No. 15-643

In the Supreme Court of the United States

JOSEPH M. ARPAIO, SHERIFF, MARICOPA COUNTY, ARIZONA, PETITIONER

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner, a county sheriff, lacks Article III standing to challenge certain federal immigration policies for providing deferred action to individual aliens.

2. Whether those federal immigration policies are substantively unlawful.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 797 F.3d 11. The opinion of the district court (Pet. App. 47-94) is reported at 27 F. Supp. 3d 185.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45-46) was entered on August 14, 2015. The petition for a writ of certiorari was filed on November 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement of [the INA] and all other laws relating to the

immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1).[1] Congress has also assigned the Secretary the responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5). One of the enforcement matters over which the Secretary has authority is the removal of aliens if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012); see 8 U.S.C. 1182(a) (2012 & Supp. 2014); 8 U.S.C. 1227(a). In this and other matters, the Secretary is vested with the authority to "establish such regulations; * * * issue such instructions; and perform such other acts as he deems necessary." 8 U.S.C. 1103(a)(3).

"A principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. When they encounter a removable alien, federal immigration officials, "as an initial matter, must decide whether it makes sense to pursue removal at all." *Ibid.* And if they pursue removal, "[a]t each stage the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*).

Like other agencies exercising enforcement discretion, the Department of Homeland Security (DHS) balances "a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Those factors include "whether agency resources are best spent on this violation or another"

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[1] Congress has transferred to the Department of Homeland Security most of the functions of the former Immigration and Naturalization Service. *E.g.*, 6 U.S.C. 202(3), 271(b), 557.

and "whether the agency has enough resources to undertake the action at all," *ibid.*, as well as "immediate human concerns," such as "whether the alien has children born in the United States [or] long ties to the community," *Arizona*, 132 S. Ct. at 2499.

The Secretary also faces resource constraints that require the exercise of enforcement discretion. More than 11 million removable aliens are estimated to live in the United States. Pet. App. 8. But Congress has appropriated sufficient funds to remove only a small fraction of that population in any given year. *Ibid.* Recognizing that gap, Congress has directed U.S. Immigration and Customs Enforcement, the relevant DHS component, to devote certain resources to identifying and removing aliens convicted of crimes, and to prioritize removals of criminal aliens "by the severity of th[e] crime." DHS Appropriations Act, 2015, Pub. L. No. 114-4, Tit. II, 129 Stat. 43.

2. a. For decades, DHS has engaged in "a regular practice * * * known as 'deferred action,'" in which the Secretary "exercis[es] [his] discretion" to forbear, "for humanitarian reasons or simply for [his] own convenience," from removing particular aliens from the United States for a designated period of time. *AADC*, 525 U.S. at 483-484. Deferred action thus memorializes a decision "[t]o ameliorate a harsh and unjust outcome" through forbearance. *Id.* at 484 (quoting 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)). Through "[t]his commendable exercise in administrative discretion, developed without express statutory authorization," *ibid.* (citation omitted), a removable alien is able to remain in the country for the duration of the agency's forbearance. That person's continued presence does

not violate any criminal law, because "[r]emoval is a civil, not criminal, matter," and "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 132 S. Ct. at 2499, 2505; see 8 U.S.C. 1227(a). But deferred action provides no defense to the civil consequence of continued presence: The alien remains removable, and DHS has discretion to revoke deferred action at any time. See *AADC*, 525 U.S. at 484-485.

b. On June 15, 2012, the Secretary of Homeland Security issued a memorandum (2012 Guidance) addressing the exercise of discretion in the enforcement of the federal immigration laws against "young people who were brought to this country as children and know only this country as home." C.A. App. (J.A.) 101; see J.A. 101-103. The Secretary determined that "additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." J.A. 101.

