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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

As explained in Defendants' motion to dismiss, 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). ECF No. 123. Plaintiffs' opposition does not alter this conclusion. Plaintiffs fail to proffer any evidence establishing injury in fact, attribute state costs to the CAM program, or demonstrate that the Court could provide adequate redress. Plaintiffs also 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)), and review is precluded by 8 U.S.C. § 1252(a)(2)(B)(ii). Finally, Plaintiffs' Take Care Clause allegations fail to state a claim upon which relief may be granted.

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs fail to establish any of the requisite elements of standing: an "injury in fact" that is "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). Plaintiffs have submitted no evidence showing that any of the small number of CAM parole beneficiaries potentially residing in Texas have used its services or caused Texas to incur any costs. They cannot establish that any expenditures are nonspeculative or a cognizable injury in fact, that the expenditures can be traced to the CAM program, or that this Court can provide even incremental redress. ECF No. 123 at 8-27.

Plaintiffs maintain they need not "show 'actual evidence of increased costs attributable to CAM parolees'" to establish injury under Fifth Circuit precedent. ECF No. 143 at 7-8 (citing *Texas v. Biden* ("MPP"), 20 F.4th 928, 971 (2021)). However, Plaintiffs conflate a requirement to show state expenditures on specific individuals paroled under CAM—which Texas does not necessarily

need to establish an injury—with showing *any* evidence of increased costs attributable to CAM, which Texas *must* show in some fashion. *See Lujan,* 504 U.S. at 560–62. Plaintiffs may not rely on mere pleading allegations. For 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. 1981). Further, 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).

The MPP case Plaintiffs rely on confirms their burden. *See* 20 F.4th at 971. When the Fifth Circuit addressed whether Texas had evidence it provided drivers' "licenses to immigrants who became eligible because of MPP's termination," the Court did not say Texas required *no* evidence of such financial injury, but rather that it need not establish with a certainty that a parolee applying for a driver's license in Texas would not have been paroled but for the termination of MPP. ECF No. 143 at 7-8 (citing *MPP*, 20 F.4th at 971). The Court indicated Texas had provided sufficient "big-picture evidence" to establish standing to challenge MPP's termination even without "highly specific individualized documents." *Id.* Texas has not offered such evidence here, in "big-picture" form or otherwise, showing it is has increased expenditures due to the concededly tiny number of noncitizens who have received parole since CAM was re-implemented (the relevant period being challenged by Plaintiffs) potentially residing in Texas. *See* ECF No. 143 at 9 (since re-implementation on March 10, 2021, only 94 approved CAM parole cases, and 86 pending CAM parole cases, involved petitioning parent living in Texas). The MPP case involved termination of a program potentially affecting tens of thousands of noncitizens. *See Texas v. Biden*, 554 F. Supp. 3d 818, 834 (N.D. Tex. 2021). A vastly smaller number of noncitizens are potentially affected by the program here. *Cf. Pollis v. New Sch. for Soc. Rsch.*, 132 F.3d 115, 121 (2d Cir. 1997)

(explaining that "[t]he smaller the sample" of individuals, "the less persuasive the inference" that may be drawn).

Although CAM parolees are not undocumented, *see* ECF No. 123 at 9 n.3, Plaintiffs nonetheless maintain that costs attributable to undocumented noncitizens are relevant. ECF No. 143 at 8. Plaintiffs argue that whether CAM parolees are "undocumented" depends on whether they win their challenge claiming the CAM parole program is unlawful, and because the Court must assume the truth of Plaintiffs' merits allegations on a Rule 12(b)(1) motion, it must assume CAM parolees are undocumented. *Id.* (citing *Pickett v. Texas Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1019 (5th Cir. 2022)). Plaintiffs' circular reasoning is incorrect for several reasons. First, even if the Court were to decide that CAM represents an unlawful use of parole, it would not render individuals who have received parole under CAM "undocumented." CAM parolees present in the United States are inspected and known to the Department of Homeland Security. *See* 8 U.S.C. § 1225(a)(1), (3). Second, invalidating CAM would not invalidate the grants of parole already made pursuant to CAM. Plaintiffs expressly do not challenge any individual grants of parole under the CAM program. ECF No. 123-1 at 13-14 (Pls' Resp. to Requests for Admission). Plaintiffs seek to declare the CAM program unlawful, not to rescind any individual grants of parole already made thereunder. ECF No. 14 at 35-36; ECF No. 110 at 18. Thus, under no circumstances would CAM parolees be rendered "undocumented."

A. Plaintiffs Lack 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, or that any such injury would be legally cognizable, *United States v. Texas* ("*Priorities*"), 143 S. Ct. 1964, 1970 (2023). Plaintiffs claim harm from the CAM program because Texas spends money on educational and healthcare services, and subsidizes driver's licenses, for "illegal aliens." ECF No. 110 ¶¶ 7-15; No. 123-1 at 10. However, any such costs were

spent on noncitizens not at issue here, or were more than offset by money Texas received from the very same service transaction. ECF No. 123 at 9-12. Plaintiffs also fail to show that state expenditures for public services allegedly incurred by noncitizens on parolees is traditionally and legally cognizable as the type permitting a state to sue the federal government. *Id.* at 12-19.

