From *Texas v. United States* to *United States v. Texas*: The Increasing Influence of State Attorneys General on Federal Immigration Policy Through the Strategically Offensive Use of State Standing Doctrine

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The Legal and Political Importance of State Attorneys General

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I. Introduction

This past September, U.S. District Judge for the Southern District of Texas found that Deferred Action for Childhood Arrivals (DACA)—a program created over a decade ago to protect and support certain undocumented immigrants who were brought to the United States as children—was an unlawful exercise of the federal executive's power.[1] Representing a cumulation of years of legal challenges, this case in the U.S. Court of Appeals for the Fifth Circuit may finally put the legality of DACA before the Supreme Court.[2] And in doing so, the Court may need to decide whether it continues its trend of providing loose requirements for state standing or whether it will lean into its more recent move to impose certain limitations on how states can allege injuries as a result of federal executive actions.[3]

The recent DACA case also provides a glimpse into a broader trend in immigration litigation: the era of state attorneys general suing the President. As this Article will review, state attorneys general from both sides of the aisle seem to have gone trigger-happy with litigation challenging the federal executive. Whether the attorneys general purport to act in pursuit of protecting immigrant communities or to protect the safety of their state and its residents, there are important concerns with how and why state attorneys general are going beyond the boundaries of their state to challenge the federal executive and effectively dictate national policy through the courts.

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[1] Texas v. United States, No. 1:18-CV-00068, 2023 WL 5951196 (S.D. Tex. Sept. 13, 2023); Andrew Krieghbaum, *DACA's Fate in Doubt as Case Starts Path Back to Supreme Court*, BLOOMBERG LAW (Sept. 18, 2023, at 5:20 AM), https://news.bloomberglaw.com/daily-labor-report/dacas-fate-in-doubt-as-case-starts-path-back-to-supreme-court.
[2] Kreighbaum, *supra* note 1.
[3] Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. LEGIS. 1, 24–25 (2021) (detailing how the creation of "special solicitude" in the Court's holding on Massachusetts v. EPA made it significantly easier for states to establish standing in lawsuits against the federal government); William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 174, 180–82 (2023) (providing analysis on whether recent Supreme Court decisions, including United States v. Texas, where the Court denied standing for the states' challenge to the Biden administration's immigration enforcement guidelines, indicate that the court is "course correcting" the deferential era of state standing).

This broad-reaching dynamic is especially concerning when taking into account the political valence of these suits. Almost every single multistate challenge to federal executive immigration policy has been along party lines, with coalitions of Republican attorneys general suing a Democratic president and vice versa.[4] When looking closely at the nature of these suits and the arguments the state attorneys general are advancing, this Article argues that the number of legal battles over immigration that have gone through the courts in the past few presidential administrations serve as a prime example of party politics masquerading as public interest.

To do so, this Article proceeds in two major parts. First, this Article reviews the legal mechanisms that enable state attorneys general to challenge the federal government, particularly defenses to federal preemption and the creation of standing doctrine that is more deferential to states, and how these mechanisms have developed in and through state-led immigration litigation. In conducting this review, the Article posits that there are two broad categories for classifying how attorneys general act in the immigration space: defensively to enforce state authority and offensively to attack federal authority. When comparing the two approaches, we can begin to see a dissonance between when state attorneys general act most firmly in their authority to protect the public interest (defensive approach) and how state attorneys general are actually using their authority to act (offensive approach).

Second, this Article explores the evolution of the strategically offensive immigration suits pursued by states attorney general in order to better understand the potential scope of the attorneys' general influence on federal immigration policy. It does so by conducting an extensive analysis of two key state-led cases challenging federal executive power: *Texas v. United States* and *United States v. Texas*.[5] In *Texas v. United States*, the Texas state attorney general opened the

[4] *Infra* Section II introductory material.
[5] It is not the aim of this Article to specifically challenge the Texas attorneys general in how they approach immigration matters. Again, partisan state-led challenges to federal executive immigration actions are not a problem

floodgates of state-led suits challenging immigration policy by pushing back against the Obama administration's Deferred Action for Parents of American Citizens and Lawful Permanent Residents (DAPA) program, alleging that the state was burdened by the program because it would have to issue driver's licenses to DAPA beneficiaries.[6] Years later, Texas would go on to challenge the federal executive's general use of prosecutorial discretion to set immigration enforcement prioritization guidelines in *United States v. Texas*.[7] Key to both of these cases was the question of whether the states had standing to challenge the federal executive, as the potential injuries were speculative in nature.

Ultimately, this article argues that the deferential approach developed by courts for assessing state challenges to the federal executive's immigration policies has allowed state attorney generals to increase their influence over immigration matters in a way that is driven more by the individual political ideologies—and the partisan politics—of the attorneys general, rather than vindicating the legitimate sovereign interests of the state. The politically driven influence of state attorneys general on immigration matters is having significant effects on how our immigration system functions and how our immigrant communities live and survive in this country. As the future of DACA, and the thousands of DACA recipients who have come to rely on the program, hang in the balance, we must ask ourselves why we are in this situation and whether we want to continue to allow state attorneys general to put us in these situations.[8]

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of just one political party. Rather, Texas's leadership on immigration challenges has made it so that one simply cannot wade into this area of law without having to wrestle with the tactics of this specific Office of Attorney General.

[6] Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

[7] United States v. Texas, 599 U.S. 670, 674 (2023).

[8] Laurence Benenson, *Explainer: The Fifth Circuit's DACA Rule*, NAT'L IMMIGR. FORUM (Oct. 7, 2022), https://immigrationforum.org/article/explainer-the-fifth-circuits-daca-ruling/.