The 2012 Guidance sets forth a policy known as Deferred Action for Childhood Arrivals (DACA). It provides that immigration officials, on a case-by-case basis and as a matter of discretion, may consider according deferred action to aliens who: (1) were under the age of 16 when they came to the United States; (2) were present in the United States on the June 2012 effective date of the memorandum and continuously resided in the United States for at least five years preceding the effective date of the memorandum; (3) are in school, have completed high school or the equivalent, or have been honorably discharged from the U.S. armed services or Coast Guard;

(4) have not been convicted of significant criminal offenses and do not otherwise pose a threat to public safety or national security; and (5) are under the age of 31. J.A. 101. Aliens who request consideration for deferred action, meet these guidelines, and pass a background check may, on a case-by-case basis, be found to warrant deferred action for a two-year period. J.A. 102.

The 2012 Guidance specifies that it "confers no substantive right" and is intended "to set forth policy for the exercise of discretion within the framework of existing law." J.A. 103. The Secretary retains discretion to revoke deferred action and to institute or reinstitute removal proceedings against aliens accorded deferred action at any time.

c. On November 20, 2014, the Secretary of Homeland Security issued two additional memoranda relevant here. The first memorandum directs DHS to focus its limited enforcement resources "to the greatest degree possible" on removing serious criminals, terrorists, aliens who recently crossed the border, and aliens who have significantly abused the immigration system. J.A. 158; see J.A. 154-159.

The second memorandum (2014 Guidance) announces "new policies for the use of deferred action." J.A. 485; see J.A. 485-489. The 2014 Guidance modifies the threshold eligibility requirements of the DACA policy announced in the 2012 Guidance to include a wider range of ages and more recent arrival dates. J.A. 487-488. The Guidance also extends the period of deferred action under the DACA policy from two years to three. *Ibid.*

The 2014 Guidance further directs U.S. Citizenship and Immigration Services "to establish a process,

similar to DACA, for exercising discretion through the use of deferred action, on a case-by-case basis," with respect to certain aliens who have "a son or daughter who is a U.S. citizen or lawful permanent resident." J.A. 488. This process is known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). To be considered for case-by-case consideration for deferred action under DAPA, an applicant must: (1) as of November 20, 2014, be the parent of a child who is a U.S. citizen or permanent resident; (2) have continuously resided in the United States since before January 1, 2010; (3) have been physically present here on November 20, 2014, and on the date of the request for consideration for deferred action; (4) have had no lawful immigration status on November 20, 2014; (5) not fall within the Secretary's enforcement priorities; and (6) "present no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." *Ibid.*

Under the 2014 Guidance, DHS was to begin accepting requests under the expanded DACA criteria no later than February 18, 2015, and for DAPA no later than May 19, 2015. J.A. 488-489.

3. Petitioner is the sheriff of Maricopa County, Arizona. Pet. App. 2. On the same day that the Secretary issued the 2014 Guidance, petitioner sued the President and other federal officials, seeking a preliminary injunction barring implementation of both the 2012 Guidance and 2014 Guidance and a declaratory judgment holding them invalid. J.A. 7-25. He alleged, among other claims, that the Guidance memoranda violate federal immigration laws, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the President's duty under Article II, Section 3 of the

Constitution to "take Care that the Laws be faithfully executed." J.A. 19; see J.A. 18-24. In support of his suit, petitioner alleged that he is "adversely affected and harmed in his office's finances, workload, and interference with the conduct of his duties, by the failure of the executive branch to enforce existing immigration laws." J.A. 15.

The district court denied petitioner's motion for a preliminary injunction and dismissed the suit for lack of subject matter jurisdiction because petitioner had failed to demonstrate Article III standing. Pet. App. 47-94. The court noted that Article III standing principles require a plaintiff to demonstrate (1) that he has suffered or will imminently suffer a concrete and particularized injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it would be redressable by a favorable decision from the court. See *id.* at 67-68. The court held that petitioner had not satisfied any of those three requirements. *Id.* at 68.

