recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy.").

The DHS cannot reasonably claim that, under a general delegation to establish enforcement policies, it can establish a blanket policy of non-enforcement that also awards legal presence and benefits to otherwise removable aliens. As a general matter of statutory interpretation, if Congress intended to confer that kind of discretion through the HSA Provision (and INA Provision) to apply to all of its mandates under these statutes, there would have been no need to expressly and specifically confer discretion in only a few provisions. The canon of statutory construction warning against rendering superfluous any statutory language strongly supports this conclusion. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

Despite this, the Government argues that the INA Provision and the HSA Provision, combined with inherent executive discretion, permits the enactment of DAPA. While the Government would not totally concede this point in oral argument, the logical end point of its argument is that the DHS, solely pursuant to its implied authority and general statutory enforcement authority, could have made DAPA applicable to all 11.3 million immigrants estimated to be in the country illegally. This Court finds that the discretion given to the DHS Secretary is not unlimited.

Two points are obvious, and each pertain to one of the three statutes (5 U.S.C. § 701, 6 U.S.C. § 202, and 8 U.S.C. § 1103) at issue here. The first pertains to prosecutorial discretion and the INA Provision and the HSA Provision. The implementation of DAPA is clearly not "necessary" for Secretary Johnson to carry out his authority under either title of the federal code.

The Secretary of the DHS has the authority, as discussed above, to dictate DHS objectives and marshal its resources accordingly. Just as this Court noted earlier when it refused the States standing to pursue certain damages, the same is true here. The DAPA recipients have been present in the United States for at least five years; yet, the DHS has not sought them out and deported them.[75]

The Court notes that it might be a point of discussion as to what "legal presence" constitutes, but it cannot be questioned that DAPA awards some form of affirmative status, as evidenced by the DHS' own website. It tells DACA recipients that:

> *[Y]ou are considered to be lawfully present in the United States* . . . and are not precluded from establishing domicile in the United States. Apart from immigration laws, "lawful presence," "lawful status," and similar terms are used in various other federal and state laws.[76]

It is this affirmative action that takes Defendants' actions outside the realm of prosecutorial discretion, and it is this action that will cause the States the injury for which they have been conferred standing to seek redress.

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[75] The implementation of DAPA is not a necessary adjunct for the operation of the DHS or for effecting its stated priorities. In fact, one could argue given the resources it is using and manpower it is either hiring or shifting from other duties, that DAPA will actually hinder the operation of the DHS. *See Executive Actions on Immigration*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/immigrationaction (last updated Jan. 30, 2015) ("USCIS will need to adjust its staffing to sufficiently address this new workload. Any new hiring will be funded through application fees rather than appropriated funds . . . . USCIS is working hard to build capacity and increase staffing to begin accepting requests and applications . . . ."). *See also* Doc. No. 64, Pl. Ex. 23 (Palinkas Dec.) ("USCIS has announced that it will create a new service center to process DAPA applications . . . . and it will be staffed by approximately 1,000 federal employees. Approximately 700 of them will be USCIS employees, and approximately 300 of them will be federal contractors."). However, such considerations are beside the point for resolving the issue currently before the Court.

[76] *See Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the DHS, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last updated Feb. 11, 2015) (emphasis added). *See also* Doc. No 38, Def. Ex. 6 at 11 (U.S. Citizenship and Immigration Services (USCIS), Deferred Action For Childhood Arrivals (DACA) Toolkit: Resources for Community Partners (2014)). This response clearly demonstrates that the DHS knew by DACA (and now by DAPA) that by giving the recipients legal status, it was triggering obligations on the states as well as the federal government.

The second obvious point is that no statute gives the DHS the power it attempts to exercise. As previously explained, Section 701(a)(2) of the APA forbids reviewability of acts "committed to agency discretion by law." The Government has pointed this Court to no law that gives the DHS such wide-reaching discretion to turn 4.3 million individuals from one day being illegally in the country to the next day having lawful presence.

The DHS' job is to enforce the laws Congress passes and the President signs (or at least does not veto). It has broad discretion to utilize when it is enforcing a law. Nevertheless, no statute gives the DHS the discretion it is trying to exercise here.[77] Thus, Defendants are without express authority to do so by law, especially since by Congressional Act, the DAPA recipients are illegally present in this country. As stated before, most, if not all, fall into one of two categories. They either illegally entered the country, or they entered legally and then overstayed their permission to stay. Under current law, regardless of the genesis of their illegality, the Government is charged with the duty of removing them. Subsection 1225(b)(1)(A) states unequivocally that the DHS "shall order the alien removed from the United States without further hearing or review . . . ." Section 1227, the corresponding section, orders the same for aliens who entered legally, but who have violated their status. While several generations of statutes have amended both the categorization and in some aspects the terminology, one thing has remained constant: the duty of the Federal Government is to effectuate the removal of illegal aliens. The Supreme Court most recently affirmed this duty in *Arizona v. United States*: "ICE

[77] Indeed, no law enacted by Congress expressly provides for deferred action as a form of temporary relief. Only regulations implemented by the Executive Branch provide for deferred action. That is not to say that deferred action itself is necessarily unlawful—an issue on which this Court need not touch.

officers are responsible for the identification, apprehension, and removal of illegal aliens." 132 S. Ct. at 2500.

Notably, the applicable statutes use the imperative term "shall," not the permissive term "may."[78] There are those who insist that such language imposes an absolute duty to initiate removal and no discretion is permitted.[79] Others take the opposition position, interpreting "shall" to mean "may."[80] This Court finds both positions to be wanting. "Shall" indicates a congressional mandate that does not confer discretion—i.e., one which should be complied with to the extent possible and to the extent one's resources allow.[81] It does not divest the Executive Branch of its inherent discretion to formulate the best means of achieving the objective, but it does deprive the Executive Branch of its ability to directly and substantially contravene statutory commands. Congress' use of the term "may," on the other hand, indicates a Congressional grant of discretion to the Executive to either accept or not accept the goal.

In the instant case, the DHS is tasked with the duty of removing illegal aliens. Congress has provided that it "shall" do this. Nowhere has Congress given it the option to either deport these individuals or give them legal presence and work permits. The DHS does have the

[78] The Court additionally notes that in 8 U.S.C. § 1227 ("Deportable Aliens") Congress uses both "may" and "shall" within the same section, which distinguishes the occasions in which the Secretary has discretion to award a stay from removal from when he is required to remove an alien. For instance, in § 1227(a), an alien "shall" be removed upon order of the Secretary if he or she is in one of the classes of deportable aliens. In § 1227(d), however, Congress provides circumstances when the Secretary "may" award an administrative stay of removal. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of the mandatory 'shall' in the very same section."); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895) ("[I]n the law to be construed here, it is evident that the word 'may' is used in special contradistinction to the word 'shall.'").

[79] See the plaintiffs' contentions as recounted in the court's Memorandum Opinion and Order dated April 23, 2013, in *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23, 2013).

[80] *See, e.g.*, *Matter of E-R-M & L-R-M*, 25 I&N Dec. 520 (BIA 2011).

[81] *See Lopez*, 531 U.S. at 241 (distinguishing between Congress' use of the "permissive may" and the "mandatory shall" and noting that "shall" "imposes discretionless obligations").

discretion and ability to determine *how* it will effectuate its statutory duty and use its resources where they will do the most to achieve the goals expressed by Congress. Thus, this Court rejects both extremes. The word "shall" is imperative and, regardless of whether or not it eliminates discretion, it certainly deprives the DHS of the right to do something that is clearly contrary to Congress' intent.

That being the case, this Court finds that the presumption of unreviewability, even if available here, is also rebuttable under the express theory recognized by the *Heckler* Court. In *Heckler*, the Supreme Court indicated that an agency's decision to "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," would not warrant the presumption of unreviewability. 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).[82]

Since *Heckler* and *Adams*, it has clearly been the law that "[r]eal or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty." *See Texas*, 106 F.3d at 667. That is not the situation here. This Court finds that DAPA does not simply constitute *inadequate* enforcement; it is an announced program of non-enforcement of the law that contradicts Congress' statutory goals. Unlike the Government's position in *Texas v.*

[82] In *Adams*, as noted above in the abdication discussion, the agency-defendants (including executive officials of Health, Education, and Welfare (HEW)) were sued for not exercising their duty to enforce Title VI of the Civil Rights Act because they had not been taking appropriate action to end segregation in schools receiving federal funds, as required by the Act. Defendants insisted that enforcement of Title VI was committed to agency discretion and thus that their actions were unreviewable. The Court first noted that the agency-discretion-exception in the APA is a narrow one, citing *Citizens to Preserve Overton Park*. It found that the statute provided "with precision the measures available to enforce" Title VI and thus the terms of the statute were "not so broad as to preclude judicial review." Like Defendants here, the defendants in *Adams* relied on cases in which courts declined to interfere with exercises of prosecutorial discretion. Rejecting defendants' reliance on those cases, the court emphasized: "[t]hose cases do not support a claim to absolute discretion and are, in any event, distinguishable from the case at bar." Unlike the cases cited, Title VI required the agency to enforce the Act and also set forth specific enforcement procedures. The INA removal provisions at issue here are no different and, like those at issue in *Adams*, are not so broad as to preclude review.

