filed a supplemental complaint but did not formally amend their complaint or include any claims specifically challenging the FRN. ECF No. 110. Plaintiffs allege that CAM's reimplementation and expansion violates the APA because it exceeds the Government's parole authority under 8 U.S.C. § 1182(d)(5)(A), is arbitrary and capricious, and does not comply with notice-and-comment rulemaking requirements. ECF No. 14 ¶¶ 85-108; ECF No. 110 ¶¶ 48-69. They further allege that CAM violates the Take Care Clause of the U.S. Constitution. ECF No. 14 ¶¶ 109-113; ECF No. 110 ¶¶ 70-74. The States allege that they are harmed by CAM because "[a]s the unlawful population of the Plaintiff States continues to grow, the strain on the Plaintiff States' resources and the ability to provide essential services such as emergency medical care, education, driver's licenses, and other public safety services will rapidly decline. Additionally, all services will come at a higher cost." ECF No. 14 ¶ 78.

On March 23, 2022, four individuals in various stages of applying for CAM to benefit their family members moved to intervene as defendants in this case. ECF No. 19. On May 26, 2022, the Court granted in part and denied in part the motion to intervene, permitting Timoteo and Uzias to intervene as defendants. ECF No. 41. On August 31, 2023, four more individuals, Antonio, Magdalena, Marta and Elizabeth, parents seeking to secure rights under CAM to reunite with their children, sought leave to intervene as well, which the Court granted. ECF Nos. 111, 115.

Plaintiffs and Defendants sought and exchanged discovery pertaining to jurisdiction. As part of that process, the parties stipulated to reciprocally limit jurisdictional discovery to Texas—

Defendants only requested and provided discovery to Texas,[1] which will bear the burden of establishing standing on behalf of all the Plaintiff States.[2] ECF No. 106. Defendants now move to dismiss for lack of jurisdiction based on the evidence adduced in discovery, and failure to state a claim upon which relief can be granted. At the outset, Defendants note that Plaintiffs do not challenge the refugee aspect of CAM, nor do they challenge the grants of parole pursuant to CAM in its first period of operation (2014-2017) or under the *S.A.* injunction and settlement agreement after its termination. Ex. A at 13-14 (Pls' Resp. to Requests for Admission Nos. 13-17). Nor do Plaintiffs challenge any individual grants of parole under the CAM program. *Id.* Plaintiffs only challenge the parole aspect of CAM at the programmatic level, as reimplemented and revised since March 2021. *Id.*

STANDARD OF REVIEW

"A case is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). "In applying Rule 12(b)(1), the district court has the power to dismiss for lack of subject-matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Willoughby v. U.S. ex rel. U.S. Dept. of the Army*, 730 F.3d 476, 479 (5th Cir. 2013). In a "factual attack" on jurisdiction—like that raised here — "no presumptive truthfulness attaches to plaintiff's allegations," *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.

[1] Although, a number of Defendants' discovery responses provided national data and information pertaining to CAM not solely limited to Texas.

[2] Thus, should Plaintiffs fail to establish standing via showing an injury to Texas, all Plaintiffs should be dismissed for lack of standing, as none of the other States provide evidence to meet their burden on this factual attack on jurisdiction.

1981), and the plaintiff has the burden of proving, by a preponderance of the evidence, that the court has subject-matter jurisdiction, *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

Courts must dismiss claims under Rule 12(b)(6) if the complaint does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs fail to establish any of the requisite elements of standing. To establish standing, a plaintiff must show it has suffered or will imminently suffer an "injury in fact" "fairly traceable" to the challenged government action that a favorable decision would "redress." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–62 (1992). Further, "the alleged injury must be legally and judicially cognizable," which means the "dispute is traditionally thought to be capable of resolution through the judicial process—in other words, that the asserted injury is traditionally redressable in federal court." *Priorities,* 143 S. Ct. at 1970 (internal quotation marks and citation omitted). After conducting jurisdictional discovery, Plaintiffs have been unable to produce evidence sufficient to establish any one of these required elements, let alone by the requisite preponderance of the evidence. *Paterson*, 644 F.2d at 523. In short, Texas has no record that any of the small number of CAM parole beneficiaries potentially residing in Texas have used any of its services and incurred any costs. It cannot establish these costs as a nonspeculative, cognizable injury in fact, cannot trace any hypothesized costs from resident noncitizens to the CAM program, and cannot show a likelihood that the Court can redress any of its costs through a remedy against the CAM program because there is no evidence showing this program is costing it money.

A. Plaintiffs Have No Injury in Fact

Plaintiffs fail to establish that it is more likely than not that they have an injury in fact, *Paterson*, 644 F.2d at 523, and that any such injury would be legally cognizable, *Priorities,* 143 S. Ct. at 1970.

Factual Injury. To satisfy the "injury-in-fact" requirement of Article III, Plaintiffs must identify an injury that is "concrete … particularized" and "actual or imminent"—not "conjectural" or "hypothetical." *Lujan*, 504 U.S. at 560. Texas's alleged injury is neither concrete, particularized, actual nor imminent.

Texas claims it is harmed by the CAM program because Texas spends money on educational and healthcare services, and subsidizes driver's licenses, for "illegal aliens."[3] ECF No. 110 ¶¶ 7-15; Ex. A at 10 (Pls' Resp. to Interrogatories Nos. 9, 11).

First, Texas's calculation of costs expended on healthcare services for noncitizens includes expenditures for Emergency Medicaid Services and Children's Health Insurance Program (CHIP)

[3] Noncitizens present in the United States pursuant to a grant of parole under section 1182(d)(5) are, by definition, not "unlawfully present." *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing a noncitizen "is deemed to be unlawfully present in the United States if [he] is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."). Though an individual paroled into the United States has not been formally "admitted," as defined by 8 U.S.C. § 1101(13)(A), the individual has been inspected and permitted to enter the United States for the duration of parole. The individual is known to the Department of Homeland Security and is not "undocumented." *See* USCIS, Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States, https://www.uscis.gov/humanitarian/humanitarian_parole#:~:text=USCIS%20uses%20its%20discretion%20to,States%20for%20a%20temporary%20period (last visited Oct. 16, 2023). Texas somewhat similarly defines "illegal" or "undocumented" noncitizens to "include non-U.S. citizens with no lawful status pursuant to any legally valid federal immigration process." Ex. A at 10 (Pls' Resp. to Interrogatory No. 9). Given that parole under section 1182(d)(5)(A) is a "legally valid federal immigration process," and that such parolees are as a matter of federal law by definition not "unlawfully present," CAM parolees logically should not even be included within the group of "illegal" noncitizens that, Plaintiffs claim, are causing Texas to incur costs. However, even if CAM parolees are included under Plaintiffs' view, Plaintiffs still fail to establish an injury in fact here.

