No. 15-40333

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; ET AL,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection; SARAH R. SALDANA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ,

Defendants-Appellees,

v.

JANE DOE #1; JANE DOE #2; JANE DOE #3

Movants-Appellants.

On appeal from the United States District Court for the Southern District of Texas, Brownsville Division, No. 1:14-cv-254, Judge Andrew Hanen

BRIEF FOR THE APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

(1) No. 15-40333. STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; PAUL R. LEPAGE, Governor, State of Maine; PATRICK L. MCCRORY, Governor, State of North Carolina; C.L. "BUTCH" OTTER, Governor, State of Idaho; PHIL BRYANT, Governor, State of Mississippi; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS; ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA; STATE OF TENNESSEE, *Plaintiffs-Appellees*, v. UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection; SARAH R. SALDANA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ, *Defendants-Appellees*, v. JANE DOE #1; JANE DOE #2; JANE DOE #3, *Movants-Appellants*.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Movants-Appellants with a direct interest in this case are the following: Jane Doe #1, Jane Doe #2, and Jane Doe #3. The Jane Does are three undocumented immigrants who are longtime residents of the Rio Grande Valley of South Texas.

Counsel for Movants-Appellants in this Court are the following: Nina Perales (Mexican American Legal Defense and Educational Fund); Adam P. KohSweeney and Gabriel Markoff (O'Melveny & Myers LLP); and Linda J. Smith (DLA Piper LLP). Assisting on the brief are Sam Wilson, Ian Kanig, and Mark Berghausen (O'Melveny & Myers LLP).

Counsel for Movants-Appellants in the district court also included the following counsel, who are not involved in this appeal: David Hinojosa (Mexican American Legal Defense and Educational Fund); J. Jorge deNeve (O'Melveny & Myers LLP); and Frank Costilla (Law Office of Frank Costilla, LP).

All other parties in this case are governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.2.1.

/s/ Nina Perales
Nina Perales
Attorney of record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Movants-Appellants Jane Does respectfully request oral argument. This is a case of national importance, in which it has become apparent that the Federal Government is unable to defend the private interests of the Jane Does. Because this appeal raises critical issues concerning this Court's precedents on intervention of right, particularly in light of the Federal Government's missteps below, oral argument would aid the Court in reaching a decision.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

TABLE OF AUTHORITIES
(continued)

Page

Statutes and Rules

Regulations

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The district court departed from this Court's established case law by refusing to allow the Jane Does, the only persons directly affected by the administrative initiative at issue, to intervene and defend themselves in this case. Not only do this Court's precedents require intervention of right under Federal Rule of Civil Procedure 24(a)(2), but the events in this case have demonstrated that the Federal Government is adverse to the Jane Does and unable to represent their interests, and perhaps even its own. The district court's ruling was in error and should be reversed.

This appeal arises out of the suit by Plaintiffs-Appellees State of Texas *et al.* (the "States") to enjoin DHS's November 20, 2014 Deferred Action Guidance, which contained the initiatives commonly known as DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) and expanded DACA (Deferred Action for Childhood Arrivals).[1] Movants-Appellants Jane Does are three DAPA-eligible immigrants, longtime residents of South Texas and mothers of U.S. citizen children, who are proper Defendants in this case. It is their lives and families that hang in the balance. The Jane Does moved to intervene in the district court to defend their interests and to raise separate arguments and defend

[1] This brief collectively refers to the Deferred Action Guidance and the initiatives it contains as "DAPA" except where there are meaningful differences between them. This brief collectively refers to Defendants as the "Federal Government."

against positions taken by the States that they correctly suspected the Federal Government would, and ultimately did, ignore. However, the district court denied intervention in a summary ruling, and then preliminarily enjoined DAPA.

On this Court's *de novo* review, reversal is appropriate because the Jane Does have met their burden on all elements of the four-part test for intervention of right under Rule 24(a)(2). The first element, timeliness, was not disputed by any party below and is clearly satisfied, given that the Jane Does moved to intervene a mere six weeks after the States filed suit. The second and third elements, the existence and potential impairment of a legally cognizable interest, are also clear. The Jane Does are eligible to apply for deferred action under DAPA, and DAPA constitutes their only practical chance to avoid removal and legally remain in the United States with their U.S. citizen children. Because the States are suing to impair those interests, it is not disputed that those interests will be negatively and directly affected by this suit.

The Jane Does have also satisfied the fourth element, inadequate representation, where they have the minimal burden of showing that the existing parties' representation of their interests could potentially be inadequate. This burden is easily met both by the adversity of the Federal Government to the Jane Does and the Federal Government's behavior in this case, which prompted the

district court to find that the Federal Government has committed potentially sanctionable misconduct.

The first point cannot be overstated: the Jane Does have no friends here. The Federal Government, the very entity that seeks to remove them from the United States, does not, and cannot, defend their interests. The stark adversity between the Federal Government's institutional interest in enforcing the immigration laws and the Jane Does' private, personal interests in avoiding removal and obtaining work authorization rebuts any presumption of adequate representation that may arise. This adversity has already been demonstrated by the Federal Government's litigation of the case thus far, which has included taking positions hostile to the Jane Does while failing to challenge the States' factual allegations of injury (which the Jane Does can and are prepared to address).

The Federal Government's inability to adequately represent the Jane Does has been further exacerbated by its conduct before the district court, which has now ruled the Federal Government to be untrustworthy, misleading, and a perpetrator of possibly sanctionable misconduct. ROA.5232-36. In March 3 and May 7 advisories, the Federal Government admitted that it granted approximately 100,000 three-year terms of deferred action under expanded DACA (including 2,000 terms granted *after* the preliminary injunction issued) even while its counsel was repeatedly telling the district court this was not occurring. As the March 19

transcript makes clear, the district court now doubts whether the Federal Government's representations—including representations by the President and the DHS Secretary—can be trusted. ROA.5568:7-11. Indeed, the court went so far as to state it was an "idiot" for believing representations by the Federal Government's counsel. ROA.5565:8. The situation has only grown more dire since then, as the May 7 advisory revealed that the Federal Government's counsel further misled the court at the March 19 hearing by incorrectly stating there had been complete compliance with the injunction. ROA.5321; ROA.5581:8-9.

The Federal Government has now become bogged down in repeated missteps, internal investigations, and the need to defend itself against a possible sanctions order. At this point, it is not clear that the Federal Government can defend its own interests, let alone those of the Jane Does. The Jane Does have important interests in this suit, and without intervention no party will present evidence and argument to disprove the States' alleged injuries or show DAPA's actual effects. Their interests, and the public interest in ensuring that both sides of the case are adequately presented, makes intervention of right under this Court's precedents a necessity. Movants-Appellants respectfully request that this Court reverse the district court's denial of intervention and remand with instructions to grant intervention of right.

JURISDICTIONAL STATEMENT

In the underlying suit, the States assert federal question jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, and 28 U.S.C. § 1361. ROA.227-28. This interlocutory appeal, filed on March 9, 2015, arises out of the district court's February 11, 2015 denial of Movants-Appellants' motion to intervene of right under Rule 24(a)(2). Because that denial was a final decision immediately appealable under 28 U.S.C. § 1291, this Court has jurisdiction over this appeal. *Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc).

ISSUES PRESENTED FOR REVIEW

The two primary issues presented for review concern the second and fourth elements of the test for intervention of right, and are as follows:

1. Whether the Jane Does' legally cognizable interests are sufficient for intervention of right, where no party disputes that they have direct, personal interests in avoiding removal, remaining in the United States with their citizen children, and obtaining work authorization, all of which will be impaired if DAPA is permanently enjoined.

2. Whether the Jane Does have shown that the Federal Government's representation of their interests "may be" inadequate, in a case where no presumption of adequate representation arises, and where the Federal Government must represent the broad public interest in enforcing the immigration laws, has

taken positions hostile to the Jane Does, and has already been found to have committed potentially sanctionable misconduct.

STATEMENT OF THE CASE

A. Factual And Legal Background

1. Jane Doe #1, Jane Doe #2, and Jane Doe #3 are undocumented immigrants who live in the Rio Grande Valley of South Texas. ROA.2820-28. They all have U.S. citizen minor children, of which they are the primary caretakers; all have lived in the United States for more than ten years and are productive members of their communities; and all are low priorities for removal from the United States. ROA.2820-29.

Jane Doe #1 lives in Edinburg, Texas. ROA.2820. She was born in 1971 in Tamaulipas, Mexico. ROA.2820. Jane Doe #1 has lived in the United States since July 1999, is married, and has four children, two of whom are minors and U.S. citizens. ROA.2820-21. Jane Doe #1 helps her husband support their family by making and selling tamales and other food, and by doing catalog sales. ROA.2820. She participates in her local community by volunteering in her church and volunteering on her children's school field trips. ROA.2821.

Jane Doe #2 lives in McAllen, Texas. ROA.2828. She was born in 1987 in Michoacan, Mexico, and was brought by her parents to the United States as a minor child. ROA.2824. Jane Doe #2 has lived in the United States for 13 years,

is married, and has a four-year-old daughter and a son in the sixth grade, both of whom are U.S. citizens. ROA.2824-25. She is currently studying for her GED and is the primary caretaker of her children and her mother, who suffers from Alzheimer's disease. ROA.2824. She also volunteers in her church, which she attends every Sunday, and volunteers in her daughter's Head Start program. ROA.2825.