U.S., the Government here is "doing nothing to enforce" the removal laws against a class of millions of individuals (and is additionally providing those individuals legal presence and benefits). *See id.* Furthermore, if implemented exactly like DACA (a conclusion this Court makes based upon the record), the Government has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances).[83] Theoretically, the remaining 6-7 million illegal immigrants (at least those who do not have criminal records or pose a threat to national security or public safety) could apply and, thus, fall into this category.[84] DAPA does not represent mere inadequacy; it is complete abdication.

The DHS does have discretion in the manner in which it chooses to fulfill the expressed will of Congress. It cannot, however, enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them. As the Government's own legal memorandum—which purports to justify DAPA—sets out, "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences." *See* Doc. No. 38, Def. Ex. 2 at 6 (OLC Op.) (citing *Heckler*, 470 U.S. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers")). The DHS Secretary is not just rewriting the laws; he is creating them from scratch.

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[83] *See Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#DACA%20process (last updated Dec. 4, 2014).

[84] *See also* Press Release, Remarks by the President on Immigration–Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014) ("*[T]he way the change in the law works* is that we're reprioritizing how we enforce our immigration laws generally. So not everybody qualifies for being able to sign up and register, *but the change in priorities applies to everybody*."). (Court's emphasis). Thus, as under the DACA Directives, absent exceptional circumstances, the DHS is not going to remove those who do not qualify for DAPA either.

b. Past Uses of Deferred Action

Defendants argue that historical precedent of Executive-granted deferred action justifies DAPA as a lawful exercise of discretion. In response, the Plaintiffs go to great lengths to distinguish past deferred action programs from the current one, claiming each program in the past was substantially smaller in scope. The Court need not decide the similarities or differences between this action and past ones, however, because past Executive practice does not bear directly on the legality of what is now before the Court. Past action previously taken by the DHS does not make its current action lawful. President Truman in *Youngstown Sheet & Tube Co. v. Sawyer*, similarly sought "color of legality from claimed executive precedents," arguing that, although Congress had not expressly authorized his action, "practice of prior Presidents has authorized it." 343 U.S. at 648. The Supreme Court firmly rejected the President's argument finding that the claimed past executive actions could not "be regarded as even a precedent, much less an authority for the present [action]." *Id.* at 649; *see also Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 n.27 (5th Cir. 1995) ("[T]he fact that we previously found another FDA compliance policy guide to be a policy statement [and thus not subject to the APA's formal procedures] is not dispositive whether CPG 7132.16 is a policy statement.").

The Supreme Court was again faced with the argument that action taken by the President was presumptively lawful based on the "longstanding practice" of the Executive in *Medellin*, 552 U.S. at 530-32. There, the Federal Government cited cases that held, "if pervasive enough, history of congressional acquiescence can be treated as a gloss on Executive power vested in the President by § 1 of Art. II." *Id.* at 531 (internal citations and quotations marks omitted). The

Supreme Court, however, distinguished those cases as involving a narrow set of circumstances; they were "based on the view that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,' can 'raise a presumption that the [action] had been [taken] in pursuance of [Congress'] consent.'" *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. 654 (1981)). In these "narrowly" construed cases cited by the government there, the Court had upheld the (same) Executive action involved in each as "a particularly longstanding practice . . . . [g]iven the fact that the practice [went] back over 200 years, and [had] received congressional acquiescence throughout its history . . . ." *Id.* In *Medellin*, the Supreme Court clarified that, even in those cases, however, "the limitations on this source of executive power are clearly set forth and the Court has been careful to note that 'past practice does not, by itself, create power.'" *Id.* at 531-32. Thus, the *Medellin* Court found that President Bush's "Memorandum [was] not supported by a 'particularly longstanding practice' of congressional acquiescence . . ., but rather [was] what the United States itself [had] described as 'unprecedented action.'" *Id.* at 532. Here, DAPA, like President Bush's Memorandum/directive issued to state courts in *Medellin*, is not a "longstanding practice" and certainly cannot be characterized as "systematic" or "unbroken." Most importantly, the Court is not bound by past practices (especially ones that are different in kind and scope)[85] when determining the legality of the current one. Past practice by immigration officials does not create a source of power for the DHS to implement DAPA. *See id.* at 531-32. In sum, Defendants' attempt to find a source of discretion committed to it by law (for purposes of Section 701(a)(2)) through Congress's alleged

[85] A member of the President's own Office of Legal Counsel, in advising the President and the DHS on the legality of DAPA, admitted that the program was unprecedented in that it exceeded past programs "in size." *See* Doc. No. 38, Def. Ex. 2 at 30 (OLC Memo).

acquiescence of its past, smaller-scaled grants of deferred action is unpersuasive, both factually and legally.

i. Rulemaking Under the APA

Neither party appears to contest that, under the APA, the DAPA Directive is an agency "rule,"[86] and its issuance therefore represents "rulemaking." *See* 5 U.S.C. § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."); *id.* § 551(5) ("'[R]ule making' means agency process for formulating, amending, or repealing a rule."). Thus, it is clear that the rulemaking provisions of the APA apply here. The question is whether Defendants are exempt from complying with specific procedural mandates within those rulemaking provisions.[87]

Section 553 of Title 5, United States Code, dictates the formal rulemaking procedures by which an agency must abide when promulgating a rule. Under Section 553(b), "[g]eneral notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. § 553(b). The required notice must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

[86] While Defendants in one place assert in passing that the DAPA Directive is not a rule, it is in the context of distinguishing a substantive rule from a statement of policy. [*See* Doc. No. 38 at 45 ("[T]he Deferred Action Guidance is not a rule, but a policy that 'supplements and amends . . . guidance' . . . . *Further*, unlike *substantive rules*, a general statement of policy is one 'that does not impose any rights or obligations' . . . .").]. There can be no doubt that the DAPA Directive is a rule within the meaning of § 551 of the APA. Instead, the issue focuses on whether the rule is substantive, subjecting it to the formal procedural requirements for rule making, or whether it is exempt from those requirements.

[87] Interestingly, the legal memorandum from the President's Office of Legal Counsel, whose opinion the Defendants have cited to justify DAPA, in no way opines that the DHS may ignore the requirements of the APA.

Id. Upon providing the requisite notice, the agency must give interested parties the opportunity to participate and comment and the right to petition for or against the rule. *See id.* § 553(c)-(e).

There are two express exceptions to this notice-and-comment requirement, one of which Defendants argue applies in this case. Pursuant to Section 553(b)(3)(A), the APA's formal rulemaking procedures do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(b)(3)(A). On the other hand, if a rule is "substantive," this exception does not apply, and all notice-and-comment requirements "must be adhered to scrupulously." *Shalala*, 56 F.3d at 595. The Fifth Circuit has stressed that the "'APA's notice and comment exemptions must be narrowly construed.'" *Id.* (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)).

The APA does not define "general statements of policy" or "substantive rules"; however, the case law in this area is fairly well-developed and provides helpful guidelines in characterizing a rule. With that said, the analysis substantially relies on the specific facts of a given case and, thus, the results are not always consistent. Here, Plaintiffs' procedural APA claim turns on whether the DAPA Directive is a substantive rule or a general statement of policy.[88] If it is substantive, it is "unlawful, for it was promulgated without the requisite notice-and-comment." *Id.*

This Circuit, following guidelines laid out in various cases by the D.C. Circuit, utilizes two criteria to distinguish substantive rules from nonsubstantive rules:

[88] Defendants specifically assert that the DAPA Directive is a general statement of policy. They do not argue that it is an "interpretative rule[]" or a "rule[] of agency organization, procedure, or practice" under § 553(b)(3)(A). Nor do they cite the other exception provided for in § 553(b)(3)(B) ("[W]hen the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."). Thus, this Court will confine its analysis to whether the Directive is a general statement of policy or substantive rule.