II. The Legal Mechanisms that Enable State Attorneys General to Challenge the Federal Government and How These Mechanisms Have Evolved in the Immigration Space

States suing the federal government has become an increasingly common occurrence, and there are significant trends within this phenomenon that elucidate how and why states sue the federal government.[9] While states have challenged congressional mandates—most famously the Affordable Care Act[10]—an overwhelming majority of state-initiated suits have been challenges to the actions of the federal executive branch, *i.e.*, federal agencies or the President.[11] Where these challenges have been successful, state attorneys general have generally compelled or halted actions by federal agencies by acting as a bloc in multistate suits—allowing statewide officers to effectively engage in national policy-making and policy-blocking.[12]

As state attorneys general have increased their presence on the national stage, there has also been increased criticism over *why* they are getting into these broad-reaching lawsuits. When looking at the explosion of multistate lawsuits over the past few years, there is concern that attorneys general pursue these high-profile suits against the federal government because of their own personal political motivations rather than a desire to protect the public interest of their state or defend the states' sovereign prerogatives as players in our dual federalist system. [13] This is not

[9] Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633 (2018).
[10] *Id.*
[11] *Id.*
[12] Paul Nolette, *Commandeering Federalism: The Rise of the Activity State Attorneys General*, LAW & LIBERTY (Sept. 5, 2016), https://lawliberty.org/forum/commandeering-federalism-the-rise-of-the-activist-state-attorneys-general/
[13] *See id.* ("The A[ttorneys] G[eneral, far from 'protecting the interests of their states,' as they frequently claim, are doing the bidding of partisan and interest coalitions on the Left and Right alike."); Lin, *supra* note 9, at 649–51 (arguing that while state-led lawsuits against the federal government may serve important federalism functions, there are evident partisan motivations in many of these suits that undermine the characterization that each of these lawsuits are faithful efforts to vindicate federalism); *see also* Miller, *supra* note 3, at 18–23 (discussing the political and partisan nature of multistate litigation in contemporary American politics, and observing that "[t]he pattern has become clear that state attorneys general of the opposite party will use lawsuits against the federal government as a political and partisan weapon.").

an unfounded concern. Over the past three presidential administrations, almost all multistate lawsuits were partisan in nature, with state attorney generals of one party suing a President who was a member of the opposite political party.[14]

In addition to overwhelming partisanship of multi-state lawsuits against the federal government, another notable trend is that states are increasingly suing the federal executive over immigration matters. Dr. Paul Nolette, a leading scholar on state attorneys general and lead researcher of the State Litigation and Attorneys General Activity Database, has tracked nearly 500 multi-state lawsuits against the federal executive since 1980.[15] Of these nearly 500 cases, only 32 have been multistate challenges to the federal executive's immigration policies,[16] and nearly all of these challenges occurred during the Biden and Trump administrations.[17]

Consistent with the larger movement, each of these challenges to federal immigration initiatives were circumstances where attorneys general of one political party were challenging a President of the other political party, such as Texas Attorney General Ken Paxton's effort to stop the Biden administration from ending Trump-era asylum restrictions or New York Attorney General Letitia James suing the Trump administration over its attempts to exclude undocumented

[14] *State Lawsuits Database*, STATE LITIGATION AND AG ACTIVITY DATABASE (Sept. 2, 2023), https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/; Miller, *supra* note 3, at 19-20 (detailing that Republican state attorneys general sued the Obama administration seventy-eight times, while nearly all the 138 lawsuits led by states against the Trump administration during its four years in office were led by Democratic state attorneys general. Additionally, the Democratic states of New York, California, Massachusetts, Washington, and Hawaii led most often in the suits against the Trump administration, and Texas often leads lawsuits against Democratic administrations.).

[15] *Data Collection Methods*, STATE LITIGATION AND AG ACTIVITY DATABASE, https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/ (Dr. Nolette's research covers multi-state lawsuits from 1980 to the present. This dataset is limited to circumstances where: at least two attorneys general were in a single case against the United States, the president, a federal agency, or another other federal official; and the attorneys general appeared as direct parties in the case, including both initiating a case or joining an existing case as direct intervenors.)

[16] *State Lawsuits Database*, supra note 14 (filtering by "issue area" to immigration).

[17] *Id.* (after filtering to the immigration cases, 31 out of 32 multi-state challenges to federal immigration policy were initiated during the Trump and Biden administrations. The remaining lawsuit was Texas v. U.S., Texas's challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).).

immigrants from the U.S. Census count.[18] Just under the Biden administration, federal courts have stalled various administration actions related to immigration as a result of state pushback, including the administration's temporary pause on immigration enforcement, new immigration enforcement guidelines, and plans to lift the Title 42 health policy barring entry of asylum seekers at the border during the COVID-19 pandemic.[19] This drastic increase in state-led lawsuits in response to federal immigration policy changes and initiatives begs the question: why are state attorneys general from both sides of the aisle suddenly so interested in suing the President over immigration matters?

These suits also raise important queries about how and why state attorney generals are challenging the federal executive and effectively going beyond the boundaries of their states to dictate nationwide policy. To begin to unravel the foundational aspects of these concerns, this section examines the legal mechanisms that allow states to challenge actions by the federal government, including state defenses against federal preemption and the special solicitude standing afforded to states. Then, this Article reviews the myriad of ways that state attorneys general may, and do, exercise their authority in the immigration context—which consists of more than just suing the President. After reviewing how and when attorneys general invoke their power to regulate immigration matters, this section proposes a categorical framework to comprehend what interest of state sovereignty is at stake when attorneys general challenge the federal government, and when attorneys general are most faithfully acting to vindicate these interests of state sovereignty.

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[18] *Id.*; *AG Paxton Sues Biden Administration to Reinstate Migrant Protection Protocol*, Press Release, ATTORNEY GENERAL OF TEXAS (Apr. 13, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-sues-biden-administration-reinstate-migrant-protection-protocols; Attorney General James Defends Census Against Trump Administration's Latest Attack at the Supreme Court, Press Release, NEW YORK STATE ATTORNEY GENERAL (Nov. 30, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-defends-census-against-trump-administrations-latest-attack.

[19] Benenson, *supra* note 8.