Jane Doe #3 lives in Donna, Texas. She was born in 1983 in Chiapas, Mexico, and completed high school in Mexico. ROA.2828. She has lived in the United States for 11 years and has a two-year-old daughter who is a U.S. citizen. ROA.2828-29. To support herself and her daughter, Jane Doe #3 makes and sells food, and sells items at a flea market. ROA.2828. She has previously worked as a waitress and child care provider. ROA.2828.

All three Jane Does believe they will be eligible for grants of deferred action if DAPA is not enjoined in this suit. They request intervention of right to defend DAPA. ROA.2821; ROA.2825; ROA.2829.

2. The Federal Government has sweeping authority and discretion in enforcing the immigration laws. *Arizona v. United States*, 132 S. Ct. 2492, 2498-99 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . [This] power to

determine immigration policy is well settled. . . . A principal feature of the removal system is the broad discretion exercised by immigration officials.").

Over the past several years, the Federal Government's immigration enforcement efforts have risen to new heights. For example, in 2013, U.S. Immigration and Customs Enforcement detained nearly 441,000 undocumented immigrants. ROA.534. These efforts have also included extensive removals of immigrants without criminal records who are already living in the United States. Notably, in 2014, the Federal Government removed 15,000 immigrants who, like the Jane Does, had no criminal record and were not detained at the border. ROA.551. Furthermore, in the first six months of 2011, 46,000 parents of U.S. citizens were removed.[2]

The Federal Government has focused its enforcement efforts to a large degree on the Rio Grande Valley of South Texas, where the Jane Does live.[3] In 2013 and 2014, respectively, the U.S. Border Patrol, which has over 3,000 agents stationed there (more than twice as many agents as it had there a decade ago),

[2] Joanna Dreby, Center for American Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground* 1 (Aug. 2012), https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf.

[3] Eric Lipton & Julia Preston, *As U.S. Plugs Border in Arizona, Crossings Shift to South Texas*, N.Y. Times, June 16, 2013, http://www.nytimes.com/2013/06/17/us/as-us-plugs-border-in-arizona-crossings-shift-to-south-texas.html?hp&_r=0.

apprehended 154,000 and 256,000 people in the region. ROA.537.[4] Additionally, in 2014, Plaintiff Texas's Department of Public Safety shifted state troopers to the border, where they patrol major roads, stop area residents for "[traffic] violations or suspicious activity[,]" and refer individuals thought to be undocumented to federal authorities.[5]

3. As part of its prosecutorial discretion over immigration enforcement, the Federal Government has the ability to defer individuals' removal proceedings, a feature known as deferred action. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (stating the Executive may grant deferred action as an exercise of discretion "for humanitarian reasons or simply for its own convenience" (footnote omitted)). Grants of deferred action are revocable at the Federal Government's will, convey no rights, and do not convey lawful immigration status or a pathway to citizenship. *Id.* at 484. Long-existent regulations provide that grantees of deferred action may, if they show financial necessity, receive work authorization, which allows them to begin working legally

[4] U.S. Border Patrol, *Sector Profile – Fiscal Year 2014* 1, http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf; Lipton & Preston, *supra* note 3.

[5] Julián Aguilar, *DPS Addresses New Border Operation*, Tex. Tribune, Jun. 19, 2014, http://www.texastribune.org/2014/06/19/states-leadership-instructs-dps-increase-patrols-b/; Tex. Dep't. of Pub. Safety, *Operation Strong Safety: report to the 84th Tex. Legislature and Office of the Governor* 18 (Feb. 2015), http://dps.texas.gov/PublicInformation/documents/operationStrongSafetyRpt.pdf.

in the United States and paying Social Security and Medicare taxes on their income. 8 C.F.R. § 274a.12(c)(14).

Since 2012, the DHS Secretary has issued several memoranda that establish immigration enforcement policies and implement guidance on issuing grants of deferred action to undocumented immigrants. In June 2012, the Secretary issued a memorandum establishing the discretionary enforcement policy known as Deferred Action for Childhood Arrivals, or DACA. ROA.130. That policy, which the States do not challenge in this suit, provided for discretionary grants of renewable two-year terms of deferred action to undocumented immigrants who (among other requirements) were under the age of 31 at the time of application and under the age of 16 when they entered the United States, met certain educational or military-service criteria, and had not been convicted of significant criminal offenses. ROA.130.

On November 20, 2014, the Secretary issued two additional memoranda relating to deferred action. ROA.565; ROA.607. The first (the "Prioritization Memo") clarified DHS's priorities for removing undocumented immigrants by instructing DHS employees to focus removal efforts on high-priority targets, *i.e.*, those undocumented immigrants who were apprehended at the border, convicted of crimes, or already subject to a final removal order. ROA.567-70. The second memorandum, the Deferred Action Guidance that is the focus of the States'

challenge in this suit, expanded DACA's guidance on deferred action to encompass a broader group of immigrants who are low-priority targets for removal under the Prioritization Memo. ROA.607-11. Specifically, the Deferred Action Guidance removed DACA's "age cap" and extended its terms of deferred action from two to three years. ROA.609. It also initiated a new set of guidelines, known as DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents), focusing on undocumented parents of U.S. citizen children. ROA.609.

Under DAPA, individuals would be eligible for grants of deferred action if they (1) had, as of November 20, 2014, a U.S. citizen or lawful permanent resident child; (2) had been continuously residing in the United States since before January 1, 2010; (3) had been physically present in the United States on November 20, 2014 and at the time of making a request for deferred action; (4) had no lawful immigration status on November 20, 2014; (5) did not fall within one of the "high priority" enforcement categories; and (6) "present no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." ROA.610. Like all grants of deferred action, grants of deferred action under expanded DACA and DAPA would only serve as a temporary reprieve from removal, could be revoked at any time, and would bestow no rights or immigration status upon the recipients. ROA.609-11. Applicants would be required to submit biometrics to U.S. Citizenship and Immigration Services ("USCIS") for a

background check, pay fees, and be counted—they must "come out of the shadows" by registering with the Federal Government and thus become vulnerable to removal. ROA.610-11.

Under the Deferred Action Guidance, USCIS was scheduled to begin accepting applications for expanded DACA and DAPA before February 18 and May 19, 2015, respectively. ROA.610-11.

B. Proceedings Below

On December 3, 2014, less than two weeks after the DHS Secretary issued DAPA, the States filed suit to enjoin its implementation, ROA.58-87, and soon thereafter moved for a preliminary injunction. ROA.144-89. The Federal Government responded on December 24. ROA.390-464. On January 7, 2015, the States filed almost 1,200 pages of declarations and other materials attached to a 67-page reply brief. ROA.1166-2444. The district court then scheduled a preliminary injunction hearing for January 15, and allowed the Federal Government until January 30 to file a sur-reply with additional evidence. ROA.2907.

On January 14, prior to the hearing and before the Federal Government's sur-reply, the Jane Does moved to intervene as Defendants and attached a short proposed opposition to the preliminary injunction motion. ROA.2641-74. The Jane Does argued, *inter alia*, that they had legally cognizable interests in defending their eligibility for grants of deferred action; that their interests would be impaired

if they could not intervene; and that the Federal Government could not represent those interests, particularly because it is the entity charged with removing the Jane Does from the United States. ROA.2653-58; ROA.4343-45.

At the January 15 hearing, the States vigorously pressed their primary argument for Article III standing: that DAPA would cause Plaintiff Texas to spend money processing driver's license applications from the new recipients of deferred action. ROA.5424-25; ROA.5462-67. The Federal Government did not contest the States' asserted facts at the hearing. See ROA.5409-5546. More troubling, the Federal Government's sur-reply failed to provide any evidence in opposition to Texas's alleged injury, to argue that Texas's alleged injury would likely be disproven during discovery, or to provide any response to the factual allegations whatsoever. *See* ROA.4040-48.

Far from pointing out the fact that Texas's assertion of Article III standing rested on a potential fabrication, the Federal Government's response seemingly assumed the truth of Texas's position. *See* ROA.4042 ("[T]o the extent Plaintiff States will lose money from their issuance of licenses to future DACA and DAPA recipients, it is money that those states have chosen to spend." (citation and quotation omitted)). Rather than contest Texas's factual assertion, the Federal Government decided to take a legal position directly adverse to the interests of the Jane Does: that nothing prevents Texas from refusing to issue driver's licenses to

recipients of deferred action. ROA.4041-44. Despite the fact that it would undermine the purpose behind granting temporary work authorization to deferred action recipients, the Federal Government argued that a State can always deny driver's licenses to recipients of deferred action, and thus Texas's alleged injuries were "self-inflicted." ROA.4042.

On February 11, the district court denied the Jane Does' motion to intervene in a single-page, summary order. ROA.4371. Without addressing the Jane Does' arguments or acknowledging the Jane Does' unique position as the targets of DAPA, the court merely held that "Rule 24(a)(2) is not applicable" and that "even if Rule 24(a)(2) were applicable based upon how the outcome of this suit might affect these individuals, the Court finds that their interests are adequately represented by the United States." ROA.4371. The lack of consideration the district court gave the Jane Does' motion is demonstrated by the fact that the order was a virtual copy of two other summary orders the district court issued at the same time, denying intervention to two frivolous litigants whose main arguments were, respectively, that this case is "outside the jurisdiction of any non-Nazi court" and that immigrants "carry infectious diseases." ROA.4282-83; ROA.4313-14; ROA.4370; ROA.4372.