1. Plaintiffs Fail to Show an Injury When the Complaint was Filed.

Plaintiffs first argue that because jurisdiction depends on the state of facts when the complaint is filed, they "did not need to show an actualized injury, but only that 'they fac[ed] prospective injury . . . where the threatened injury was real, immediate, and direct.'" ECF No. 143 at 10 (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). However, the CAM program does not represent only a "prospective" alleged injury, because it was in operation from 2014 to 2017, was officially restarted *more than a year before* Plaintiffs filed the currently operative Amended Complaint on March 14, 2022, ECF No. 14, and was in operation for nearly two and a half years when they filed the Supplemental Complaint on August 29, 2023, ECF No. 110. Whichever of these pleadings the Court deems operative, CAM had long been in existence when Plaintiffs brought their operative claims. Plaintiffs cannot sidestep their failure to produce any evidence pertaining to actual expenses for CAM parolees by saying none would have been available at the time of filing. Years' worth of data should have been available if Texas had recorded data pertaining to CAM parolees in its State, which it concededly does not. ECF No. 123-1 at 8-10 (Pls.' Resp. to Interrogatories Nos. 1, 2, 5, 6, 7, 8). While record-keeping is not *per se* required to establish standing, the absence of even generalized data pertaining to expenditures on CAM parolees leaves the Court with no basis to connect the dots between Plaintiffs' claimed expenses and the CAM program, other than conjecture. *See Lujan*, 504 U.S. at 560 (injury cannot be "conjectural or hypothetical").

2. Plaintiffs Cannot Establish Injury in Fact from Profitable Services.

Plaintiffs cannot establish an injury in fact from providing drivers' licenses to noncitizens because Texas did not lose any revenue by providing that service. The evidence shows that Texas spends between $3.05 and $3.58 to produce licenses for noncitizens, based on the verification and card production costs, and charges $33 for the service. ECF No. 123 at 11-12.

Texas concedes that, under Fifth Circuit law, such offsets must be considered against the alleged costs when they "arise from the same transaction as the costs." ECF No. 143 at 11 (quoting *Texas v. United States* ("*DAPA*"), 809 F.3d 134, 155 (5th Cir. 2015)), as they do here where card production, verification costs, and fees arise from the same transaction. *See id. at* 156 (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). Texas contests this conclusion, pointing to statements in a state Department of Public Safety (DPS) declaration that states that "'[e]ach additional customer seeking a limited[-]term driver license or personal identification certificate imposes a cost on DPS that exceed [the application fee] of $33,' and that every 10,000 licenses cost DPS an average of over $200 per license." However, the DPS declarant does not explain how the cost exceeds $33, and the assertion is not supported by any of the math identified in the declaration pertaining to verification and production costs. ECF No. 123-7 ¶ 8.[1] Given its location in paragraph 8, that assertion appears potentially related to Texas's claim, based on the chart in that paragraph, that "every 10,000 licenses cost DPS an average of over $200

[1] Further, this statement was only in the pre-existing DPS declaration Plaintiffs provided to Defendants in discovery. *See* ECF No. 123-7. In the updated DPS declaration, with this case's caption, attached to Plaintiff's Response brief, the declarant merely states: "Each additional customer seeking a limited term driver license or personal identification certificate imposes a cost on DPS," with no mention of whether that cost exceeds $33, and the updated declaration does not otherwise mention this "over $33" claim. ECF No. 143 at 60-64.

per license." *See id.*; ECF No. 143 at 11. However, those costs are due to estimated projected costs Texas might incur if forced to expand facilities or hire more staff to respond to "every 10,000 additional customers above the 10,000 customer threshold." ECF No. 123-7 ¶ 8. As explained, Texas has not offered any evidence that any possible increased expenditures on drivers' licenses have required the State to build, or plan to build, any new facilities or hire any additional staff. ECF No. 123 at 11. Furthermore, Plaintiffs concede that the number of CAM parolees potentially living, or seeking to live, with parents in Texas is a tiny fraction of that 10,000 threshold. ECF No. 143 at 9 (94 granted parole, and 86 with parole pending, with parental residence in Texas).[2] Plaintiffs have not offered evidence of how many, if any, of this small number of CAM parolees (mostly children) have applied for drivers' licenses. The conclusory and hypothetical statements in the DPS declaration, with no bearing on the actual size of the possible CAM population in the State, fail to demonstrate an injury in fact from drivers' license costs by a preponderance of the evidence. *See Paterson,* 644 F.2d at 523.

Next, Plaintiffs attempt to bolster their theory by arguing "the Supreme Court in *Priorities* cited the Fifth Circuit's *DAPA* ruling—which found standing solely on the same driver's license data as in this case—as a model for State standing to challenge federal immigration policies." ECF No. 143 at 12 (citing *Priorities*, 143 S. Ct. at 1974). But *Priorities* did not offer the DAPA case as a "model for State standing," but rather only highlighted it as an example of a different type of case than *Priorities* where "the challenged policy might implicate more than simply the Executive's traditional enforcement discretion," and where a different standing analysis may

[2] Plaintiffs mistakenly claim that "as of April 4, 2023, the Federal Defendants had paroled 425 aliens into the United States under the CAM Program who resided in Texas." ECF 143 at 9. Rather, this is the total, national number of individuals granted parole under CAM since re-implementation and is not limited to those with residences in Texas. ECF No. 125-5 at 29 ("USCIS can only provide totals that are not limited to the state of Texas.").

apply. 143 S. Ct. at 1974. Furthermore, *Priorities* does not support standing here, as the Court there rejected the same evidence purporting to establish an injury in fact. *Compare* ECF No. 123-3 *with Texas v. United States*, No. 6:21-cv-00016 (S.D. Tex.), ECF No. 19-7 at 1-6; *compare* ECF No. 123-5 *with Texas*, No. 6:21-cv-00016, ECF No. 19-8.