Perinatal coverage. However, such expenditures are for "undocumented immigrants" generally or for nationals of Cuba, Haiti, Nicaragua, and Venezuela, *see generally* Exhibit B (Declaration of Susan Bricker), who by definition would not qualify for CAM, 88 Fed. Reg. at 21694 (noting the CAM program is for "nationals of El Salvador, Guatemala and Honduras"). Texas also proffers evidence of expenditures on noncitizens under Texas's Family Violence Program and, until 2010, estimates of uncompensated medical services provided by state public hospitals. *See generally* Exhibit C (Declaration of Lisa Kalakanis). However, these categories of estimated state healthcare expenditures on noncitizens are also only provided for "undocumented immigrants," without further elaboration or evidence pertaining to CAM beneficiaries (not to mention that the CAM program was not even created until 2014). *Id.* To the extent that CAM parolees even qualify as "undocumented immigrants," *see supra* p.9 n.3, Texas offers no evidence that is "concrete" and "particularized," as opposed to "conjectural," showing that noncitizens in this narrow category are among the unspecified "undocumented immigrants" served. *See Lujan*, 504 U.S. at 560.

Second, regarding education, Texas only proffers data related to educational costs for unaccompanied noncitizen children (UCs or UACs). *See generally* Exhibit D (Declaration of James Terry); Exhibit E (Declaration of Leonardo R. Lopez). However, in general, CAM beneficiaries — who are sponsored by their parents or guardians to join them in the United States pursuant to CAM, and who obtain parole or refugee status prior to traveling to the United States — are not UCs. A UC is a minor who "has no lawful immigration status in the United States" and for whom "there is no parent or legal guardian in the United States; or … no parent or legal guardian is available to provide care and physical custody." 6 U.S.C. § 279(g)(2); *Flores v. Sessions*, 862 F.3d 863, 870 (9th Cir. 2017). Further, even if UCs were relevant, Texas's calculation of costs associated with education relies on the unsupported assumptions that all UCs

are (1) in Texas public schools, and (2) qualify for Bilingual and Compensatory Education weighted funding, on the presumption they lack sufficient English proficiency. Ex. D ¶¶ 3-4. Again, Texas proffers no concrete and particularized evidence pertaining to expenses for CAM parolees. *See Lujan*, 504 U.S. at 560.

Finally, as for state costs from issuing drivers' licenses to noncitizens, Plaintiffs first fail to offer any evidence concretely and particularly demonstrating that CAM parolees, who are largely children, have obtained Texas drivers' licenses. Second, the evidence demonstrates Texas does not incur costs from drivers' licenses. Texas speculates that if the demand for driver's licenses increases by tens of thousands of individuals, it will have to build new facilities and hire more staff. Exhibit F ¶¶ 8-10 (Declaration of Sheri Gipson). But Texas has not provided any evidence showing that any possible increased expenditures on drivers' licenses have actually required the State to build, or even plan to build, any new facilities or hire any additional staff, nor that any such conjectural improvements would be a result of increased demand due to the CAM program. *See id.*; *Texas*, 809 F.3d at 162 (noting standing based on licensing fees "was based largely on the need to hire employees, purchase equipment, and obtain office space").

In fact, the actual costs for verification of lawful-presence status, social security and eligibility are a total of $0.35 for one limited-term driver's license for most applicants, and an absolute maximum of less than $0.88 for a small percentage of applicants. Ex. F ¶¶ 6-7. The actual costs for card production for one limited term driver's license is $2.70. *See* Ex. F ¶ 8 ($540,000.00 annually for card production divided by 200,000 applicants). Combining the costs for verification and production of limited term driver's licenses, each license costs Texas between $3.05 and $3.58, *see id.* ¶¶ 6-8, approximately one tenth of the $33 Texas charges for each limited term driver's license. *See* Texas Dep't of Public Safety, *Driver License Fees,*

https://www.dps.texas.gov/section/driver-license/driver-license-fees (last visited Oct. 16, 2023). The Fifth Circuit has held that these types of offsets must be considered in determining whether Texas has suffered an Article III injury. *See Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (citing *Henderson v. Stalder*, 287 F.3d 374, 379-81 (5th Cir. 2002)), and noting that the Fifth Circuit had held that licensing fees were an offset that must be considered in the standing analysis). In sum, even if CAM beneficiaries obtained state drivers' licenses, which Texas has provided no evidence they have, Texas has a revenue gain, not loss, from the transaction.

Texas's theory of standing relies on showing economic injury from the CAM program. However, Texas fails to meet its burden of offering any evidence, let alone a preponderance, showing CAM parolees have used the specified services or are causing any healthcare, educational, or drivers' license costs to the State. *See Paterson*, 644 F.2d at 523. Because Texas cannot show actual evidence of increased costs attributable to CAM parolees, Plaintiffs cannot establish any Article III injury in fact.

Legally Cognizable Injury. Nor can Plaintiffs show that their alleged injury—state expenditures for public services allegedly incurred by noncitizens permitted to enter the United States on a grant of parole—is traditionally and legally cognizable as the type permitting a state to sue the federal government.

There are "bedrock Article III constraints in all cases, even those brought by States against an executive agency or officer." *Priorities,* 143 S. Ct. at 1972 n.3. And "[c]ontingent injuries, especially those arising from the impact of regulations on third parties not before the Court, rarely create cognizable cases or controversies." *Arizona v. Biden*, 40 F.4th 375, 383 (6th Cir. 2022). Federal policies routinely have incidental effects on States' expenditures, revenues, and other activities. Yet such effects have historically not been viewed as judicially cognizable injuries, *see*

State of Fla. v. Mellon, 273 U.S. 12, 17-18 (1927) (noting States may sue the United States only if they have suffered a "direct injury," not where the alleged harm is "only remote and indirect"), and the Supreme Court recently cautioned against recognition of such "attenuated" claims by States in a very similar context. *Priorities*, 143 S. Ct. at 1972 n.3.

In *Priorities*, the Supreme Court reaffirmed that courts must examine "history and tradition" as "a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Id.* at 1970. In doing so, courts must consider whether the "asserted injury" is the type that has "traditionally" been "redressable in federal court" and determine the dispute is one that "is traditionally thought capable of resolution through the judicial process." *Texas*, 143 S. Ct. at 1970.