First, the district court held that petitioner had not demonstrated a cognizable injury from the challenged deferred action policies. Pet. App. 69. It reasoned that insofar as petitioner had brought the suit in his personal capacity, the law is well settled that "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws." *Ibid.* (quoting *Sure-Tan, Inc.* v. *NLRB,* 467 U.S. 883, 897 (1984)). Petitioner's claims as a private individual thus amounted to no more than a generalized grievance, which is not constitutionally sufficient to support Article III standing. *Id.* at 69-70.

The district court further reasoned that insofar as petitioner brought suit in his official capacity, he had

not demonstrated that the challenged policies interfere with his duties as sheriff of Maricopa County. Pet. App. 71-76. The court noted that the challenged policies do not regulate petitioner in the conduct of his office as a local sheriff, but rather are confined to federal enforcement of federal immigration laws—a matter that lies outside petitioner's authority as a local law-enforcement official. *Id.* at 72-73. The court concluded that "a state official has not suffered an injury in fact to a legally cognizable interest because a federal government program is anticipated to produce an increase in that state's population and concomitant increase in the need for the state's resources." *Id.* at 75.

The district court further held that petitioner had not demonstrated that his claimed injuries are fairly traceable to the Secretary's deferred action policies. The court reasoned that petitioner's alleged injuries are due to the independent action of third parties—aliens who petitioner alleged will enter the country and commit crimes in Maricopa County in response to the challenged deferred action policies. Pet. App. 75. The court explained that the challenged policies, which by their terms are restricted to individuals who have already been present in this country for years, do not authorize new immigration, much less criminal activity. *Id.* at 79-80. Moreover, the court pointed out that the deferred action policies focus the government's enforcement resources on removing criminal aliens and promoting border security, and thus may well reduce rather than exacerbate any adverse consequences that flow from alien criminal activity within petitioner's county. *Id.* at 80.

Finally, the district court concluded that petitioner's claimed injuries could not be redressed by a favorable decision. The court explained that an order barring implementation of the deferred action policies would not prevent aliens from attempting to unlawfully enter the United States; would not prevent any subsequent criminal activity that could burden law-enforcement resources; would not provide the Executive Branch the additional resources needed to prevent more undocumented aliens from entering the United States; and would not increase the government's ability to remove criminal aliens who had previously entered the United States. Pet. App. 84-85. The court therefore dismissed the suit for lack of subject matter jurisdiction. *Id.* at 94.

4. The court of appeals affirmed, holding that petitioner had failed to demonstrate that his alleged injuries were fairly traceable to the DACA and DAPA policies or would be redressable by an order in his favor enjoining those policies. Pet. App. 1-28. Specifically, petitioner contended that DACA and DAPA would increase law-enforcement burdens by allowing more aliens who are already present in the United States and are prone to commit crimes to remain within his jurisdiction, and by encouraging additional aliens prone to commit crimes to enter the country unlawfully. *Id.* at 2-3. The court held that those contentions were too speculative to support petitioner's standing. *Id.* at 3-5.

As an initial matter, the court of appeals explained that, because the government had challenged the adequacy of petitioner's complaint on a motion to dismiss, the reviewing court must accept the well-pleaded allegations of the complaint as true and draw

all reasonable inferences therefrom in petitioner's favor. Pet. App. 14. The court of appeals further explained, however, that a court need not accept the truth of legal conclusions couched as allegations of fact, or accept inferences that are unsupported by the facts set out in the complaint. *Id.* at 14-15.

Applying those well-settled standards, the court of appeals concluded that petitioner had not adequately alleged a sufficient causal connection between the DACA and DAPA policies and his alleged injury. The court held in this regard that any increase in law-enforcement costs imposed by newly arriving aliens would not be fairly traceable to DACA or DAPA because those policies allow consideration of deferred action only for aliens who had already entered the United States by January 1, 2010, and thus do not apply to aliens arriving now or in the future. Pet. App. 16-17.