Plaintiffs' additional arguments related to offsets for its alleged educational and healthcare costs respond to arguments raised by Defendant Intervenors. ECF No. 143 at 12-13. Regardless of whether the Court deems these offsets to negate Texas's alleged injury from costs in these categories, the critical point remains that the evidence Texas proffered regarding education, healthcare and family services costs spoke to expenditures on services for "undocumented" noncitizens and other categories of noncitizens, not CAM parolees. ECF No. 123 at 9-11.

B. Plaintiffs Fail to Establish Causation and Redressability.

Plaintiffs also 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. None of their data on state expenditures for noncitizens addresses CAM parolees, and Plaintiffs concede they do not track this information in a way that would permit them to determine if any CAM parolee was using subsidized services. ECF No. 123 at 19-22. Further, Plaintiffs fail to show it is likely that a favorable order enjoining or vacating CAM would redress their alleged financial injury because they have no evidence that CAM parolees are causing Texas to incur the costs attributed to "undocumented" noncitizens. *Id.* at 22-24. Also, absent CAM, Defendants would still retain the discretion under 8 U.S.C. § 1182(d)(5)(A) to parole these Central American children and relatives into the United States for the same or similar urgent humanitarian or significant public interest reasons. *Id.*

1. Plaintiffs Cannot Trace Evidence to Their Alleged Injury.

Plaintiffs argue that Texas's alleged injury is traceable to the CAM program because it is the predictable effect of governmental action on the decisions of third parties. ECF No. 143 at 13-34 (citing *Dep't of Com. v. New York,* 139 S. Ct. 2251, 2566 (2019). Their argument fails to establish causation for multiple reasons. First, it ignores the fatal flaw undergirding Plaintiffs' standing argument—Texas's reliance on evidence of "undocumented" noncitizens generally and other types of noncitizens and the absence of any evidence showing CAM parolees are using any of the subsidized services. *See supra* pp. 3-7.

Second, absent that or any evidence establishing that CAM parolees will use the selected state services, there is no basis other than speculation for assuming they will use state-subsidized healthcare services, or enroll in state public education *and* trigger English-proficiency expenditures. ECF No. 123 at 9-11. Further, despite their reliance on an ambiguous statement in a prior DPS declaration that no longer is present in its updated declaration, ECF No. 143 at 59-64 (Pls' Ex. A), Plaintiffs have still failed to show that Texas incurs costs, and does not net revenue, from *any* noncitizen's drivers' license application. *Id.* at 11-12. Whether CAM parolees use state healthcare and educational services depends on a host of personal and independent factors that Texas has not supported. *Department of Commerce* does not suggest otherwise: what rendered the state's injury "predictable" there is that New York presented evidence at trial "that noncitizen households have historically responded to the census at lower rates than other groups," an effect attributed to inclusion of a citizenship question, rendering it predictable that including such a question again would lead to a similar result. *Dep't of Com.*, 139 S. Ct. at 2566. Here, even though the CAM program has existed for years, Texas offers *no* evidence showing that CAM parolees have utilized the identified services, providing *no* evidentiary basis such as in *Department of*

Commerce, but rather mere speculation, that CAM parolees would do so in the future.[3] Such speculation fails to establish causation by a preponderance of the evidence. *See Lujan*, 504 U.S. at 561. Further, the mere presence of a very few additional noncitizens in Texas because of the CAM program would not represent an injury traceable to CAM. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 202 (D.D.C. 2014) (explaining that a state entity "has not suffered an injury in fact to a legally cognizable interest because a federal government program is anticipated to produce an increase in that state's population"), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015).

2. Defendants Raised a Routine, Cognizable Factual Attack on Jurisdiction.

Following months of jurisdictional discovery, Defendants raise a factual attack on Plaintiffs' standing, requiring Plaintiffs to demonstrate the elements of standing by a preponderance of the evidence or have their case dismissed. *See Paterson*, 644 F.2d at 523.

Plaintiffs argue that Defendants' challenge to their failure to produce evidence tracing any alleged costs to CAM is a noncognizable "factual merits defense," such that they need not produce evidence and may rely on the assumption of truth of their allegations. ECF No. 143 at 14-15 (relying on *Gen. Land Off. v. Biden*, 71 F.4th 264, 272–73 (5th Cir. 2023) ("*GLO*")). *GLO* is inapposite. Here, Defendants have raised a routine factual attack on jurisdiction to which Plaintiffs must respond with evidence. *See Paterson,* 644 F.2d at 523. In *GLO*, the government did not raise a factual attack on standing but rather moved to dismiss based only on the State's allegations, which as a result had to be accepted as true. *See GLO*, 71 F.4th at 272. Second, *GLO* predates

[3] Nor does *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004), support Plaintiffs. *See* ECF No. 143 at 14. That case rejected standing because redressability was too speculative and collected authority showing "the Supreme Court has made clear that a plaintiff's standing fails where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries." 366 F.3d at 938-39.