On February 16, the district court enjoined implementation of DAPA. ROA.4380-82; ROA.4383-4505. In so doing, it made clear that it had applied the

incorrect test to the Jane Does' intervention motion. In a footnote, it stated that "one set of the putative intervenors is allegedly covered by Secretary Johnson's memorandum and may be affected by this ruling, [but] there was no intervention as a matter of right because there is no federal statute that gives them an unconditional right to intervene nor does this lawsuit involve property or a transaction over which they claim a *property interest*." ROA.4390 (emphasis added). The Court also noted, citing Rule 24(a)(2), that permitting intervention "would have been imprudent" "[b]ecause the Court had already implemented a schedule in this time-sensitive matter that was agreed to by all existing parties" and that "the interests of all putative intervenors are more than adequately represented by the Parties in this lawsuit." ROA.4389-90.

In the same order, the district court went on to hold that DAPA actually grants substantive rights to undocumented immigrants like the Jane Does. *See* ROA.4492 ("[T]he DAPA memorandum confers the right to be legally present in the United States and enables its beneficiaries to receive other benefits . . . . [DAPA] provides a legal benefit in the form of legal presence (plus all that it entails)—a benefit not otherwise available in immigration laws."). The district court did not clarify how the Jane Does could be entitled to substantive rights and benefits under DAPA yet at the same time have no interest in DAPA sufficient for intervention under Rule 24(a)(2).

The Federal Government timely appealed the preliminary injunction and filed a motion asking the district court to stay its injunction. ROA.4512-14; ROA.4515-4538. Thereafter, on March 3, the Federal Government filed an Advisory to the district court notifying it that, prior to the injunction, the Federal Government had already implemented expanded DACA by issuing approximately 100,000 three-year terms of deferred action to immigrants renewing their deferred action under the original, June 2012 DACA guidelines. ROA.4950. The States immediately moved for discovery on this issue and, on March 9, the district court set a hearing for March 19. ROA.5001. The district court stated that, "[d]ue to the seriousness of the matters," it would not rule on the motion to stay before the hearing. ROA.5001. It also ordered the Federal Government "to be prepared to fully explain to this Court all of the matters addressed in and circumstances surrounding the Defendants' Advisory." ROA.5001.

Later that same day, believing these events to be further evidence of the Federal Government's inability to adequately defend DAPA, let alone represent the Jane Does' interests in this case, the Jane Does filed their notice of appeal of the denial of intervention. ROA.5007-08. The Jane Does' fears were confirmed at the March 19 hearing, where the district court incredulously asked the Federal Government's counsel "I can trust what you're saying, is what you're saying, yes? . . . I can trust what Secretary Johnson says? . . . I can trust what the

[P]resident says?" ROA.5568:3-9. Making clear that it did not believe the Federal Government's previous assurances that it would not implement DAPA or expanded DACA before February 2015, the court stated "I said, 'So you're telling me nothing is happening?' And you basically said, 'Yes, that's what I'm telling you.' So like an idiot, I believed that.'" ROA.5565:5-8.

On April 7, the district court denied the Federal Government's motion to stay and instead granted the States' motion for early discovery. ROA.5226; ROA.5237-38. In doing so, it excoriated the Federal Government, finding, among other things, that the Federal Government's counsel had committed "unacceptable . . . misconduct" by "misrepresenting the facts" about the implementation of expanded DACA. ROA.5232-36. The district court then issued a sweeping document preservation and discovery order requiring the Federal Government to preserve numerous documents relating to the implementation of expanded DACA, and to name government attorneys and officials who knew about the early implementation of the three-year terms of deferred action. ROA.5237-38. The district court left open the possibility for sanctions, *up to and including striking the Federal Government's pleadings*. ROA.5236. However, it refrained from striking the pleadings immediately, holding that doing so would "penalize those with an interest in the outcome." ROA.5236.

On April 30, the Federal Government responded with a sealed document production and redacted public filing, arguing that any failure to properly inform the court of expanded DACA's implementation was unintentional. ROA.5295-5307; ROA.5588-5646. But, on May 7, the Federal Government filed an additional advisory indicating that, contrary to its counsel's statements at the March 19 hearing that "with respect to the three year to two year grants, immediately as of [February] 17th, that did cease," the Federal Government had granted approximately 2,000 additional three-year terms of deferred action *after the preliminary injunction issued*. ROA.5320; ROA.5581:8-9. The Federal Government has since supplemented this advisory with lengthy declarations from high-ranking USCIS officials listing a litany of errors that allegedly led to an unintentional violation of the preliminary injunction, and stating that it has now launched an internal investigation into these errors.[6] The district court has not ruled on these issues as of the filing of this brief.

SUMMARY OF ARGUMENT

The district court committed reversible error by denying the Jane Does' motion to intervene of right. The Jane Does meet all the elements of the four-part

[6] Movants-Appellants do not formally cite these declarations, which were filed May 15, 2015, because they are not in the May 12 version of the Record on Appeal that is the only form of the Record in Movants-Appellants' possession at the time of the filing of this brief. Movants-Appellants understand that these declarations are in the supplemental Record filed on May 21, one day before the filing of this brief, and they intend to cite that supplemental Record in their Reply Brief.

test for intervention under Federal Rule of Civil Procedure 24(a)(2): their motion was timely, they have legally cognizable interests that are related to and will be impaired by the outcome of this litigation, and the Federal Government does not and cannot adequately represent those interests. This Court should reverse the district court's order denying intervention and remand with instructions to grant intervention of right.

I. The Jane Does' motion to intervene was timely. No party contested timeliness below, and the district court's summary order made no findings of untimeliness. The Jane Does filed their motion exactly six weeks after the States filed suit, while the preliminary injunction was still being briefed and before the Federal Government had filed an answer. Given the early stage of the litigation, allowing intervention would cause no prejudice to the parties and would not unduly delay the proceedings. All factors support a finding of timeliness.

II. The district court's ruling that the Jane Does do not have an interest supporting intervention was error for two reasons. First, the district court failed to apply this Court's interest test, which requires the movant to have only a direct, substantial, legally protectable interest that is related to the subject of the suit. No "property" interest need be shown; nor must the Jane Does show they have a right granted by DAPA itself. Their undeniable interests in avoiding removal, retaining custody of their children, and obtaining employment to support their families will

be substantially impaired if the States succeed in blocking DAPA. That is all the interest test requires. Moreover, the test is further relaxed in public law cases such as this one. As likely recipients of deferred action under DAPA, the Jane Does are the focus of the administrative initiative being challenged. They are DAPA's regulatory targets and thus have an interest in this case.

Second, the Jane Does also have interests sufficient for intervention because the question of whether DAPA grants them substantive rights is one of the key questions being litigated in this case. The district court first held that the Jane Does lacked a sufficient interest in DAPA, but then held that DAPA grants them substantive rights. These rulings cannot be reconciled. If the district court concluded that DAPA grants substantive rights, then it should have concluded that the Jane Does have a sufficient interest in this suit. Indeed, although the parties dispute whether DAPA grants substantive rights, the *possibility* that the district court's ruling will ultimately be upheld creates a contingent interest sufficient to mandate intervention.

III. No party below disputed that the Jane Does' interests will be impaired if the States' suit is successful. However, the extent and severity of the impairment is further proof that the interests are cognizable for intervention purposes. The Jane Does are already being harmed by the preliminary injunction, and their

interests in remaining in the United States with their citizen children will be irreparably harmed if DAPA is permanently enjoined.

IV. The district court also erred in holding that the Federal Government adequately represents the Jane Does' interests. Under this Court's case law, the Jane Does need only meet a "minimal burden" to show there "may be" inadequate representation. No presumption of adequate representation arises here, for the Federal Government is not the Jane Does' legal representative and has different objectives than the Jane Does. The Federal Government defends DAPA to increase the efficiency of its immigration enforcement efforts, efforts that may include the removal of the Jane Does. The Jane Does, by contrast, seek to defend the only means by which they may lawfully remain in the United States with their families.

Even if a presumption of adequate representation applies, it is rebutted by the clear adversity of interest between the Federal Government and the Jane Does, and by the Federal Government's nonfeasance in this case. The Federal Government must represent the general public interest in immigration enforcement, and as a matter of law it cannot also represent the Jane Does' private, personal interests in avoiding removal and remaining with their children.

Moreover, the Federal Government has already taken specific litigation positions harmful to the Jane Does' interests, including arguing that the Plaintiff

States can deny DAPA recipients driver's licenses in order to save costs. This position runs contrary to the Jane Does' interest in obtaining driver's licenses so that they can support their families, as well as to the Jane Does' legal position that any refusal to issue driver's licenses would violate Equal Protection and be preempted by federal law. Furthermore, the Federal Government has steadfastly refused to challenge the States' factual assertions of injury, despite the availability of budget documents showing the States' alleged harms are likely to be grossly inflated, if not outright fabricated.