> First, courts have said that, unless a pronouncement acts prospectively, it is a binding norm. Thus ... a *statement of policy may not have a present effect*: "a 'general statement of policy' is one that does not impose any rights and obligations".... The second criterion is whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion.
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> The court [in *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987)] further explained that "*binding effect,* not the timing, ... *is the essence of criterion one.*" In analyzing these criteria, we are to give some deference, "albeit 'not overwhelming,' " to the agency's characterization of its own rule.

Id. (emphasis added) (citations omitted).

The rule's effect on agency discretion is the primary determinant in characterizing a rule as substantive or nonsubstantive. *Id.* ("While mindful but suspicious of the agency's own characterization, we follow the D.C. Circuit's analysis . . ., focusing primarily on whether the rule has binding effect on agency discretion or severely restricts it."). For instance, rules that award rights, impose obligations, or have other significant effects on private interests have been found to have a binding effect on agency discretion and are thus considered substantive. *Id.* n.19 (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983)). A rule, while not binding per se, is still considered substantive if it "severely restricts" agency discretion. Put another way, any rule that "narrowly constrict[s] the discretion of agency officials by largely determining the issue addressed" is substantive. *Id.* n.20. Lastly, a substantive rule is generally characterized as one that "establishes a standard of conduct which has the force of law." *Id.* (quoting *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 847 F.2d 1168, 1174 (5th Cir. 1988)).

In sharp contrast to a substantive rule, a general statement of policy does not establish a binding norm, nor is it "finally determinative of the issues or rights to which it is addressed." *Shalala*, 56 F.3d at 596. A general statement of policy is best characterized as announcing the

agency's "tentative intentions for the future." *Id.* Thus, it cannot be applied or relied upon as law because a statement of policy merely proclaims what an agency seeks to establish as policy.[89] *See id.*

(1) The Government's Characterization of DAPA

Both parties[90] acknowledge that, in line with the Fifth Circuit's analysis above, the starting point in determining whether a rule is substantive or merely a statement of policy is the DHS' own characterization of the DAPA Directive. Defendants insist that the Directive is "a policy that 'supplements and amends . . . guidance' for the use of deferred action." [Doc. No. 38 at 45]. In their briefings before the Court, Defendants label DAPA "Deferred Action Guidance."[91] The Court finds Defendants' labeling disingenuous and, as discussed below,

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[89] The Fifth Circuit in *Panhandle Producers* further defined a general statement of policy:

> When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

847 F.2d at 1175.

[90] Although Plaintiffs strenuously insist that Defendants "mislabel" the DAPA Directive and that an agency's characterization of its own rule is "self-aggrandizement," they apparently agree that the agency's characterization is at least relevant to the analysis. *See* Doc. No. 64 at 38 (citing *Shalala*, 56 F.3d at 596, where the Fifth Circuit states that an agency's characterization of its own rule, while not conclusive, is the starting point to the analysis).

[91] The DHS may have a number of reasons for using the language and specific terms it uses in the DAPA Memorandum--whether to assure itself, the public and/or a future reviewing court that it need not comply with formal agency rulemaking procedures, or simply because it is standard language used in its other memoranda. The Court, however, finds substance to be more important than form in this case. The DHS' actions prove more instructive than its labels.

Moreover, the Court notes that it is not bound by any decision a different court may have reached regarding the characterization of a *prior* DHS/INS memorandum (e.g., the Ninth Circuit's opposing holdings in *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979) and *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987)). For one, past DHS/INS memoranda, including the operating instructions reviewed in the 1970s and 80s by the Ninth Circuit, have been expressly superseded by subsequent DHS memoranda or instructions. Further, both Ninth Circuit opinions (each dealing with a different INS memorandum) support this Court's findings on the characterization of DAPA. Finally, as the Fifth Circuit has held, a prior court ruling that characterizes an agency's rule as a general statement of policy

contrary to the substance of DAPA. Although Defendants refer to DAPA as a "guidance" in their briefings and in the DAPA Memorandum, elsewhere, it is given contradictory labels. For instance, on the official website of the DHS, DAPA is referred to as "a new Deferred Action for Parents of Americans and Lawful Permanent Residents *program*."[92]

The DHS website does use the term "guidelines" in describing DAPA's criteria; however, this is only in the context of a "list" of guidelines that candidates must satisfy in order to qualify for DAPA (or the newly expanded DACA).[93] Thus, not only does this usage of the term "guidelines" not refer to the DAPA program itself, but it is also a misnomer because these "guidelines" are in fact requirements to be accepted under these programs. Throughout its description of DAPA, the DHS website also refers to the various "executive actions" taken in conjunction with the implementation of the DAPA Directive as "initiatives." *Id.* ("On November 20, 2014, the President announced a series of executive actions . . . . These initiatives include . . . ."). For example, the site states that "USCIS and other agencies and offices are responsible for implementing these initiatives as soon as possible." *Id.* The term "initiative" is defined in Black's Law Dictionary as:

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is not dispositive in determining the characterization of that agency's current rule. *See Shalala*, 56 F.3d at 596 n.27 ("[T]he fact that we previously found another FDA compliance policy guide to be a policy statement is not dispositive whether [the current FDA compliance policy guide] is a policy statement."). This rule would be especially applicable to a directive that changes the current law.

[92] *Executive Actions on Immigration*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/immigrationaction (last updated Jan. 30, 2015) (emphasis added); *see also*, Doc. No. 1, Pl. Ex. A ("In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows . . . .").

[93] *See, e.g., id.* (listing out the new DACA criteria and including as the last criterion, "meet all the other DACA guidelines").

> An electoral process by which a percentage of voters can *propose legislation* and compel a vote on it by the legislature or by the full electorate. Recognized in some state constitutions, the initiative is one of the few methods of direct democracy in an otherwise representative system.

Black's Law Dictionary (9th ed. 2009) (emphasis added) (the sole definition offered for "initiative"). An "initiative," by definition, is a legislative process—the very thing in which Defendants insist they have not partaken.

What is perhaps most perplexing about the Defendants' claim that DAPA is merely "guidance" is the President's own labeling of the program. In formally announcing DAPA to the nation for the first time, President Obama stated, "I just took an action to change the law."[94] He then made a "deal" with potential candidates of DAPA: "if you have children who are American citizens . . . if you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community – *you're not going to be deported . . . . If you meet the criteria, you can come out of the shadows . . . .*"[95]

While the DHS' characterization of DAPA is taken into consideration by this Court in its analysis, the "label that the . . . agency puts upon its given exercise of administrative power is not . . . conclusive; rather, it is what the agency does in fact." *Shalala*, 56 F.3d at 596 (internal quotation marks omitted) (citing *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th

[94] Press Release, Remarks by the President on Immigration – Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014) ("But what you're not paying attention to is the fact that I just took action to change the law . . . . [t]he way the change in the law works is that we're reprioritizing how we enforce our immigration laws generally. So not everybody qualifies for being able to sign up and register, but the change in priorities applies to everybody.").

[95] President Obama, Remarks in Nevada on Immigration (Nov. 20, 2014) (emphasis added). (Court's emphasis). *See also* Doc. No. 64, Pl. Ex. 26 (Press Release, Remarks by the President in Immigration Town Hall – Nashville, Tennessee, The White House Office of the Press Secretary (Dec. 9, 2014) ("What we're also saying, though, is that for those who have American children or children who are legal permanent residents, that you can actually register and submit yourself to a criminal background check, pay any back taxes and commit to paying future taxes, *and if you do that, you'll actually get a piece of paper that gives you an assurance that you can work and live here without fear of deportation.*") (emphasis added)).

Cir. 1979)). Thus, the Court turns its attention to the primary focus of its analysis: the substance of DAPA. Nevertheless, the President's description of the DHS Directive is that it changes the law.

(2) Binding Effect

The Fifth Circuit in *Shalala* propounded as a "touchstone of a substantive rule" the rule's binding effect. The question is whether the rule establishes a "binding norm." *Id.* at 596. The President's pronouncement quoted above clearly sets out that the criteria are binding norms. Quoting the Eleventh Circuit, the *Shalala* Court emphasized:

> The key inquiry ... is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy *so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria.* As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Id. at 596-97 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)). In this case, upon application, USCIS personnel working in service centers (established for the purpose of receiving DACA and DAPA applications), need only determine whether a case is within the set-criteria. If not, applicants are immediately denied.