As explained, Plaintiffs challenge a program that implements Defendants' statutory parole authority, a discretionary authority that authorizes DHS to permit applicants for admission to enter the United States for a temporary period. 8 U.S.C. § 1182(d)(5)(A). Plaintiffs cannot show, however, that a challenge to the federal government's programmatic implementation of parole is traditionally cognizable. In fact, precedent shows the opposite. *See Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (Kavanaugh, J., concurring) (noting that "[n]othing in the relevant immigration statutes at issue here suggests that Congress wanted the Federal Judiciary to improperly second-guess the President's Article II judgment" with respect to the use of parole, particularly when that judgment is based in part on "foreign-policy reasons"); *see also Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985) ("Congress has delegated remarkably broad discretion to executive officials under the [INA]" and its grants of authority "are nowhere more sweeping than in the context of parole."); *see Jean v. Nelson*, 727 F.2d 957, 966 & n.8 (11th Cir. 1984) (noting "the INA grant[s] broad discretionary powers to [DHS] with regard to the parole power"), *aff'd*, 472

U.S. 846 (1985). Further underscoring the traditionally non-reviewable nature of parole claims, courts lack jurisdiction to review "any … decision or action" by DHS concerning discretionary humanitarian parole. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *infra* pp. 33-35.

Here, Plaintiffs claim they are injured because CAM parolees who settle in Texas will use its services. But the Supreme Court has indicated the difficultly a state faces in trying to satisfy its standing burden by arguing that some change in federal policy may cause a change in population that may in turn cause indirect changes in States expenditures. *Priorities*, 143 S. Ct. at 1972 n.3. To allow such a challenge on the basis that those decisions generally affect the entire population of a state would open the door to an untold number of lawsuits. For example, where the federal government opens a military base, whether a business should be permitted to open or close, or whether an individual enrolls in a particular state's university could all become challengeable under the theory that the decisions impact the state's population and therefore its costs.[4] There is no precedent for such challenges, and under *Priorities* such a lack of precedent strongly counsels against allowing Plaintiffs to proceed with the challenges made in this case.

The historical absence of suits premised on speculative indirect state costs from regulation of third parties is powerful evidence that such suits are incompatible with our constitutional structure that "contemplates a more restricted role for Article III courts." *Raines v. Byrd*, 521 U.S. 811, 828 (1997); *cf. Haaland v. Brackeen*, 143 S. Ct. 1609, 1640 (2023) (noting limits on state standing to raise claims against the federal government). "Real or perceived inadequate

[4] *See Massachusetts v. Laird*, 400 U.S. 886 (1970). There, Massachusetts sued the Secretary of Defense to enjoin the Vietnam War. The Court summarily rejected the suit, *id.* at 886, but Justice Douglas argued in dissent that the State had standing, *id.* at 887-891. On Plaintiffs' theory, the Court was wrong, and Justice Douglas was right. Surely the Vietnam War caused at least one dollar in peripheral harm to Massachusetts - for example, because drafted Massachusetts residents would earn less taxable income while away or be entitled to state veterans' benefits after returning.

enforcement of immigration laws does not constitute a reviewable abdication of duty," and a "State's allegation that defendants have failed to enforce the immigration laws and refuse to pay the costs resulting therefrom is not subject to judicial review." *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *see Arizona*, 31 F.4th at 476; *Arpaio v. Obama*, 27 F. Supp. 3d 185, 202 (D.D.C. 2014) (A "state official has not suffered an injury in fact to a legally cognizable interest" even if "a federal government program is anticipated to produce an increase in that state's population and a concomitant increase in the need for the state's resources" because this is simply a generalized grievance that would improperly "permit nearly all state officials to challenge a host of Federal laws."), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015).

The *Priorities* decision also explained that states will have greater difficulty establishing standing when their theory of harm is based solely on indirect costs that may result from changes in federal policy that could affect a state's population. As the Supreme Court noted, "in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending," and "when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated." *Priorities*, 143 S. Ct. at 1972 n.3. In such circumstances, "federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer." *Id*. Like the guidance at issue in the *Priorities* case, CAM does not direct states or state agencies to take any particular action with respect to healthcare, educational or drivers' licensing services, thereby making any allegations of costs indirect.

By contrast, in its discussion one week later of direct injuries in the student loan forgiveness case, the Supreme Court explained that the challenged policy would by its terms directly "cut … revenues" of a State entity, which the Court viewed as "necessarily a *direct* injury to Missouri

itself." *Biden v. Nebraska*, 143 S. Ct. 2355, 2366 (2023) (emphasis added). The challenged act would have eliminated a sizeable portion of loans serviced by a state entity, costing it approximately "$44 million a year" as a direct result, and eliminating the portion of those revenues that is used to fund education in Missouri. In contrast to the present case, *Nebraska* provides an example of direct injuries.

Plaintiffs do not allege that states are directly regulated by CAM. When a "suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be … proved … in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action." *Lujan*, 504 U.S. at 561. "When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed." *Id*.; *see also Warth v. Seldin*, 422 U.S. 490, 504-05 (1975) (noting that where "the harm to petitioners may have resulted indirectly" because they are "a third party" not directly regulated by the challenged policy "the indirectness of the injury" may "make it substantially more difficult to meet the minimum requirement of Art. III"). As the Supreme Court has long held, an indirect theory of harm based solely on the assertion that a change in federal policy will affect a state's population and affect state revenue is insufficient to satisfy Article III. *See Mellon*, 273 U.S. at 17-18. Such injuries are "at most, only remote and indirect" and insufficient to show the type of more "direct injury" required for standing. *Id*. at 18; *see also Priorities*, 143 S. Ct. at 1972 n.3 (citing *Mellon* and *Lujan* in noting that standing arguments premised on "indirect effects" and "attenuated" harms may not satisfy "bedrock Article III constraints"). Indeed, in rejecting such indirect costs as sufficient to show standing, *Priorities* rejected some of the very same evidence that Plaintiffs rely on here: declarations from the same state officials addressing the same subject matter for the same period. *Compare* Ex. C *with Texas*

v. United States, No. 6:21-cv-00016 (S.D. Tex.), ECF No. 19-7 at 1-6; *compare* Ex. E *with Texas*, No. 6:21-cv-00016, ECF No. 19-8.

Previously, states could plausibly challenge federal action that directly regulated state entities or affected federal funding to states. *See Gen. Land Off. v. Biden*, 71 F.4th 264, 272 (5th Cir. 2023). Such a theory of injury is no longer permitted following the *Priorities* decision.[5] Further, courts generally should not consider these types of indirect costs sufficient to satisfy Article III because such costs are self-inflicted and traceable to decisions of state legislatures rather than to changes in federal policy. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (rejecting standing where "[t]he injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures").

