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. SALDAÑA, Director of U.S. Immigration and Customs Enforcement; LEÓN RODRÍGUEZ,
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, No. 1:14-cv-254 (Hanen, J.)

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Certificate of Interested Persons

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 the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees, as well as Defendants-Appellees, are governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.1. Movants-Appellants are proposed intervenors and are not parties to the case. Because they proceed under pseudonyms, their identity is unknown to the undersigned. The counsel representing them are Nina Perales, of the Mexican-American Legal Defense & Educational Fund; J. Jorge deNeve, Adam Paul KohSweeney, and Gabriel Markoff, of the law firm O'Melveny & Myers, L.L.P.; and Linda J. Smith, of the law firm of DLA Piper L.L.P.

Statement Regarding Oral Argument

This Court has scheduled oral argument in this case for July 10, 2015.

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Statement of the Issues

The question presented in this case is whether the proposed intervenors are entitled to intervene under Federal Rule of Civil Procedure 24(a)(2).

Introduction

Plaintiffs have challenged an executive action ("DAPA") which would provide lawful presence and a host of benefits to millions of unauthorized aliens. Three of those aliens ("the Jane Does" or "the Does") have sought to intervene in the lawsuit as defendants. The district court properly denied their motion.

The Jane Does are not entitled to intervene because the existing defendants—the federal government and several executive officials—adequately represent their interests. They have the same ultimate objective as the Does: namely, to defend DAPA in full. Moreover, governmental entities are presumed to be adequate in defending their own programs. The Department of Justice, in particular, is clearly a motivated and capable advocate for DAPA. The Jane Does' efforts to quibble with its litigation tactics are both belated and unpersuasive.

Resolving this case on adequacy of representation grounds would allow this Court to avoid the more complicated question of whether the Does have a sufficient interest in the case to intervene.[1] If the Court reaches that ques-

[1] This Court routinely bypasses the interest question by considering adequacy of representation first. *See, e.g.*, *Kneeland v. NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987) (no need

tion, it should hold that the Does *do* have such an interest. However, the arguments that establish this interest also undermine the Does' position on the merits of the case.

Specifically, the Jane Does must show that they have a cognizable legal interest in DAPA. They do, because DAPA is a change in the law that would confer lawful presence, eligibility for work permits, and various other benefits on them. The same argument, however, also demonstrates once again that DAPA is a reviewable agency action, and a substantive rule requiring notice and comment.

In other words, the Does can prevail only by reinforcing the Plaintiffs' procedural APA challenge to DAPA. They attempt to escape this Catch-22 by arguing that they should be allowed to intervene based on an interest they disclaim—as long as an existing party takes the view that such an interest exists. This escape route is foreclosed by the plain language of Rule 24, which is limited to interests a proposed intervenor "claims."

STATEMENT OF THE CASE

1. On November 20, 2014, the President announced an initiative to confer lawful presence and work authorizations on over four million unauthorized

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to consider interest if there is adequate representation); *Bush v. Viterna*, 740 F.2d 350, 354-55 (5th Cir. 1984) (per curiam) (same).

aliens. The President urged potential beneficiaries to "come out of the shadows" and stated that he was "offer[ing] the following deal": anyone meeting the programs' criteria was "not going to be deported."[2]

The initiative was implemented through a directive from the Secretary of Homeland Security. ROA.90-94. Secretary Johnson instructed his subordinates to expand an earlier deferred-action program (known as "DACA"), and create a new deferred-action program (known as "DAPA").[3] ROA.92-94. His directive made clear that beneficiaries of both programs would be "lawfully present" in the United States for the duration of their deferred-action period, and would also be eligible for work authorization. ROA.91-93. Lawful presence, in turn, would trigger a host of other benefits, including driver's licenses, Social Security, Medicare, the Earned Income Tax Credit, and unemployment insurance. *See Texas et al. v. United States et al.*, __ F.3d ____, 2015 WL 3386436, at *1 (5th Cir. May 26, 2015) ("Stay Op.").

2. Plaintiffs—representing 26 States—filed a lawsuit challenging DAPA. ROA.58. They alleged that DAPA violated the procedural requirements of the Administrative Procedure Act because it was promulgated without notice and comment. ROA.250-51. They further alleged that DAPA exceeded the bounds

[2] Remarks by the President on Immigration (Nov. 21, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/11/21/remarks-president-immigration; *see* Remarks by the President in Address to the Nation on Immigration, (Nov. 20, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[3] For brevity, this brief will generally use "DAPA" to refer to both DAPA and the expansion of DACA.

of the Executive's authority, and therefore violated Section 706 of the APA, as well as the Constitution's separation of powers scheme. ROA.248-50, 251-52.

Plaintiffs quickly moved for a preliminary injunction, and the district court scheduled a hearing on the motion for January 15, 2015. ROA.144, 976. The day before the hearing, the Jane Does—three unauthorized aliens who wish to receive DAPA benefits—moved to intervene, claiming they were entitled to intervention of right under Rule 24(a)(2). ROA.2641. They argued that Defendants—the federal government and several executive-branch officials—could not adequately represent their interests in the litigation. ROA.2657-58.

The Does suggested, in particular, that "Defendants may be hesitant to advance relevant arguments because of the highly-charged political debate surrounding immigration." ROA.2658. Although the Defendants had already submitted a brief opposing the preliminary injunction motion, ROA.390, the Does did not identify any arguments Defendants had failed to make. They insisted, however, that "Defendants' *potential* failure to advance certain arguments" was sufficient to support intervention. ROA.2658 (emphasis added).[4]

The Jane Does also submitted what they called a "short proposed opposition," ROA.4352, to the preliminary injunction motion. ROA.2663. This document explicitly "adopt[ed] and incorporate[d] in full" the Defendants' response in opposition to the preliminary injunction motion (indeed, it was

[4] The Jane Does also requested permissive intervention, ROA.2658-59, but they have since abandoned that argument. Jane Does' Br. ("Br.") 24 n.7.

styled as a "Joinder" of Defendants' response). ROA.2663, 2664. The Jane Does praised the Defendants' response for its "compelling detail" and "thorough[] outlin[ing]" of the legal issues. ROA.2665, 2668. Their contribution was primarily to describe their own experiences which, they believed, bolstered the Defendants' arguments. *See, e.g.*, ROA.2670 (stating that the Jane Does had "contributed to their communities through active participation in church and volunteering"). Both Plaintiffs and Defendants opposed the motion to intervene. ROA.4210, 4288.

The district court denied the motion, holding that Rule 24(a)(2) was not applicable. ROA.4371. The court concluded that the Jane Does did not have an interest sufficient to intervene, and that in any event their interests "are more than adequately represented by the Parties in this lawsuit." *Texas et al. v. United States et al.*, __ F. Supp.3d __, 2015 WL 648579, at *4 & n.6 (S.D. Tex. Feb. 16, 2015) (mem. op.) ("P.I. Op."). However, it agreed to consider the Does' pleadings "as if they were *amici curiae*." *Id.* at *4.