Despite the DAPA memorandum's use of phrases such as "case-by-case basis" and "discretion," it is clear from the record that the only discretion that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the criteria therein. That criteria is binding. At a minimum, the memorandum "severely restricts" any discretion that Defendants argue exists. It ensures that "officers will be provided with *specific* eligibility criteria for deferred action." Doc. No. 1, Pl. Ex. A at 5 (emphasis added).

Indeed, the "Operating Procedures" for implementation of DACA[96] contains nearly 150 pages[97] of specific instructions for granting or denying deferred action to applicants.[98] Denials are recorded in a "check the box" standardized form, for which USCIS personnel are provided templates.[99] Certain denials of DAPA must be sent to a supervisor for approval before issuing the denial.[100] Further, there is no option for granting DAPA to an individual who does not meet each criterion.[101] With that criteria set, from the President down to the individual USCIS employees actually processing the applications, discretion is virtually extinguished.

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[96] There is no reason to believe that DAPA will be implemented any differently than DACA. In fact, there is every reason to believe it will be implemented exactly the same way. The DAPA Memorandum in several places compares the procedure to be taken for DAPA to that of DACA. [*See, e.g.*, Doc. No. 1, Ex. 1 at 5 ("As with DACA, the above criteria are to be considered for all individuals encountered . . . .")].

[97] The Court was not provided with the complete Instructions and thus cannot provide an accurate page number.

[98] *See* Doc. No. 64, Ex. 10 (National Standard Operating Procedures (SOP), Deferred Action for Childhood Arrivals (DACA), (Form I-821D and Form I-765)).

[99] *See id.* Defendants assert that "even though standardized forms are used to record decisions, those decisions are to be made on a case-by-case basis." [Doc. No. 130 at 34]. For one, the Court is unaware of a "form" or other process for recording any discretionary denial based on factors other than the set-criteria (to the extent that such a denial is even genuinely available to an officer). Further, the means for making such discretionary decisions are limited considering the fact that applications are handled in a service center and decisions regarding deferred action are no longer made in field offices where officers may interview the immigrant.

[100] *See id.* at 96.

[101] Defendants argue that officers retain the ability to exercise discretion on an individualized basis in reviewing DAPA applications as evidenced by the last factor listed in DAPA's criteria ("present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate"). Evidence of DACA's approval rate, however, persuades the Court that this "factor" is merely pretext. As previously noted, there is every indication, including express statements made by the Government, that DAPA will be implemented in the same fashion as DACA. No DACA application that has met the criteria has been denied based on an exercise of individualized discretion. Whether Plaintiffs' or Defendants' calculations are correct, it is clear that only 1-6% of applications have been denied at all, and all were denied for failure to meet the criteria (or "rejected" for technical filing errors, errors in filling out the form or lying on the form, and failures to pay fees), or for fraud. *See, e.g.*, Doc. No. 64, Pl. Ex. 29 at App. p. 0978; *id.* Pl. Ex. 23 at 3 (Palinkas Dec.) (citing a 99.5% approval rate for all DACA applications from USCIS reports). Other sources peg the acceptance rate at approximately 95%, but, again, there were apparently no denials for those who met the criteria.

The Court in oral argument specifically asked for evidence of individuals who had been denied for reasons other than not meeting the criteria or technical errors with the form and/or filing. Except for fraud, which always disqualifies someone from any program, the Government did not provide that evidence. Defendants claim that some

In stark contrast to a policy statement that "does not impose any rights and obligations" and that "*genuinely* leaves the agency and its decisionmakers free to exercise discretion," the DAPA Memorandum confers the right to be legally present in the United States and enables its beneficiaries to receive other benefits as laid out above. The Court finds that DAPA's disclaimer that the "memorandum confers no substantive right, immigration status, or pathway to citizenship" may make these rights revocable, but not less valuable. While DAPA does not provide legal permanent residency, it certainly provides a legal benefit in the form of legal presence (plus all that it entails)—a benefit not otherwise available in immigration laws. The DAPA Memorandum additionally imposes specific, detailed and immediate obligations upon DHS personnel—both in its substantive instructions and in the manner in which those instructions are carried out. Nothing about DAPA "*genuinely* leaves the agency and its [employees] free to exercise discretion." In this case, actions speak louder than words.

(3) Substantive Change in Existing Law

Another consideration in determining a rule's substantive character is whether it is essentially a "legislative rule." A rule is "legislative" if it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citations omitted).

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requests have been denied for public safety reasons (e.g. where the requestor was suspected of gang-related activity or had a series of arrests), or where the requestor had made false prior claims of U.S. citizenship. Public safety threats and fraud are specifically listed in the Operation Instructions as reasons to deny relief, however. More importantly, one of the criterion for DAPA is that the individual not be an enforcement priority as reflected in another November 20, 2014 Memorandum ("Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants"). That DHS memorandum lists a threat to public safety as a reason to prioritize an individual for removal in the category, "Priority 1" (the highest priority group). *See* Doc. No. 38, Def. Ex. 5 at 5 (Nov. 20, 2014, Memorandum, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants").

The DAPA program clearly represents a substantive change in immigration policy. It is a program instituted to give a certain, newly-adopted class of 4.3 million illegal immigrants not only "legal presence" in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled.[102] It does more than "supplement" the statute; if anything, it contradicts the INA. It is, in effect, a new law. DAPA turns its beneficiaries' illegal status (whether resulting from an illegal entry or from illegally overstaying a lawful entry) into a legal presence. It represents a massive change in immigration practice, and will have a significant effect on, not only illegally-present immigrants, but also the nation's entire immigration scheme and the states who must bear the lion's share of its consequences. *See Shalala*, 56 F.3d at 597 (concluding the agency's policy guidance was not a binding norm largely because it did "*not represent a change in [agency] policy* and *[did] not have a significant effect* on [the subjects regulated]"). In the instant case, the President, himself, described it as a change.

Far from being mere advice or guidance, this Court finds that DAPA confers benefits and imposes discrete obligations (based on detailed criteria) upon those charged with enforcing it. Most importantly, it "severely restricts" agency discretion.[103] *See Community Nutrition Inst. v.*

[102] One could argue that it also benefits the DHS as it decides who to remove and where to concentrate their efforts, but the DHS did not need DAPA to do this. It could have done this merely by concentrating on its other prosecutorial priorities. Instead, it has created an entirely new bureaucracy just to handle DAPA applications.

[103] This is further evidenced by the "plain language" of the DAPA Directive. *See Shalala*, 56 F.3d at 597 (considering the policy's plain language in determining its binding effect). Without detailing every use of a mandatory term, instruction, or command throughout Secretary Johnson's memorandum, the Court points to a few examples:

> (1) When detailing DAPA and its criteria, the Secretary states: "I hereby direct USCIS to establish a process . . . . Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics . . . . Each person who applies . . . shall also be eligible to apply for work authorization . . . ."

Young, 818 F.2d 943, 948 (D.C. Cir. 1987) ("[C]abining of an agency's prosecutorial discretion can in fact rise to the level of a substantive . . . rule.").

In sum, this Court finds, both factually based upon the record and the applicable law, that DAPA is a "legislative" or "substantive" rule that should have undergone the notice-and-comment rule making procedure mandated by 5 U.S.C. § 553. The DHS was not given any "discretion by law" to give 4.3 million removable aliens what the DHS itself labels as "legal presence." *See* 5 U.S.C. § 701(a)(2). In fact the law *mandates* that these illegally-present individuals be removed.[104] The DHS has adopted a new rule that substantially changes both the status and employability of millions. These changes go beyond mere enforcement or even non-enforcement of this nation's immigration scheme. It inflicts major costs on both the states and federal government. Such changes, if legal, at least require compliance with the APA.[105] The Court therefore finds that, not only is DAPA reviewable, but that its adoption has violated the procedural requirements of the APA. Therefore, this Court hereby holds for purposes of the temporary injunction that the implementation of DAPA violates the APA's procedural requirements and the States have clearly proven a likelihood of success on the merits.

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(2) When explaining the expansion of DACA, the Secretary states: "I hereby direct USCIS to expand DACA as follows . . . DACA will apply . . . The current age restriction . . . will no longer apply . . . . The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than two-year increments. This change shall apply to all first-time applicants . . . . USCIS should issue all work authorization documents valid for three years . . . ."