Priorities, which calls into serious question *GLO*'s standing analysis. *See infra* 11-14. Third, the Government's argument went to the merits in *GLO*, a case challenging diversion of funds from the border wall project, because the Government argued it was pursuing other measures "at least as effective in reducing the relative amount of illegal immigration as building additional border barriers." *GLO*, 71 F.4th at 272–73. Thus, the merits of DHS's decision to pursue those measures instead of a border wall was placed at issue. *See id.* Here, Defendants have not attacked Plaintiffs' standing based on an assertion regarding the efficacy or legality of the CAM program, but rather based on Plaintiffs' lack of evidence of injury, causation, or redressability vis a vis CAM. This is not a factual merits defense. *See id.*

3. Plaintiffs Fail to Show a Likelihood of Any Redress of Their Alleged Injury.

Plaintiffs maintain Defendants are incorrectly arguing redress must provide complete relief to Texas's alleged injury, whereas the law only requires "that a favorable ruling could potentially lessen its injury," not eliminate it entirely. ECF No. 143 at 15-16 (quoting *Texas v. Biden*, No. 6:22-cv-00004, 2023 WL 6281319, at *4 (S.D. Tex. Sept. 26, 2023)). Not so: Defendants have consistently argued that Plaintiffs have not established the requisite likelihood that their requested relief, enjoining or vacating the CAM parole program, would reduce their alleged agency costs *at all*. ECF No. 123 at 22-24. Plaintiffs have offered only speculation that costs are or are likely to be caused by CAM parolees, and cannot refute that DHS officers could parole CAM applicants under section 1182(d)(5)(A) regardless of the existence of CAM. *Id.* Plaintiffs argue that "[a]t a minimum, enjoining the CAM Program's parole aspect would require the Government to grant parole 'only on a case-by-case basis,' … which would still reduce Texas's harm." ECF No. 143 at 15. However, CAM already requires that DHS grant parole only on a "case-by-case basis" and otherwise in accordance with 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") ("Each parole determination was, and continues to be made on an individualized, case-by-case basis.") Enjoining CAM as Plaintiffs propose would thus not alter the number of parolees who may potentially enter Texas based on case-by-case grants of parole.

Plaintiffs also challenge Defendants' reliance on Justice Gorsuch's concurrence in *Priorities*, because Justice Gorsuch in part discussed 8 U.S.C. § 1252(f)(1) and Plaintiffs argue that statute does not explicitly refer to section 1182(d)(5)(A). ECF No. 143 at 15-16. However, Justice's Gorsuch's point about the absence of redressability does not depend on section 1252(f)(1), but rather applies whenever officials have underlying statutory discretion independent of the particular agency policy or program challenged, and that discretion would not be altered by enjoining that policy or program. *See Priorities*, 143 S. Ct. at 1978 (Gorsuch, J., concurring) ("A judicial decree rendering the [challenged program] a nullity does nothing to change the fact that federal officials possess the same underlying … discretion."). That is true of section 1182(d)(5)(A) and thus Justice Gorsuch's observation is equally applicable here.

II. The *Priorities* Decision Undermines Plaintiffs' Bid for Standing.

A. Plaintiffs Lack a Cognizable Injury Under the Rationale of *Priorities*.

As Defendants explained, ECF No. 123 at 12-19, the Supreme Court reaffirmed in *Priorities* 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." *Id.* at 1970. Plaintiffs cannot show, however, that a challenge to the federal government's programmatic implementation of parole (here via the CAM program) is

traditionally cognizable. Precedent shows the opposite. *See Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (Kavanaugh, J., concurring); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985); *Jean v. Nelson*, 727 F.2d 957, 966 & n.8 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Plaintiffs maintain that *Priorities* does not apply here because "Texas is not asking Defendants to arrest, deport, or prosecute any particular alien." ECF No. 143 at 16-17. But *Priorities* was not limited to only cases challenging Executive arrest and prosecution policies. Indeed, this case implicates the same concerns as those reflected in the *Priorities* decision. For example, the Supreme Court stated that, in assessing standing, courts must examine "history and tradition" to guide the determination of whether a case is one that Article III has traditionally empowered federal courts to consider. *Priorities*, 143 S. Ct. at 1970. Plaintiffs have not identified any history of courts finding attenuated theories of harm based on indirect costs allegedly caused by parole programs to satisfy Article III. ECF No. 143 at 16-18. This case thus falls within a long line of precedent holding that a plaintiff bears a high burden to establish concrete harm when it is not directly regulated by a policy but rather asserts only indirect harm. *Id*. at 25-27.

Plaintiffs argue that *Priorities* stands only for the proposition that indirect costs are insufficient to establish Article III standing if they result from the government's failure to arrest certain noncitizens. ECF No. 143 at 17. But *Priorities* followed a long line of Supreme Court decisions holding that states generally face a substantially harder burden to show standing when they are not directly regulated by the challenged policy and any allegations of costs are thus indirect. *See* ECF No. 123 at 14-19. Even if the Court viewed the precise holding of *Priorities* as limited to arrest and prosecution policies, *Priorities* reaffirmed this general principle about indirect costs from cases that did not involve arrest and prosecution policies and called into question the viability of standing arguments based on attenuated indirect costs, such as Plaintiffs advance. *Id*.

Plaintiffs claim this case is similar to *GLO*, where the Fifth Circuit found standing for Texas to challenge DHS's diversion of funds from the border wall. ECF No. 143 at 17-18. Plaintiffs argue that *GLO*'s logic should apply here because there "Texas alleged that border barriers reduce illegal entry and increase the detection and apprehension of illegal immigrants" and here they claim, "that the statutory border barrier (*i.e.,* the refugee admissions and parole process) does the same thing." *Id.* at 30. But their argument fails in several respects. First, Texas's "statutory border barrier" phrase is a semantic conceit; there is a substantial difference in form and effect between an actual wall built on the international border physically preventing entry and immigration processes for admitting refugees and parolees. Indeed, the CAM program is the opposite of an immigration *barrier*: its purpose is to provide an opportunity for Central American children and qualifying relatives to *enter* the United States for reunification with their families. Second, the government did not make a factual attack on jurisdiction in *GLO*, and therefore that court had to assume the truth of Texas's allegations of injury. *See GLO*, 71 F.4th at 272. In contrast, here Defendants do make a factual challenge, so Plaintiffs must support their allegations with evidence that the CAM program is causing them financial injury, which they fail to do.