A. The Power of State Attorneys General to Challenge and Sue the Federal Government

In our dual federalist system, states are seen as an important check on federal overreach.[20] As the Supreme Court has previously articulated, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."[21] In essence, our constitutional design enables states to push back against undue exercise of federal might in order to control this aspect of our government—deeming the states as "guardians against federal overreach."[22]

One way that states theoretically safeguard these boundaries of power is by challenging the federal government through the court system when its efforts encroach on or burden the states.[23] To enable this form of constitutional checks and balances, courts have allowed states to vindicate their sovereign interests through unique legal mechanisms, including defenses against federal preemption and the creation of "special solicitude" to help states establish standing.[24]

Both of these mechanisms have been critical to state attorneys' general efforts to protect the states' role as co-regulators in areas that significantly impact their residents, from environmental protection to managing the sale of tobacco products.[25] State attorneys general have taken a particular interest in immigration matters,[26] including effectively functioning as a

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[20] F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 94–96 (2018).
[21] Bond v. United States, 564 U.S. 211, 222 (2011).
[22] Hessick & Marshall, *supra* note 20, at 96.
[23] *Id.* at 94.
[24] *Id.* at 89–95.
[25] Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (The State of Massachusetts, with several other states, suing the Environmental Protection Agency to regulate carbon dioxide emissions in order to better protect the environments of the states); Lorillard Tobacco Co. v. Reily, 533 U.S. 525 (2001) (upholding state regulations requiring retailers to place tobacco products behind counters).
[26] *See* Pratheepan Gulasekaram, *Immigration Enforcement Preemption*, 84 OHIO ST. L.J. 535 (2023) (analyzing the Supreme Court's evolving jurisprudence that now seemingly allows states to play a greater role in immigration enforcement matters).

blockade on certain initiatives and policy changes proposed by the federal executive.[27] While states have historically shared in some aspects of regulating immigration, state attorneys general have seemingly leveraged the unique legal mechanisms provided to states to create a new era of state influence over immigration.[28]

1. State Attorney Generals Have Carved Out Greater State Authority Over Immigration Matters by Defending State Laws Against Federal Preemption

One such avenue that attorneys general have pursued to increase state influence over immigration is by advocating for more expansive state authority to regulate aspects of immigration enforcement as a defense against federal preemption. When the states and the federal government act simultaneously to address issues of public interest—including when both entities act to regulate immigration matters—state and federal law can come into conflict. Theoretically, the Supremacy Clause of the U.S. Constitution resolves these conflicts by mandating that federal sovereignty displace state law, but "the exact point at which state power impermissibly interferes with federal prerogatives is difficult to identify."[29] This is especially true in the context of immigration, where the federal government largely controls who may legally enter and reside in the country, but the state dictates the legal and policy decisions that impact immigrants once they enter a particular state.[30]

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[27] *See e.g.*, Texas v. U.S., 579 U.S. 547 (2016) (The State of Texas successfully led an effort to block the Obama administration from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)); DHS v. Regents Univ. Cal., 140 S.Ct. 1891 (States joined in the successful effort to challenge the Trump administration's attempted rescission of the Deferred Action for Childhood Arrivals program).
[28] *See* Addison Thompson, *The Office of the State Attorney General and the Protection of Immigrant Communities: Exploring an Expanded Role*, 38 COLUM. HUM. RTS. L. REV. 387, 394–96 (2007); Baude & Bray, *supra* note 3, at 168 (expressing concerns with how broadly state standing has been read after reviewing the development of state standing doctrine and the speculative injuries allowed to grant standing after federal action).
[29] Thompson, *supra* note 28, at 393.
[30] *Id.* at 397; *see* Kansas v. Garcia, 140 S. Ct. 791, 805 (2020) (reasoning that while the Court's precedent held that federal immigration law occupied the field of noncitizen registration, it did not create a comprehensive and unified system regarding the information that a State may require employees to provide, leaving space for states to regulate).

Preemption challenges can pose a significant threat to how the state exercises its authority as a political entity. Preemption not only displaces state laws, but it also sets a boundary of what and how much the state can legislate or regulate in any given area. Effectively, preemption draws the line in the sand between the states and the federal government, and it can push the line back to the point where it leaves no space for the state to act. Given the drastic effect that preemption can have on a state's authority to craft its own laws and respond to the needs of its state, preemption doctrine is important to the efforts of state attorneys general to serve their citizens.[31]

As a National Association of Attorneys General (NAAG) preemption report details, there are several ways that federal law can preempt state laws.[32] Generally, there are three major categories of preemption: express preemption, where the federal statute explicitly declares a state law is preempted; implied preemption, where state law conflicts with the mandates of federal law; and field preemption, where federal law creates a scheme of federal regulation so pervasive that is reasonable to infer that Congress left no room for states to supplement it.[33] In arguing in defense of state laws, state attorney generals can rely on several constitutionally-based and statutorily-based arguments. This includes that the state is acting within its historic police powers; that the state is acting absent congressional intent to preempt; that Congress's full purposes and objectives are difficult to discern; and that the state laws further countervailing congressional interests.[34]

In the immigration context, there have been several instances in which states have faced federal preemption challenges, particularly where states have sought to regulate unauthorized

[31] Thompson, *supra* note 28.
[32] Dan Schweitzer, *The Law of Preemption*, NAT'L ATTORNEYS GENERAL TRAINING & RSCH. INSTITUTE 3–5 (Oct. 2011), https://www.naag.org/wp-content/uploads/2020/10/The-Law-of-Preemption-2d-ed.-FINAL.pdf.
[33] *Id.*; Thompson, *supra* note 28, at 393.
[34] Schweitzer, supra note 32, at 9–13.

noncitizen employment. Despite the seemingly expansive federal control of immigration, states have been successful in defending their laws from federal preemption, as seen by the Supreme Court's recent decision to uphold Kansas's identity theft and fraud laws that allowed for the prosecution of unauthorized noncitizens seeking employment.[35] The Kansas decision seems to indicate a significant shift away from the Court's previous precedent in *Arizona v. United States*, which maintained the federal government's exclusive control over the regulation of unauthorized employment.[36] Under the new *Kansas* approach, immigration enforcement has seemingly become more like any other regulatory area, "where enforcement redundancy and overlap between federal and state authorities is common."[37]

As will be further examined in this Article, state attorneys general have found themselves at the forefront of an expanding realm of state authority by advocating for their state's immigration regulatory efforts. The advocacy of state attorneys general has been critical in carving out a greater role for states as co-regulators of immigration matters—significantly altering the balance of power in an area of law that has often emphasized federal control.