Petitioner argued that prospective entrants might nonetheless view DACA and DAPA as harbingers of future immigration policy and seek to enter the country in the hope of receiving similar treatment at some later time. Pet. App. 16. The court of appeals, however, concluded that this attenuated theory of causation could not support petitioner's standing. *Id.* at 16-17. The court reasoned that, under *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), standing is substantially more difficult to establish when the claimed injury turns on speculation about the future conduct of third parties not regulated by the challenged policy, Pet. App. 16-17, and that petitioner could not base standing on a mere conjecture that third-party aliens "will act in unreasonable reliance on current governmental

policies that concededly cannot benefit those third parties," *id.* at 16.

The court of appeals also rejected petitioner's contention that the exercise of deferred action under the DACA and DAPA policies would increase his office's law-enforcement costs by reducing removals of aliens who are already present in the United States and are likely to commit crimes within his jurisdiction. Pet. App. 24-27. The court explained that this allegation "runs contrary to the thrust of those policies." *Id.* at 26. DACA and DAPA, it explained, "are designed to allow [DHS] to focus its resources on those undocumented aliens most disruptive to the public safety and national security of the United States." *Ibid.* "DACA and DAPA apply only to non-dangerous immigrants" who "pass a background check, have long-term ties to the United States, and submit to individualized assessments for compatibility with the Secretary's priorities in removing criminals." *Ibid.* By contrast, aliens who commit serious crimes "remain high priorities for removal from the United States." *Ibid.* "The policies [thus] are designed to remove *more* criminals in lieu of removals of undocumented aliens who commit no offenses or only minor violations while here." *Ibid.*

The court of appeals further held that petitioner's allegation of a procedural violation of the APA did not provide him with standing because a party complaining that an agency action was taken without complying with applicable procedures must still show that the agency action caused him a cognizable injury. Pet. App. 18.

Finally, the court of appeals noted that petitioner's standing claim was not supported by the Fifth Cir-

cuit's decision in *Texas* v. *United States*, 787 F.3d 733 (2015) (*Texas I*). Pet. App. 23-24.[2] The court observed that, in *Texas I*, the State of Texas had alleged that the 2014 Guidance would have a direct and predictable effect on the State's costs of issuing subsidized driver's licenses to aliens with deferred action. *Ibid.* Assuming *arguendo* that *Texas I* was correct, the D.C. Circuit in this case contrasted Texas's asserted basis for standing to petitioner's attempt to premise standing on a prediction that the DACA and DAPA policies would create incentives for third parties to behave in misinformed or irrational ways—a prediction too uncertain and speculative to support standing. *Id.* at 24.

Judge Brown concurred. Pet. App. 28-44. She agreed that "the state of the law on standing requires, or at least counsels, the result reached here." *Id.* at 28 (citation and internal quotation marks omitted). She agreed that petitioner could not show causation, "owing largely to the difficulty of showing causation in cases dependent on third-party behavior." *Id.* at 35. She nonetheless "wr[o]te separately to emphasize the narrowness" of the court's ruling and to express disagreement with certain aspects of this Court's standing jurisprudence. *Id.* at 28-29.

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[2] The *Texas I* decision distinguished by the court of appeals here declined to grant the United States a stay pending appeal of a preliminary injunction. The Fifth Circuit has since affirmed that injunction. See *Texas* v. *United States*, No. 15-40238, 2015 WL 6873190 (Nov. 9, 2015) (*Texas II*), petition for cert. pending, No. 15-674 (filed Nov. 20, 2015). The United States has filed a petition for a writ of certiorari in *Texas II*, which is pending.

ARGUMENT

The court of appeals held that petitioner lacks Article III standing because his allegations of increased law-enforcement costs are not fairly traceable to the DACA and DAPA policies he challenges, and would not be redressed by enjoining them. That case-specific holding does not warrant this Court's review because it is correct, represents a factbound application of this Court's well-settled standing precedents, and does not conflict with the decision of any other court of appeals. Petitioner also raises a variety of claims on the merits of his challenges to the DACA and DAPA policies. But this would be an inappropriate vehicle for resolving those claims, as petitioner's lack of standing prevented the court of appeals from reaching the merits.