The lack of precedent finding standing whenever a change in federal policy might arguably cause some incidental costs to a state makes sense, because such a theory would allow any state to challenge any change in immigration policy. But as numerous courts have recognized, "such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 573-74); *Arizona*, 31 F.4th at 476 (it would be astonishing "to say that any federal regulation of individuals through a policy statement that imposes peripheral costs on a State creates a cognizable Article III injury."). Article III "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), by preserving the "proper—

[5] Further, because the government did not raise a factual attack at the pleadings stage in *General Land Office*, Texas was not required to put forward evidence of its alleged standing like it does here. *See generally* 71 F.4th 264. Regardless, that case was decided on June 16, 2023, *see* 71 F.4th 264, and predates the Supreme Court's decision on June 23, 2023, in *Priorities*, 143 S. Ct. 1964 (2023). The Supreme Court's later-in-time decision significantly calls into question the continued viability of the theory of standing discussed in *General Land Office*. *See* 143 S. Ct. at 1972 n.3.

and properly limited—role of the courts in a democratic society," *Warth*, 422 U.S. at 498. The recent explosion of suits brought by states seeking nationwide injunctions against national immigration policies vividly illustrate the need for courts to prevent states from litigating generalized grievances. *See Priorities*, 143 S. Ct. at 1978 (Gorsuch, J., concurring). A theory of standing that would allow any State to sue the federal government any time it changed federal immigration policy merely by saying the change might affect its population would vitiate the rule that "[t]he mere fact that a state is the plaintiff is not enough" to establish Article III standing unless the state has suffered a concrete harm of the sort that has traditionally "furnish[ed a] ground for judicial redress." *Mellon*, 273 U.S. at 17.

Part of the reason the *Priorities* Court held that the challenge there was not legally cognizable was that immigration policies "implicate[] 'foreign-policy objectives.'" *Id.* at 1971-72 (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–491 (1999)). The Supreme Court held that these factors weigh against finding under Article III or the APA that "federal courts" are "the proper forum for resolving" such disputes. *Id*. Likewise here, the CAM program implements important foreign policy objectives. *See, e.g.,* 88 Fed. Reg. at 21694 (noting "the CAM Program plays an important role" in the president's "comprehensive framework to manage migration throughout North and Central America"). Challenges implicating the Executive Branch's discretionary consideration of costs and benefits in creating foreign policy are not easily susceptible to judicial resolution because there are no "meaningful standards for assessing those policies," which "explain[s] why federal courts have not traditionally entertained lawsuits of this kind." *Id*. at 1972-1973 (*citing Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985)); *see also Texas*, 106 F.3d at 667 (noting that 8 U.S.C. § 1103 "commits enforcement of the INA to" the Secretary's

"discretion" and "is unreviewable under the Administrative Procedure Act because a court has no workable standard against which to judge the agency's exercise of discretion").

B. Plaintiffs Fail to Establish Causation.

Plaintiffs also lack standing because they fail to proffer sufficient evidence for the Court to find it more likely than not that any increased state costs would be "fairly traceable" to the reimplemented CAM program. *See Lujan*, 504 U.S. at 560–62.

As discussed above, Plaintiffs claim that increased Texas state expenditures are attributable to "undocumented immigrants" generally or other categories of noncitizens, not CAM parolees. *See generally* Exs. B-F. Indeed, the evidence Texas produced to show standing does not directly speak to CAM participants at all. *See id*. Whether such allegation would suffice to raise an inference that some of the "undocumented immigrants" might include CAM parolees under the more generous *Iqbal* standard, 556 U.S. at 678, were this a facial attack on the pleadings is irrelevant. Defendants raise a *factual* attack to Plaintiffs' standing, and Plaintiffs' request that the Court hypothesize, without any more concrete evidence, that omnibus "undocumented immigrant" expenditures are caused by CAM parolees is insufficient to meet the preponderance of evidence standard necessary to show jurisdiction is more likely than not. *See Paterson*, 644 F.2d at 523. Indeed, Plaintiffs concede they do not track data concerning social-service expenditures on noncitizens in a way that would permit Texas to trace those expenditures to the CAM program. Ex. A at 8-10 (Pls.' Resp. to Interrogatories Nos. 1, 2, 5, 6, 7, 8).

Even if Plaintiffs could show actual expenditures, they would not be fairly traceable to the CAM program, but rather would be the consequence of the "unfettered choices made by independent actors." *Lujan*, 504 U.S. at 562. Where causation hinges upon the choices of third parties, a plaintiff must adduce facts to show that those choices "will be made in such a manner that will produce causation and permit redressability of the harm." *Nat'l Wrestling Coaches Ass'n*

v. Dep't of Educ., 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Lujan*, 504 U.S. at 562). The Supreme Court has emphasized that standing is "substantially more difficult" to establish in those circumstances. *Lujan*, 504 U.S. at 562; *Texas*, 143 S. Ct. at 1973 ("When 'a plaintiff's asserted injury arises from the government's allegedly unlawful regulation of someone else, much more is needed' to establish standing."); *see, e.g., California v. Texas,* 141 S. Ct. 2104, 2117 (2021); *Clapper*, 568 U.S. at 414. Here, Texas's alleged injuries would arise from the independent choices of third parties, the CAM parolees and their families, whether to reside in Texas and, if so, whether to use the state-subsidized services allegedly at issue in this case.

The D.C. Circuit rejected a similar theory of standing as too speculative in *Arpaio,* 797 F.3d at 24, where a county sheriff asserted that a federal immigration policy would result in more noncitizens remaining in his county and that "some portion of those [noncitizens] will commit crimes." *Id.* at 24. The Court observed that even if the challenged policies increased unlawful immigration, one could not infer that the policies increased crime because "crime is notoriously difficult to predict." *Id.* at 22. "Crime rates are affected by numerous factors, such as the local economy, population density, access to jobs, education, and housing, and public policies that directly and indirectly affect the crime rate." *Id*. Thus, the Court concluded, "it is pure speculation whether an increase in unlawful immigration would result in an increase" in crime, and "where predictions are so uncertain, we are prohibited from finding standing." *Id*.; *see also Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir.) ("The attenuation in this chain of reasoning, unsupported by well-pleaded facts, is worthy of Rube Goldberg"), *cert. denied,* 142 S. Ct. 713 (2021). Similarly, it is speculative whether CAM parolees would use

publicly subsidized healthcare, educational or drivers' license[6] services in Texas—which defeats Plaintiffs' ability to trace their alleged injury to the CAM program.

Similarly, in *Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022), in a unanimous opinion written by Chief Judge Sutton, in which the Sixth Circuit granted a stay of a nationwide injunction pending appeal, the Court found that the plaintiff states were not likely to show that their alleged injuries—including the cost of increased law enforcement and medical costs—were traceable to the federal government's immigration enforcement priorities because they depended in large part upon the choices of third-parties. *Id.* at 8. Similarly, Texas cannot trace any of its alleged injuries to the CAM program, which undermines Plaintiffs' standing.

The Fifth Circuit's decisions finding standing in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015) ("DAPA" case); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev'd and remanded*, 142 S. Ct. 2528 (2022) ("MPP" case); and *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022) ("DACA" case), do not dictate a different result here.[7] First, those cases preceded the *Priorities* opinion, which calls into question their straightforward reliance on indirect injuries to establish standing. Second, the DAPA and DACA courts found evidence establishing causation, which is lacking here. *Texas (DAPA)*, 809 F.3d at 152-55 (finding that, if DAPA went into effect, it would enable at least 500,000 noncitizens in Texas to become eligible for State-funded benefits, and holding that "DAPA would have a major effect on the states' fiscs"); *Texas (DACA)*, 50 F.4th at 520 (pointing to evidence in the record that "if DACA were no longer in effect, at least some recipients would leave, and their departure would

[6] If they even presented a loss of revenue to Texas which, as explained *supra*, drivers' license verification fees do not.