Finally, the district court's ruling that the Federal Government has committed potentially sanctionable misconduct and misrepresentations confirms that the Federal Government cannot adequately defend DAPA, let alone the Jane Does interests, in this case. For the past month and a half, the Federal Government's efforts have been diverted from defending DAPA to attempting to avoid sanctions by complying with the district court's extensive document production and preservation order. The Jane Does' intervention is necessary to ensure that DAPA is adequately defended against the States' suit.

STANDARD OF REVIEW

Courts must grant intervention of right to those applicants who satisfy Rule 24(a)(2). Fed. R. Civ. P. 24(a)(2). "It is well settled that to intervene as of right each of the four requirements of the rule must be met: (1) the application for

intervention must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) [hereinafter "*NOPSI*"] (en banc).

Accordingly, "[a]lthough the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). Courts must accept all allegations pleaded in connection with a proposed intervenor's motion as true, *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 56 n.2 (5th Cir. 1977), and all doubts must be construed in favor of the movant. *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). As a practical matter, "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be obtained." *Doe v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001) [hereinafter "*Glickman*"] (citation omitted).

On appeal, this Court reviews *de novo* a district court's denial of a motion to intervene of right under Rule 24(a)(2). *Edwards*, 78 F.3d at 995. The only exception to this rule is that, if the district court makes specific factual findings on timeliness, that particular requirement will be reviewed under an abuse of

discretion standard. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 & n.8 (5th Cir. 1992). In the absence of such findings, timeliness will also be reviewed *de novo*. *Glickman*, 256 F.3d at 376.

ARGUMENT

I. THE JANE DOES' MOTION TO INTERVENE WAS TIMELY

The Jane Does timely moved to intervene. The district court's order denying intervention of right made no mention of that factor, ROA.4371, nor should it have. The Jane Does filed their motion on January 14, 2015, six weeks to the day after the States filed suit, before the preliminary injunction hearing was held, and over a month before the district court issued the preliminary injunction. ROA.2660. No party contested timeliness with respect to intervention of right. ROA.4210-4220; ROA.4288-94.

Because the district court's order was silent on timeliness, that issue is reviewed *de novo*.[7] *Glickman*, 256 F.3d at 376. The four sub-factors this Court considers regarding timeliness are "(1) how long the potential intervener knew or reasonably should have known of her stake in the case into which she seeks to intervene; (2) the prejudice, if any, the existing parties may suffer because the potential intervener failed to intervene when she knew or reasonably should have

[7] The court's only mention of timeliness in its summary order was in relation to the Jane Does' request for permissive intervention, the denial of which they do not appeal. *See* ROA.4371.

known of her stake in the case; (3) the prejudice, if any, the potential intervener may suffer if the court does not let her intervene; and (4) any unusual circumstances that weigh in favor of or against a finding of timeliness." *Id.* (quoting *Stallworth v. Monsanto*, 558 F.2d 257, 264–66 (5th Cir. 1977)). All sub-factors demonstrate the motion's timeliness.

As noted, the Jane Does moved to intervene six weeks after the States filed suit, while briefing on the preliminary injunction was still pending and before the Federal Government had filed its Answer (which remains pending). The Jane Does sought no modification of the briefing schedule for the preliminary injunction motion. Crucially, neither the States nor the Federal Government would suffer any prejudice from allowing intervention after a mere six-week delay. "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervener, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Glickman*, 256 F.3d at 375 (citation omitted). No such prejudice can be shown here. "Prejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervener to participate in the litigation." *Id.* at 378 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) [hereinafter "*Espy*"]). While both parties are opposed to intervention, their opposition comes from other sources, not from any

delay on the part of the Jane Does. *Cf. Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 423 (5th Cir. 2002).

By contrast, with intervention denied, the Jane Does have been prejudiced by losing access to their "legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence and ability to appeal." *Edwards*, 78 F.3d at 1003. As for the fourth sub-factor, there are no other unusual issues that would weigh against timeliness. The motion to intervene was timely.

II. THE JANE DOES HAVE LEGALLY COGNIZABLE INTERESTS THAT ARE RELATED TO THE PLAINTIFFS' SUIT

The Jane Does have cognizable interests in participating in litigation that seeks to enjoin the only avenue by which they may legally remain with their children in the United States. In failing to recognize this fact, the district court applied the wrong test for intervention of right. The summary order denying intervention merely noted that Rule 24(a)(2) was "not applicable." ROA.4371. The district court then stated in its preliminary injunction opinion a week later that while the Jane Does "may be affected by this ruling . . . there was no intervention as a matter of right because . . . this law suit [does not] involve property or a transaction over which they claim a *property* interest." ROA.4390 (emphasis added).

The court's opinion, although acknowledging that enjoining DAPA would likely impair the Jane Does' interests, thus held the Jane Does to a much stricter

burden than is required by this Court. No "property" interest is required. *See Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 62 (5th Cir. 1987) ("We do not suggest that a person must possess a pecuniary or property interest to satisfy the requirement of Rule 24(a)(2)."). Instead, a movant need only show the suit is "related" to an interest of theirs that is "direct, substantial, and legally protectable[,]" a requirement satisfied where the movant shows the disposition of the suit could potentially impair familial interests, educational interests, or employment interests. *Brumfield*, 749 F.3d at 343 (citations omitted). The interest requirement is further relaxed in "public law" cases such as this one, where intervention is appropriate for all of those in the "zone of interests" of the law in question. *Id*. at 344.

Here, there is no doubt that the Jane Does have an interest in defending DAPA that satisfies the test for intervention of right. As undocumented immigrants who are low priorities for removal, the Jane Does are the precise focus of DAPA and thus within its zone of interests. If DAPA is enjoined and the Jane Does are unable to receive grants of deferred action, the Government will continue to target them for removal. *See* 8 U.S.C. § 1227 (removal statute). Removal would separate them from their U.S. citizen children, some of whom are toddlers. ROA.2824; ROA.2828. Even assuming they are able to maintain custody of their children outside the United States, removal would require their children to leave

the United States and prevent them from receiving their rights and benefits as U.S. citizens and Texas residents, including the right to a public education. *See* Tex. Const. art. VII, § 1; *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex. 2005). Moreover, even if the Jane Does are never removed, their inability to obtain grants of deferred action would restrict their ability to work and travel within the United States. *See* 8 C.F.R. § 274a.12(c)(14).

Furthermore, although the Jane Does' other interests entitle them to intervene even if DAPA does not afford them substantive rights, the question of whether they possess a substantive right to deferred action under DAPA is one of the ultimate questions to be decided in this case. It is well-settled that, as here, "intervention may be based on an interest that is contingent upon the outcome of the litigation." *San Juan County v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (en banc). The States' primary argument is that DAPA is unlawful because it grants substantive rights to undocumented immigrants. ROA.165-66; ROA.171-78. While the parties dispute whether DAPA does so, *if* the States' view is correct, the Jane Does have an additional, undeniable interest supporting intervention. ROA.4210.

Paradoxically, the district court itself held in its preliminary injunction opinion, issued a mere *five days* after it denied intervention for lack of a legally cognizable interest, that DAPA grants the Jane Does substantive rights.

ROA.4371; ROA.4390; ROA.4467-69. Simply put, the Jane Does cannot be denied intervention for lack of an interest in DAPA when it is this very litigation that will determine whether they have such an interest. Where the existence of an interest supporting intervention is an open question, intervention is mandatory.

A. The Jane Does' Interest In Defending Their Eligibility For Discretionary Grants Of Deferred Action Satisfies The Test For Intervention Of Right

While Rule 24(a)(2) states that an intervenor must claim "an interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2), this Court has long interpreted the interest test as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Ceres Gulf*, 957 F.2d at 1203 n.10 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Under the "direct, substantial, and legally protectable" standard applied by this Court, *Brumfield*, 749 F.3d at 343, the interest asserted must be "one which the substantive law recognizes as belonging to or owned by the applicant." *Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005) (citation omitted). Crucially, the movant's interest need not be identical to the issues adjudicated in the main action, *NOPSI*, 732 F.2d at 463, but need only be "relating" or "related" to the issues at stake in the case. *Ross*, 426 F.3d at 757; Fed. R. Civ. P. 24(a)(2). Where the movant seeks to intervene as a defendant, this Court has sometimes stated that the interest test is

satisfied "when the suit is intended to have a 'direct impact' on the intervenor." *Ross*, 426 F.3d at 757 n.46 (quoting *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) [hereinafter "*Sierra Club*"] (per curiam)).[8]

Accordingly, this Court has held the interest test satisfied where the movant shows that the resolution of the case could potentially impair familial interests, educational interests, or financial interests, among other things. *See, e.g.*, *Drummond v. Fulton County*, 547 F.2d 835, 855-56 (5th Cir. 1977) (child granted intervention in adoption case because, although a ward of the state, he was "the individual who will be most affected by the ultimate decision in this case"); *Brumfield*, 749 F.3d at 344-45 (suit potentially threatened intervenors' children's opportunities to use school vouchers); *Black Fire Fighters Ass'n v. City of Dall.*, 19 F.3d 992, 994 (5th Cir. 1994) (suit could potentially interfere with job promotion opportunities); *Espy*, 18 F.3d at 1207 (suit could potentially affect intervenor's financial interest in the ability to use a less expensive timber-harvesting method).