2. State Attorney Generals Have Used the Leniency of Standing Doctrine to Launch Successful Attacks on the Policy Decision-Making of the Federal Executive

Just as state attorney generals have used preemption doctrine to expand state presence in immigration regulation, attorneys general have leveraged the leniency of state standing to increase state influence over the federal executive's actions, particularly in regard to immigration. Theoretically, the principles of standing serve as a gatekeeping function for the courts—making sure the judiciary is only hearing cases where the proper party is seeking the

[35] Kansas v. Garcia, 140 S.Ct. 791 (2020).
[36] Gulasekaram, *supra* note 26, at 538–39.
[37] *Id.* at 539.

proper remedy. However, states seemingly receive certain doctrinal "subsidies" that make it easier for them to establish standing.[38]

First, states have more avenues available to establish standing than normal, private individuals or entities. States can still establish standing by demonstrating an injury to the same kinds of interests held by private litigants, like harm to property holdings.[39] However, states can also establish standing through their sovereign and quasi-sovereign interests.[40] Under its sovereign interests, states can seek the enforcement of its criminal and civil laws and defend its state laws against preemption challenges.[41] States can also establish standing in order to vindicate quasi-sovereign interests in the broad well-being of its populace, referred to as *parens patriae* standing.[42]

Additionally, recent jurisprudence seems to set a relatively low standing threshold for states when they are suing the federal government.[43] As exemplified by the creation of special solicitude, states as political entities are given more deference when articulating why they should be allowed to leverage the might of the courts in response to, essentially, policy disagreements with the federal government.

Broadly speaking, a party has standing where it can show an "injury in fact" that is fairly traceable to the defendant's actions and redressable by the relief the plaintiff seeks.[44] But when states seek to establish standing, courts will provide them "special solicitude."[45] The Court first

[38] This article uses the term "subsidy" to characterize the many points at which states receive deferential treatment in asserting a claim of injury, whether it be through their *parens patriae* authority or special solicitude. The way that state standing doctrine has developed may not result in standing being established in every single case, *see infra* Section III(B), but the judiciary's assessment of state standing claims certainly provides states with many different forms of assistance.
[39] Hessick & Marshall, *supra* note 20, at 90.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Baude & Bray, *supra* note 3, at 168.
[44] Davis v. FEC, 554 U.S. 724, 734 (2008) (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)).
[45] Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

articulated this concept of "special solicitude" in *Massachusetts v. EPA*, where the State of Massachusetts, along with eleven other states, sued the Environmental Protection Agency (EPA) for failing to regulate carbon dioxide under the Clean Air Act.[46] Massachusetts' claim to standing rested on the financial costs the State would come to bear in the coming decades from sea level rises and erosion of Massachusetts's coastline if global warming continued unchecked due to the EPA's failure to regulate a driving cause of climate change.[47] Despite the arguably speculative nature of the State's alleged injury, the Court ultimately found that "Massachusetts's stake in protecting its quasi-sovereign interest" entitled it to "special solicitude" in a standing analysis, thereby pushing the state across the standing threshold.[48]

Besides insinuating that state standing should be read broadly as a form of compensation to the states for sacrificing sovereign prerogatives by joining the union, the Court's obtuse articulation of "special solicitude" in *Massachusetts v. EPA* left open many questions on how states can establish standing.[49] Of particular concern was whether the Court's reference to "quasi-sovereign interests" meant that it was opening the door to allowing states to establish *parens patriae* standing when suing the federal executive to compel compliance with federal law. However, as scholars F. Andrew Hessick and William P. Marshall argue in their analysis of *Massachusetts v. EPA*, the reference to "quasi-sovereign interests" appears to not be a reference

[46] *Id.* at 521.
[47] *Id.* at 522–523.
[48] *Id.* at 520–51.
[49] *Id.* at 516; *see* Baude & Bray, *supra* note 3, at 166 (reviewing the Court's creation of special solicitude in *Massachusetts v. EPA*, observing that "the Court emphasized that states were *entitled to special access to the federal courts*.") (emphasis added); Philip Green, *Keeping Them Honest: How State Attorneys General Use Multistate Litigation to Exert Meaningful Oversight over Administrative Agencies in the Trump Era*, 71 ADMIN. L. REV. 251, 258 (2019) (defining the sovereign prerogatives sacrificed by the states that give rise to special solicitude, including: preventing neighbor states from engaging in behaviors harmful to their own interests; making treaties with foreign nations; creating regulations free from federal preemption).

to *parens patriae* standing, but rather an attempt by the Court to relax the restriction on speculative injuries.[50]

Hessick and Marshall further clarify that it is unlikely that sovereign interests or *parens patriae* standing would provide a basis to sue federal officials for compliance with a federal statute of the Constitution.[51] A state's hypothetical sovereign interest claim would likely fail because states do not have a sovereign interest in federal compliance with a federal statute.[52] Moreover, a *parens patriae* suit would likely fail because its aim to protect the well-being of the state citizenry is incompatible with principles of federal supremacy.[53] As the Supreme Court articulated in *Massachusetts v. Mellon* when it refused to hear a state challenge to federal spending to protect mothers and infants, "it is no part of [the state's] duty or power to enforce their [citizens'] rights in respect of their relation with the federal government," nor may the state under *parens patriae* authority "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."[54] Therefore, it is not the job of the state to sue to protect its citizens from unconstitutional acts from the federal government, but rather the responsibility of the citizens themselves to challenge these acts.

Under Hessick and Marshall's analysis, states are seemingly left with only one avenue to establish standing when suing the federal government: factual injury. As such, they characterize special solicitude solely as a means of relaxing the restriction on speculative injuries—a means that is seemingly distinct and separate from a *parens patriae* form of standing.[55] In

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[50] Hessick & Marshall, *supra* note 20, at 107 ("*Massachusetts v. EPA* thus supports the idea that, when a state alleges a quasi-sovereign interest, the standing inquiry should be relaxed, even when the state seeks to base standing on an injury in fact instead of *parens patriae* standing.").
[51] *Id.* at 91.
[52] *Id.*
[53] *See id.* at 91–92 ("According to the Court, the United States has the primary responsibility of managing the federal government and ensuring its compliance with federal law. Therefore, states cannot sue the federal government as *parens patriae* to protect state citizens from unconstitutional acts of the federal government.").
[54] Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).
[55] Hessick & Marshall, *supra* note 20, at 107.