1. The court of appeals' ruling that petitioner lacks Article III standing is correct and does not warrant review.

a. To establish Article III standing, a plaintiff bears the burden of demonstrating an injury that is (1) "concrete, particularized, and actual or imminent"; (2) "fairly traceable to the challenged action"; and (3) "redressable by a favorable ruling." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Where, as here, standing is premised on a claim of an alleged future injury, Article III demands not merely a possibility of injury, but a showing that the injury is "certainly impending." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted); see *Clapper*, 133 S. Ct. at 1148. Moreover, this standing inquiry is "especially rigorous" where a plaintiff asks a court "to decide whether an action taken by one of the other two branches of the Federal Government was uncon-

stitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

The court of appeals correctly held that any alleged financial burdens on petitioner's office would not be fairly traceable to the DACA or DAPA policies or be redressed by enjoining them. The obvious problem with petitioner's claim is the lack of a causal relationship between the injury he asserts (increased law-enforcement costs in Maricopa County) and the DACA and DAPA policies he challenges. Petitioner contends that DACA and DAPA will increase law-enforcement costs (1) by creating "a magnet drawing more undocumented aliens than would otherwise come across the Mexican border into Maricopa County, where they will commit crimes"; and (2) by allegedly "decreas[ing] total deportations" and thereby enabling "more individuals [to] remain unlawfully in Maricopa County and commit crimes than would be the case without deferred action." Pet. App. 3. But such speculation about third-party conduct "runs contrary to the thrust of those policies," which are designed to enable DHS to devote more resources to removing aliens who are serious criminals or have recently arrived. *Id.* at 26.

To be considered for deferred action under DACA or the announced DAPA policy, aliens must identify themselves, pay for, and pass a background check confirming that they are not serious criminals or otherwise an enforcement priority. See J.A. 488. If law-enforcement officials subsequently encounter a person accorded deferred action, they can quickly confirm that he is a non-priority alien who does not warrant the commitment of potentially substantial resources to remove. The challenged policies accordingly reduce administrative burdens on DHS connected with pro-

cessing of non-priority aliens, and thereby free up resources to devote to removing serious criminals and aliens who have recently crossed the border. See Pet. App. 2. It is implausible that policies designed to help DHS remove more criminals and recent arrivals would somehow have the opposite effect of increasing the number of criminal aliens and recent arrivals in Maricopa County.

Petitioner's allegations that the DACA and DAPA policies will create a "magnet" for future migration also run directly counter to a central feature of those policies: any alien who enters the country now or in the future will be expressly ineligible for deferred action under DACA or DAPA. Aliens may be considered for deferred action under those policies only if they have already been living in this country since before January 1, 2010. Pet. App. 9. Petitioner has identified no case in which an injury has been found to be *fairly* traceable to a government policy (or redressable by enjoining that policy) when the injury is predicated on conjecture that third-parties "will act in unreasonable reliance on current governmental policies that concededly cannot benefit [them]." *Id.* at 16.[3]

Petitioner's allegations that the DACA and DAPA policies will increase crime by aliens who are already present in Maricopa County are also infirm. "This theory rests on the unsupported assumption that the

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[3] Petitioner's speculations are also unfounded because they overlook uncertainty regarding the "complex decisions made by noncitizens of the United States before they risked life and limb to come here." Pet. App. 19. "While immigration policies might have played into that calculus, so, too, might the myriad economic, social, and political realities in the United States and in foreign nations." *Ibid.*

total removals will drop due to DACA and DAPA, plus the speculation that those programs' beneficiaries will increase the crime rate." Pet. App. 25. But DACA and DAPA do not address *how many* aliens will be removed; they are instead part of a suite of policies addressing *which* aliens should be removed. See *ibid.* Again, the contention that according deferred action under DACA and DAPA will increase the crime rate for aliens who have already lived here for years is implausible and unfounded. As set forth above, the DACA and DAPA policies are designed to enable DHS to "focus [its] resources on removing dangerous criminals." *Id.* at 2; see J.A. 487. Aliens can obtain deferred action under DACA and DAPA only if they are not serious criminals. Pet. App. 8-9. With or without deferred action, those aliens "are extremely unlikely to be deported given th[e] Department's limited enforcement resources." J.A. 487. And DHS can revoke deferred action at any time, in its discretion, see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484-485 (1999), including if the alien subsequently commits a crime.