[7] Defendants continue to disagree that standing was properly established in these three cases; standing may not be based merely on the presence of more people in a State. *See Arpaio*, 27 F. Supp. 3d at 202.

reduce the State's Medicaid, social services and education costs"). Finally, the MPP court found standing based on Texas's theory of economic injury due to drivers' license provision, which the evidence presented above undermines by showing Texas *actually makes money* from those transactions. *Texas (MPP)*, 20 F.4th at 968 (holding states had standing on the theory that "some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will obtain Texas driver's licenses at a cost to Texas, and that [e]ach additional customer seeking a Texas driver's license imposes a cost on Texas") (internal quotation marks omitted).

C. Plaintiffs Cannot Show Redressability.

Plaintiffs have also failed to demonstrate the likelihood that the Court can provide adequate redress for any injuries accruing from the parole aspect of the re-implemented CAM program. "[S]tanding is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.5 (1996), and Plaintiffs bear the burden to "demonstrate standing separately for each form of relief sought," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "To establish standing, a plaintiff must show an injury in fact caused by the defendant and *redressable by a court order*." *Priorities*, 143 S. Ct. 1964, 1970 (citing *Lujan*, 504 U.S. at 560–561) (emphasis added)). The Court's judgment must actually "remedy the plaintiff's harms." *Id.* at 1979. "[R]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019).

The relief Plaintiffs seek here is "declar[ing] the CAM Enhancements unlawful and vacat[ing] (i.e., set them aside) them to the extent that they provide any benefits outside of the contours of the Refugee Admissions Program" and "[e]njoin[ing] the Defendants' use of the parole authority under the CAM Enhancements." ECF No. 110 at 18. However, "it is not likely, as opposed to merely speculative," that Plaintiffs' injury would be redressed by any such order.

Lujan, 504 U.S. at 561. The evidence has not established that any of Texas's proffered costs from providing services to "undocumented immigrants" includes CAM parolees, nor that these costs can be causally traced to the CAM program. Without any evidence that CAM is causing these costs, it is not "likely" that enjoining or vacating CAM would ameliorate them. *See id.*; *Priorities,* 143 S. Ct. at 1978 (Gorsuch, J., concurring).

Even had Texas demonstrated a concrete, cognizable, traceable injury from CAM, vacatur or injunction of the CAM program would not prevent Texas's alleged injuries. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-06 (1998) (finding no redressability where specific relief sought would not address the harms suffered). Regardless of whether CAM is in operation, humanitarian parole is available in DHS's discretion to any "alien applying for admission" who demonstrates an urgent humanitarian reason or significant public benefit. 8 U.S.C. § 1182(d)(5)(A). The development of the CAM program was based, in significant part, on the Government's finding that children seeking to be reunified with family members in the United States were approaching the border in record numbers, via a dangerous and unauthorized approach that rendered them particularly vulnerable to "abuse and harm from transnational criminal organizations." 88 Fed. Reg. at 21695. Thus, absent a program like CAM, children and other noncitizens would still be coming to the United States border as applicants for admission, albeit in a more dangerous and unregulated fashion. *See id.* And once at the border, even absent CAM, DHS officers could use their longstanding statutory parole authority to parole these noncitizens into the United States, some of whom may settle in Plaintiff States. *See* 8 U.S.C. § 1182(d)(5)(A); 88 Fed. Reg. at 21695 (noting that accomplishing "the safe reunification of children with their parents" can serve a significant public benefit and/or meet urgent humanitarian needs). Thus, there is no likelihood of redress because enjoining or vacating CAM would not alter immigration officials'

underlying discretion to parole children and other noncitizen relatives into the United States for exactly the same humanitarian and public interests that CAM was created to serve, and could not prevent any such parolees from moving to Plaintiff States and utilizing public services there if they so chose. In fact, the evidence cited in the CAM FRN, *id.*, demonstrates that ending CAM is more likely to *contribute* to the harms Plaintiffs *actually* complain of, i.e., costs due to "unlawful" immigration, *see, e.g.*, ECF No. 110 ¶¶ 42-44, because CAM provides an alternative to such irregular migration for individuals otherwise predisposed to seek to enter the United States.[8]

Thus, as Justice Gorsuch explained in a concurrence on behalf of three justices in *Priorities*, redressability is equally lacking here because enjoining or vacating CAM would not prevent government officials from using their pre-existing statutory discretion to achieve the same result absent CAM. 143 S. Ct. at 1978 (Gorsuch, J., concurring). "A judicial decree rendering the [CAM program] a nullity does nothing to change the fact that federal officials possess the same underlying … discretion." *Id.* "Nor does such a decree require federal officials to change how they exercise that [parole] discretion" regardless of whether CAM is in operation. *Id.* at 1978-79.

Accordingly, Plaintiffs fail to demonstrate redress is likely and therefore lack standing on this basis as well.

D. Plaintiffs Do Not Benefit from Special Solicitude In the Standing Analysis.

Plaintiffs do not allege that, as states, they are entitled to special solicitude in the standing analysis. *See generally* ECF Nos. 14, 110. Regardless, such special solicitude is not available and would not establish standing here.

[8] To the extent any CAM parolees may seek work authorization, work authorization is available not because of any provision of the CAM FRN or other CAM guidance, but because parolees are generally able to apply for work authorization under long-standing regulations that Plaintiffs do not (and could not due to the time bar) challenge. *See* 8 C.F.R. § 274a.12(c)(11).

The Supreme Court's decision in *Priorities* questioned the circumstances in which special solicitude might apply and confirmed that the doctrine has no application when a state asserts standing based on the type of indirect costs Plaintiffs have asserted here. The Court noted that the plaintiffs based "part of their argument for standing" on *Massachusetts*, the case creating the doctrine of special solicitude. *Texas*, 143 S. Ct. at 1975 n.6 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)). But the Court recognized no such special solicitude for the States, and did not even discuss it—even though the States argued in their brief that they were entitled to it. *See* Br. for Pet'rs, *United States v. Texas*, 2022 WL 12591050 (U.S.) at 16. And the Court held that ultimately, "none of the various theories of standing asserted by the States in this case overcomes the fundamental Article III problem with this lawsuit." *Id*. at 1972 n.3. Plaintiffs in *Priorities* based their standing on the same theory of indirect costs that Plaintiffs raise in this case—that the challenged immigration policy will increase the number of noncitizens in their State, which might in turn affect State expenditures with respect "social services such as healthcare and education." *Id*. at 1968-69. Rejecting the plaintiff States' theory of harm, the Supreme Court emphasized that "federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer," and "when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated." *Id*. at 1972 n.3. Justice Gorsuch's concurrence highlighted the absence of any finding of special solicitude and explained its lack of buttress for the States' standing bid. *Id*. at 1977 (Gorsuch, J., concurring). As he explained: "Before *Massachusetts v. EPA*, the notion that States enjoy relaxed standing rules 'ha[d] no basis in our jurisprudence.' … Nor has 'special solicitude'

played a meaningful role in this Court's decisions in the years since." *Id*. (citation omitted).[9] Thus, "it's hard not to think … that lower courts should just leave that idea on the shelf in future" cases. *Id*.