4. The district court went on to grant the preliminary injunction in a thorough 123-page opinion. It held, first, that Plaintiffs had standing, most clearly because they would be obligated to provide driver's licenses to DAPA recipients, at a cost of millions of dollars. P.I. Op. at *11-17. Turning to the merits, it rejected the Defendants' argument that DAPA was an unreviewable exercise of discretion, explaining that "prosecutorial discretion … does not also entail bestowing benefits." *Id.* at *44. And even if a presumption of reviewability applied, it would have been rebutted here because DAPA amounts

to an "announced program of non-enforcement of the law that contradicts Congress' statutory goals." *Id.* at *50. Finally, the district court concluded that Plaintiffs were likely to prevail on their procedural APA claim, because DAPA is a "substantive" rule, and therefore notice and comment was required. *Id.* at *56. As such, the court did not need to reach the Plaintiffs' separation-of-powers claim or their substantive APA claim. *Id.* at *61-62. The remaining preliminary injunction factors also favored the Plaintiffs. *Id.* at *56-61.

The Defendants appealed the grant of the preliminary injunction, and the Jane Does appealed from the denial of intervention. Plaintiffs moved for summary affirmance of the intervention ruling. This Court denied the motion and adopted an expedited briefing schedule. Order, *Texas et al. v. United States et al.*, No. 15-40333 (5th Cir. Apr. 27, 2015).

In addition to pursuing the present appeal, the Jane Does filed an amicus brief in the preliminary injunction appeal. Their brief focused entirely on standing, a subject they had not addressed in the district court. Jane Does' Amicus Br., *Texas et al. v. United States et al.,* No. 14-40238 (5th Cir.) ("Am. Br.").

5. Defendants sought a stay of the preliminary injunction, in the district court (which denied it, ROA.5226), and then in this Court. After extensive briefing and over two hours of oral argument, this Court denied the stay motion in a detailed published opinion. Stay Op. at *1; *see id.* at *6 n.40.

The panel majority largely endorsed the district court's analysis. It held, first, that "the government's challenge to standing is without merit" because at least one Plaintiff—Texas—could likely demonstrate standing based on the costs of issuing additional driver's licenses.[5] *Id.* at *7. And it explained that DAPA was not an exercise of prosecutorial discretion because DAPA "is more than nonenforcement: It is the affirmative act of conferring 'lawful presence' on a class of unlawfully present aliens." *Id.* at *9. Finally, the Court rejected the Defendants' argument that DAPA did not require notice and comment because it was merely a policy statement. *Id.* at *12-13. Accordingly, the Defendants had failed to make the necessary showing of likelihood of success on the merits. The remaining stay factors favored Plaintiffs as well. *Id.* at *14-15.

This Court set oral argument in the present appeal, as well as in the preliminary injunction appeal, for July 10, 2015.

SUMMARY OF THE ARGUMENT

I. The Jane Does have not met their burden of demonstrating that the Defendants do not adequately represent their interests. Adequate representation should be presumed in this case for two reasons. First, the Defendants share the Does' ultimate objective in this case: namely, defending DAPA in its entirety. Second, Defendants represent the federal government, and their defense of their own program should be treated as presumptively adequate.

[5] Accordingly, the Court did not need to reach Plaintiffs' alternative theories of standing. *Id.* at *2.

The Jane Does attempt to rebut these presumptions in three ways. First, they suggest that the Defendants' interests are adverse to them. However, they fail to identify any concrete divergence of interests. Defendants seek to do precisely what the Does want—namely, to protect DAPA—and are not limited or encumbered in doing so.

Second, the Does complain about arguments the Defendants did and did not make with respect to standing. These are narrow tactical disagreements that do not support intervention. Moreover, they are *post hoc*: the Does had an opportunity to make these points below, but did not. Instead, they praised, adopted and incorporated the government's submission (which they now criticize as inadequate).

The Does fault Defendants for failing to make one narrow standing argument, concerning a purported inconsistency between a declaration introduced by the Plaintiffs and Texas's budget documents. But Defendants advanced a variety of standing arguments, some very close to the one the Does suggest. The failure to make one particular argument is hardly proof of inadequacy. Indeed, the Does themselves did not make that argument when they had the chance. Moreover, the argument is meritless, because the declaration is entirely consistent with the budget document. The argument is also irrelevant. Even if it were valid, it could at most undermine one theory of standing as to one plaintiff. Other plaintiffs would still have standing based on that theory, Texas would still have standing based on other theories, and only one plaintiff needs to have standing for the entire case to move forward.

The Does also criticize Defendants for suggesting that states may, in some circumstances, deny driver's licenses to deferred-action recipients. But they themselves endorsed this argument below. And it is easy to see why: arguing that DAPA preempts state regulatory programs is tantamount to a concession that it is illegal (because a program with such pronounced legal consequences clearly cannot be described as an exercise of prosecutorial discretion, or a mere statement of policy). In any event, this is a purely legal disagreement, so if the Does insist on pressing this argument they can do so in amicus submissions.

Finally, the Does suggest that the federal government cannot adequately represent them because it has lost the trust of the district court. But the district court itself—although it has criticized the Defendants—has not indicated that they are not capable of appropriately litigating this case. If it ever reaches such a conclusion, it will be able to act on it at that time.

In short, the Jane Does have not defeated the presumptions of adequate representation. And all practical factors counsel against intervention. The Department of Justice is presumptively well-positioned to defend this new, large federal bureaucracy. The Jane Does, meanwhile, have neither special legal expertise, nor access to uniquely valuable facts. To whatever narrow extent they have a distinct legal position, it can be conveyed in amicus briefs; and whatever specific knowledge or evidence they have can be shared with Defendants.

Accordingly, there is little to gain from intervention, but much to lose. The district court noted that allowing intervention in this time-sensitive matter would create unnecessary delay and confusion. Plaintiffs, Defendants, amici,

and all other parties interested in the outcome of this important case would be injured by this unwarranted delay.

II. Assuming the Does demonstrate inadequacy of representation, they will also have to demonstrate that they have a sufficient interest to intervene. Plaintiffs concede that they have made this showing—but only by undercutting their own position on the merits.

The most reliable way of demonstrating sufficient interest would be to show that the Does have non-speculative legal interests in DAPA. They do, because, as the stay panel held, DAPA grants legal rights to its beneficiaries. Moreover, it is not speculative to suggest that the Does will enjoy these rights because, as the stay panel also held, DAPA benefits will be granted to all qualified applicants without case-by-case discretion. While these holdings reflect an interest sufficient to support the Does' intervention, they also demonstrate that DAPA is *not* an exercise of prosecutorial discretion and *is* a substantive rule requiring notice and comment.

The Does also attempt to establish a sufficient interest by taking advantage of the looser test that is sometimes applied in public law cases. They argue that it is enough that they are the main beneficiaries of DAPA and that their interests are profoundly affected by DAPA. This line of argument also likely establishes a sufficient interest for intervention; but it also once again reinforces the Plaintiffs' position on the merits. This is because any administrative action that has such a significant effect on third parties is necessarily a substantive rule.

The Does attempt to escape this tension in their position by arguing that they can intervene even based on interests whose existence they deny. They believe that they are entitled to intervene as long as any existing party suggests that such interests exist. This view is foreclosed by the plain language of Rule 24(a)(2), which requires a proposed intervenor to "claim[]" the interest supporting intervention.

STANDARD OF REVIEW

Subject to an exception not relevant here, the right to intervene is an issue of law that this Court reviews *de novo*. *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009).

ARGUMENT

The Jane Does seek to intervene of right under Rule 24(a)(2). Accordingly, they "must meet four requirements: (1) the application for intervention must be timely; (2) the applicant[s] must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant[s] must be so situated that the disposition of the action may, as a practical matter, impair or impede [their] ability to protect that interest; [and] (4) the applicant[s'] interest must be inadequately represented by the existing parties to the suit." *Haspel & Davis Milling & Planting Co. Ltd. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007). "Failure to satisfy any one requirement precludes intervention of right." *Ibid.*

Two of these requirements—interest, and inadequate representation—were disputed below.[6] As we will explain, the Jane Does *do* meet the interest requirement—but only by relying on arguments that are fatal to their position on the merits. Nevertheless, intervention should be denied because Defendants will adequately represent the Does' interests.