Massachusetts, the state was allowed to speculate as to costs from land erosion that may not occur for decades, and the court granted this distant and speculative injury that would have failed if advanced by any other litigant.[56] When states are allowed to establish standing on factual injuries crafted in such a forward-looking and attenuated manner, there are serious concerns over whether there is a meaningful difference between speculative factual injuries permissible under special solicitude and the impermissible form of *parens patriae* standing when suing the federal government.[57]

This line-blurring is further explored by William Baude and Samuel L. Bray, who argue that a relaxed approach to speculative injury is not totally separate from *parens patriae*.[58] Rather, Baude and Bray posit that a form of standing that allows for such speculative injuries for states undermines the doctrinal prohibition of *parens patriae* lawsuits against the federal government dating back to *Mellon*.[59] While Baude and Bray acknowledge that the Court attempted to distinguish between the relaxed speculative form of factual injury determined to be permissible under standing doctrine and the impermissible form of *parens patriae* standing, they find that the logical implications of a relaxed form of factual injuries to be close to what would result from a *parens patriae* form of standing.[60]

Specifically, they argue that the relaxed form of factual injuries articulated in *Massachusetts v. EPA* "could license a kind of broad economic speculation about the impact of federal policies on states, which might give states power to challenge every major administrative

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[56] *Id.*
[57] This concern is particularly heightened by the fact of the tension in the state claiming *parens patriae* to protect its citizens when those citizens of the state are also broadly citizens of the United States. Consequently, "the United States has the primary responsibility of managing the federal government and ensuring its compliance with federal," not the states. *Id.* at 91–92.
[58] Baude & Bray, *supra* note 3, at 166.
[59] *Id.*
[60] *Id.* at 167.

action."[61] And this sentiment has shown through many of the state-led immigration challenges that followed *Massachusetts v. EPA*.

In its successful challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), Texas was able to establish standing through the speculative administrative costs the DAPA program would have on the state—alleging that DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, forcing the state to lose millions of dollars.[62] And in Washington's challenge to the Trump administration's travel ban, the states were able to establish standing on a preliminary basis by alleging that the teaching and research missions of the state universities were harmed by the ban's effect on their faculty and students who are nationals of the seven affected countries.[63] In doing so, the Ninth Circuit acknowledged that the schools could not consider applicants or faculty from the affected countries—allowing the states to speculate as to the universities' inability to accept students or faculty who had not even applied to the schools yet.[64]

In the years since the Supreme Court announced the idea of "special solicitude" in *Massachusetts v. EPA*, standing doctrine has seemingly evolved to provide "near-automatic standing in lawsuits against the federal government."[65] According to scholar Phillip Green, this flexible approach to state standing has greatly empowered state attorneys general by removing a barrier to pursuing complex federal litigation.[66] In the following sections, this Article will take this argument one step further by arguing that, in fact, this flexible approach to standing has *substantively* empowered state attorneys general to become more influential in dictating federal immigration law. Under current standing doctrine, it is not just easier for attorneys general to

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[61] *Id.*
[62] Texas v. United States, 809 F.3d 134, 153 (5th Cir. 2015).
[63] Washington v. Trump, 847 F.3d 1151, 1159 (9th Cir. 2017).
[64] *Id.*
[65] Green, *supra* note 49, at 258.
[66] *Id.*

pursue cases; attorneys general are actively using leniency in standing to significantly alter the implementation of the country's immigration laws.

B. State Attorneys General and Immigration: Determining When Attorney Generals are Acting Most Faithfully to Vindicate State's Sovereign Prerogatives

As this Article has already begun to show, the federal government does not maintain exclusive authority over all immigration matters. While "control over immigration policy regarding who may enter the country lies with the federal government … the states—through legislation and decisional law—increasingly define immigrants' experiences after entry."[67] For instance, states determine whether noncitizens are eligible for public healthcare benefits,[68] driver's licenses,[69] in-state tuition at state colleges and universities,[70] and state and local government employment.[71] Additionally, states are becoming increasingly involved in the national debate of immigration issues by suing the federal executive over its immigration policies and initiatives—from state-led efforts to end Deferred Action for Childhood Arrivals to attempts to block the Trump administration's different iterations of its travel bans. [72]

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[67] Thompson, *supra* note 28, at 390.
[68] *Key Facts on Health Coverage of Immigrants*, KFF (Sept. 17, 2023), https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-health-coverage-of-immigrants/#:~:text=In%20January%202020%2C%20California%20extended,eligible%20on%20May%201%2C%202022 (For over twenty years, states have had the option to provide prenatal care to people regardless of immigration status by extending federal Children's Health Insurance Program (CHIP) coverage to the unborn child. Twenty states have adopted this option).
[69] *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. STATE LEGS. (Mar. 13, 2023), https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants#:~:text=These%20states%E2%80%94California%2C%20Colorado%2C,as%20a%20foreign%20birth%20certificate%2C.
[70] *Tuition & Financial Aid Equity for Undocumented Students*, HIGHER ED IMMIGRATION PORTAL, https://www.higheredimmigrationportal.org/states/.
[71] Cal. Gov't Code § 1020 (West) ("Notwithstanding any other law, a person, regardless of citizenship or immigration status, is eligible to hold an appointed civil office if the person is 18 years of age and a resident of the state."); See Cal. Gov't Code § 24001 (West) (mandates that all county employees be registered voters within the county of their appointment, where citizenship is a requirement for voter registration).
[72] *Texas v. United States: A Timeline of The Fight to Protect DACA*, MALDEF (Oct. 27, 2021), https://www.maldef.org/2021/10/texas-v-united-states-a-timeline-of-the-fight-to-protect-daca/; Joanna Walters, *Four States Sue Trump Administration Over "Un-American" Travel Ban*, GUARDIAN (Feb. 1, 2017, 3:47 AM),

As states assert their role as co-regulators of immigration matters, attorneys general play a critical role. This section reviews the different ways that state attorneys general use their power and authority to regulate immigration matters and seeks to classify the principles of sovereign interest that state attorneys general invoke when acting on immigration matters. In doing so, this Article argues that there are two broad categories for characterizing how attorneys general act in the immigration space: defensively to enforce state authority and offensively to attack federal authority.[73]