Additionally, *Priorities* calls *GLO*'s logic into question because it accepted without question Texas's theory that "if border wall construction does not proceed, the State will incur unrecoverable" service costs from "illegal aliens who would not otherwise be in the State" satisfied Article III. *GLO*, 71 F.4th at 272. And while that may have been the case under Fifth Circuit precedent when *GLO* was decided, the Supreme Court's subsequent decision in *Priorities* makes clear that such a theory of standing based on alleged indirect injuries[4] is "attenuated," indicating

[4] The injuries were indirect because DHS's border-wall funding decision does not directly regulate Texas's rights or obligations, but only potentially affects the state at all if third parties

that, at minimum, such a theory cannot be accepted fully at face value without greater proof in the manner taken by *GLO*. *See Priorities*, 143 S. Ct. at 1972 n.3. Plaintiffs counter that "the injury in *GLO*, as here, is far more direct and traceable to the challenged policy" than the "indirect harm resulting from a failure to arrest" in *Priorities*. *See id.* But the injury both here and in *GLO* is indirect: the Government is not directly acting on the state or its entities, and any costs invoked by Texas rely on independent actions by third parties who choose to settle in Texas and use services. *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").

Finally, Plaintiffs attempt to rely on *Department of Commerce,* 139 S. Ct. 2551, which they claim found injury based on indirect costs. ECF No. 143 at 30. However, the injury in *Dep't of Commerce* was significantly direct: it was based on evidence that a change in the census would undercount a state's population and lead *directly* to a loss of federal funds which are based on population. 139 S. Ct. at 2565. In contrast, CAM does not affect Texas in any way that would directly cause it to lose revenue—any unreimbursed costs depend on contingencies pertaining to the independent choices of CAM parolees. Their theory of injury is more attenuated than the basis for standing in *Dep't of Commerce* and involves the same types of alleged injuries the Supreme Court found to be "indirect" in *Priorities*. 143 S. Ct. at 1972 n.3.

B. The CAM Program Does Not Create Affirmative Legal Benefits.

Plaintiffs next argue that certain "exceptions articulated by the Supreme Court would apply even if" *Priorities* applied here. ECF No. 143 at 18. *Priorities*, however, did not hold that there

directly affected by the absence of a border wall decide to enter Texas and utilize those state services.

were exceptions to its holding, but rather observed that certain factors might affect the standing analysis in "cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions," and reserved resolution of those questions for another day. 143 S. Ct. at 1973. In any event, if such factors are relevant here, they do not change the standing analysis.

Plaintiffs first argue CAM provides parole recipients with "legal benefits," a distinction the Supreme Court suggested "could lead to a different standing analysis." ECF No. 143 at 19-21 (quoting *Priorities,* 143 S. Ct. at 1974). However, they concede "the CAM Program does not directly provide aliens with benefits." *Id.* at 20. They acknowledge that any legal benefits CAM parolees may enjoy are the result of independent statutes and regulations providing eligibility for parolees in general, and not the CAM program. *Id.* at 19 & n.20. And they do not dispute that those provisions have been in effect for decades—so any challenge to them would be time-barred—or that these provisions would apply to parolees with or without the CAM program existing.

Yet, Plaintiffs counterintuitively argue that a federal program need not affirmatively confer any legal benefits to constitute a policy conferring legal benefits under the language in *Priorities*, purporting to rely on DACA and MPP precedent. ECF No. 143 at 19-20 (citing *DHS v. Regents of Univ. of Cal.,* 140 S. Ct. 1891, 1906–07 (2020), and *MPP*, 20 F.4th at 966). Unlike here, where CAM concededly does not confer work-authorization eligibility or other benefits, the "benefits" associated with deferred action from removal in *Regents* were deemed part and parcel of the DACA program. *See Regents*, 140 S. Ct. at 1913 (noting that "[t]he Government acknowledges that '[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands'"). Plaintiffs' admission that independent authorities rather than the CAM parole program itself are what directly provide "aliens" with benefits, ECF No. 143 at 19-20, illustrates the flaw in the district court's belief in MPP that "parole *does* create affirmative benefits for aliens

such as work authorization." *Texas*, 554 F. Supp. 3d at 845 (emphasis in original). And it was this erroneous understanding upon which the court's holding that "the termination of MPP is more than a non-enforcement policy" was based. *Id.* (internal quotation omitted). As explained, it is not the grant of parole but rather independent statutes making parolees part of the class of eligible noncitizens that provide the benefits, and those are available to parolees generally, regardless of the existence of the CAM program.

Plaintiffs also cite the Supreme Court's discussion of direct injuries in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). ECF No. 143 at 21. But that case dealt with a policy that would cause a direct financial loss to a state entity created to administer federal student loans (and thereby gain revenue), unlike the contingent, attenuated theory of loss that Texas claims as its injury here. ECF No. 123 at 15-16. Although Texas argues that the harm in *Nebraska* is similar to its allegations of harm related to driver's licenses, ECF No. 143 at 21, its theory of harm is the same indirect theory addressed in *Priorities*—that the challenged immigration policy will affect the number of individuals in Texas who may impose costs on the State. As explained, Plaintiffs face a high burden to prove harm based on such an indirect theory, a burden the drivers' license theory clearly fails to meet, as the preponderance of evidence does not demonstrate that Texas is suffering any loss from issuing licenses to noncitizens generally, much less CAM parolees specifically.