I. The Jane Does Cannot Demonstrate Inadequate Representation.

"The burden of establishing inadequate representation is on the applicant for intervention." *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (en banc). This burden is minimal, but "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Bush,* 740 F.2d at 355. Accordingly, the proposed intervenor "must 'produce something more than speculation as to the purported inadequacy.'" *LULAC, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) (citation omitted); *see also Veasey v. Perry*, 577 F. App'x 261, 262 (5th Cir. 2014) (per curiam) (reviewing intervention cases and observing that this Court has always required an "incongruity of interests" that is "pronounced").

[6] Plaintiffs do not contest the remaining two requirements: timeliness, and impairment of interest (assuming a sufficient interest is established). However, Plaintiffs dispute the Movants' claim that "the States are suing *in order* to impair the Jane Does' interests." Br. 41. Plaintiffs have explained from the outset of this case that they seek to protect the "constitutional separation of powers," which "requires Congress to pass a law and the President to execute it." ROA.154.

A. The Jane Does Must Overcome Two Separate Presumptions of Adequate Representation.

This Court has explained that a presumption of adequate representation arises if (1) the existing party and the proposed intervenor have the same ultimate objective or (2) the existing party is the government. *See, e.g.*, *Kneeland*, 806 F.2d at 1288; *Texas v. DOE*, 754 F.2d 550, 553 (5th Cir. 1985). Both of those presumptions apply in this case.

1. The Defendants And The Jane Does Have The Same Ultimate Objective: Defending DAPA.

The Defendants' ultimate objective in this litigation is simply to defend DAPA in its entirety. Accordingly, they have argued that Plaintiffs lack standing, that DAPA is an unreviewable exercise of prosecutorial discretion, and that in any event it is merely a policy statement that does not require notice and comment. *See, e.g.,* Appellants' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 1-3 (5th Cir.).

The Jane Does are pursuing the same objective. *See* ROA.2654 (Motion to Intervene) (stating that the Does' "interest is to uphold DAPA"); Am. Br. 1 (noting that the Does' "interest in this suit is to protect their [DAPA] eligibility"); Br. 47 (acknowledging that "the Jane Does and the Federal Government currently share the immediate objective of defending DAPA").

The "same ultimate objective" presumption of adequate representation applies straightforwardly to this situation. *See, e.g.*, *Kneeland*, 806 F.2d at 1288 (noting that the existing parties "have the same ultimate objective as [the proposed intervenors]: to prevent disclosure of the documents"); *Bush*, 740 F.2d

at 356 (stating that defendant and the proposed intervenor "have the same objectives—to uphold the present standards and practices of the Commission, and to resist any changes in those standards and practices sought by the plaintiffs"); *see also United States v. Tex. Educ. Agency*, 138 F.R.D. 503, 506 (N.D. Tex. 1991) (noting that "the Proposed Intervenors have admitted that their ultimate goal is a desegregated school system [which] also is the ultimate goal of the Government"); *Villas at Parkside Partners v. City of Farmers Branch*, 245 F.R.D. 551, 555 (N.D. Tex. 2007) (mem. op.) (noting that "both FAIR and the city of Farmers Branch seek to uphold and enforce the … ordinance"); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (proposed intervenor and federal defendants share the "ultimate objective [of] uphold[ing] the constitutionality of the challenged statutes"); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) ("Here, the Employees and the state share the same goal: protecting Act 10 against the Unions' constitutional challenge.").

The Jane Does attempt to escape this conclusion by pushing the concept of "ultimate objective" beyond the parameters of this lawsuit. They observe that their objective is to "hav[e] DAPA favorably applied to them in particular," whereas the government seeks to "maintain its ability to apply DAPA generally to all applicants in the aggregate." Br. 47. Those two goals, however, require the same result *in this case*: namely, both the Jane Does and the Defendants need DAPA to be upheld. And it is only the ultimate objective *in the ongoing litigation* that counts.

For instance, in *Haspel*, the would-be intervenor argued that "its objective [was] more expansive in that [it sought] to ensure that Louisiana's anti-seizure provisions are uniformly applied to prevent the seizure of public property and funds in satisfaction of any judgment, and not merely a judgment against the Levee Board." 493 F.3d at 579. This Court held that "even assuming that the State's interest is broader than that of the Levee Board, the more narrow issue regarding execution of the judgment against the Levee Board is the only matter currently before us." *Ibid.* Accordingly, "the Levee Board and the State have the same ultimate objective in this case." *Ibid.*

It is just the same here. It is conceivable that—if DAPA is upheld—the Defendants and the Jane Does could eventually have a disagreement as to how DAPA should apply to the Jane Does. However, this case does not present that question, so the *relevant* ultimate objective is the same. *See, e.g.*, *Bush*, 740 F.2d at 356-57 (holding that "the possibility that the interests of intervenors and defendants might clash in some future dispute does not demonstrate the necessary adverse interest in a present suit"); *Int'l Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 968 (5th Cir. 1978) (same); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 n.9 (11th Cir. 2007) (explaining that "the relevant Rule 24(a)(2) inquiry is whether the party will represent the proposed intervener's interest *with respect to the subject matter of the action*").

This approach makes practical sense: Defendants' ability to represent the Jane Does *in this case* should be assessed by reference to their goals *in this case*.

The Jane Does' approach, by contrast, would deprive the "ultimate objective" presumption of all content, as no two parties share identical "goals" and "reasons." Br. 47; *see Nat'l Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 834 F.2d 60, 61-62 (2d Cir. 1987) ("A putative intervenor does not have an interest not adequately represented by a party to a lawsuit simply because it has a motive to litigate that is different from the motive of an existing party."). Indeed, by the Does' rationale, *each* of the 4.3 million unauthorized aliens covered by DAPA could intervene in this case because each of them has a unique interest in "having DAPA favorably applied to them in particular." Br. 47.

In short, the "ultimate objective" presumption of adequacy clearly applies here. Accordingly, the Jane Does must demonstrate "collusion, nonfeasance, or adversity of interest" to show inadequacy of representation. *Haspel*, 493 F.3d at 579.

2. The Defendants Represent The Federal Government.

This Court has also held that "there is a presumption of adequate representation" in cases where "the existing representative in the suit is the government." *DOE*, 754 F.2d at 553; *see also Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam) (noting that "where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required"); *Clements*, 884 F.2d at 189 (referring to "the Texas Attorney General's presumed representation of common interests").

The United States, in particular, has been presumed to be an adequate representative of the public interest, "in the absence of a very compelling showing to the contrary," in a variety of cases. 7C Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE § 1909 (3d ed.).

The Does point to authorities suggesting that this presumption applies only if the governmental entity is obligated to represent the proposed intervenor. Br. 44-45. But those authorities are not easily reconciled with cases like *DOE*, where the Department of Energy was presumed to adequately represent the interests of utility companies without any suggestion that it had any special legal relationship with those companies. 754 F.2d at 553. The better view is that a "public entity must normally be presumed to represent the interest of its citizens *and to mount a good faith defense of its laws.*" *City of Houston v. Am. Traffic Solutions, Inc.*, 668 F.3d 291, 294 (5th Cir. 2012) (emphasis added); *see also State v. Director, U.S. Fish & Wildlife Serv.,* 262 F.3d 13, 19 (1st Cir. 2001) ("Generally, our decisions have proceeded on the assumption … that the government will adequately defend its actions."). Here, the federal government should be presumed to be adequate in defending its own program.