Ultimately, special solicitude was no aid to the plaintiff States in *Priorities* because even in the rare circumstances where the doctrine has been applied, it does not relieve States of the obligation to meet the basic requirements of Article III by showing a concrete and particularized injury in fact traceable to the challenged agency action. *See Massachusetts*, 549 U.S. at 522. At most such special solicitude would lower the threshold for establishing redressability. *See Texas*, 50 F.4th at 514. But a looser standard for redressability cannot help a plaintiff who has not established a concrete harm and is of no use to plaintiff states, such as Plaintiffs here, who raise the type of indirect, unsubstantiated costs that were insufficient to satisfy "bedrock Article III constraints" in the priorities case. *Priorities*, 143 S. Ct. at 1972 n.3; *see Mellon*, 273 U.S. at 17-18 (States may sue the United States only if they have suffered a "direct injury," not where the alleged harm is "only remote and indirect"). Special solicitude thus has no place in a case predicated on indirect costs such as this one.[10]

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[9] Indeed, the Supreme Court has never afforded States "special solicitude" in any other case. To the contrary, the Court's decisions since *Massachusetts v. EPA* have consistently analyzed state standing without granting States favorable treatment simply because they are States. *See, e.g.*, *California*, 141 S. Ct. at 2116-20; *Trump v. New York*, 141 S. Ct. 530, 534-37 (2020) (per curiam); *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

[10] Plaintiffs' notice-and-comment claim, even if it had merit, does not change this analysis. The lack of opportunity to comment on the CAM FRM through notice-and-comment rulemaking is not a sufficient injury to satisfy Article III and obtain relief. The "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing." *Summer v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id*. Thus, even if the Court finds the CAM FRN is the type of agency action that should require notice-and-comment rulemaking and none of the APA's exceptions apply, Plaintiffs still must show a concrete injury, which they have not done, as explained. Because

II. Plaintiffs' Operative Pleadings Are Moot.

Should the Court find that Plaintiffs have standing, it should nevertheless dismiss Plaintiffs' claims, because their legal challenges pertain to an agency action that has been replaced and Plaintiffs' claims fail to address the operative agency action embodying CAM.

Plaintiffs cannot challenge the CAM program apart from a discrete agency statement or memorandum embodying the agency's decision-making with respect to CAM. *Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022) (explaining courts cannot "review[] an abstract decision apart from specific agency action"). The Supreme Court explicitly reversed the Fifth Circuit's opposite view on this issue: that plaintiffs can challenge an agency decision in abstract form and need not focus their claims on the operative document announcing and explaining that decision. *Id.* Here, Plaintiffs' legal claims are in their Amended Complaint, ECF No. 14, which challenges the March 2021 announcement of the re-implementation of CAM. Their challenge to that specific agency action was rendered moot when Defendants promulgated the FRN and "deal[t] with the [issue] afresh by taking new agency action." *Texas*, 142 S. Ct. at 2546. The FRN provided a fuller explanation of Defendants' reasons for reimplementing and then expanding CAM, and further modified the program. *See* 88 Fed. Reg. at 21697 (explaining "the look afresh at the process being announced in this notice" and explaining why Defendants "changed position" from the earlier decision to terminate CAM).

Although Plaintiffs filed a supplemental complaint in response to the FRN, ECF No. 110, a supplemental pleading can only "set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). Supplemental pleadings

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"Article III standing requires a concrete injury even in the context of a statutory violation," Plaintiffs cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in fact requirement of Article III." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

can only plead new *facts*. *Weisbord v. Michigan State Univ.*, 495 F. Supp. 1347, 1350 (W.D. Mich. 1980). Any supplemental pleading should be limited to "new facts that have occurred since the filing of the original pleading and that affect the controversy and the relief sought. Its function is to bring the action 'up to date.'" *Id.* at 1350–51. In contrast, if a plaintiff wants to add new "claims or defenses," the Rules require an amendment of their operative pleading. *See* Fed. R. Civ. P. 15(c)(1)(B) (permitting relation back "when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out … in the original pleading"). Although Plaintiffs did add *factual allegations* regarding the FRN in their supplemental complaint, they cannot add to or change their *legal claims* to address the FRN in a mere supplement. *See id.* None of the claims in their operative pleading, the Amended Complaint, ECF No. 14, challenge the FRN, which is the operative agency action embodying the CAM program currently, *see Texas*, 142 S. Ct. at 2546. Accordingly, Plaintiffs' legal claims have been rendered moot and should be dismissed.

III. Plaintiffs Cannot Obtain APA Review of Their Claims.

The Court should additionally dismiss Plaintiffs' APA claims as unreviewable. Plaintiffs impermissibly challenge action committed to agency discretion by law, fail to properly challenge a final agency action, are not within the zone of interests of section 1182(d)(5)(A), and jurisdiction-stripping provisions of the INA preclude review.

A. Decisions Committed to Agency Discretion by Law are Not Reviewable.

This Court may not review Plaintiffs' challenge to the CAM program because decisions regarding parole under that program are committed to agency discretion by law. The APA precludes review of decisions "committed to agency discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *see* 5 U.S.C. § 701(a)(2). The text of section 1182(d) commits the decision to grant

parole explicitly to the "discretion" of the Secretary of DHS. 8 U.S.C. § 1182(d)(5)(A); *see Jama v. ICE*, 543 U.S. 335, 346 (2005) (Congress's use of "may" "connotes discretion"). The Court therefore lacks APA review of discretionary actions taken under the parole authority.[11]

Even absent such an explicit textual commitment, the decision to reimplement and expand the CAM program is unreviewable under section 701(a)(2) because it involved the "complicated balancing of a number of factors which are peculiarly within its expertise," including the Executive Branch's comprehensive efforts to manage the flows of migration from Central America and address international child trafficking. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The concerns justifying executive discretion are "greatly magnified in the [immigration] context," *see Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015), which implicates the "dynamic nature of relations with other countries" and the need for policies to be "consistent with this Nation's foreign policy," *Arizona v. United States*, 567 U.S. 387, 397 (2012). Considering the foreign-affairs and international-crime-fighting concerns that justify CAM, the Court "'would have no meaningful standard against which to judge the agency's exercise of discretion'" in re-implementing the program. *See Lincoln*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 830). The INA offers no guidelines for a court's micromanagement of policies to limit unlawful international migration, but rather charges the Executive Branch with implementing policies to do so. *See* 8 U.S.C. § 1103(a). While Plaintiffs may argue that section 1182 offers some standards for assessing the lawfulness of individual parole determination, i.e., whether they serve an urgent humanitarian reason or significant public benefit, "Texas admits that it is not challenging any grants of parole

[11] While Plaintiffs might rely on cases showing that the Supreme Court and Fifth Circuit did not find the DACA and DAPA programs committed to agency discretion by law, *see DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020); *Texas*, 809 F.3d at 168, those programs were not rooted in an explicit statutory grant of discretion to DHS such as the parole authority challenged here is.