[8] The "direct impact" standard is derived from the "real party in interest" doctrine, which this Court has intermittently employed to measure the interests of proposed intervenors, generally those seeking to intervene as plaintiffs in cases involving contractual or property issues. *See Ross*, 426 F.3d at 757 & n.46; *but see Brumfield*, 749 F.3d at 343 (no discussion of "real party in interest" doctrine); *Edwards*, 78 F.3d at 1004 (same).

1. The Jane Does Have Legally Protected Interests Related To This Suit That Will Be Directly Affected If DAPA Is Permanently Enjoined

Without intervention, the Jane Does will be unable to protect their interests by presenting evidence and arguments disproving the States' alleged injuries; they will be unable to show the actual effects of DAPA, including its effects on their ability to work and the fact that even with DAPA they will remain ineligible for social services and other benefits (an issue contested by the plaintiffs). In particular, in what has become a specific focus of this case, the Jane Does will be unable to protect their potential interest in receiving driver's licenses, which will be necessary for them to obtain and maintain gainful employment, care for their families, and participate in their communities.

First and foremost, the Jane Does have an interest in remaining in the United States, where they live with their families. This interest is legally protected, as the Supreme Court has recognized in extending due process guarantees to undocumented immigrants who, like the Jane Does, are residents of the United States. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *see also Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001). While the Jane Does have no specific entitlement to grants of deferred action under DAPA or otherwise, the Jane Does' sworn declarations (which must be liberally

construed for purposes of intervention) show they are eligible to apply for such grants. ROA.2820-28. But for the district court's preliminary injunction and the possibility of a permanent injunction, the Jane Does would have already applied for, and are otherwise highly likely to receive, grants of deferred action. Those grants are the only current means by which the Jane Does can legally avoid removal. If DAPA is permanently enjoined, the Jane Does will continue to be targeted for removal by the Federal Government, which is statutorily bound to remove them. *See* 8 U.S.C. § 1227. As a result, the Jane Does' interests in avoiding removal suffice for purposes of intervention, notwithstanding their lack of a substantive right to deferred action.

Second, the Jane Does have legally protected interests in preserving their relationships with their U.S. citizen children, from whom they would be separated if they are removed, as is likely to occur if deferred action becomes unobtainable. ROA.551 (15,000 immigrants without criminal records removed from the interior United States in 2014). The Supreme Court has long recognized that parents have substantive, protected rights in the upbringing, care, and companionship of their children. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923). For purposes of intervention, this Court's rulings make clear that the potential impairment of familial interests, particularly custody interests, suffices to

allow intervention of right. *See Drummond*, 547 F.2d at 855-56. Those interests are uniquely implicated here, where the Jane Does' children are U.S. citizens who are not subject to removal, would likely remain in the United States if the Jane Does are removed, and have all the rights and privileges of citizenship.

Indeed, even if the Jane Does were able to retain custody of their children after removal, their children would have to leave the United States and would lose access to the benefits of citizenship and Texas residency, including the right to a public education. *See* Tex. Const. art. VII, § 1; *Neeley*, 176 S.W.3d at 774. As this Court has held, parents have the right to intervene to protect their children's educational opportunities. *Brumfield*, 749 F.3d at 343-44. Because removal would impair either the Jane Does' interests in maintaining custody of their children or their interests in protecting their children's educational opportunities, intervention of right is required.

Finally, the Jane Does have a legally protectable interest in the employment opportunities they would gain if granted work authorization. Recipients of deferred action, whether granted under DAPA or otherwise, are eligible to apply for work authorization for the period of deferred action. *See* 8 C.F.R. § 274a.12(c)(14); ROA.610. This Court has held that individuals seeking to defend their potential employment opportunities have an interest that supports intervention of right. *See Edwards*, 78 F.3d at 1004; *Black Fire Fighters*, 19 F.3d

at 994. If granted work authorization, the Jane Does would receive a Social Security number, be able to obtain legal employment, and have the right to apply for driver's licenses in order to travel to work. *See* Tex. Transp. Code § 521.142(a). Even if they are never removed, if DAPA is permanently enjoined, the Jane Does are foreclosed from applying for work authorization. This interest, likewise, is independently sufficient for intervention of right.

2. Intervention Is Also Proper Because The Jane Does Are The Regulatory Targets Of DAPA

Intervention is also appropriate under this Court's rule regarding "public law" cases, which relaxes the interest test in litigation concerning constitutional issues and governmental policies, particularly those involving agency action. "The interest requirement may be judged by a more lenient standard if the case involves a public interest question or is brought by a public interest group." *Brumfield*, 749 F.3d at 344 (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 24.03[2][c], at 24-34 (3d ed. 2008)). In such cases, "a zone-of-interest analysis in standing doctrine can bear on the interest question for purposes of intervention." *Id.* (citing *NOPSI*, 732 F.2d at 464-65). Other circuits have noted that the interest test should be expanded in cases involving important issues of policy, particularly cases that, like this case, involve challenges to administrative action. *See San Juan County*, 503 F.3d at 1201 ("[T]he requirements for intervention may be relaxed in cases raising significant public interests."). The D.C. Circuit's *Nuesse* case, the

source of this Court's principle that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," drives this point home. *Ceres Gulf*, 957 F.2d at 1203 n.10 (quoting *Nuesse*, 385 F.2d at 700). That court stated that the intervention rules were "obviously tailored to fit ordinary civil litigation [and] require other than literal application in atypical cases. *Administrative cases . . . often vary from the norm*." *Nuesse*, 385 F.2d at 700 (emphasis added) (quotation omitted). Similarly, the First Circuit has held that movants may intervene as defendants where they are "the real targets of the suit and the subjects of the regulatory plan." *Conservation Law Found. of New Eng., Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992).

This Court's precedents addressing public law issues make clear that this case fits the bill. *See Brumfield*, 749 F.3d at 343-44 (parents of children receiving private school vouchers had sufficient "public interest" to intervene as defendants in Federal Government's challenge to Louisiana's school voucher program because "potential decree" enjoining the program "threaten[ed] prospective interference with educational opportunities"); *Sierra Club*, 82 F.3d at 109 (farmers whose water use could be impeded by environmental group's lawsuit against federal agency had an interest supporting intervention because the suit "targeted" them); *Espy*, 18 F.3d at 1206 (timber companies had a financial interest supporting intervention where

an environmental group sued the U.S. Forest Service over a forest management plan). Like those cases, this case plainly involves issues of public interest, issues that center on the Jane Does and their fate.

The Jane Does are the subject and focus of DAPA, and it is they whose lives will be affected by the outcome of this case. At its core, this case seeks to change the Federal Government's treatment of low-priority undocumented immigrant parents of U.S. citizens like the Jane Does. The Jane Does are the targets of the Federal Government's statutorily required removal efforts. If the Federal Government's means of increasing the efficiency of its removal efforts by granting deferred action to low-priority targets is allowed to proceed, they are the individuals who will benefit from DAPA. *See Nat'l Credit Union Ass'n v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (zone-of-interests test in standing doctrine applies to those "arguably to be protected" by the provision at issue (internal marks omitted)).

This is a unique case, and will have an enormous effect on the public interest. *See* Oral Arg. at 59:33, *Texas v. United States*, No. 15-40238 (5th Cir. Apr. 17, 2015)[9] (statement of States' counsel that "this would be one of the largest changes in immigration policy in our nation's history"). And at the center of this case are the Jane Does. Like the parents in *Brumfield*, "[t]hey therefore assert not

[9] http://www.uscourts.gov/courts/ca5/15-40238_4-17-2015.mp3.

only a matter of public interest but matters more relevant to them than to anyone else." *Brumfield*, 749 F.3d at 344. Their interests support intervention.

B. The Interest Test Is Also Satisfied Because One Of The Issues To Be Decided In This Litigation Is Whether DAPA Grants Substantive Rights

Any one of the interests discussed above is sufficient for intervention. However, the States have presented this Court with one more. The States' primary argument is that DAPA is actually a camouflaged amnesty-granting program implemented by executive fiat, under which the Jane Does have a substantive right to deferred action. ROA.165-66; ROA.173-78. While the Jane Does do not share this view, if the States are right, and the Jane Does *do* in fact have a legally protected interest in receiving deferred action under DAPA, that is an additional interest supporting intervention.[10]

The States argue a catch-22: that intervention is only appropriate if the Jane Does have substantive rights to deferred action under DAPA and, if they have those rights, DAPA is unlawful. ROA.4213-14. This flips the proper analysis on its head. Whether DAPA grants substantive rights is one of the ultimate questions that must be adjudicated in the merits of the underlying case—a question that likely will not be settled until this case makes its way to the United States Supreme

[10] Critically, the States' position concedes that the interest test is satisfied. ROA.4213. While the Jane Does disagree that DAPA creates substantive rights, for purposes of the preliminary question of intervention, it is the *possibility* that the States' position will ultimately be adjudicated correct that controls.

Court. The only question before this Court in this appeal is the preliminary issue of whether intervention is appropriate, a question that must be answered affirmatively so long as the Jane Does, with all doubts construed in favor of intervention, face *potential* interference with their interests. *In re Lease Oil*, 570 F.3d at 247-48.