This Court has rejected efforts to base standing on similarly unfounded speculation about future conduct, especially where the claimed, anticipated injury rests on unsubstantiated predictions of future unlawful activity. See, *e.g.*, *City of L.A.* v. *Lyons*, 461 U.S. 95, 102 (1983) ("past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects") (brackets omitted) (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974)). The court of appeals decision here is fully consistent with those precedents.

Petitioner asserts (Pet. 6-8) that the court of appeals erred by requiring him to show "substantial evidence" of a causal connection between the challenged governmental action, subsequent third-party conduct, and injury to him. But this Court has squarely held that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citing *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). "When * * * a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Ibid.*; see *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975). The court of appeals' determination that petitioner was required to show substantial evidence of a causal connection between the challenged governmental policies, third-party conduct, and his alleged injury is fully consistent with these precedents—particularly given that his conclusory allegations of causation "run[] contrary to the thrust of those policies." Pet. App. 26.

b. Petitioner's additional assignments of error lack merit. Contrary to petitioner's suggestion (Pet. 27-28), the court of appeals correctly declined to accept as true his conclusory allegation that according deferred action under DACA and DAPA will cause a substantial increase in law-enforcement costs for his office. As the court explained, on a motion to dismiss, all well-pleaded factual allegations are presumed to be true and all reasonable inferences must be drawn in the plaintiff's favor. See Pet. App. 14 (citing *Ashcroft*

v. *Iqbal*, 556 U.S. 662, 678 (2009)). But a reviewing court is not obligated to accept the truth of legal conclusions or factual inferences that are not reasonably supported by the facts set out in the complaint. *Ibid.*; see *Iqbal*, 556 U.S. at 678-679; *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007); see also 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 540 (3d ed. 2004) (noting that courts, when examining motions to dismiss, have rejected "sweeping legal conclusions cast in the form of factual allegations"). Here, the court of appeals correctly determined that petitioner's allegation that DACA and DAPA will increase law-enforcement costs was conclusory and too speculative to support standing. Pet. App. 15. That result is correct, consistent with *Iqbal* and *Twombly*, and in any event is highly factbound, as it is limited to this particular complaint and petitioner's unusual standing theories.

Petitioner also errs in asserting (Pet. 33-35) that the court of appeals' decision conflicts with other appellate decisions holding that a plaintiff's injury-in-fact cannot be offset by other benefits that are only remotely related to the challenged action. The court of appeals here did not make any ruling about offsetting benefits. The court held instead that petitioner's alleged injuries were not fairly traceable to DACA and DAPA or redressable by an injunction against those policies. See Pet. App. 2-3.

c. Contrary to petitioner's suggestion (Pet. 5-16), the court of appeals' decision does not conflict with *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), or with *Texas* v. *United States*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015) (*Texas II*), petition for

cert. pending, No. 15-674 (filed Nov. 20, 2015). Petitioner is a county official, not a sovereign State, and thus this case does not implicate the questions of state standing at issue in *Massachusetts* or in *Texas II*. Indeed, the concurrence below distinguished *Massachusetts* on that basis. See Pet. App. 33 ("*Massachusetts* does not support [petitioner's] standing.").

As the court of appeals correctly recognized, see Pet. App. 23-24, the chain of causation that petitioner alleges is also different from the allegations at issue in the *Texas* case. In that case, the Fifth Circuit panel majority extended *Massachusetts* and accorded Texas "special solicitude" to find standing based on an alleged injury resulting from Texas's decisions (1) to subsidize the costs of certain driver's licenses; and (2) to make aliens with deferred action eligible to apply for those licenses. *Texas II*, 2015 WL 6873190, at *4-*12. By increasing the number of aliens in Texas with deferred action, the majority reasoned, the 2014 Guidance will increase the subsidy's overall cost and put "substantial pressure" on Texas to change its state laws. *Id.* at *5; see *id.* at *4-*12.