When acting *defensively*, the focus of a state attorney general is on protecting the state's institutional integrity, including by enforcing the state's laws and by protecting the state's laws from federal interference. This focus is primarily insular—concerned with the strength of the state as the decisionmaker in traditional areas of its control. When acting *offensively*, the focus of a state attorney general is on stopping the federal government from acting in a manner that may impact the states. The focus is primarily external—concerned with preventing new regulations or policy decisions from taking effect nationally. As was previously discussed, these policy-blocking suits often have a political valence, with attorneys general of one party challenging the immigration initiatives of the President of a different political party.[74]

In comparing these two approaches, this Article argues that the state's interest is stronger—meaning more tangibly connected to issues of state sovereignty—where the state attorney general is acting defensively. As will be further examined in the discussion of the state-

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https://www.theguardian.com/us-news/2017/jan/31/trump-travel-ban-state-lawsuits#:~:text=New%20York%2C%20Massachusetts%20and%20Virginia%20on%20Tuesday%20joined%20Washington%20state,arriving%20on%20flights%20from%20overseas.

[73] This Article adapts this terminology of "defensive" and "offensive" from William Baude and Samuel L. Bray's *Proper Parties, Proper Relief*. Baude & Bray, *supra* note 3, at 168. In that Comment, the authors observed trends in standing doctrine, finding that "a gradual shift over the twentieth century: from having public law questions answered *defensively*, when the law was being enforced against someone; to having such questions answered *offensively*, via suits for injunctions and declaratory judgments." *Id.* (emphasis added).

[74] *See* contextual multi-state lawsuit information, *supra* Section II, at 3–4.

led efforts to end Deferred Action for Parents of American Citizens and Lawful Permanent Residents (DAPA) and Deferred Action for Childhood Arrivals (DACA), the state interest in many of the strategically "offensive" suits pursued by attorneys general is cloudier—with significant debate on whether the state is truly acting in the best interest of its citizenry. Ultimately, the recent legal battles in the immigration space highlight emerging divisions between when state attorneys general act most firmly in their authority to protect the public interest and how state attorneys general are actually using their authority to act.

1. The Defensive Interests of State Attorneys General are Grounded in Concerns of State Authority and Integrity

Despite the impression given by the proliferation of headlines proclaiming the most recent lawsuit brought by a group of state attorneys general against the President, attorneys general have played a prominent role in regulating immigration matters in many other ways. In fact, the work of state attorneys general often intersects with immigration issues.

One such area of overlap is education, where state attorney generals have advised state legislatures on the legality of providing in-state college tuition to undocumented residents.[75] After the 1996 passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigration Responsibility Act, federal law seemed to prohibit undocumented students from receiving in-state tuition rates.[76] Despite such language, several states enacted legislative measures to grant in-state tuition for eligible undocumented immigrants, and state attorneys general were charged with advising legislatures on the legality of these initiatives and, in some cases, defending these laws in court.[77]

[75] Thompson, *supra* note 28, at 407.
[76] *Id.* at 408.
[77] *Id.* at 409–11.

As a more contemporary example, as fear spread among the immigrant community during the Trump administration, the Office of the California Attorney General worked with schools to develop policies to better protect the rights of undocumented students and their families.[78] The guidance from the office included recommendations for handling the personal information of students and their families and how to respond to information requests regarding immigration status, warrants regarding immigration enforcement, and immigration agents requesting access to school grounds.[79] Such guidance was aimed to empower California schools when potentially faced with having to respond to federal immigration enforcement, protecting both the individual students and the right of the state and localities to facilitate their students' learning environment.

Additionally, immigrants—even undocumented immigrants who lack legal presence in the United States—are residents of their home states, and state attorneys general are charged with protecting these communities just as they would any other residents within their respective states.[80] One such example was the response of the attorneys general to fraudulent schemes run by "notarios," unofficial immigration services that advertise and offer legal assistance to immigrants navigating immigration procedures—even though these services are not run by lawyers nor authorized to provide services by the Bureau of Immigration Affairs. [81] These

[78] *Attorney General Becerra Issues Guidance to K-12 Schools on Privacy and Equal Rights of All Students*, Press Release, OFFICE OF THE ATTORNEY GENERAL OF CALIFORNIA (Mar. 30, 2018), https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-guidance-k-12-schools-privacy-and-equal-rights.
[79] *Id.*
[80] While many politically conservative attorneys general may argue that *parens patriae* authority only covers the state's interest in protecting individuals with legal status, this is seemingly inconsistent with how attorneys general have approached applying the law as it affects immigrant communities. As will be demonstrated in this section, even Texas Attorney General Greg Abbott—who would go on to lead the charge against the Deferred Action for Parents of U.S. Citizens and Lawful Permanent—was a leader in cracking down on frauds targeting the immigrant community of his state, indicating an implicit acceptance that immigrant communities, even undocumented individuals, were part of the fabric of the state.
[81] Thompson, *supra* note 28, at 399.

services thrived because of the particular vulnerabilities of immigrant communities, particularly their limited fluency in English, mistrust of government, and fear of deportation.[82]

As Addison Thompson details in her work, attorney generals saw this issue arising in their states and acted to fill a gap in federal oversight by investigating and prosecuting notaries.[83] Specifically:

> Beginning in California in 1986, states began passing legislation regulating non-attorney service providers. Attorneys General began using these laws in conjunction with consumer protection statutes--particularly those aimed at deceptive practices--to target illicit immigration service providers. Hence, although the underlying issue is one that implicates immigration policy (a federal prerogative), consumer protection laws (which are situated squarely within a state's police powers) offer attorneys general the latitude necessary to protect their populations.[84]

In responding to widespread notario fraud, state attorney generals were not dissuaded from enforcing the law because the impacted community was comprised of individuals without legal status. What mattered was that state laws were being routinely violated. In fact, to better promote enforcement efforts, the then-Attorney General of Texas Greg Abbott initiated a series of culturally-sensitive campaigns aimed at informing immigrant populations about their rights, including publicly announcing that the Office of the Attorney General would not investigate the immigration status of any victim who came forward.[85]

In both examples provided—of state attorneys general advising on the intersection of education and immigration, and of attorneys general aggressively prosecuting fraudsters targeting immigrant communities—the focus of the office was on protecting and supporting residents of their states. By working to guarantee the legality of state laws or the full enforcement of state laws, state attorneys general demonstrated a concern with the scope of state authority. While the actions of the attorneys general may have had an ancillary impact on the

[82] *Id.*
[83] *Id.*
[84] *Id.* at 399–400.
[85] *Id.* at 402.

implementation of federal law, it was not their central aim to "usurp[] federal prerogatives."[86] Rather, the central question was how the state could act in the authority available to it.