[104] The Court again emphasizes that it does not find the removal provisions of the INA as depriving the Executive Branch from exercising the inherent prosecutorial discretion it possesses in enforcing the laws under which it is charged. Whether or not Defendants may exercise prosecutorial discretion by merely not removing people in individual cases is not before this Court. It is clear, however, that no *statutory* law (i.e., no express Congressional authorization) related to the removal of aliens confers upon the Executive Branch the discretion to do the opposite.

[105] This Memorandum Opinion and Order does not rule on the substantive merits of DAPA's legality.

2. Preliminary Injunction Factor Two: Irreparable Harm

In addition to showing a likelihood of success on the merits of at least one of their claims, the Plaintiff States must also demonstrate a "likelihood of substantial and immediate irreparable injury" if the injunction is not granted, and the "inadequacy of remedies at law." *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

It is clear that, to satisfy this factor, speculative injuries are not enough; "there must be more than an unfounded fear on the part of [Plaintiffs]." Wright & Miller § 2948.1. Thus, courts will not issue a preliminary injunction "simply to prevent the possibility of some remote future injury." *Id.* Instead, the Plaintiff States must show a "presently existing actual threat." *Id.*; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("We agree . . . that the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (internal citations omitted). The Plaintiffs' injury need not have already been inflicted or *certain* to occur; a strong threat of irreparable injury before a trial on the merits is adequate for a preliminary injunction to issue. *See, e.g.*, Wright & Miller § 2948.1.

Plaintiffs allege that they will suffer two "categories" of irreparable injuries if this Court declines to grant a preliminary injunction. First, according to Plaintiffs, the DAPA Directive will cause a humanitarian crisis along the southern border of Texas and elsewhere, similar to the surge of undocumented aliens in the summer of 2014. *See* Doc. No. 5 at 25-26. The State of Texas specifically points to the economic harm it experienced in the last "wave" of illegal immigration allegedly caused by DACA. *See id.* at 26 ("Texas paid almost $40 million for Operation Strong Safety to clean up the consequences of Defendants' actions."). Texas

additionally complains of the millions of dollars it must spend each year in providing uncompensated healthcare for these increasing numbers of undocumented immigrants.

The Court finds primarily, for the reasons stated above, this claimed injury to be exactly the type of "possible remote future injury" that will not support a preliminary injunction. For the same reasons the Court denied standing to Plaintiffs on their asserted injury that DAPA will cause a wave of immigration thereby exacerbating their economic injuries, the Court does not find this category of alleged irreparable harm to be immediate, direct, or a presently-existing, actual threat that warrants a preliminary injunction. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (noting that standing considerations "obviously shade into those determining whether the complaint states a sound basis for [injunctive] relief," and that, even if a complaint presents an existing case or controversy under Article III, it may not also state an adequate basis for injunctive relief). The general harms associated with illegal immigration, that unfortunately fall on the States (some of whom must bear a disproportionate brunt of this harm), are harms that may be exacerbated by DAPA, but they are not immediately caused by it.[106] Whether or not Defendants' implementation of DACA in 2012 actually contributed to the flood of illegal immigration experienced by this country in 2014—an issue not directly before this Court—injuries associated with any future wave of illegal immigration that may allegedly stem from DAPA are neither immediate nor direct. *Lyons*, 461 U.S. at 102 (citing *O'Shea*, 414 U.S. at 496, in which the Court denied a preliminary injunction because the "prospect of future injury rested

[106] Indeed, Chief Kevin Oaks, Chief of the Rio Grande Valley Sector of U.S. Border Patrol, testified before this Court in Cause No. B-14-119 that in his experience, it has been traditionally true that when an administration talks about amnesty, or some other immigration relief publicly, it increases the flow across the border and has an adverse effect on enforcement operations. As of the time he testified, on October 29, 2014, he stated that the DHS was preparing for another surge of immigrants given the talk of a change in immigration policy. *See* Test. of Kevin Oaks, Cause No. B-14-119 (S.F. 172-176).

'on the likelihood that [plaintiffs] [would] again be arrested for and charged with violations'" and be subjected to proceedings; thus, the "threat to the plaintiff was not sufficiently real and immediate to show an existing controversy simply because they anticipate" the same injury occurring in the future). The law is clear that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Id.* Consequently, this Court will exclude Plaintiffs' first category of injuries from the Court's determination of irreparable injury.

Plaintiffs additionally allege that legalizing the presence of millions of people is a "virtually irreversible" action once taken. *See* Doc. No. 5 at 25-28. The Court agrees. First, there are millions of dollars at stake in the form of unrecoverable costs to the States if DAPA is implemented and later found unlawful in terms of infrastructure and personnel to handle the influx of applications. Doc. No. 64, Pl. Ex. 24. The direct costs to the States for providing licenses would be unrecoverable if DAPA was ultimately renounced. Further, and perhaps most importantly, the Federal Government is the sole authority for determining immigrants' lawful status and presence (particularly in light of the Supreme Court's holding in *Arizona v. United States*, 132 S. Ct. 2492 (2012)) and, therefore, the States are forced to rely on the Defendants "to faithfully determine an immigrant's status." Once Defendants make such determinations, the States accurately allege that it will be difficult or even impossible for anyone to "unscramble the egg." *Id.* Specifically, in Texas and Wisconsin, as this Court has already determined, through

benefits conferred by DAPA, recipients are qualified for driver's licenses, in addition to a host of other benefits.[107]

The Court agrees that, without a preliminary injunction, any subsequent ruling that finds DAPA unlawful after it is implemented would result in the States facing the substantially difficult—if not impossible—task of retracting any benefits or licenses already provided to DAPA beneficiaries. This genie would be impossible to put back into the bottle. The Supreme Court has found irreparable injury in the form of a payment of an allegedly unconstitutional tax that could not be recovered if the law at issue was ultimately found unlawful. *See Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929). There, the Court held that "[w]here the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted and the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable . . . the injunction usually will be granted." *Id.* at 814.

Similarly, here, any injury to Defendants, even if DAPA is ultimately found lawful, will be insubstantial in comparison to Plaintiffs' injuries. A delay of DAPA's implementation poses no threat of immediate harm to Defendants.[108] The situation is not such that individuals are currently considered "legally present" and an injunction would remove that benefit; nor are potential beneficiaries of DAPA—who are under existing law illegally present—entitled to the benefit of legal presence such that this Court's ruling would interfere with individual rights.

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[107] For example, in Texas, these individuals, according to Plaintiffs, would also qualify for unemployment benefits (citing Tex. Lab. Code § 207.043(a)(2)); alcoholic beverage licenses (citing 16 Tex. Admin. Code § 33.10); licensure as private security officers (citing 37 Tex. Admin. Code § 35.21); and licensure as attorneys (citing Tex. Rules Govern. Bar Adm'n, R. II(a)(5)(d)).

[108] To the contrary, if individuals begin receiving benefits under DAPA but DAPA is later declared unlawful, Defendants, just like the States, would suffer irreparable injuries.

Preliminarily enjoining DAPA's implementation would in this case merely preserve the status quo that has always existed.

According to the authors of Wright & Miller's Federal Practice and Procedure:

> Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. *Therefore, if a trial on the merits can be conducted before the injury would occur, there is no need for interlocutory relief.* In a similar vein, a preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief.

Wright & Miller § 2948.1 (emphasis added).

Here, the Government has required that USCIS begin accepting applications for deferred action under the new DACA criteria "no later than ninety days from the date of" the announcement of the Directive. Doc. No. 1, Pl. Ex. A. The Directive was announced on November 20, 2014. Thus, by the terms of the Directive, USCIS will begin accepting applications no later than February 20, 2015. Further, as already mentioned, the DHS' website provides February 18, 2015 as the date it will begin accepting applications under DACA's new criteria, and mid-to-late May for DAPA applications. The implementation of DAPA is therefore underway. Due to these time constraints, the Court finds that a trial on the merits cannot be conducted before the process of granting deferred action under the DAPA Directive begins. Without a preliminary injunction preserving the status quo, the Court concludes that Plaintiffs will suffer irreparable harm in this case.