But even assuming that the presumption attaches only if the federal government has some obligation to represent the Does' interests, the presumption is still applicable here. The Does asserted below that DAPA is justified by a federal statutory policy in favor of family reunification. ROA.2671. The federal government defends DAPA by reference to the same humanitarian goal. Appellants' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 25 (5th

Cir.). Indeed, the Office of Legal Counsel, in its opinion purporting to justify DAPA, opined that DAPA is constitutional *only* because of this humanitarian interest. ROA.525. Plaintiffs have explained why these arguments are mistaken, *see, e.g.,* Appellees' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 4-5 (5th Cir.), but what is relevant here is that Defendants *believe* they are appropriately pursuing this interest.

Accordingly, the presumption of adequate representation applies because the Does "are the exact constituents the United States is seeking to protect in this action." *United States v. City of Los Angeles*, 288 F.3d 391, 402-03 (9th Cir. 2002); *see also Bush*, 740 F.2d at 358 ("[T]his is not a case in which we can say that the counties are 'without a friend in this litigation.'" (quoting *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 825 (5th Cir. 1967)).

In short, the Jane Does must defeat the second presumption of adequacy as well. To do so, they have to demonstrate that their interest "is in fact different" from that of Defendants and that their interest "will not be represented" by Defendants. *Hopwood*, 21 F.3d at 605 (internal quotation marks omitted).

B. The Jane Does Fail To Rebut The Presumptions of Adequate Representation.

The Jane Does attempt to overcome the presumptions of adequacy in three ways: 1) by demonstrating actual adversity of interests; 2) by quibbling

with the government's litigation tactics; and 3) by accusing the government of nonfeasance. Their arguments are unpersuasive.[7]

1. There Is No Adversity Of Interest.

As explained above, the Does have the same interest in this litigation as the Defendants: namely, defending DAPA. And their pleadings below reflected as much. In their proposed response to the preliminary injunction motion, the Does joined the government's response, "adopt[ed]" it and "incorporate[d] [it] in full." ROA.2663, 2664. They also praised the government for its legal analysis. ROA.2665, 2668. Their current objections to the government's tactics, *see* Part I.B.2, *infra*, are simply a *post hoc* effort to justify intervention. *See Bush*, 740 F.2d at 357 (finding it "particularly instructive" that a proposed intervenor's pleading took "virtually identical positions to those taken by the Commission" and "affirm[ed] in glowing terms its confidence" in the Commission); *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) ("Virginia seeks no relief other than that which VEPCO asks for itself. In fact, the Commonwealth's pleadings have been nearly identical to those submitted by VEPCO."); *see also Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) (requiring "real and legitimate additional or contrary arguments" to show inadequacy of representation).

Unsurprisingly, the Jane Does identify no relevant adversity of interests between themselves and the Defendants. Their core observation is simply that

[7] Indeed, even in the absence of both presumptions, these arguments would not suffice to meet the minimal burden of showing inadequacy.

their interests are "private and highly personal" whereas the Defendants' interests are "governmental." Br. 51-52. But of course, that by itself cannot be enough. If it were, no governmental entity could adequately represent a private one, and that is not the law. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (Posner, J.) (explaining that if it were sufficient to point to the DOJ's "unique status as the lawyer for the entire federal government," "then in no case brought or defended by the Department could intervention be refused on the ground that the Department's representation ... was adequate").

In short, the Jane Does must point to some *concrete* adversity between their interests and those of Defendants. For instance, in *Kneeland*, this Court held that two regulatory associations adequately represented the interests of their regulated universities. 806 F.2d at 1288. It was not enough that "the associations are the regulators while the universities are the regulated"; the universities had to show an actual "conflict[]" and they could not. *Ibid.*

The Does' efforts to articulate a divergence in interests are cursory and unpersuasive. They note, first, that the government has an interest in enhancing its enforcement efforts. Br. 51. But that interest creates no adversity in this case. The government has taken the position that DAPA will aid its enforcement efforts; accordingly, it is defending DAPA, just as the Jane Does would wish.

The Does also point to the ongoing relationship between the federal government and the States. Br. 51-52. But the general proposition that the state

and federal governments will continue to cooperate on a variety of matters is not sufficient to establish adversity of interest. The Does rely heavily on *Brumfield*, but that decision is easily distinguishable. Br. 50. In *Brumfield*, the proposed intervenors had reason to think that Louisiana might not adequately represent their interests in part because "it had to maintain relations with … courts with continuing desegregation jurisdiction." *Veasey*, 577 F. App'x at 263 (discussing *Brumfield*, 749 F.3d at 346). No such *jurisdictional* relationship exists here. *Ibid.* (noting special significance of continuing jurisdiction). Moreover, Louisiana had already demonstrated its adversity with the proposed intervenors by adopting a "significantly different" legal position and "apparently [] conced[ing]" the jurisdictional issue in the case. *Brumfield*, 749 F.3d at 346.

In short, *Brumfield*, like all of this Court's intervention cases, required a genuine "incongruity of interests" for intervention. *Veasey*, 577 F. App'x at 262-63 (reviewing cases). This Court has allowed intervention, for example, where the existing party had announced that it "would be acting contrary to the interests of the [proposed intervenors]," *Brumfield*, 749 F.3d at 345 (discussing *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994)); where the existing party contradicted its previous position, failed to contest a TRO or preliminary injunction, and did not object to the admission of questionable evidence, *John Doe No. 1 v. Glickman*, 256 F.3d 371 (5th Cir. 2001); where there were "substantial doubts about the [existing party's] motives and conduct in its defense" because the party had an incentive to settle in a way that would harm

the intervenor, *Traffic Solutions*, 668 F.3d at 294; and where the proposed intervenor was free to make an argument that was unavailable to the existing party because it was "bound by a prior court judgment," *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996).[8]

No such incongruity of interests exists here. *See Hopwood*, 21 F.3d at 606 (no adversity where "[t]he proposed intervenors [had] not demonstrated that the State will not strongly defend its … program" or "shown that they have a separate defense of the … plan that the State has failed to assert."). Defendants seek to defend DAPA; they are not precluded from offering any argument that the Jane Does might offer; and they certainly have exhibited no "ambivalence" about their position. *Day v. Sebelius*, 227 F.R.D. 668, 674-75 (D. Kan. 2005) (mem. op) (allowing intervention where a state Attorney General had put the government's motivation in doubt by publicly refusing to be involved in the case).

Finally, the Does point to the Supreme Court's decision in *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972). Br. 49. But as this Court has explained in rejecting a similar argument, *Trbovich* turned on a "conflict[] be-

[8] Other circuits approach the issue the same way. *See, e.g.*, *Dimond v. D.C.*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (permitting intervention where there was "a potential conflict of interest"); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (allowing intervention where "the differing scope of EPA and appellants' interests" could give rise to "[g]ood faith disagreement," and where the appellants could be expected to make a more vigorous argument); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003) (because of the conflicting interests of upstream and downstream river users, government could not adequately represent downstream users).

tween agency attempts to represent the regulated parties and statutory mandates to serve the 'public interest.'" *Kneeland*, 806 F.2d at 1288 (quoting *Trbovich*, 404 U.S. at 538-39). The Does do not identify any statutory mandate that would interfere with the Defendants' efforts to represent them.[9]

2. The Jane Does' Attempts To Quibble With Defendants' Litigation Tactics Are Unavailing.

The Jane Does attempt to make their adversity of interest argument more concrete by taking issue with Defendants' tactics. In particular, they claim that Defendants declined to make a supposedly crucial argument against standing, and instead relied on an argument that was contrary to the Does' interest. Br. 52-57. But narrow disagreements with the existing party's tactical choices are not sufficient to create adversity of interest. *See, e.g.*, *United States v. S. Bend. Cmty. Sch. Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) (adequate representation where the "only disagreement shown was with respect to the road map to be used to achieve" the shared objective); *United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986).