As another point of contrast to when state attorneys general sue the federal executive over federal immigration policy initiatives, attorneys general are charged with defending state laws regulating in-state immigration matters from federal preemption challenges and have successfully leveraged preemption doctrine to expand the state's role in immigration matters.[87] For instance, in *Chamber of Commerce v. Whiting*, the Attorney General of Arizona successfully defended a state law imposing certain sanctions on employers who hire unauthorized aliens.[88] Critical to the argument articulated by the Attorney General was the idea that the state's authority to co-regulate noncitizen employment was within the "mainstream of state police power."[89] Specifically, the Attorney General characterized the state's interest in regulating noncitizen employment as an attempt to mitigate the harms posed by unauthorized workers entering the State's labor market, including a potential decrease in job availability for citizens and authorized workers, depressed wages and conditions, other "local" problems.[90]

However, when assessing the preemption challenge to Arizona's laws, the Supreme Court did not address the underlying concerns for *why* Arizona was implementing this law. Rather, the Supreme Court focused more on how the state was using its authority to regulate in an area of law where federal statute has already set certain regulations and definitions pertinent to unauthorized employment. Specifically, the Court agreed with the state and reaffirmed that states

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[86] *Id.* at 402.
[87] *See generally* Schweitzer, *supra* note 32.
[88] Chamber of Com. v. Whiting, 563 U.S. 582, 611 (2011) (reasoning that Arizona's law allowing suspension and revocation of business licenses for employing unauthorized noncitizens fell within the confines of the IRCA's clause reserving some regulatory authority for the states did not fundamentally conflict with the mandates of federal law); *Id.* at 6.
[89] Brief for the Respondent at 27–28, Chamber of Com. v. Whiting, 563 U.S. 582 (2011) (No. 09–115), 2010 WL 4216271.
[90] *Id.*

possess authority to regulate aspects of unauthorized employment under their police powers, albeit in a more limited capacity since Congress passed the Immigration Reform and Control Act (IRCA).[91]

Since *Whiting*, the Court has seemingly built on this principle to create even more space for states to co-regulate immigrant enforcement with the federal government.[92] In its recent *Kansas v. Garcia* decision, the Court upheld Kansas' identity-theft and false-information statutes.[93] By denying a challenge that these laws were preempted by the IRCA provision prohibiting the use of employment verification information for law enforcement purposes, the Court seemingly broke from its previous precedent *in Arizona v. United States*, in which it struck down several provisions of the state's omnibus criminal and immigration enforcement bill by arguing that the federal government maintained exclusive control over the regulation of unauthorized employment.[94]

Notably, Kansas Attorney General Derek Schmidt seemingly took a slightly different approach to the Attorney General in *Arizona v. United States.*, focusing more on how the state was able to regulate unauthorized immigration in this manner rather than the policy concerns that drove the state to pass these laws. In contrast to the arguments articulated in *Whiting*, General Schmidt focused the defense of state law on the technical aspects of IRCA, the scope of the preemptive effect of IRCA, and the potential of co-regulation between the states and the federal

[91] Whiting, 563 U.S. at 590. In *Whiting*, the court reaffirmed that "[i]n *De Canas*, we recognized that the '[p]ower to regulate immigration is unquestionably ... a federal power.' …. At the same time, however, we noted that the 'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State,'" *id.* at 588, while also recognizing that the subsequent passage of IRCA "restricts the ability of States to combat employment of unauthorized workers." *Id.* at 590.
Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 588, 131 S. Ct. 1968, 1974, 179 L. Ed. 2d 1031 (2011)
[92] *See generally* Gulasekaram, *supra* note 26 (arguing that the Supreme Court's recent decision in *Kansa v. Garcia* suggests that immigration enforcement should be treated like other regulatory areas where enforcement redundancy and overlap between federal and state authorities is common, rather than an area of law with such strong deference to federal executive power).
[93] Kansas v. Garcia, 140 S. Ct. 791 (2020).
[94] *Id.*; Gulasekaram, *supra* note 26, at 566–69.

government—a focus echoed by the Court's reasoning in upholding the state law against the preemption challenge.[95]

This evolution of the states' defenses against preemption on immigration matters could have significant implications for the institutional authority of the states, including whether states can enforce immigration laws on their own, create their own enforcement policies, or use existing state laws as proxies for federal enforcement.[96] The advocacy of state attorneys general has carved out a greater role for states as co-regulators of immigration matters—significantly altering the balance of power in an area of law that has often emphasized federal control.

And while attorneys general have successfully fashioned their defenses of state laws in the language of federalism, these suits still present an opportunity for the type of partisanship seen in what this Article calls strategically "offensive" lawsuits suing the federal government. For instance, attorneys general certainly engage in political calculus when deciding whether to defend challenged state laws.[97] Because this Article focuses on how attorneys general have leveraged standing doctrine to establish more influence over federal immigration policy, it leaves open the question of whether attorneys general are weaponizing federal preemption doctrine just as much to increase the power of states in regulating immigration.[98] However, the foundational question of preemption—whether the state has the authority to engage in regulation with the federal government—may provide a kind of doctrinal guardrail that compels state attorneys

[95] Reply Brief for the Petitioner, Kansas v. Garcia, 140 S.Ct. 791 (2020) (No. 17–834), 2019 WL 4273834; Gulasekaram, *supra* note 26, at 566 (observing that Justice Alito's reasoning relied on a "thin distinction" between the legal purpose of the employment verification forms protected by IRCA and those used to prosecute noncitizens for identity theft, rather than examining "the defendants' reasons for using a false identity in the employment process.").
[96] Gulasekaram, *supra* note 26, at 539.
[97] Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 281–82 (Mar. 2014).
[98] *See* Gulasekaram, *supra* note 26, for a full discussion on the implications of *Kansas v. Garcia* on the balance of power between the states and the federal government regarding immigration enforcement and the concerns that arise out of granting the states an out-sized role in immigration enforcement.

general to more closely advocate for interests that align with and advance institutional state prerogatives rather than their own political ideologies.