(i.e., orders) but is challenging the rules of the reopened CAM program announced in March 2021 and the subsequent rules implementing it." Ex. A at 14. But the CAM program does not guarantee grants of parole to any applicants, and they must individually satisfy section 1182 on a case-by-case basis and merit a favorable exercise of discretion. It merely creates a framework of common factors and priorities, such as combatting unlawful migration and child trafficking, that may support findings of urgent humanitarian reasons or significant public benefit for CAM applicants upon individual review. The Court has no meaningful standard for assessing the government's decision to reimplement CAM to address those priorities.

B. Plaintiffs Do Not Challenge Final Agency Action.

Second, the CAM program is not a challengeable final agency action under the terms of the APA. To state an APA claim, Plaintiffs must challenge "final" agency action, 5 U.S.C. § 704, and agency action is "final" under the APA only if it both "consummate[es] the agency's decision making process" and determines "rights or obligations" or produces "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The operative document embodying the agency's decision-making, the CAM RFN, does not determine anyone's rights or obligations or itself produce "legal consequences." *Id.*

Rather, the CAM FRN is a general statement of policy about how the agency currently intends to use its discretionary authority, and a "general statement of policy … is not a 'final agency action,' rendering it unreviewable." *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *vacated in part on reh'g*, 599 F.3d 652 (D.C. Cir. 2010); 650 F.3d 717 (D.C. Cir. 2011); *see Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). "By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach" and "retains the discretion and

the authority to change its position — even abruptly." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

Here, the CAM FRN lets the public know the agencies' current approach to providing parole to eligible Central American applicants who meet the pre-existing statutory standards. *See id.* But it does not create any rights to parole for CAM applicants, nor does it obligate DHS to confer parole on anyone, or otherwise alter the legal consequences attendant to any noncitizen's consideration for parole under section 1182(d)(5)(A). *See Bennett*, 520 U.S. at 178. The CAM FRN does not require or guarantee that any qualifying Central American child or relative automatically receives parole. Any grant of parole is an individualized decision made by a DHS line officer on a case-by-case basis if the individual is statutorily eligible and merits a favorable grant of parole. *See* 88 Fed. Reg. at 21696 ("Each parole determination was, and continues to be made on an individualized, case-by-case basis. Authorization of parole may be warranted based on serving a significant public benefit or for urgent humanitarian reasons … and if a favorable exercise of discretion is merited."). And the FRN leaves USCIS officers with discretion to deny parole to CAM applicants when they deem it appropriate, and leaves the final parole decision to U.S. Customs and Border Protection when the applicant presents at a Port of Entry. *Id.* Because the CAM FRN is only a statement of the agency's policy approach to implementing section 1182 in these circumstances, and has no binding effect on whether any CAM applicant receives parole, it does not constitute reviewable final agency action.

C. Plaintiffs Do Not Fall Within the Zone of Interests of Section 1182(d).

APA review is also unavailable here because Plaintiffs' claims do not fall within the zone of interests of section 1182(d)(5)(A). A plaintiff "may not sue unless he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for

his complaint." *Thompson v. N. Am. Stainless*, 562 U.S. 170, 177 (2011). This inquiry asks whether Congress intended for a particular plaintiff to invoke a particular statute to challenge agency action. *See Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 399 (1987). If a plaintiff is not the object of a challenged regulatory action, the plaintiff has no right of review because its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399.

Nothing in the text, structure, or purpose of the INA generally, or section 1182(d)(5)(A) specifically, suggests that Congress intended to permit a state to invoke attenuated downstream financial costs from the enforcement or implementation of immigration policies to bring lawsuits to challenge those policies. *See Fed'n for Am. Immigration Reform (FAIR), Inc. v. Reno*, 93 F.3d 897, 902 (D.C. Cir. 1996) ("The immigration context suggests the comparative improbability of any congressional intent to embrace as suitable challengers in court all who successfully identify themselves as likely to suffer from the generic negative features of immigration."). To the contrary, the INA reflects the principle that managing migration to the border is exclusively the province of the federal government and the Executive. And that conclusion is reinforced by the fact that the federal government, not the States, is "the key sovereign with authority and 'solicitude' with respect to immigration." *Arizona*, 31 F.4th at 476; *see Arizona*, 567 U.S. at 394-97. Additionally, third parties generally have no cognizable legal interest in compelling the enforcement of laws against others. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The disconnect between the CAM FRN and Plaintiffs underscores the problem. Plaintiffs are not regulated by CAM and they lack a legally or judicially cognizable interest in avoiding incidental effects on state resources that might occur from CAM applicants receiving parole and moving to their state—a merely "indirect effect[]" of the Rule that makes their assertion of injury "more attenuated." *Priorities,*

143 S. Ct. at 1972 n.3. Their reallocation decisions do not give rise to an injury with which the parole statute is concerned. "If the law were otherwise, an enterprising plaintiff would be able to secure" the right to challenge a governmental action without any otherwise cognizable injury "simply by making an expenditure" in response to the action. *Clapper*, 568 U.S. at 416.

Consistent with those principles, Congress has provided in the INA that only the noncitizens against whom the immigration laws are being enforced may challenge application of those laws—and only in certain circumstances and through their removal proceedings. *See, e.g.,* 8 U.S.C. §§ 1226(e); 1252(a)(2)(B)(ii), 1252(a)(5), (b)(9), (g); *see also id.* §§ 1226a(b)(1), 1229c(f), 1231(h), 1252(a)(2)(A), (a)(2)(C), (b)(4)(D), (b)(9), (d), (f), (g). A detailed review scheme that allows some parties, but not others, to challenge specific executive action is "strong evidence that Congress intended to preclude [other parties] from obtaining judicial review." *United States v. Fausto*, 484 U.S. 439, 448 (1988); *see Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that organizational plaintiff could not challenge INS policies "that bear on an alien's right to legalization").

Allowing any state or third party to invoke alleged indirect monetary harms to challenge the Executive's immigration-enforcement decisions through the APA would circumvent Congress's design.