For the reasons stated in the government's pending petition for a writ of certiorari in *Texas II*, the Fifth Circuit's extension of *Massachusetts* is seriously wrong, extraordinarily important, and warrants this Court's review. See Pet. at 15-16, *Texas II*, *supra* (No. 15-674). Unlike in *Massachusetts*, the INA does not grant Texas any special "procedural right" to challenge federal immigration policy. 549 U.S. at 517. Indeed, "the removal process is entrusted to the discretion of the Federal Government" and thus is not a process in which a State inherently has a sovereign or quasi-sovereign interest. *Arizona* v. *United States*,

132 S. Ct. 2492, 2506 (2012). Unlike in *Massachusetts*, the 2012 and 2014 Guidance memoranda do not cause or threaten Texas with any loss of sovereignty. And under *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), a State's choice to extend a subsidy on the basis of another sovereign's actions does not give that State standing to challenge policy choices by the other sovereign that may have the incidental effect of increasing the cost of the plaintiff State's voluntary subsidy. See *id.* at 662-664. The Fifth Circuit thus erred in *Texas II* in finding standing on the theory Texas posited: that "DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's [alleged] injury." 2015 WL 6873190, at *5.

But whatever the force of Texas's claim of standing, petitioner's theory of causation here—that DACA and DAPA will increase law-enforcement costs in Maricopa County—is different from that in *Texas* and indeed is illogical. The DACA and DAPA policies are part of DHS's effort to focus more resources on removing serious criminals and recent arrivals, and thus if anything would be expected to reduce state and local law-enforcement costs. Furthermore, unlike in the *Texas* case, where standing is predicated on the notion that deferred action makes aliens newly eligible for subsidized Texas driver's licenses, deferred action does not make aliens newly "eligible" to engage in activity that could cause law enforcement costs in Maricopa County. Aliens who could be accorded deferred action under DACA and DAPA have already been living in this country for years and thus already have the opportunity to engage in such activity—yet have avoided serious criminal activity and thus are not

enforcement priorities. The court of appeals thus correctly distinguished the *Texas* case, as the questions of standing in the two cases are quite different. See Pet. App. 23-24 (the decision in *Texas* v. *United States*, 787 F.3d 733 (2015), "does not support [petitioner's] standing").

2. In addition to seeking review of the court of appeals' standing decision, petitioner also renews (Pet. 16-26) a variety of underlying claims on the merits that DACA and DAPA are procedurally and substantively invalid. The court of appeals did not pass upon any of those claims, however, because it held that petitioner lacked standing and affirmed the dismissal of petitioner's suit without reaching any other issues in the case. As set forth above, that decision is clearly correct and thus any merits questions are not properly presented here.

Prudential considerations further counsel against review. This Court "is a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (citation omitted), and it generally does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); see *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014). The federal government's authority to exercise prosecutorial discretion through deferred action policies like those set forth in DACA and DAPA is a matter of considerable national importance. For that reason, it would be inappropriate to review those questions in a case in which the court of appeals has not addressed them. See *Zivotosfsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (noting that it is preferable to review important questions

where the Court will have the benefit of a lower court opinions to guide its analysis). Rather, the appropriate vehicle for addressing those issues is *Texas II*, in which the Fifth Circuit addressed the procedural and substantive validity of the 2014 Guidance, and in which the United States has filed a petition for a writ of certiorari.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] If this Court grants a writ of certiorari in *Texas II*, this Court should not hold this petition for a decision in that case. The standing question here is wholly different from the standing question in the *Texas* case. See pp. 18-20, *supra*; Pet. App. 23-24 (*Texas I* "does not support [petitioner's] standing."). No matter how any question in *Texas II* is resolved, petitioner lacks standing and the judgment below is correct.