"Although an intervenor cannot rely on an interest that is wholly remote and speculative, intervention as of right may be based on an interest that is contingent upon the outcome of the litigation." *San Juan County*, 503 F.3d at 1203. Accordingly, this Court holds the interest test satisfied so long as the movant can demonstrate the *possibility* that she may have an interest that *could* be impaired. *See Brumfield*, 749 F.3d at 343-44 (potential of blocking future private school vouchers); *Sierra Club*, 82 F.3d at 109 (farmers' future water use); *Edwards*, 78 F.3d at 1004-05 (potential promotion opportunities). Otherwise, courts could decide that an intervenor has no interest sufficient to intervene, and subsequently establish the existence of that interest in the very same litigation. *Atlantis Development Corp. v. United States*, 379 F.2d 818, 827 (5th Cir. 1967) ("[I]t hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all."). As the Court stated in *Brumfield*, "[i]t would indeed be a questionable rule that would require prospective

intervenors to wait on the sidelines until after a court has already decided enough issues contrary to their interests. The very purpose of intervention is to allow interested parties to air their views so that a court may consider them before making potentially adverse decisions." *Brumfield*, 749 F.3d at 344-45.

Yet the "questionable rule" *Brumfield* disapproved is exactly what the district court applied below. The district court denied intervention for lack of an interest and then enjoined DAPA on the ground that it confers substantive rights. ROA.4371; ROA.4390; ROA.4493. These opposing rulings cannot be reconciled. So long as there is a chance that the States might succeed on the merits of their claim, the Jane Does have an interest supporting intervention of right.

III. IF DAPA IS ENJOINED, THE JANE DOES' INTERESTS WILL BE SUBSTANTIALLY IMPAIRED

The third element of the test for intervention is impairment. To satisfy it, "the movant must demonstrate that disposition of th[e] action may, as a practical matter, impair or impede the movant's ability to protect [its] interest." *Brumfield*, 749 F.3d at 344. No party below contested that the Jane Does' interests, if sufficient for intervention, would be impaired by this suit, and the district court did not hold otherwise. ROA.4211-15; ROA.4289-91; ROA.4371; ROA.4390. But the extent of that impairment is an additional factor proving that the interests are legally cognizable.

The outcome of this case will determine whether the Jane Does will be treated as potential candidates for deferred action, or as targets for removal. With complete impairment of their chances of remaining with their children and becoming contributing members of their communities hanging in the balance, the existence of the Jane Does' interests is beyond dispute.

While technically separate, the interest and impairment factors are "closely related issues" "and the ultimate conclusion reached as to whether intervention is of right may reflect that relationship." Charles A. Wright *et al*., 7C *Federal Practice and Procedure* § 1908 (3d ed. 2015). As another leading treatise often cited in this Court's intervention cases states, the "criteria are not analyzed in a vacuum and, instead, are often applied as a group. Intervention should be granted of right if the interests favoring intervention outweigh those opposed. For example . . . intervention of right may be granted if the movant's claimed interest may be significantly impaired by the action, *even if some uncertainty exists regarding the sufficiency of that interest*." 6 James W. Moore *et al*., *Moore's Federal Practice* § 24.03[1][b], at 24-35 (3d ed. 2015) (emphasis added) (footnotes omitted). Here, the certainty of impairment if DAPA is permanently enjoined illustrates why the Jane Does' asserted interests are sufficient for intervention.

If the States' suit is ultimately successful, the Jane Does will have lost their only legal means of avoiding removal. In addition to living with the ever-present

possibility of being detained and separated from their children, the Jane Does will continue to lack work authorization and will also be restricted in their movements to the small geography between the international border and the Border Patrol Interior Checkpoints, unable to take their children out of the Rio Grande Valley for medical care or school trips. This goes far beyond the minimal requirements for showing impairment, which are satisfied so long as the action's disposition "may" impair the movant's ability to protect her interests. *Brumfield*, 749 F.3d at 344; *Edwards*, 78 F.3d at 1004-05. Indeed, a proposed intervenor shows a sufficiently impaired interest by demonstrating no more than the possibility that *stare decisis* might serve to block future assertion of the interest. *Atlantis Development*, 379 F.2d at 822, 829. Here, there is not only the potential for a negative *stare decisis* effect but the certainty that the Jane Does will have no other opportunity to defend their positions. As the Federal Government pointed out below, there is no substantive right to receive deferred action that the Jane Does could use as a defense to a removal proceeding. ROA.4290. Indeed, there is no other forum in which they can defend their interests. *See Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525-26 (5th Cir. 1994); *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124-25 (5th Cir. 1970).

Moreover, the simple fact is that the States are suing *in order to* impair the Jane Does' interests. *See Ross*, 426 F.3d at 757 & n.46. As their Amended

Complaint shows, the States sue because they oppose the Jane Does' presence in the United States, and they wish to prevent the Jane Does from pursuing their familial, employment, and other interests. ROA.245-48. Indeed, the States freely admit that they would act to remove the Jane Does if they could, and that this suit is a substitution for State efforts to enforce the immigration laws: "If the Plaintiff States had the sovereign power to redress these harms, they would. But the Supreme Court has held that authority over immigration is largely lodged in the federal government. Accordingly, litigation against the federal government is the only way for the States to vindicate their interests and those of their citizens." ROA.248 (citations omitted).

While the Federal Government may be the defendant in this case, it is the Jane Does' predicament, and it is they who face removal and separation from their families if the States prevail. This undeniable potential for substantial impairment mandates intervention of right.

IV. THE JANE DOES' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE FEDERAL GOVERNMENT DEFENDANTS

As discussed above, the Federal Government cannot represent the Jane Does' interests for at least three reasons. First, the Federal Government has a duty to serve its concept of the broad public interest—including by removing undocumented immigrants like the Jane Does—rather than the Jane Does' private

interests. Second, the Federal Government has already established its adversity to the Jane Does in this case. Finally, it has lost the district court's trust and proven itself to be ineffective, at best, in its defense of DAPA. Although it is the Jane Does' burden to show inadequate representation, this burden is "minimal." *Edwards*, 78 F.3d at 1005 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Indeed, it requires no more than the "*de minimis*" showing that the Federal Government's representation of their interests "may be" inadequate. *Id.* at 1005-06 (quoting *Trbovich*, 404 U.S. at 538 n.10). This showing is more than met in this case.

The Jane Does also defeat the two rebuttable presumptions of adequate representation that can trigger a heightened burden. The first arises in instances where the existing party is the movant's legal representative, which is not the case here. The second is where the Federal Government has the exact same ultimate objectives as the movant, also not the case here, since the Federal Government's goal is to defend its own prosecutorial discretion and authority, and ultimately to enforce the immigration laws against the Jane Does.

Even if a presumption of adequate representation applies, the Jane Does easily rebut it. The Jane Does' interests are adverse to those of the Federal Government, which opposes intervention in this case. The Jane Does' private, personal interests cannot be represented by the very entity that administers the

immigration enforcement system. This adversity is thrown into clear relief by the fact that the Federal Government's primary argument against standing—that federal law does not require the States to issue driver's licenses to deferred action recipients—is directly opposed to the Jane Does' interests in obtaining driver's licenses after they apply for deferred action and work authorization. ROA.4041-44; Appellants' Opening Br. at 25-31, *Texas v. United States*, No. 15-40238 (5th Cir. March 30, 2015) ("Government's Injunction Brief"). And, unlike the Jane Does, the Federal Government refuses to challenge the States' questionable allegations regarding Texas's supposed financial injuries from processing driver's license applications, which the States rely on for Article III standing. The Jane Does have specific, critical interests in this suit, and only their intervention will allow them to present evidence and argument on the contested issues of the States' alleged injuries and the actual effect of DAPA on their authorized presence, ability to work, and ineligibility for social services and other benefits.

Likewise, the Federal Government's nonfeasance, defined as "[t]he failure to act when a duty to act existed," *Black's Law Dictionary* 1153 (9th ed. 2009), demonstrates inadequate representation. The district court has already ruled that the Federal Government committed potentially sanctionable misconduct in this suit, including by misrepresenting the facts regarding implementation of expanded DACA. ROA.5232-38. This behavior has seriously damaged the Federal

Government's credibility. ROA.5232-38. Furthermore, its efforts and energies have now been diverted from defending DAPA (including challenging Texas's allegations of injury) to responding to the district court's sweeping discovery order in an attempt to avoid sanctions.

On these facts, the Federal Government cannot offer an adequate defense of DAPA, let alone the Jane Does' interests. If the Jane Does are not granted intervention, their interests will not be represented in this vitally important case.

A. No Presumption Of Adequate Representation Arises On The Facts Of This Case

The Jane Does easily meet the *de minimis* burden of showing the Federal Government's representation "may be" inadequate. *Edwards*, 78 F.3d at 1005-06. Thus, the next question is whether either of the presumptions of adequate representation apply to raise the Jane Does' minimal burden. The answer is that they clearly do not.

The first presumption is inapplicable because, with respect to immigration enforcement generally and DAPA specifically, the Federal Government is the adverse party to the Jane Does, not their legal representative. Crucially, the presumption is not one that applies whenever a governmental entity is a party; rather, the entity must have a specific, binding duty to represent the particular interest the movant seeks intervention to defend. *See Edwards*, 78 F.3d 1005. Put

another way, the government must be the "representative of the absentee by law." *Brumfield*, 749 F.3d at 345.