D. Statutes Preclude Jurisdiction.

Finally, 8 U.S.C. § 1252(a)(2)(B)(ii), a jurisdiction-stripping provision of the INA, applies here and precludes APA review of Plaintiffs' claims. *See* 5 U.S.C. § 701(a)(1). Congress provided that "no court shall have jurisdiction to review . . . any other decision or action … the authority for which is specified … to be in the discretion of the . . . Secretary." 8 U.S.C. § 1252(a)(2)(B)(ii). The parole statute provides that humanitarian parole under section 1182(d), such as the grants of

parole under CAM, is in the discretion of the Homeland Security Secretary. 8 U.S.C. § 1182(d)(5)(A) (Secretary may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States"). The intersection of the grant of discretion in section 1182(d)(5)(A) and the jurisdiction-stripping effect of section 1252(a)(2)(B)(ii) preclude jurisdiction over challenges to both the individual parole decisions under CAM and the overall CAM framework providing guidelines for the circumstances in which "that discretionary judgment" can be "exercised" for eligible Central American children and relatives seeking relief through this program. *See id.*

The Supreme Court's recent decision interpreting section 1252(a)(2)(B)(i) underscores that its neighboring provision, section 1252(a)(2)(B)(ii), also bars review of programmatic-level challenges. In *Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022), the Supreme Court held that section 1252(a)(2)(B)(i), which bars jurisdiction to review "any judgment regarding the granting of relief" under certain INA provisions bars review of "judgments of whatever kind" covered by the statute, and "not just discretionary judgments or the last-in-time judgment," and "encompasses not just the granting of relief but also any judgment relating to the granting of relief." The Court has explained that sections 1252(a)(2)(B)(i) and (ii) cover decisions "of a like kind." *Kucana v. Holder,* 558 U.S. 233, 247 (2010). Even prior to *Patel*, in the similar context of 8 U.S.C. § 1226(e), which bars review of challenges to release on conditional parole under section 1226(a), the Fifth Circuit explained that if a decision is discretionary, neither the "discretionary judgment," nor "the manner in which that discretionary judgment is exercised," is "subject to review." *Loa-Herrera v. Trominski*, 231 F.3d 984, 991 & n.12 (5th Cir. 2000).

Applying these principles to section 1252(a)(2)(B)(ii)'s bar on review, they indicate that Defendants' decisions to re-implement and expand the CAM program, which are "judgment[s] relating to" the Secretary's discretionary decision to grant parole under section 1182(d)(5)(A), are shielded from review by section 1252(a)(2)(B)(ii). *See Patel*, 142 S. Ct. at 1622. Review under the APA is therefore precluded.

Further, section 1252(a)(2)(B)(ii) not only precludes review of Plaintiffs' APA claims, but their constitutional challenge as well. This is indicated by the fact that the exception to section 1252(a)(2)(B)(ii), permitting plaintiffs to bring "colorable constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), applies only to a petition for review of an order of removal filed with an appropriate court of appeals. *See id.*; *Luna-Garcia De Garcia v. Barr*, 921 F.3d 559, 564 (5th Cir. 2019). Because that exception for "constitutional claims" does not apply outside of the removal-order-review context, in which this case does not arise, this provision indicates that section 1252(a)(2)(B)(ii)'s jurisdictional bar applies to the constitutional claim presented here..

IV. Plaintiffs' Constitutional Claim Fails to State a Claim.

The Court should dismiss Plaintiffs' Take Care Clause claim, ECF No. 110 ¶¶ 70-74, for failure to state a claim.[12] Despite numerous challenges, no court has yet definitively held that the Take Care Clause provides a private right to sue or cause of action. *Las Americas Immigrant Advocacy Center v. Biden*, 571 F. Supp. 3d 1173, 1180 (D. Or. 2021) (collecting cases); *City of Columbus v. Trump*, 453 F. Supp. 3d 770, 800 (D. Md. 2020) ("No court in this circuit, or any other circuit, has definitively found that the 'Take Care Clause' provides a private cause of action which a Plaintiff may bring against the President of the United States or his administration.");

[12] The merits of Plaintiffs' APA claims, to the extent the Court finds it has jurisdiction to review them, will largely require the Court to examine the administrative record and are therefore not yet ripe for challenge in this liminal motion.

Robbins v. Reagan, 616 F. Supp. 1259, 1269 (D.D.C.), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) (similar). This lack of precedent should foreclose finding a private cause of action under the Clause here given the Supreme Court's repeated caution that courts should avoid creating new constitutional causes of action or even extend the application of previously implied causes of action. *See, e.g.*, *Egbert v. Boule,* 142 S. Ct. 1793, 1800 (2022) (noting "our cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts. . ."); *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). Thus, if this Court held that the Clause creates a private right of action, it would be reaching a novel conclusion that neither the Supreme Court nor any other court has reached and, in doing so, would disregard 40 years of Supreme Court precedent disfavoring the creation of new constitutional causes of action.

Indeed, courts recently addressing State challenges to programmatic use of parole by the federal government have rejected the viability of Take Care claims by those States. *Florida v. United States*, No. 3:21-CV-1066, 2023 WL 2399883, at *33 (N.D. Fla. Mar. 8, 2023); *Brnovich v. Biden*, 630 F. Supp. 3d 1157, 1178 (D. Ariz. 2022).

This case similarly does not present an occasion for such a drastic break from precedent, especially because even were the Court to recognize such a cause of action, it could only provide relief regarding ministerial duties where "nothing was left to discretion" and there was "no room for the exercise of judgment." *State of Mississippi v. Johnson*, 71 U.S. 475, 498 (1866); *see Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 608 (D.C. Cir. 1974). However, Defendants' implementation of the parole authority pursuant to CAM is explicitly discretionary and ruling that DHS's and DOS's discretionary decisions to re-implement and expand CAM are unlawful under the Constitution would constitute impermissible "judicial interference with the exercise of Executive discretion." *Johnson*, 71 U.S. at 499. The fact that expressly discretionary, and not

ministerial, functions are at issue in this challenge to the parole aspect of the CAM program independently precludes the viability of a Take Care Clause claim.

Finally, the APA offers a vehicle to challenge action that is allegedly "contrary to constitutional … power," 5 U.S.C. §702(B), and freestanding equitable relief for federal officers' alleged violation of the Constitution or statute, as Plaintiffs seek under their Take Care Clause claim, ECF No. 110 ¶ 74, is unavailable in a suit under the APA. The 1976 amendment to the APA was intended "to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer[,]" *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989), and thus "do away with the ultra vires doctrine," *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985). *See, e.g., Locke v. Warren*, No. 19-61056-CIV, 2019 WL 4805716, at *4 (S.D. Fla. Oct. 1, 2019) (collecting cases).

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' case in its entirety.

Dated: October 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2023, I electronically filed this motion to dismiss with the Clerk of the Court for the United States District Court for the Northern District of Texas by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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