This is doubly true when the proposed intervenors' objections are *post hoc*. As we will show below, the Does had an opportunity to make the meritless

[9] Elsewhere, the Does suggest that the federal government is "statutorily bound to remove them." Br. 32. We have also argued that DAPA violates the Executive's statutory obligations. *See, e.g.,* Appellees' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 4-5, 22-23 (5th Cir.). Of course, if that is true, DAPA is both reviewable and illegal. But it doesn't necessarily mean the Does are entitled to intervene. What is relevant here is that the Defendants clearly do not *believe* DAPA violates their statutory obligations, so their defense of it is unhampered.

standing argument they now wish to raise, but they declined to do so. Moreover, they actually *adopted* the argument they now claim is deleterious to their interests. Such "post-hoc quibbles with the [government's] litigation strategy [do] not provide the conflict of interest necessary to render the [government's] representation inadequate." *Walker*, 705 F.3d 659; *see also Lelsz v. Kavanagh*, 710 F.2d 1040, 1046-47 (5th Cir. 1983) (rejecting arguments that were not made by intervenors until "rather late in the game … while their appeal was pending before this court").

Accordingly, the Jane Does' objections can be rejected on their face. And upon closer examination, they only become less persuasive.

a. Defendants have vigorously (albeit, to date, entirely unsuccessfully) attacked the theory of standing that relies on the additional costs DAPA would impose on Plaintiffs' driver's license programs. The stay panel dedicated numerous pages to reviewing and rejecting those arguments, as did the district court. Stay Op. at *2-7; P.I. Op. at *11-17.

The Does, however, claim that the Defendants have "forsaken any challenge to the States' *factual* allegations underlying standing." Br. 54. This is false, as Defendants have unquestionably made arguments contesting Plaintiffs' presentation of the facts. *See, e.g.*, Stay Op. at *4 (discussing Defendants' argument that the driver's license costs would be "outweighed by countervailing economic benefits"). Indeed, Defendants even tried to argue—just as the Jane Does suggest, Br. 55—that there is a tension between the Plaintiffs'

driver's license cost calculations and the State's public documents. Appellants' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 30 (5th Cir.) (discussing a Texas Department of Motor Vehicles document).

In short, Defendants have "expressed [the Jane Does'] concerns." *Kneeland*, 806 F.2d at 1288. Any residual disagreement is simply "disagreement about litigation tactics," Br. 56, and is not sufficient for intervention. *See, e.g.*, *Veasey*, 577 F. App'x at 263 (rejecting the argument that the existing party was unwilling to produce evidence of fraud when the party had introduced such evidence); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy … does not, in and of itself, establish inadequacy of representation.").

Nevertheless, the Does insist that the Defendants' failure to make the precise argument they have now articulated is proof that Defendants cannot make a sufficiently vigorous presentation. Br. 56. This is mistaken for several reasons.

Most obviously, the Does themselves failed to make this argument to the district court, despite having the opportunity. To review, they submitted a proposed response to the preliminary injunction motion. That document adopted and incorporated the Defendants' response and added *nothing* about standing—presumably, because the Jane Does were satisfied with Defendants' treatment of the subject. ROA.2664. By that time, Plaintiffs had already submitted the declaration that the Does now take exception to. ROA.2110-31

("Peters Declaration"). If questioning that declaration were genuinely a litmus test for vigorous representation, surely the Does would have mentioned it in their proposed response (which the district court ultimately considered as an amicus submission). And yet, they did not.

Moreover, the argument is both meritless and irrelevant several times over. First, there is no tension between the Peters Declaration and Texas's budgetary documents. For example, the Jane Does argue that a budget document suggesting that an employee can handle over 2,500 driver's license transactions per year disproves the Peters Declaration's claim that Texas would need to hire an extra employee for every additional 875 driver's license applications by DAPA recipients. Am. Br. 8. This simplistic analysis overlooks the fact that not all "driver's license transactions" are created equal. That umbrella category includes a variety of transactions, such as: issuing new driver's licenses; renewing driver's licenses; replacing driver's licenses; issuing or renewing identification cards; and providing copies of a driver's records. *See* Tex. Dep't of Public Safety, *Operating Budget, Fiscal Year 2014* III.A.38 (2013), *cited in* Am. Br. 8-9.

Many of these transactions—including some driver's license renewals—can be done by phone or online. By contrast, issuing a driver's license to a DAPA recipient requires both an office visit and a check of the DAPA recipient's legal status. ROA.2114. Even renewals of driver's licenses for DAPA recipients cannot be done without an office visit, *ibid.,* both because DAPA re-

cipients are not citizens[10] and because their licenses will be term-limited.[11] Unsurprisingly, more complex driver's license transactions require more employee effort. *See* ROA.2114-15.[12]

And even if this argument had any merit, it would have made no difference. Even as to Texas, the Jane Does admit that their analysis may show at most that the costs were "exaggerated." Br. 54. This would not have helped Defendants, as the magnitude of the injury is irrelevant to the standing analysis. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007). Moreover, other States put in similar declarations concerning their driver's license costs. *See* ROA.2045-55 (Wisconsin); ROA.2250-56 (Indiana). Only one plaintiff needs to demonstrate standing, so questioning Texas's declaration would not have done the Defendants any good. *See* Stay Op. 3 & n.23 (citing, *e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

And even if Defendants had somehow undermined the driver's license costs theory of standing, Plaintiffs would have prevailed on their other standing theories. For instance, in the wake of this Court's stay opinion, it is clear

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[10] *See* https://www.txdps.state.tx.us/DriverLicense/dlfork.aspx?action=renew.

[11] *See* https://www.txdps.state.tx.us/DriverLicense/limitedTerm.htm.

[12] The Jane Does are similarly cavalier in their treatment of the budgetary "objective" labeled "Driver License." Tex. Dep't of Public Safety, *Operating Budget, Fiscal Year 2014* II.A.2 (2013), *cited in* Am. Br. 7-8. This report does not purport to identify *all* driver's license costs incurred by the State. In short, the Does' repeated insinuation that the Plaintiffs may have engaged in "fabrication," Br. 13, 54, 56, is both irresponsible and inappropriate—especially in light of their own casual treatment of these materials.

that Plaintiffs have standing based on the healthcare, education, and law enforcement costs imposed by DAPA. The district court found that unauthorized aliens impose such costs, and that more unauthorized aliens would be present in Texas as a result of DAPA (in part, because fewer unauthorized aliens would choose to leave voluntarily). P.I. Op. at *22-26. The *only* reason the district court denied standing on this ground is that there were speculative offsetting benefits—which, the stay panel held, should not be considered in the standing analysis. P.I. Op. at *27; Stay Op. at *4-5.