Under this rule, the presumption applies where the law gives a governmental body a fiduciary role over the movant's unclaimed property, or designates a specific governmental officer as the sole legal advocate for a particular interest that the movant seeks to defend. *See In re Lease Oil*, 570 F.3d at 250-51; *Baker v. Wade*, 743 F.2d 236, 242-43 (5th Cir. 1984). Likewise, the presumption applies where the movant asserts no private interests, but only a generalized grievance that is coterminous with the governmental entity's own duty to serve the broad, public interest. *See Hopwood v. Texas*, 21 F.3d 603, 605-06 (5th Cir. 1994) (per curiam) (minority groups' generalized interest in defending affirmative action policy in order to remedy effects of past discrimination and foster a receptive atmosphere for minority students was adequately represented by Texas, which had the very same interest in defending the policy).

Here, the Jane Does request intervention to defend their eligibility to apply for deferred action in order to protect their interests in avoiding removal, remaining with their U.S. citizen children in Texas, and obtaining work authorization and legal employment. The Federal Government, the entity that must and does remove hundreds of thousands of undocumented immigrants each year, is not their legal representative in these affairs. *See Brumfield*, 749 F.3d at 345 ("Here there is no

suggestion that the state is the parents' legal representative."). The first presumption of adequate representation is inapplicable.

The same is true for the second presumption. For that "same ultimate objective" presumption to apply, there must be "unity in *all* objectives." *Brumfield*, 749 F.3d at 346; *see Bush v. Viterna*, 740 F.2d 350, 352-54, 358 (5th Cir. 1984) (per curiam) (same ultimate objective as existing party where movant Texas Association of Counties wished to defend its constituent counties' interests against civil rights suit, but one constituent county was already a defendant). Here, while both the Jane Does and the Federal Government currently share the immediate objective of defending DAPA, they do so for different reasons and with different goals in mind. Their ultimate objectives—for the Jane Does, to avoid removal, continue living with their families, and obtain work authorization and legal employment; and for the Federal Government, to preserve its authority to enforce the immigration laws and, in its discretion, to remove the Jane Does—are strikingly different. The Jane Does' objectives include having DAPA favorably applied to them in particular, so that they actually receive discretionary grants of deferred action. By contrast, the Federal Government defends DAPA in order to maintain its ability to apply DAPA generally to all applicants in the aggregate. Its objectives will be met so long as its authority to grant deferred action is preserved, even if the Jane Does are denied deferred action and are removed. Because the

ultimate objectives are far from identical, the second presumption of adequate representation does not apply. *See Brumfield*, 749 F.3d at 345 ("The second presumption does not apply here. Although both the state and the parents vigorously oppose dismantling the voucher program, their interest may not align precisely.").

B. Even If A Presumption Of Adequate Representation Arises, It Is Rebutted By The Clear Adversity Of Interest Between The Federal Government And The Jane Does

Furthermore, the Federal Government's representation is inadequate because, even if a presumption of adequate representation arises, the Federal Government's interests in this case are adverse to those of the Jane Does. Generally, the presumptions are rebutted where the movant can show that her interests are different and will not be represented by the existing party, or can show the possibility of "adversity of interest, collusion, or nonfeasance on the part of the existing party." *Edwards*, 18 F.3d at 1005. Once the presumption is rebutted, the standard "revert[s] to the *de minimis* standard of proof required by the [Supreme Court] to establish inadequate representation." *Id.* at 1006. Because adversity of interest is self-evident on these facts, the Jane Does have succeeded in rebutting any presumption that may apply and establishing the possibility of inadequate representation, "which is all that the rule requires." *Brumfield*, 749 F.3d at 346.

1. The Federal Government Represents The General Public Interest, Not The Jane Does' Private Interests

The Jane Does' interests in this suit are the archetype of private interests that cannot be represented by a sovereign party, *particularly when it is that very sovereign that is statutorily charged with removing them.* The case law is clear that a movant demonstrates adversity of interest and rebuts the presumption of adequate representation if they have a private interest that could conflict with the governmental party's duty to represent the broad, public interest. This rule stems from the Supreme Court's *Trbovich* decision, which found inadequate representation of a union member's interests in a suit where the Secretary of Labor was statutorily charged with being "the union member's lawyer" but was also bound "to protect the vital public interest in assuring free and democratic union elections." 404 U.S. at 538-39 (citations and quotations omitted). As the Court noted, "[b]oth functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation." *Id.* Given the Secretary's dual roles, the movant had met his minimal burden to show the possibility of inadequate representation. *Id.* at 538 n.10, 539; *see also Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1288 (5th Cir. 1987) ("The adversity [*Trbovich*] discuss[es] between federal regulatory agencies and the private regulated parties stems from conflicts between agency attempts to represent the regulated parties and statutory mandates to serve the public interest." (internal citations and quotations omitted)).

This Court has extended this doctrine in subsequent cases where, as here, the movants attempted to intervene to defend challenged governmental action: "Plaintiffs contend that the government adequately represents the movant's interest because the interests are essentially identical. We cannot agree with this position. . . . The government must represent the broad public interest, not just the economic concerns of the timber industry." *Espy*, 18 F.3d at 1207-08. This rule was also applied in finding inadequate representation in *Sierra Club*, 82 F.3d at 110, where an environmental group sued the U.S. Department of Agriculture in order to force it to restrict farmers' water usage, and the Court noted that the movant farmers' interests "will not necessarily coincide [with the government's], even though, at this point, they share common ground." *Id.*; *see Glickman*, 256 F.3d at 380-81.

Most relevant to the Jane Does' situation is this Court's recent decision in *Brumfield*, where the Federal Government sued Louisiana state officials to enjoin a private school voucher program that allegedly violated a desegregation order. 749 F.3d at 340. Parents whose children received such vouchers sought to intervene of right as defendants, and this Court held they had met their minimal burden of showing the possibility of inadequate representation by Louisiana. *Id.* at 345-46. The *Brumfield* court found that even though "both the state and the parents vigorously oppose dismantling the voucher program, their interests may not align

precisely." *Id.* at 345. Louisiana, unlike the movant parents, had "many interests in this case—maintaining not only the [voucher program] but also its relationship with the federal government and with the courts that have continuing desegregation jurisdiction. The parents do not have the latter two interests; their only concern is keeping their vouchers." *Id.* at 346. Based on these facts, the *Brumfield* court concluded that "[w]e cannot say for sure that the state's more extensive interests will *in fact* result in inadequate representation, but surely they might, which is all the rule requires." *Id.* (emphasis original).

The facts here are directly analogous to the facts of *Brumfield*, *Sierra Club*, and *Espy*. The Jane Does are private parties who request intervention to defend DAPA, an administrative initiative that is aimed at them and under which they can seek discretionary grants of deferred action. Their interests in defending that initiative against the threatened injunction are private and highly personal. While the Federal Government is also trying to defend DAPA, its interest is in enhancing its enforcement efforts so that it can prioritize, apprehend, and remove undocumented immigrants, a duty that it carries out zealously by removing hundreds of thousands of immigrants a year, including 15,000 in 2014 who had no criminal background and were not detained at the border. ROA.534, ROA.551. Moreover, like Louisiana in *Brumfield*, the Federal Government has interests in maintaining good working relationships with the Plaintiff States (who often assist

the Federal Government in detaining undocumented immigrants for removal proceedings) during and after this litigation. The Jane Does do not share these governmental interests, which are adverse to their own.

2. The Federal Government Bases Its Defense Of DAPA On An Argument That Directly Harms The Jane Does' Interests

The adversity of interests here has boiled over into actual conflict. One of the Federal Government's key defenses in this case, that the States can refuse to give driver's licenses to deferred action recipients, directly threatens the Jane Does' interests. This Court's case law makes clear that adversity of interest is demonstrated where "the party with whom the applicant would be aligned has taken a position in direct opposition to the intervenor." *Bush*, 740 F.2d at 357; *Lelsz v. Kavanagh*, 710 F.2d 1040, 1046 (5th Cir. 1983) (inadequate representation can be demonstrated where the existing party is incentivized to downplay the intervenor's issues). Notably, the *Brumfield* court found inadequate representation where Louisiana conceded a jurisdictional point that the movants sought to raise as a defense. *See Brumfield*, 749 F.3d at 346. The same situation is present here.

In the underlying case, one of the primary legal questions is whether Texas's alleged financial injuries from processing the driver's license applications of deferred action recipients gives Texas standing to sue. ROA.4404-14. The Federal Government's main argument in opposition is that these costs would be

self-inflicted injuries because the States can always choose not to issue driver's licenses to deferred action recipients. ROA.4041-44; Government's Injunction Brief at 27-29. In contrast, the Jane Does position is that a State's denial of driver's licenses to recipients of deferred action would both violate the Equal Protection Clause of the United States Constitution and be preempted by federal law. *Cf. Ariz. DREAM Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). If this Court or the Supreme Court ultimately accepts the Federal Government's argument as a reason to hold that Texas lacks standing, Texas will have a binding opinion that it can change its law to deny driver's licenses to recipients of deferred action. This would be extremely harmful to the Jane Does and other potential recipients of deferred action, for whom the possibility of receiving driver's licenses is very important. *See* Roberto Gonzales & Angie Bautista-Chavez, American Immigration Council, *Two Years and Counting: Assessing the Growing Power of DACA* 3 (June 2014) (57 percent of DACA recipients obtained driver's licenses in that initiative's first 16 months). Most workers in Texas commute by car, and public transit in South Texas in particular, where the Jane Does live, is minimal. *See* U.S. Census Bureau, *American Community Surveys, Means of Transportation to Work* 2009-2013 (2015). Even if the Jane Does obtain deferred action and work authorization, their ability to maintain legal employment and earn wages to care for their children will be impaired if they are barred from receiving driver's licenses.