C. The *Priorities* Reference to "Abdication" of Statutory Duty is Irrelevant.

Alternatively, Plaintiffs argue that *Priorities* is distinguishable based on the Court's statement that the standing analysis might be different if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." ECF No. 143 at 21-22 (citing *Priorities,* 143 S. Ct. at 1973-74). This language is inapplicable to Plaintiffs' Complaint, which alleges a policy disagreement with DHS over the

proper use of parole but does not plausibly allege an "abdication" of DHS's responsibilities with respect to the inspection and admission of noncitizens. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)..

The only theory Plaintiffs advance that CAM represents a wholesale "abdication" is that, "[c]ontrary to the parole statute's requirements to evaluate aliens on a case-by-case basis, the CAM Program paroles the vast majority of its applicants who do not qualify for refugee status." ECF No. 143 at 21. This bare assertion does not pass the threshold *Iqbal* plausibility test. The CAM Federal Register Notice (FRN) contradicts their assertion, requiring that all parole considerations comply with section 1182(d)(5)(A) and be made on a case-by-case basis. 88 Fed. Reg. at 21696. DHS officers are entitled to a presumption of regularity that they are acting in accordance with this law. *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Plaintiffs have produced nothing to contradict this presumption. The percentage of Central American children found eligible for parole fails to raise a plausible inference that USCIS is not conducting case-by-case analyses in accordance with the statute and FRN—especially since Plaintiffs make no allegations and produce no evidence of failure to make individualized parole determinations or other irregularity in the implementation of the CAM program. *Iqbal*, 556 U.S. at 678.

D. Plaintiffs Do Not Benefit from Special Solicitude.

Plaintiffs, for the first time, claim they are entitled to special solicitude in the standing analysis. ECF No. 143 at 22-24. It is unlikely states may benefit from special solicitude in the wake of *Priorities*. Regardless, Texas does not meet the requirements here and receiving special solicitude would not cure its fatal flaws in demonstrating standing. ECF No. 123 at 24-26.

Priorities rejected the application of *Massachusetts v. EPA*, 549 U.S. 497 (2007), the case creating the special solicitude doctrine, to Texas's challenge to the DHS priorities guidance. 143 S. Ct. at 1975 n.6 (holding "that decision does not control this case"). In doing so, the Court indicated the doctrine applies to "a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion." *Id.* Here, Plaintiffs do not challenge denial of a petition for rulemaking but rather DHS's discretionary use of its immigration enforcement authority under the parole statute. Thus, *Priorities* makes clear that Plaintiffs cannot benefit from special solicitude here. *See id.*

As Plaintiffs acknowledge, even where special solicitude has been applied, it is relevant only to a plaintiff's burden to establish redressability.[5] ECF 143 at 22. Special solicitude would not relieve a plaintiff of the burden to prove a concrete injury traceable to the challenged action. *See Massachusetts*, 549 U.S. at 522. Because Plaintiffs have not proven a traceable concrete injury, *supra* pp. 1-9, special solicitude has no bearing on the standing analysis.

Nevertheless, Plaintiffs maintain they have satisfied the prerequisites for special solicitude. They have not. First, Texas cannot show a particular procedural right like the one in the Clean Air Act that the Supreme Court identified as a critical aspect of its holding in *Massachusetts,* 549 U.S. at 522. Plaintiffs argue that raising an APA claim is sufficient, ECF No. 143 at 22-23, but the Supreme Court has never held that an APA claim alone is sufficient to satisfy this requirement, as explained *See* ECF 102 at 31 & n.10.

Second, Plaintiffs fail to show that the CAM program affects Texas's quasi-sovereign interests. *See* ECF No. 143 at 23-24. Plaintiffs argue the Fifth Circuit's holding that federal pre-

[5] And immediacy, which is not at issue here, where CAM has already been re-implemented. *See Texas v. United States* ("*DACA*"), 50 F.4th 498, 514 (5th Cir. 2022).

emption of a state's ability to classify noncitizens within its borders implicates a quasi-sovereign interest, applies to their challenge to CAM. *Id.* (citing *DACA*, 50 F.4th at 515). But Plaintiffs' argument is missing several critical steps. Texas does not state which federally preempted laws it plans to pass, how it proposes to reclassify immigrants within its borders, and how the CAM program would preempt the passage of such laws. Plaintiffs also fail to explain how the inability to reclassify noncitizens would implicate a quasi-sovereign interest that is relevant to their challenge to the CAM program.

Finally, Plaintiffs respond to the *Priorities* Court's meaningful silence on affording Texas special solicitude—even though it argued for it, Br. For Pet'rs, *United States v. Texas*, 2022 WL 12591050 (U.S.) at 16—by arguing that the majority's opinion did not address special solicitude (which is incorrect, as explained, because the majority expressly rejects the application of *Massachusetts* to that case, 143 S. Ct. at 1975 n.6) and by arguing that *Priorities* does not govern because this case falls within one of its "exceptions." ECF No. 143 at 24. Those "exceptions" are not exceptions and regardless do not apply to this challenge to CAM. *Supra* pp. 14-16.