To sum up, the Does are criticizing the government for failing to make a mistaken, unhelpful argument which they themselves declined to make below. That cannot conceivably rebut the presumption of adequate representation. Moreover, the Does' assertion (at 54) that Defendants would refuse to make this argument in the future—even if it somehow became plausible or relevant—is pure speculation. If the argument would advance DAPA's cause, there is every reason to believe the Defendants will make it. *See United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991) ("speculation" does not create an entitlement to intervene).

b. In addition to complaining about an argument Defendants *didn't* make, the Does also question (at 52-54) an argument Defendants did make. Specifically, they object to the suggestion (however tentative) that under some

circumstances the Plaintiffs might be entitled not to provide driver's licenses to DAPA recipients.[13]

The Does claim that this position is deeply inimical to their interests. Br. 44, 52. But that directly contradicts their pleadings below. Their proposed response to the preliminary injunction motion *adopted and incorporated in full* the Defendants' response—which made the very argument the Does now claim is so harmful to them. ROA.2664; *see* ROA.428-29 (Defendants' response arguing that DAPA "does not require States to provide any state benefits to deferred action recipients," that states "have leeway in administering [driver's license] schemes" and that the driver's license costs imposed by DAPA should therefore be regarded as self-inflicted injuries).

The Does have never explained their change of heart—not even in their amicus brief in the preliminary injunction appeal, which ignores this entire subject. It is hard to reconcile the Does' failure to address this issue in their amicus brief—and their outright endorsement of the argument below—with their current position that Defendants' argument is severely harmful to their interests.

Moreover, it is clear why Defendants shied away from the position that "any refusal" by a State to offer driver's licenses to deferred action grantees

[13] *See* Appellants' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 28-29 (5th Cir.) (suggesting that in some narrow circumstances such a scheme might not be preempted, but also suggesting it would likely violate the Equal Protection Clause); Appellees' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 29-30 (5th Cir.) (criticizing Defendants for their shifting positions on this issue).

would be "preempted by federal law." Br. 22. After all, that position would be straightforwardly fatal to DAPA's legality. If DAPA preempts state law, any state with a conflicting law (such as Arizona) would have standing to sue on that basis alone;[14] it would become even more difficult to characterize DAPA as enforcement discretion;[15] and DAPA would self-evidently confer rights, making it a substantive rule that requires notice and comment.[16]

Even assuming that the Does have genuinely changed their mind and are now committed to pursuing this self-undermining position, they are still not entitled to intervene. This is at most a purely legal disagreement with the Defendants' position, and the Does can adequately address it by continuing to participate in this case as amici curiae. *See, e.g.*, *DOE*, 754 F.2d at 553 ("The utilities may seek to present their views as *amicus curiae*."); *Hopwood*, 21 F.3d at 606 ("[The proposed intervenors] have been authorized to act as amicus and we see no indication that the State would not welcome their assistance."); *Villas*, 245 F.R.D. at 555 (explaining that where issues are primarily legal, proposed intervenors could adequately address them by appearing as amici); 6-24 MOORE'S FEDERAL PRACTICE § 24.03 (noting that "movants concerned only

[14] *See* Stay Op. at *3-4 (expressly endorsing the settled principle that States always have standing to challenge the preemption of their laws).

[15] *See* Stay Op. at *10 (explaining that an exercise of agency power creates a focus for judicial review).

[16] *See* Stay Op. at *12 (discussing the substantive rule test).

about the legal principles may appear as amici curiae, but they are not entitled to intervene as of right").[17]

After all, the Does' only concern is that this argument may create a harmful precedent. Br. 53. But it is well-established that the "potential precedential effects of a court ruling are the type of indirect economic interests that are insufficient to confer intervention as of right." *Bear Ranch, LLC v. Heart-Brand Beef, Inc.*, 286 F.R.D. 313, 317 (S.D. Tex. 2012) (Costa, J.). As the Seventh Circuit explained in a passage approvingly quoted by this Court, "When should the prospect of an appellate decision cutting off further litigation … be enough to support intervention? 'Infrequently' is one response, an essential one if cases are to remain manageable. … Participation as *amicus curiae* will alert the court to the legal contentions of concerned bystanders." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532-33 (7th Cir. 1988) (quoted in *Taylor Commc'ns Grp., Inc. v. Sw. Bell Tel. Co.*, 172 F.3d 385, 389 (5th Cir. 1999)).

3. The Jane Does' Nonfeasance Argument Is Unpersuasive.

Finally, the Jane Does attempt to overcome the presumption of adequacy by pointing to Defendants' difficulties relating to the implementation of

[17] *See generally Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013) (noting that appellants "retain[ed] the ability to present their views … by seeking leave to file amicus briefs" and that the "availability of such alternative avenues of expression reinforces our disinclination to drive district courts into multi-cornered lawsuits by indiscriminately granting would-be intervenors party status"); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 526 (5th Cir. 1994) ("Intervention generally is not appropriate where the applicant can protect its interests … through some other means.").

DAPA. The Does' description of the facts is accurate. Contrary to their representations to the district court, Defendants granted over 100,000 Expanded-DACA three-year deferred action terms before the preliminary injunction was in place. ROA.4950; *see* Br. 57. The district court has criticized them for this. *See, e.g.,* ROA.5229; Br. 58. Moreover, *after* the preliminary injunction was in place, Defendants violated it by giving out over 2,000 more three-year terms. ROA.5320; *see* Br. 57. And it is reasonable for the Does to observe that recent declarations by 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." Br. 58; *see* ROA.5711-39 (USCIS declarations).

Whether or not any of this amounts to nonfeasance, it does not amount to the sort of *relevant* nonfeasance that would sufficiently impair Defendants' ability to represent the Does' interests.[18]

The Does argue that Defendants are now "distract[ed]." Br. 59. They claim that "the Federal Government, instead of defending DAPA, is now spending its energies implementing intensive document preservation, review and production efforts" in response to a district court discovery order. Br. 58. But if there is one litigant capable of attending to two matters at once, it is

[18] The Does cite no cases, and we are aware of none, suggesting that *any* nonfeasance, however unrelated to the proposed intervenors' interests, is sufficient to demonstrate inadequate representation.

surely the federal government. The Department of Justice is easily able, particularly in a case of this significance, to assign separate teams of lawyers to the discovery issues and the merits issues (as it apparently has). *See Haspel*, 493 F.3d at 579 (no inadequacy where party had able counsel); *Tex. Educ. Agency*, 138 F.R.D. at 507 (noting that the government had "numerous attorneys working on this case" and that the "record in this case is replete with adequate and full representation"); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (no intervention where "the named defendants … have adequately defended this suit"); 7C FEDERAL PRACTICE & PROCEDURE § 1909 (noting that the United States has been presumed to be an adequate representative in a wide variety of cases).

The Does also argue that the Defendants have lost the confidence of the district court. The best source of guidance on that question is, of course, the district court itself. And while it has criticized the Defendants and even contemplated striking their pleadings, ROA.5236, it declined to do so in part because "the country … needs and deserves a resolution on the merits." ROA.5236. Implicit in that is the conclusion that, at least as of this moment,[19] the district court views Defendants as capable of litigating the case to its resolution. *See* ROA.5236 ("The court … finds that the issues at stake here have national significance and deserve to be fully considered on the merits by the

[19] The district court has scheduled a hearing on all pending matters (such as whether further discovery is warranted) for June 23, 2015. Order, *Texas et al. v. United States et al.*, No. 1:14-cv-00254 (S.D. Tex. June 10, 2015).

Fifth Circuit Court of Appeals and, in all probability, the Supreme Court of the United States.").[20] In short, the district court appears to regard Defendants as the appropriate party to defend DAPA—and there is no reason for this Court to reject that conclusion.