3. Preliminary Injunction Factors Three and Four: Balancing Hardship to Parties and the Public Interest

Before the issuance of an injunction, the law requires that courts "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). Thus, in addition to demonstrating threatened irreparable harm, the Plaintiffs must show that they would suffer more harm without the injunction than would the Defendants if it were granted. The award of preliminary relief is never "strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," but is rather "a matter of sound judicial discretion" and careful balancing of the interests of—and possible injuries to—the respective parties. *Yakus v. United States*, 321 U.S. 414, 440 (1944). If there is reason to believe that an injunction issued prior to a trial on the merits would be burdensome, the balance tips in favor of denying preliminary relief. *See Winter*, 555 U.S. at 27 ("The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome.") (quoting Wright & Miller § 2948.2).

The final factor in the preliminary injunction analysis focuses on policy considerations. Plaintiffs have the burden to show that if granted, a preliminary injunction would not be adverse to public interest. *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986). If no public interest supports granting preliminary relief, such relief should ordinarily be denied, "even if the public interest would not be harmed by one." Wright & Miller § 2948.4. "Consequently, an evaluation of the public interest should be given considerable weight in determining whether a motion for a preliminary injunction should be granted." *Id.*

Here, the Plaintiffs seek to preserve the status quo by enjoining Defendants from acting. The Court is not asked to order Defendants to take any affirmative action. *See* Wright & Miller § 2948.2 (noting that one significant factor considered by courts when balancing the hardships is whether a mandatory or prohibitory injunction is sought—the latter being substantially less burdensome to the defendant). Further, the Court's findings at the preliminary injunction stage in this case do not grant Plaintiffs all of the relief to which they would be entitled if successful at trial. *See id.* (explaining that if "a preliminary injunction would give plaintiff all or most of the relief to which the plaintiff would be entitled if successful at trial," courts are less likely to grant the injunction). Indeed, as detailed below, the Court is ruling on the likelihood of success for purposes of preliminary relief on only one of the three claims (and that one being a procedural, not a substantive claim) brought by Plaintiffs. Thus, neither of the usual concerns in considering potential burdens on a defendant in granting a preliminary injunction is applicable here. Preliminarily enjoining Defendants from carrying out the DAPA program would certainly not be "excessively burdensome" on Defendants. *See id.*

Additional considerations suggest that the Government would not be harmed at all by the issuance of a temporary injunction before a trial is held on the merits. The DHS may continue to prosecute or not prosecute these illegally-present individuals, as current laws dictate. This has been the status quo for *at least* the last five years[109] and there is little-to-no basis to conclude that harm will fall upon the Defendants if it is temporarily prohibited from carrying out the DAPA program. If a preliminary injunction is issued and the Government ultimately prevails at a trial on the merits, it will not be harmed by the delay; if the Government ultimately loses at trial, the

[109] Obviously, this has been the status quo for at least the last five years with respect to the specific individuals eligible for DAPA. Given that DAPA is a program that has never before been in effect, one could also conclude that enjoining its implementation would preserve the status quo that has *always* existed.

States avoid the harm that will be done by the issuance of SAVE-compliant IDs for millions of individuals who would not otherwise be eligible.

If the preliminary injunction is denied, Plaintiffs will bear the costs of issuing licenses and other benefits once DAPA beneficiaries—armed with Social Security cards and employment authorization documents—seek those benefits. Further, as already noted, once these services are provided, there will be no effective way of putting the toothpaste back in the tube should Plaintiffs ultimately prevail on the merits. Thus, between the actual parties, it is clear where the equities lie—in favor of granting the preliminary injunction.

This is not the end of the inquiry; in fact, in this case, it is really the tip of the iceberg. Obviously, this injunction (as long as it is in place) will prevent the immediate provision of benefits and privileges to millions of individuals who might otherwise be eligible for them in the next several months under DAPA and the extended-DACA. The Court notes that there is no indication that these individuals will otherwise be removed or prosecuted. They have been here for the last five years and, given the humanitarian concerns expressed by Secretary Johnson, there is no reason to believe they will be removed now. On the other hand, if the Court denies the injunction and these individuals accept Secretary Johnson's invitation to come out of the shadows, there may be dire consequences for them if DAPA is later found to be illegal or unconstitutional. The DHS—whether under this administration or the next—will then have all pertinent identifying information for these immigrants and could deport them.

For the members of the public who are citizens or otherwise in the country legally, their range of interests may vary substantially: from an avid interest in the DAPA program's consequences to complete disinterest. This Court finds that, directly interested or not, the public

interest factor that weighs the heaviest is ensuring that actions of the Executive Branch (and within it, the DHS—one of the nation's most important law enforcement agencies) comply with this country's laws and its Constitution. At a minimum, compliance with the notice-and-comment procedures of the APA will allow those interested to express their views and have them considered.

Consequently, the Court finds, when taking into consideration the interests of all concerned, the equities strongly favor the issuance of an injunction to preserve the status quo. It is far preferable to have the legality of these actions determined before the fates of over four million individuals are decided. An injunction is the only way to accomplish that goal.

The Court finds that Plaintiffs' injuries cannot be redressed through a judicial remedy after a hearing on the merits and thus that a preliminary injunction is necessary to preserve the status quo in this case. While recognizing that a preliminary injunction is sometimes characterized as a "drastic" remedy, the Court finds that the judicial process would be rendered futile in this case if the Court denied preliminary relief and proceeded to a trial on the merits. If the circumstances underlying this case do not qualify for preliminary relief to preserve the status quo, this Court finds it hard to imagine what case would.

C. Remaining Claims

In this order, the Court is specifically not addressing Plaintiffs' likelihood of success on their *substantive* APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine. Judging the constitutionality of action taken by a coequal branch of government is a "grave[]" and "delicate duty" that the federal judiciary is called on to perform. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (citations omitted).

The Court is mindful of its constitutional role to ensure that the powers of each branch are checked and balanced; nevertheless, if there is a non-constitutional ground upon which to adjudge the case, it is a "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question." *Id.* at 205 (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*)). In this case, the Plaintiffs brought substantive and procedural claims under the APA in addition to their constitutional claim to challenge the Defendants' actions. All three claims are directed at the same Defendants and challenge the same executive action. Thus, the Court need only find a likelihood of success on one of these claims in order to grant the requested relief. This "constitutional avoidance" principle is particularly compelling in the preliminary injunction context because the Court is not abstaining from considering the merits of Plaintiffs' constitutional claim altogether. It is only declining to address it now.[110]

Consequently, despite the fact that this ruling may imply that the Court finds differing degrees of merit as to the remaining claims, it is specifically withholding a ruling upon those issues until there is further development of the record. As stated above, preliminary injunction requests are by necessity the product of a less formal and less complete presentation. This Court, given the importance of these issues to millions of individuals—indeed, in the abstract, to virtually every person in the United States—and given the serious constitutional issues at stake,

[110] Given the dearth of cases in which the Take Care Clause has been pursued as a cause of action rather than asserted as an affirmative defense (and indeed the dearth of cases discussing the Take Care Clause at all), a complete record would no doubt be valuable for this Court to decide these unique claims. It also believes that should the Government comply with the procedural aspects of the APA, that process may result in the availability of additional information for this Court to have in order for it to consider the substantive APA claim under 5 U.S.C. § 706.

finds it to be in the interest of justice to rule after each side has had an opportunity to make a complete presentation.

VI. CONCLUSION

This Court, for the reasons discussed above, hereby grants the Plaintiff States' request for a preliminary injunction. It hereby finds that at least Texas has satisfied the necessary standing requirements that the Defendants have clearly legislated a substantive rule without complying with the procedural requirements under the Administration Procedure Act. The Injunction is contained in a separate order. Nonetheless, for the sake of clarity, this temporary injunction enjoins the implementation of the DAPA program that awards legal presence and additional benefits to the four million or more individuals potentially covered by the DAPA Memorandum and to the three expansions/additions to the DACA program also contained in the same DAPA Memorandum.[111] It does not enjoin or impair the Secretary's ability to marshal his assets or deploy the resources of the DHS. It does not enjoin the Secretary's ability to set priorities for the DHS. It does not enjoin the previously instituted 2012 DACA program except for the expansions created in the November 20, 2014 DAPA Memorandum.

Signed this 16th day of February, 2015.