III. Plaintiffs' Operative Pleadings Are Moot.

Should the Court find Plaintiffs have standing, it should nevertheless dismiss Plaintiffs' claims because their operative complaint challenges agency action that has been superseded by issuance of the CAM FRN and their Supplemental Complaint can only add factual allegations rather than new legal claims. ECF No. 123 at 27-28.

Plaintiffs point to the Fifth Circuit's holding that mootness does not result "when a government repeals the challenged action and replaces it with something substantially similar." ECF No. 143 at 25 (quoting *Texas v. Biden*, 20 F.4th 928, 958 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022)). However, this was *the precise* Fifth Circuit holding the Supreme Court *reversed* in

Biden v. Texas, 142 S. Ct. 2528 (2022). The Supreme Court held an agency memorandum that supersedes the memorandum at issue is a distinct final agency action, and the lower court must acknowledge the effect of the new memorandum. *Id.* At 2546-48. Plaintiffs also cite a case from this district holding that a "supplemental pleading may bring in new claims when the subsequent allegations stem from the original cause of action." *Mangwiro v. Napolitano*, 939 F. Supp. 2d 639, 647 (N.D. Tex. 2013), *aff'd on other grounds*, 554 F. App'x 255 (5th Cir. 2014). The Supreme Court explained that separate agency actions that address the same subject constitute discrete agency actions that must be individually challenged. *Biden*, 142 S. Ct. at 2545. Accordingly, this Court should recognize the re-examination and revision of CAM in the FRN as discrete action that does not "stem from the original cause of action," *Mangwiro*, 939 F. Supp. 2d at 647. As such, Plaintiffs cannot raise new legal claims through a mere supplemental complaint.

IV. Plaintiffs Cannot Obtain APA Review of Their Claims.

A. The CAM Program is Committed to Agency Discretion.

This Court may not review Plaintiffs' challenge to the CAM program because decisions regarding parole are explicitly committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). ECF No. 123 at 28-30. Plaintiffs do not respond to this argument, *see generally* ECF No. 143, and therefore the Court should deem their defense to it waived. *See Matter of Dallas Roadster, Ltd.*, 846 F.3d 112, 126 (5th Cir. 2017); *Bradley v. Target Corp.*, No. 3:23-CV-00193, 2023 WL 6166475, at *2 (N.D. Tex. Sept. 21, 2023).

B. The CAM Program is Not a Challengeable Final Agency Action.

As explained, the operative document embodying the agency's decision-making, the CAM FRN, does not determine rights or obligations, or produce "legal consequences," and therefore

does not represent challengeable final agency action. *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *see* ECF No. 123 at 30-31.

Plaintiffs argue that the CAM "program creates rights for aliens (to apply through a particular process not available to other applicants) and produces legal consequences for them (parole into the United States through a process not available to other applicants)." ECF No. 143 at 26. However, CAM creates no such "rights" or "consequences"; those are functions of independent authorities that provide eligibility for benefits to parolees in general. All "applicants for admission" are eligible to apply for parole into the United States under section 1182(d)(5)(A). The CAM program offers guidance for use of that authority in the context of Central American Minors but does not itself create the possibility for applying for or receiving parole. *See* 8 U.S.C. § 1182(d)(5)(A); 88 Fed. Reg. at 21696; *see also Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (explaining an unreviewable "general statement of policy" "simply lets the public know [the agency's] current enforcement or adjudicatory approach").

Plaintiffs contend the "CAM Program does not genuinely leave the agency and its personnel free to exercise discretion, as demonstrated by the approval rates of nearly 100% under the Program." ECF No. 143 at 27. However, as explained, CAM explicitly requires that USCIS and Customs officers grant parole only on a case-by-case basis as required by section 1182(d)(5)(A). 88 Fed. Reg. at 21696. Unlike many other provisions of the INA providing for entry of noncitizens, section 1182(d)(5)(A) places no numerical limit on the number of individuals who may be paroled. *Compare* 8 U.S.C. § 1182(d)(5)(A) *with* 8 U.S.C. § 1157(a) (numerical limits on admission of refugees as determined by the President); 8 U.S.C. § 1184(p)(2) (principal U-visas capped at 10,000 per year). And DHS accounts for the number of "long-term parolees," who have been on parole longer than a year, by counting them "towards the worldwide level of family-

sponsored immigrants." H.R. Rep. No. 104-828, at 162, 245 (1996). A high grant rate, absent any allegation of failure to follow the lawfully prescribed procedure, fails to raise a plausible inference to overturn the agency's presumption of regularity. *See Chem. Found.*, 272 U.S. at 14–15.

Finally, Plaintiffs argue that the "CAM Program also alters the rights of aliens because the agency adjudicates applications for parole, and parole, in turn, makes aliens eligible for federal and State benefits." ECF No. 143 at 27. However, as explained and as Plaintiffs concede, it is not the CAM parole program that provides eligibility for the referenced benefits but independent federal and state statutes and regulations that provide these benefits to all eligible parolees, and would continue to do so even without the CAM program. *Supra* pp. 15-16.

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

Plaintiffs' claims do not fall within the zone of interests of section 1182(d)(5)(A) because nothing in section 1182(d)(5)(A) specifically, suggests Congress intended to permit a state to challenge the government's parole decisions by invoking attenuated downstream financial costs. ECF No. 123 at 31-33.