4. Practical Considerations Preclude Intervention.

Ultimately, the Rule 24(a)(2) inquiry is a practical one. *See, e.g., Tex. E. Transmission Corp.*, 923 F.2d at 413 (rejecting "arguments in support of intervention of right [that] rest on a technical rather than a practical application of Rule 24(a)(2)"). Here, no "greater justice could be attained" by intervention, but many interested parties "would be hurt." *Glickman*, 256 F.3d at 375. Accordingly, intervention should be denied.

a. There will be no substantial benefit from intervention. Most fundamentally, there should be a heavy presumption that the Department of Justice is capable of defending a federal program effecting one of the largest changes in immigration policy in our Nation's history. Moreover, the Jane Does have "no special expertise on the … law issues" involved in the case, so they have "little basis for arguing inadequate representation." *DOE*, 754 F.2d at 553. And as noted above, the Does have offered no "unique arguments," *Cajun Electric Power Co-op., Inc. v. Gulf States Utilities, Inc.,* 940 F.2d 117, 120 (5th Cir.

[20] If Defendants had genuinely lost the district court's confidence, the court could have explored any number of procedural avenues that would have allowed other litigants to take up the defense of DAPA (for instance, it could have reconsidered its denial of the Does' intervention motion, or invited intervention motions from other interested parties). The district court has not done so. Of course, it remains free to take these or other measures in the future if circumstances warrant.

1991)—and their narrow legal disagreements with Defendants can be fully aired out in amicus briefs.

The Does also have no special expertise in factual development. And to whatever limited extent they may be privy to knowledge or information that would be helpful in defending DAPA, they can simply share that information with Defendants. *Hopwood*, 21 F.3d at 605-06 ("Although the [proposed intervenors] may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State."); *Tex. Educ. Agency*, 138 F.R.D. at 506 (rejecting argument that proposed intervenors had more "local knowledge" because intervenors "had never attempted to directly communicate their position to the Government").

b. By contrast, many interested parties would be harmed by intervention. As the district court observed, this case is "time sensitive," so "the addition of new parties will cause undue delay and prejudice." ROA.4371. Accordingly, allowing intervention would have been "imprudent" because "it would have unduly complicated and delayed the orderly progression of this case." ROA.4390. This is no surprise: "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair." *Bush*, 740 F.2d at 359. Here, Plaintiffs, Defendants, and all other interested individuals and entities—many of whom have appropriately confined themselves to participating as amici—would all be harmed by a delayed resolution of this important case.

This Court has emphasized that intervention should only be permitted if it is "compatible with efficiency and due process." *Taylor*, 172 F.3d at 388 (internal quotation marks omitted). Indeed, one of Rule 24's goals is "to prevent the single lawsuit from becoming fruitlessly complex or unending." *Tex. E. Transmission Corp.*, 923 F.2d at 412 (internal quotation marks omitted); *see Westinghouse*, 542 F.2d at 217 ("[W]e also must consider the potential unmanageability of the … litigation should we allow intervention.") Here, as the district court observed, adding the Does would make the litigation unnecessarily complex. And if they are allowed to intervene, any number of additional interested parties—perhaps some from the lengthy list of amici—may seek to do the same.

In short, both formal and pragmatic considerations counsel against intervention.

II. The Jane Does Have Demonstrated A Sufficient Interest, But It Undermines Their Merits Case.

If this Court concludes that the Jane Does have demonstrated inadequate representation, it will have to determine whether the Does "claim[] an interest relating to the property or transaction that is the subject of the action." FED. R. CIV. P. 24(a)(2). This is a notoriously difficult test to apply. *See, e.g.*, 7C FEDERAL PRACTICE & PROCEDURE § 1908.1 (noting that "[t]here is not any clear definition of the nature of" a Rule 24(a)(2) interest). Nevertheless, this Court's cases make clear that the Does can make the required showing *only* by making arguments that undercut their position on the merits of the lawsuit.

A. To justify intervention, the Does must assert an interest that is "direct, substantial," and, most importantly, "legally protectable." *New Orleans Pub. Serv. Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (internal quotation marks omitted). In other words, the interest must "be one which the substantive law recognizes as belonging to or being owned by the applicant." *Id.* at 464.

Accordingly, "consideration of practical harm is irrelevant"—the proposed intervenor must point to a "direct legal right." *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 62-63 (5th Cir. 1987); *see also Saldano v. Roach*, 363 F.3d 545, 553 (5th Cir. 2004) (no intervention in the absence of a legally cognizable interest, even if the intervenor would "be affected, as a practical matter," by the lawsuit); *Lelsz*, 710 F.2d at 1046 ("Thus, where a would-be intervenor is not asserting a legal right of his own, but is advocating the pursuit of a particular policy, his interest will be deemed to be adequately represented by existing parties."); *In re Lease Oil Antitrust Litig.*, 570 F.3d at 251 (explaining that an economic interest is not sufficient and that a legally protectable interest is needed).[21]

In addition, this legally cognizable interest must be "an interest in the property or other rights *that are at issue*." *Diaz v. S. Drilling Corp.*, 427 F.2d

[21] The Does are wrong to suggest that the interest test can be reduced to the "direct impact" or "real party in interest" test. Br. 29-30 & n.8. In reality, the "real party in interest" test is a separate and additional requirement. *See, e.g.*, *Saldano*, 363 F.3d at 551 (explaining that "[i]n addition" to having a legally cognizable interest, "the intervenor should be the real party in interest regarding his claim").

1118, 1124 (5th Cir. 1970). Not just any legal interest will do; the Does must identify a legal interest concerning "the subject of the action." FED. R. CIV. P. 24(a)(2). Here, the subject of the action is DAPA, so the Does have to assert a legal interest in DAPA.

B. Plaintiffs argued, and the district court agreed, that DAPA grants legal rights to its beneficiaries. *See, e.g.,* P.I. Op. at *39 (noting that "DAPA confers upon its beneficiaries the right to stay in the country lawfully"). The stay panel reached the same conclusion in a binding, precedential opinion.[22] *See, e.g.*, Stay Op. at *1 (explaining that DAPA confers lawful presence—which in turn confers eligibility for a variety of other benefits—and also makes recipients eligible for work permits); Br. 33 (asserting an interest in the right to work conferred by DAPA). This is sufficient for Plaintiffs to prevail on their procedural APA claim. The fact that DAPA confers legal rights eliminates the possibility that DAPA is simply an exercise of prosecutorial discretion, and also demonstrates that DAPA is a substantive rule requiring notice and comment. Stay Op. at *10, *12. However, it does *not*, by itself, demonstrate that the Jane Does have an interest that could support intervention.

This is because DAPA confers legal rights *on its beneficiaries*. If it were speculative whether the Jane Does would become DAPA beneficiaries, their

[22] The stay opinion creates binding precedent for future Fifth Circuit panels because it is published. *See, e.g.*, *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 411 (5th Cir. 2006); *Samaad v. City of Dallas*, 922 F.2d 216, 219 & n.2 (5th Cir. 1991) (collecting cases); *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999).

interest would be speculative as well. Their interest in DAPA would be contingent on the outcome of a separate proceeding—namely, their eventual DAPA applications. This Court has rejected intervention under those circumstances.[23]

For instance, "[a]n insurer who defends its insured under a full reservation of rights" may *not* intervene in the liability lawsuit, because its "interest in the liability lawsuit is contingent upon the outcome of the coverage lawsuit." *Ross v. Marshall*, 456 F.3d 442, 443 (5th Cir. 2006). It is only once the insurer "accepted coverage over any negligence liability" that might have been assessed against its insured that it acquired "a direct interest in the liability lawsuit." *Id.* at 444; *see also* 6-24 MOORE'S FEDERAL PRACTICE § 24.03 (explaining that "an interest that is … contingent on the future occurrence of a sequence of events is insufficient").