Andrew S. Hanen
United States District Judge

[111] While this Court's opinion concentrates on the DAPA program, the same reasoning applies, and the facts and the law compel the same result, to the expansions of DACA contained in the DAPA Directive.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. LORETTA E. LYNCH, Attorney General of the United States, Defendant.	Civil Action No. 12-1332 (ABJ)

FINAL JUDGMENT

On August 13, 2012, plaintiff Committee on Oversight and Government Reform of the United States House of Representatives ("Committee") filed this action against Eric H. Holder, in his official capacity as Attorney General of the United States, seeking to enforce certain aspects of a subpoena issued to the Attorney General and requesting declaratory and injunctive relief. [Dkt. # 1]. The complaint was amended when a subsequent Congress reissued the subpoena. [Dkt. # 35].

Defendant moved to dismiss the complaint on jurisdictional and prudential grounds [Dkt. # 13], and the Court denied the motion on September 30, 2013. [Dkt. # 51].

In 2015, pursuant to Fed. R. Civ. Proc. 25(d), Loretta E. Lynch, the current Attorney General of the United States, was automatically substituted as a party.

Over the course of this proceeding, the Court has entered multiple orders addressing the merits of the dispute. On August 20, 2014, the Court denied pending cross-motions for summary

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judgment and ordered defendant to conduct a "document-by document analysis" and determine which responsive records being withheld satisfied both prongs of the deliberative process privilege in his view. [Dkt. # 81]. Defendant was directed to "prepare a detailed list that identifies and describes the material" in a manner sufficient to enable resolution of the privilege claims, and to produce any documents (including segregable sections of documents) that were not both predecisional and deliberative.

On January 19, 2016, the Court issued a Memorandum Opinion and Order [Dkt. # 117] granting plaintiff's Motion to Compel [Dkt. # 103] in part, and directing the Attorney General to produce certain responsive records on the detailed list by February 2, 2016.

On January 28, 2016, defendant sought an extension of the production deadline until March 21, 2016, seeking sixty days from to entry of the Court's order to consider whether to file an appeal and "to allow sufficient time to fully process, review, and produce" the records. [Dkt. # 118].

Plaintiff opposed the request for additional time, and it urged the Court to enter final judgment in the matter. *See* Pl.'s Resp. to Def.'s Mot. to Extend Deadline for Produc. of Docs. [Dkt. # 119].

In a minute order dated February 1, 2016, the Court suspended the February 2, 2016 date for production pending further order of the Court, and it solicited defendant's view on the question of whether the Court should enter judgment in the case.

The parties are agreed that in light of the Court's rulings in the Memorandum Opinion and Order dated January 19, 2016, the Court should enter final judgment at this time. *See* Def.'s Notice Regarding Entry of Final J. [Dkt. # 120]. While the Court does not believe that defendant requires additional time to review and process the records in light of the August 2014 order to do just that,

the Federal Rules of Appellate Procedure accord the Attorney General sixty days to file a notice of appeal after an entry of judgment. Fed. R. App. Proc. 4(a)(1)(B).

It is therefore **ORDERED** that, on or before April 8, 2016:

> Defendant shall, as specified in the Memorandum Opinion and Order dated January 19, 2016, produce to the Committee those documents responsive to the October 11, 2011 subpoena that concern the Department of Justice's response to congressional and media inquiries into Operation Fast and Furious which were withheld on deliberative process privilege grounds;
>
> Defendant shall produce document numbers 9087, 883, 6592, 6594, 7038, 7987, 8002, 9685, and 14768; and
>
> Defendant shall produce to plaintiff all segregable portions of any responsive records withheld in full or in part on the grounds that they contain attorney-client privileged material, attorney work product, private information, law enforcement sensitive material, or foreign policy sensitive material.

This is a **FINAL, APPEALABLE ORDER.**

Amy B Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: February 8, 2016

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:17-cv-116

Tareq Aqel Mohammed Aziz
and
Ammar Aqel Mohammed Aziz,
by their next friend,
Aqel Muhammad Aziz,
and
John Does 1-60,

Date: January 28, 2017

Petitioners,

v.

DONALD TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); U.S. CUSTOMS AND BORDER PROTECTION ("CBP"); JOHN KELLY, Secretary of DHS; KEVIN K. MCALEENAN, Acting Commissioner of CBP; and WAYNE BIONDI, Customs and Border Protection (CBP) Port Director of the Area Port of Washington Dulles,

Respondents.

TEMPORARY RESTRAINING ORDER

Pursuant to Federal Rule of Civil Procedure 65, the Court orders that:

a) respondents shall permit lawyers access to all legal permanent residents being detained at Dulles International Airport;

b) respondents are forbidden from removing petitioners—lawful permanent residents at Dulles International Airport—for a period of 7 days from the issuance of this Order.

Dates: January 28, 2017

/s/
Leonie M. Brinkema
United States District Judge

exh E

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Sharon Bridgewater

Plaintiff/Petitioner/Appellant/Claimant

Vs.

Jeff Sessions in his official capacity as Attorney General of the United States

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001 et al

Defendant/Respondent/Appellee

CASE # 17-CV-169 (R.B.W.)

AFFIDIVANT OF SERVICE

AFFIDIVANT OF SERVICE

I being duly sworn dispose and says that:

I Sharon Bridgewater mailed the summons and/or complaint, hereby declare that on Dec. 1, 2015

I mailed a copy of the summons and/or complaint, certified mail return receipt request to one or

Ø
ahF

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
Jeff Sessions in his official capacity as Attorney General of the United States – Department of Justice
450 Pennsylvania Ave, N.W.
Washington, D.C. 20530-0001

9590 9402 2030 6123 6276 60

7015 1520 0001 6915 4870

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) MAR 28 2017

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
☐ Certified Mail Restricted Delivery
Collect on Delivery
Collect on Delivery Restricted Delivery
☐ Insured Mail
☐ Insured Mail Restricted Delivery (over $500)
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

Domestic Return Receipt

I certify and/or Declare and/or state under penalty and perjury and to pursuant to 28 U.S.C. §1746 that the foregoing is true and correct. Executed ~~27th~~ 31st DAY OF MARCH 2017 in Detroit, Michigan.

Date: March 31, 2017

Sharon Bridgewater –Pro Se
Plaintiff/Petitioner/Appellant/Claimant
18952 Dale Street
Detroit, MI 48219
313-471-8714
sbridge11@yahoo.com
ATTORNEY FOR THE ABOVE

Sworn to and subscribed before me this 31st day of March, 2015

NOTARY PUBLIC or other person authorized to administer an oath

MY COMMISSION EXPIRES: 2/15/22

AMANDA HODGSON
Notary Public - Michigan
Oakland County
My Commission Expires Feb 15, 2022
Acting in the County of WAYNE

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NOTICE OF DEMAND FOR PERFORMANCE FILED IN CONJUCTION WTH NOTICE OF APPEAL

TO: Jeff Sessions in his official capacity as Attorney General of the United States

The Department of Justice
950 Pennsylvania Ave, NW
Washington DC 20530

And

TO: Donald Trump in his official capacity as United States President

The White House
1600 Pennsylvania Ave, NW
Washington DC 20500

You are notified that annexed to this demand is a duly certified copy of the original ubpean entered in the above entield ation in the office of the cler of the Untied States District Cour for the Distric of Colubmai and in case entitled Committee and Overisgh vs. Loretta Lynch in her official capacity as United States Attorney General dated Oc. 111, 20111,(attached as exh. A); and which is a "continuing subpeana." You are directed and required to produce docment numbers 9087, 883, 6592, 6594, 7038, 7987, 8002, 9685, and 14768; to the Committee and Oversight all segregable portions of any responsive records withheld in full or in part on the grounds that they contain attorney-client privileged material,

Exh 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION**

INTRODUCTION

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of Executive Order No. 13,780, entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). *See* Order Granting Mot. for TRO, ECF No. 219 [hereinafter TRO]. Plaintiffs State of Hawai'i and Ismail Elshikh, Ph.D., now move to convert the TRO to a preliminary injunction. *See* Pls.' Mot. to Convert TRO to Prelim. Inj., ECF No. 238 [hereinafter Motion].

Upon consideration of the parties' submissions, and following a hearing on March 29, 2017, the Court concludes that, on the record before it, Plaintiffs have met

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their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs' Motion (ECF No. 238) is GRANTED.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion. A fuller recitation of the facts is set forth in the Court's TRO. *See* TRO 3–14, ECF No. 219.