In response, Plaintiffs argue that Defendants read this rule "too narrowly" in their focus on section 1182(d)(5)(A) and that Plaintiffs fall within the zone of interests of the INA generally, the many provisions of which "set[] the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." ECF No. 143 at 35-36 (quoting *DACA*, 50 F.4th at 521). Plaintiffs misunderstand the law. The Supreme Court has made clear that the zone of interests test focuses on the specific provision that the plaintiff claims is being violated. 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) (emphasis added).

Plaintiffs rely on the Fifth Circuit's holding that Texas was within the zone of interests to challenge the DACA and DAPA programs and MPP termination. ECF No. 143 at 35-36. Those actions were not rooted in section 1182(d)(5)(A), which governs the explicitly discretionary decision to parole an individual noncitizen that Congress has indicated is beyond court review. *See* 8 U.S.C. § 1252(a)(2)(B)(ii). The unreviewable and discretionary operation and structure of section 1182(d)(5)(A) indicate that Congress did not intend third parties, any more than individuals denied parole themselves, to challenge parole-related decisions in court. *See Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Further, these previous decisions by the Fifth Circuit are in tension with the more recent *Priorities* decision, in which the Supreme Court reaffirmed that non-regulated parties have no cognizable interest in how the INA is enforced against others. 143 S. Ct. at 1970-72. Although *Priorities* focused on standing, the articulated principles are also relevant to the zone-of-interests inquiry, especially where Congress has given no indication that the type of harms Plaintiffs allege here are "legally cognizable injuries redressable by a federal court." *Id.* at 1973.

D. Section 1252(a)(2)(B)(ii) Precludes Jurisdiction Here.

In the alternative, as Defendants explained, 8 U.S.C. § 1252(a)(2)(B)(ii) precludes jurisdiction to review decisions specified by the INA to be in the discretion of the DHS Secretary, such as parole under section 1182(d)(5)(A), and therefore precludes review of Plaintiffs' challenge to parole under CAM. ECF No. 123 at 33-35.

Plaintiffs contend that section 1252(a)(2)(B)(ii) does not bar their challenge to the programmatic use of parole under CAM because the statute does not purport to strip federal-question jurisdiction under 28 U.S.C. § 1331. ECF No. 143 at 37 (citing *Feds for Medical Freedom v. Biden,* 63 F.4th 366 (5th Cir. 2023). But that is precisely what the statute does. The statute

specifies that it precludes jurisdiction "notwithstanding any other provision of law (statutory or nonstatutory)," clause, which encompasses 28 U.S.C. § 1331. 8 U.S.C. § 1252(a)(2)(B)(ii) *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) ("notwithstanding any other provision of law" in jurisdictional provision encompasses 28 U.S.C. § 1331). Plaintiffs' reliance on *Feds for Medical Freedom* is also unavailing. That case did not involve a jurisdiction-stripping provision including a "notwithstanding" clause, and instead concerned whether a statutory regime providing exclusive review mechanisms for covered employee to challenge a covered personnel action, barred review of a particular type of personnel-action challenge. 63 F.4th at 372. By comparison to that case's more nuanced inquiry that looked at whether the CSRA's structure had implicitly repealed jurisdiction, the straightforward language of section 1252(a)(2)(B)(ii) expressly repeals jurisdiction over discretionary decisions. *See Feds for Med. Freedom*, 63 F.4th at 370 ("It's also undisputed that the CSRA nowhere expressly repeals district courts' § 1331 jurisdiction over plaintiffs' claims.").

Next, Plaintiffs argue that "the *Thunder Basin* factors demonstrate that jurisdiction is proper." ECF No. 143 at 37-38. Those factors are (1) whether "a finding of preclusion could foreclose all meaningful judicial review"; (2) whether the claims are "wholly collateral" to the statutory scheme; and (3) whether the claims are "outside the agency's expertise." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 186 (2023) (quoting *Thunder Basin*, 510 U.S. at 212-13). However, the *Thunder Basin* factors are likewise inapplicable here because they help a court assess whether Congress's creation of an alternative "review scheme for agency action" *implicitly* "divests district courts of their ordinary jurisdiction over the covered cases." *Id.* at 185-86. No such inquiry is necessary, for Congress, in section 1252(a)(2)(B)(ii), *expressly* precluded jurisdiction. Congress did so "explicitly, providing in so many words that district court jurisdiction will yield." *Id*. at 185;

see 8 U.S.C. § 1252(a)(2)(B)(ii) (providing 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"). And the Supreme Court's *Patel* decision indicates that this lack of jurisdiction covers not only the final decision to provide the discretionary relief (here, parole), but "any [decision or action] relating to the granting of relief," thus encompassing the decisions to re-implement and revise the overarching CAM framework for granting parole. *Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022); ECF No. 123 at 34-35.

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

The Court should dismiss the Take Care Clause claim. No court has held that the Take Care Clause provides a private right to sue or cause of action, and Plaintiffs offer no reason for this Court to be the first. ECF No. 123 at 35-37.

In response, Texas argues some courts have considered Take Care Clause claims and not outright dismissed them as non-justiciable. ECF No. 143 at 39-40. Plaintiffs, however, do not deny that no court has ultimately actually held the Take Care Clause provides a private cause of action or that the Government violated it. *See, e.g., Las Americas Immigrant Advocacy Center v. Biden*, 571 F. Supp. 3d 1173, 1180 (D. Or. 2021) (collecting cases). Plaintiffs fail to make a persuasive case that the allegations in their complaint demonstrate the first Take Care Clause violation.

CONCLUSION

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

Dated: November 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 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.

/s/ *Joseph A. Darrow*
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