Accordingly, the Does can meet this test only by showing that they are *entitled* to DAPA benefits, or at least that it is not speculative to suggest they would receive them.[24] *See Bear Ranch*, 286 F.3d at 316 (observing that courts have rejected interests that were "too contingent, speculative, or remote from

[23] For this reason, the Does are wrong to suggest that there is any inconsistency in holding that (1) DAPA grants substantive rights but (2) the Does lack a sufficient interest to intervene in this case. *See, e.g.*, Br. 15.

[24] The Does' proposed interests in parenting, and in not being removed from the country, Br. 31-32, do not solve this problem. First, the Does' presence in this country and their parental rights are not at issue in this case—the validity of DAPA is. And even if these interests could potentially support intervention, they would not change the analysis. After all, these interests would be protected only if the Does become DAPA beneficiaries. If their interests in DAPA itself are too speculative, these farther-removed interests are as well.

the subject of the case"); *id.* (discussing *DOE*'s holding that even statutory obligations could not support intervention where it was speculative whether or not they would accrue); *Taylor,* 172 F.3d at 388 (explaining that *Espy* allowed intervention only because "a ruling contrary to the position of the timber industry was *certain* to affect the *already-existing* contracts." (emphasis added)); *LULAC, Dist. 19 v. City of Boerne*, 659 F.3d 421, 434 (2011) (holding that a litigant's interest was sufficient because he asserted a right which would be abrogated by a consent decree that was the subject of the action). Perhaps this is why the Does insist—albeit without elaboration—that they would be "highly likely to receive" DAPA benefits if the program is upheld. Br. 32.

But the Does can say something stronger than that. As Plaintiffs have argued, and as both the district court and the stay panel have confirmed, the Does would be all but certain to receive DAPA if they meet the eligibility criteria. *See* Stay Op. at *12-13 (approving the district court's finding that there will be no discretion in the application of DAPA). This is enough to show that their legal interests in DAPA are non-speculative. But it also further demonstrates that DAPA is a substantive rule, and is not an exercise of prosecutorial discretion. Stay Op. at *12-13; Appellees' Br., *Texas et al. v. United States et al.*, No. 15-40238, at 23-24 (5th Cir.).

C. The Does also rely on a broader interest test which, they suggest, should apply in public law cases like this one. Br. 35-37. It is not entirely clear whether this broader test actually exists, and how much work it can do. At times, this Court has explicitly cautioned *against* applying a broader test in

public law cases. *See, e.g.*, *Traffic Solutions*, 668 F.3d at 294 ("A court must be circumspect about allowing intervention of right by public-spirited citizens in suits by or against a public entity for simple reasons of expediency and judicial efficiency."); *Lelsz*, 710 F.2d at 1047 (acknowledging the importance of "according representation to diverging interests" in public law cases but noting that the existing version of Rule 24(a)(2) was already "formulated with just this sort of 'public law' case in mind"); *see also Keith*, 764 F.2d at 1268 (expressly rejecting "a broad interpretation of the interest factor in public law cases"). And even the few cases endorsing the broader test are tentative and vague. *See, e.g.*, *Brumfield*, 749 F.3d at 344 (noting that a looser standard *may* apply in public law cases).

Still, after *Brumfield* it is plausible to conclude that the "primary intended beneficiaries" of an administrative action have a sufficient interest in defending it. *Ibid.* And the Does certainly meet that test. As they correctly point out, they are the "precise focus of DAPA." Br. 27. And obtaining deferred action under DAPA would have a tremendous impact on the Does, by allowing them to avoid removal, remain unified with their children, work legally, and move freely around the country (among other benefits). *See* Br. 40-41. All in all, these consequences give the Does a sufficient interest to intervene under the looser public law test. However, they once again undercut the Does' defense of DAPA. After all, any regulation that so dramatically affects third parties is necessarily a substantive rule requiring notice and comment. *See, e.g.*, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 236 (5th Cir. 2015) (explaining

that regulations which impose "significant effects on private interests" are substantive rules (internal quotation marks omitted)).

D. In short, there is a profound contradiction—which the Jane Does aptly term a "Catch-22," Br. 37—underpinning their position. To establish a sufficient interest, they must argue (correctly) that DAPA endows them with legal rights and profoundly affects their interests; to protect DAPA from legal challenge, they must argue (incorrectly) that it is a mere policy statement that involves no affirmative action of any kind.

Fully aware of this difficulty, the Does attempt to escape the Catch-22 by asserting, in effect, that they need not actually believe in the interest that supports their intervention. According to the Does, it is enough that *Plaintiffs* believe the interest exists, and that the courts might ultimately agree. Br. 37. That possibility, the Does argue, entitles them to intervene—even if they themselves "do not share" the Plaintiffs' view. Br. 37.

This approach is foreclosed by the plain text of Rule 24(a)(2), which requires intervention to be based on an interest that the proposed intervenor "claims." *See Heaton v. Monogram Credit Card Bank of Ga.,* 297 F.3d 416, 422 (5th Cir. 2002) (explaining that "the applicant must claim an interest in the subject matter of the action").[25] That language straightforwardly precludes

[25] *See also Wolfsen Land & Cattle Co. v. Pacific Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012) ("Second, the movant must claim some interest in the property affected by the case. This interest must be 'legally protectable'—merely economic interests will not suffice."); *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1149 (9th Cir. 2010) ("An applicant for intervention must have a 'significantly protectable interest,' meaning that '(1) it asserts an interest that is protected under some law, and (2)

reliance on an interest the proposed intervenor *dis*claims. Unsurprisingly, all of the cases the Does cite in this section of their brief rely on interests that were asserted by the proposed intervenors—not denied by them.[26]

Ultimately, the Jane Does must take ownership of their position and its consequences. The only way for them to demonstrate an interest sufficient to support intervention is to make arguments that further damage their position on the merits.

CONCLUSION

The district court's decision should be affirmed.

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there is a 'relationship' between its legally protected interest and the plaintiff's claims.'"); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001) (explaining that "a putative intervenor as of right must meet four criteria" including that "the applicant must . . . claim an interest"); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) ("Under Rule 24(a)(2), the intervenors must 'claim[ ] an interest . . . .'"); *United States v. 116 Emerson Street*, 942 F.2d 74, 77 (1st Cir. 1991) (holding that "the following criteria must be met in order to intervene as a matter of right: (1) the party must claim an interest"); *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926 (9th Cir. 1990) (explaining that "the applicant must assert an interest relating to the property or transaction which is the subject of the action"); *Am. Nat'l Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989) (noting that "the proposed intervenor must claim an interest"); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984) ("To intervene as a matter of right the proposed intervenor must demonstrate . . . that he has an interest . . . .")

[26] *See Brumfield*, 749 F.3d at 344-45 (5th Cir. 2014); *In re Lease Oil Antitrust Litig.*, 570 F.3d at 250; *San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007); *Sierra Club*, 82 F.3d at 109-110; *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 826 (5th Cir. 1967).

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1. I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission 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 virus-scanning software and was reported free of viruses.

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

Dear Mr. Potapov,

The following pertains to your Appellees brief electronically filed on June 16, 2015.

You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 within **five (5) days** of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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