I. The President's Executive Orders

A. Executive Order No. 13,769

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017).[1] On March 6, 2017, the

[1]On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin Sections 3(c), 5(a)–(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2. The Court stayed the case (*see* ECF Nos. 27 & 32) after the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking a stay of the *Washington* TRO, pending appeal. That emergency motion was denied on February 9, 2017. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir.) (per curium), *denying reconsideration en banc*, --- F.3d ---, 2017

President issued another Executive Order, No. 13,780, identically entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), 82 Fed. Reg. 13209. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends the United States refugee program for specified periods of time.

B. Executive Order No. 13,780

Section 1 of the Executive Order declares that its purpose is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." By its terms, the Executive Order also represents a response to the Ninth Circuit's per curiam decision in *Washington v. Trump*, 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit." Notice of Filing of Executive Order 4–5, ECF No. 56.

Section 2 suspends from "entry into the United States" for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*: Iran, Libya, Somalia,

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WL 992527 (9th Cir. 2017). On March 8, 2017, the Ninth Circuit granted the Government's unopposed motion to voluntarily dismiss the appeal. *See* Order, Case No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187.

Sudan, Syria, and Yemen. 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date; and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of Executive Order No. 13,769). Exec. Order § 3(a). The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b). Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis.

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and Homeland Security to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

II. Plaintiffs' Claims

Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 (ECF No. 64) simultaneous with their Motion for TRO (ECF No. 65). The State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

According to Plaintiffs, the Executive Order results in "their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion." SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a "Muslim ban," which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35–60. Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1. Plaintiffs additionally present evidence that they contend undermines the purported national security rationale for the Executive Order and demonstrates the Administration's pretextual justification for the Executive Order. *E.g.*, SAC ¶ 61 (citing Draft DHS Report, SAC, Ex. 10, ECF No. 64-10).

III. March 15, 2017 TRO

The Court's nationwide TRO (ECF No. 219) temporarily enjoined Sections 2 and 6 of the Executive Order, based on the Court's preliminary finding that Plaintiffs

demonstrated a sufficient likelihood of succeeding on their claim that the Executive Order violates the Establishment Clause. *See* TRO 41–42. The Court concluded, based upon the showing of constitutional injury and irreparable harm, the balance of equities, and public interest, that Plaintiffs met their burden in seeking a TRO, and directed the parties to submit a stipulated briefing and preliminary injunction hearing schedule. *See* TRO 42–43.

On March 21, 2017, Plaintiffs filed the instant Motion (ECF No. 238) seeking to convert the TRO to a preliminary injunction prohibiting Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order until the matter is fully decided on the merits. They argue that both of these sections are unlawful in all of their applications and that both provisions are motivated by anti-Muslim animus. Defendants oppose the Motion. *See* Govt. Mem. in Opp'n to Mot. to Convert TRO to Prelim. Inj., ECF No. 251. After full briefing and notice to the parties, the Court held a hearing on the Motion on March 29, 2017.

DISCUSSION

The Court's TRO details why Plaintiffs are entitled to preliminary injunctive relief. *See* TRO 15–43. The Court reaffirms and incorporates those findings and conclusions here, and addresses the parties' additional arguments on Plaintiffs' Motion to Convert.

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

The Court previously found that Plaintiffs satisfied Article III standing requirements at this preliminary stage of the litigation. *See* TRO 15–21 (State), 22–25 (Dr. Elshikh). The Court renews that conclusion here.

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). "With these allegations and evidence, the [Plaintiffs] must make a 'clear showing of each element of standing.'" *Id.* (quoting

Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). On the record presented at this preliminary stage of the proceedings, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

For the reasons stated in the TRO, the State has standing based upon injuries to its proprietary interests. *See* TRO 16–21.[2]

The State sufficiently identified monetary and intangible injuries to the University of Hawaii. *See, e.g.*, Suppl. Decl. of Risa E. Dickson, Mot. for TRO, Ex. D-1, ECF No. 66-6; Original Dickson Decl., Mot. for TRO, Ex. D-2, ECF No. 66-7. The Court previously found these types of injuries to be nearly indistinguishable from those found sufficient to confer standing according to the Ninth Circuit's *Washington* decision. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be

[2]The Court once again does not reach the State's alternative standing theory based on protecting the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement."). The State also presented evidence of injury to its tourism industry. *See, e.g.*, SAC ¶ 100; Suppl. Decl. of Luis P. Salaveria, Mot. for TRO, Ex. C-1, ECF No. 66-4; Suppl. Decl. of George Szigeti, ¶¶ 5–8, Mot. for TRO, Ex. B-1, ECF No. 66-2.

For purposes of the instant Motion, the Court concludes that the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. *See* TRO 21. These preliminary findings apply to each of the challenged Sections of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

C. Dr. Elshikh Has Standing

Dr. Elshikh likewise has met his preliminary burden to establish standing to assert an Establishment Clause violation. *See* TRO 22–25. "The standing

question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness' required." *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048–49 (9th Cir. 2010) (en banc). Dr. Elshikh attests that the effects of the Executive Order are "devastating to me, my wife and children." Elshikh Decl. ¶ 6, Mot. for TRO, Ex. A, ECF No. 66-1; *see also id.* ¶¶ 1, 3 ("I am deeply saddened . . . . by the message that both [Executive Orders] convey—that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States."); SAC ¶ 90 ("Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths."). The alleged injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context. *E.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3. These injuries have already occurred and will continue to occur if the Executive Order is implemented and enforced; the injuries are neither contingent nor speculative.

The final two aspects of Article III standing—causation and redressability—are also satisfied with respect to each of the Executive Order's challenged Sections. Dr. Elshikh's injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

The Court turns to the factors for granting preliminary injunctive relief.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The Court applies the same standard for issuing a preliminary injunction as it did when considering Plaintiffs' Motion for TRO. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

The Court, in its discretion, may convert a temporary restraining order into a preliminary injunction. *See, e.g.*, *ABX Air, Inc. v. Int'l Bhd. of Teamsters*, No. 1:16-CV-1096, 2016 WL 7117388, at *5 (S.D. Ohio Dec. 7, 2016) (granting motion to convert TRO into a preliminary injunction because "Defendants fail to allege any material fact suggesting that, if a hearing were held, this Court would reach a different outcome"; "[n]othing has occurred to alter the analysis in the Court's original TRO, and since this Court has already complied with the requirements for the issuance of a preliminary injunction, it can simply convert the nature of its existing Order."); *Productive People, LLC v. Ives Design*, No. CV-09-1080-PHX-GMS, 2009 WL 1749751, at *3 (D. Ariz. June 18, 2009) ("Because Defendants have given the Court no reason to alter the conclusions provided in its previous Order [granting a TRO], and because '[t]he standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction,' the Court will enter a preliminary injunction." (quoting *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002))). Here, the parties were afforded notice, a full-briefing on the

merits, and a hearing both prior to entry of the original TRO and prior to consideration of the instant Motion.

For the reasons that follow and as set forth more fully in the Court's TRO, Plaintiffs have met their burden here.

III. Analysis of Factors: Likelihood of Success on the Merits

The Court's prior finding that Plaintiffs sufficiently established a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause remains undisturbed. *See* TRO 30–40.[3]

A. Establishment Clause

Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), provides the benchmark for evaluating whether governmental action is consistent with or at odds with the Establishment Clause. According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010).

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[3]The Court again expresses no view on Plaintiffs' additional statutory or constitutional claims.

The Court determined in its TRO that the preliminary evidence demonstrates the Executive Order's failure to satisfy *Lemon*'s first test. *See* TRO 33–36. The Court will not repeat that discussion here. As no *new* evidence contradicting the purpose identified by the Court has been submitted by the parties since the issuance of the March 15, 2017 TRO, there is no reason to disturb the Court's prior determination.

Instead, the Federal Defendants take a different tack. They once more urge the Court not to look beyond the four corners of the Executive Order. According to the Government, the Court must afford the President deference in the national security context and should not "'look behind the exercise of [the President's] discretion' taken 'on the basis of a facially legitimate and bona fide reason.'" Govt. Mem. in Opp'n to Mot. for TRO 42–43 (quoting *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972)), ECF No. 145. No binding authority, however, has decreed that Establishment Clause jurisprudence ends at the Executive's door. In fact, *every court* that has considered whether to apply the Establishment Clause to either the Executive Order or its predecessor (regardless of the ultimate outcome) has done so.[4] Significantly, this Court is constrained by the binding precedent and guidance

[4]*See Sarsour v. Trump*, No. 1:17-cv-00120 AJT-IDD, 2017 WL 1113305, at *11 (E.D. Va. Mar. 27, 2017) ("[T]he Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its