This kind of actual adversity of interest is dispositive on the question of inadequate representation. *See Brumfield*, 749 F.3d at 346 (adversity established where "the parents are staking out a position significantly different from that of the state, which apparently has conceded the continuing jurisdiction of the district court"); *Edwards*, 18 F.3d at 1005-06. There is no question that the Federal Government, which has chosen to improve its own position in this case to the detriment of the interests of undocumented immigrants, cannot represent the Jane Does' interests.

3. The Federal Government Has Failed To Challenge The States' Assertions Of Injury, Thereby Abandoning A Key Jurisdictional Defense

Remarkably, the Federal Government has forsaken any challenge to the States' *factual* allegations underlying standing. Its failure to do so is an independent basis for finding inadequate representation and an affirmative reason why the Jane Does must be granted intervention.

As explained in their amicus brief filed in the Federal Government's appeal of the preliminary injunction, the Jane Does believe that Texas has either greatly exaggerated or perhaps even fabricated the financial injuries it would supposedly suffer if it has to process driver's license applications from deferred action recipients. *See* Amicus Br. of Jane Does at 5-10, *Texas v. United States*, No. 15-40238 (5th Cir. Apr. 6, 2015) ("Amicus Brief"). In that brief, the Jane Does

pointed out that Texas's claims of financial injury rest on a single declaration speculating that Texas would have to spend up to $198 for each driver's license application it processed from a DAPA recipient, for a total of up to $103 million over two years, all for an increase of less than 10% over the 6.1 million license transactions it handled in 2014. *Id.*; ROA.2111-15. The district court's novel "abdication standing" theory aside, this alleged injury was the *sole basis* for finding standing and irreparable injury supporting the preliminary injunction. ROA.4404; ROA.4497. Yet Texas's own publicly available budget documents show that the alleged costs are highly questionable, at best. These documents show that the average cost of processing an application is (at most) $21, less than the $25 application fee charged; moreover, the total wages and salaries for Texas's driver's license operations in 2014 were only $70 million, such that an asserted increase of $103 million over two years from processing less than 10% more applications is highly dubious. Amicus Brief at 5-10.

Perhaps Texas ultimately will be able to demonstrate an injury supporting standing and the issuance of an injunction. But it will never have to defend its questionable arithmetic if the Federal Government has its way. The Federal Government has not once challenged Texas's allegations or even questioned whether they would hold up in discovery, choosing instead to repeat its argument that the States may avoid these costs simply by denying driver's licenses to

deferred action recipients. *See* Government's Injunction Brief at 27-28. In contrast, the Jane Does, if intervention is granted, will vigorously pursue discovery on the issue, including by seeking to depose the sole declarant upon whom Texas relies to support its claims of injury and by requesting an evidentiary hearing.

This is no mere disagreement about litigation tactics; rather, it is a deeply rooted adversity of interest that demonstrates inadequate representation and goes to the heart of the district court's jurisdiction to hear the case. Inadequate representation is proven where "it is clear that the applicant will make a more vigorous presentation of arguments than existing parties." *Bush*, 740 F.2d at 357 (citation omitted). Accordingly, this Court has granted intervention where the movant sought to assert "real and legitimate additional or contrary arguments" not made by the existing party. *Brumfield*, 749 F.3d at 346. And it has denied intervention where the movant sought only to repeat arguments already being made. *See Cajun Elec. Power Co-op. v. Gulf States Utilities, Inc.*, 940 F.2d 117, 120 (5th Cir. 1991) (intervention denied because the movant "brings no unique arguments to the litigation"); *Bush*, 740 F.2d at 357 ("[T]he same positions and defenses will be presented in this suit, whether or not intervention is allowed."); *Hopwood*, 21 F.3d at 606 ("Nor have the proposed intervenors shown that they have a separate defense . . . that the State has failed to assert.").

Here, the Jane Does are the only ones who will bring this most basic of arguments into play: that the States' allegations of injury are not actually supported in fact, as is required for standing and an injunction. Whether the Federal Government has chosen to concede the States' factual allegations to maintain its working relationship with them or for some other reason, its failure to challenge these allegations is not simply a matter of tactics. It is an abandonment of its duty to defend DAPA and proof certain that it cannot represent the interests of the Jane Does.

C. The Federal Government's Adjudicated Misconduct Has Impaired Its Ability To Defend DAPA

Finally, the Federal Government's complete disarray below raises serious doubts about its ability to defend DAPA, let alone to represent the Jane Does' interests. As noted, another ground for finding a presumption of adequate representation rebutted is to demonstrate the "nonfeasance" of the current party, generally defined as "[t]he failure to act when a duty to act existed." *Edwards*, 78 F.3d at 1005; *Black's Law Dictionary* 1153 (9th ed. 2009). In its March 3 and May 7 advisories, the Federal Government admitted that it granted approximately 100,000 three-year terms of deferred action under expanded DACA (including 2,000 terms granted after the preliminary injunction issued) while its counsel represented otherwise to the district court.

This nonfeasance is conclusive. The Federal Government cannot adequately represent the Jane Does' interests in a case where it has been found to have committed, according to the district court, "unacceptable . . . misconduct" by "misleading" the district court about the ongoing implementation of expanded DACA. ROA.5232; ROA.5236. As discussed, the district court considered striking the Federal Government's pleadings but, acknowledging the national importance of this litigation, first ordered the production of privileged documents in camera so that it could determine whether the Federal Government's counsel intentionally misled the court. ROA.5237-38.

As a result, the Federal Government, instead of defending DAPA, is now spending its energies implementing intensive document preservation, review, and production efforts, and ultimately by turning over highly sensitive, privileged documents for the district court's review, documents that apparently include White House correspondence. ROA.5311-12; ROA.5314-16. And its most recent filings make clear that it is unable to accurately convey information to the district court. The May 7 advisory and newly-filed declarations of USCIS officials paint a disturbing picture of a network of agencies administering DAPA that are not properly communicating with DOJ, such that DOJ does not actually know whether the Federal Government is implementing expanded DACA or complying with the district court's injunction. ROA.5284-5317. Indeed, the Federal Government is

now apparently conducting an internal investigation into the issue, further distracting its focus from the defense of DAPA.

The Jane Does take no position on whether the district court's findings of misconduct were correct or whether misrepresentations occurred, but it is indisputable that the Federal Government, by repeatedly representing to the district court that expanded DACA was not being implemented when it in fact was, has very seriously damaged its credibility in the district court. *See* ROA.5565:7-8 ("So like an idiot, I believed [you]."). This loss of credibility is especially damaging because, as explained above, the States have also made questionable allegations, yet the Federal Government is now spending its time and efforts defending its own actions instead of challenging the States' claims.

Under these facts, the Federal Government is unable to continue as the sole defender of DAPA in this suit. No matter what the circumstances were that led to the Federal Government's failures to disclose the ongoing implementation of expanded DACA before and after the district court's injunction, those failures have harmed DAPA's chances of survival. This nonfeasance shows the need for the Jane Does' intervention. As the court below noted, the entire nation "deserves a resolution [of this litigation] on the merits." ROA.5236. For the nation to receive the resolution on the merits that it deserves, the Jane Does must be allowed to

intervene to provide the vigorous defense of DAPA that the Federal Government cannot and will not provide.

Because no presumption of adequate representation arises and the Jane Does easily fulfill their "minimal" burden to show that the Federal Government's representation of their interests "may be" inadequate, the district court's contrary ruling was in error. *Edwards*, 78 F.3d at 1005-06.

CONCLUSION

For the foregoing reasons, Movants-Appellants Jane Does respectfully request that this Court reverse the order of the district court and remand with instructions that Movants-Appellants be allowed to intervene as a matter of right.

Dated: May 22, 2015

Respectfully submitted,

By: /s/ Nina Perales

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2015, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that the following counsel for the parties were served by next-day FedEx and email:

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CERTIFICATE OF COMPLIANCE

1. I certify that on May 22, 2015, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's electronic-document filing system.

2. I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic copy is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial anti-virus software and was reported free of viruses.

3. This brief complies with the page type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2.

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No. 15-40333 State of Texas, et al v. USA, et al
USDC No. 1:14-CV-254

Dear Ms. Perales,

The following pertains to your brief electronically filed on 5/22/15.

We filed your brief. However, you must make the following corrections within the next 14 days.

Opposing counsel's briefing time continues to run.

You need to correct or add:

Complete list of names in the Certificate of interested persons, see 5TH CIR. R. 28.2.1. "Et al" is not sufficient.

Once you have prepared your sufficient brief, **you must email it** to: Christina_Gardner@ca5.uscourts.gov for review. If the brief is in compliance, you will receive a notice of docket activity advising you that the sufficient brief has been filed.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

cc: Mr. J. Campbell Barker
Mr. Jeffrey A. Clair
Mr. William Ernest Havemann
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