Ultimately, the common thread between these examples of state attorney general actions on immigration issues is that the attorneys general were acting to safeguard the state's role in protecting and regulating its residents. Whether advising on the legality of potential new laws or seeking the full enforcement of existing laws, the attorney general is acting as a key decisionmaker for how the state manages its infrastructure and serves its residents. In doing so, state attorneys general must focus on the authority and integrity of the state, its laws, and its governmental institutions; they must ask themselves if and how a state can act to regulate. Of course, these defensive actions are not made free from political influence. But, at the very least, the defensive actions of the state attorney general seem to inherently require them to act within the confines of state prerogatives.

2. The Dissonance Between When State Attorneys General Act in a Strategically Offensive Manner and State Prerogatives

Meanwhile, it can be difficult to identify the underlying state prerogative that attorneys general are trying to vindicate when they pursue lawsuits against the federal executive, especially in the immigration space. As previously discussed, an underlying assumption of our constitutional design is that the states serve as an essential guard against federal overreach.[99] But the overwhelming trends in the litigation now pursued by attorneys general seem to "explode[] this myth."[100] Under what this Article calls a "strategically offensive" approach, state attorneys general have shown that they are not just more willing to sue the federal executive, they are more

[99] *Supra* Section II(A); Lin, *supra* note 9, at 646–49.
[100] Nolette, *supra* note 12.

willing to sue the federal executive in a partisan manner.[101] They are also more willing to challenge the federal executive's policymaking in different areas of law, including immigration.

In other words, the deeply partisan nature of state-led litigation—whether to compel the federal government to act a certain way or to prohibit the federal government from implementing policy—seems more reflective of the commitment of attorneys general to the broader goals of their political parties than a commitment to "vindicate any abstract principle of competitive federalism."[102] This is evident where state attorneys general have advocated for legal arguments inconsistent with "states' rights" or potentially contrary to the broader state public interest.[103]

The dissonance between how state attorneys general are challenging the federal government and how state prerogatives would be best served under federalism is exemplified in the recent thread of state-led challenges to immigration policies advanced by the federal executive. This is for three reasons: 1) attorneys general have drastically increased their use of strategically offensive policy-blocking litigation to challenge federal immigration policies; 2) they have done so by leveraging the loose boundaries of state standing doctrine to pursue seemingly politically-motivated litigation with tenuous connections to issues of state prerogatives; and 3) the increasing influence of attorneys general over immigration matters could have—and already has had—serious ramifications on the stability and security of immigrants and their families across the nation. Therefore, looking at how and why state attorneys general

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[101] *Supra* Section II(A)(2).
[102] Nolette, *supra* note 12.
[103] *Cf id.* ("It was the Republican AGs who intervened in *United States v. Windsor* (2013) to support the Defense of Marriage Act, despite its representing federal encroachment on the traditionally state-defined institution of marriage. The conservative AGs of Nebraska and Oklahoma unsuccessfully sued Colorado in the Supreme Court, seeking to prevent Colorado's new marijuana laws from going into effect. Republican AGs called upon the Supreme Court to invalidate states' gun laws (in some cases, even their own state's gun laws) in *McDonald v. Chicago* (2010)."). While Nolette broadly cites instances where attorneys general acted inconsistently with principles of federalism, there are parallels to the "offensive" approach defined in this Article. Specifically, Nolette's examples exemplify external-facing actions taken by attorneys general, where the attorneys general were concerned with the changes in laws outside of their states.

have come to exert so much control over federal immigration policy can help unravel the mechanisms and motivations that have broadly enabled state attorneys general to engage in strategically offensive litigation so forcefully against the federal executive.

III. Strategically Offensive Lawsuits Led by State Attorneys General Challenging Federal Executive Immigration Policies and What They Tell Us About the Scope of Influence of Attorneys General in Federal Immigration Policy

The rest of this Article is focused on conducting that very type of review. From state-led efforts to end deferred action for undocumented youth and parents to unsuccessful attempts to rein in the Trump administration's anti-immigrant policies, state attorney generals have sought to use the court system to advance specific goals and agendas. Notably, these challenges to immigration law have often required the courts to meaningfully engage with questions of state standing as a vehicle for determining whether the state had the authority to challenge the federal executive's immigration policy choices.

As such, these strategically offensive cases allow us to see the gaps between how state attorneys general articulate the sovereign interests harmed and the real effects borne by the states as a result of federal immigration policies. This Article selects three state-led litigation battles against the federal executive to elucidate this tension: Texas's successful blockade of the Deferred Action for Parents of Americans and Lawful Permanent Residents; the failed attempts by the states to stop the Trump administration's travel bans; and, finally, the Supreme Court's most recent engagement with state-led efforts to preempt federal decision-making on immigration matters where the states of Texas and Louisiana attempted to vacate the Biden administration's immigration enforcement guidelines. By examining the moments of success of the attorneys general—and, more notably, their moments of failure—these immigration lawsuits

may help determine at what point the gap between the strategically offensive acts of the attorney generals and the broad interest of the state becomes untenable.

A. States Successful Challenges to Federal Executive Immigration Policies

> It's simple to me to fix it. I think you control the border first. You create a pathway for those people that are here — you don't say you've got to go home …. The majority of people here, if some people have criminal records you can send them home, but if people are here, law-abiding, participating for years, their kids are born here, you know, first secure the border, pathway to citizenship, done … You can't let the problem continue — it's got to stop.
> - ***Sean Hannity**, in remarks on his radio programming in 2012*[104]

This country has an immense unanswered policy issue: how to handle the fact that there are approximately 11 million undocumented immigrants living in the United States at any given moment.[105] As conservative media presence Sean Hannity pointed out over a decade ago, many of these individuals have built a life here and become ingratiated members of our communities. Nearly two-thirds of undocumented immigrants are estimated to have been in the United States for more than ten years.[106] One-third reside with at least one U.S. citizen child, and nearly a third are married to either a U.S. citizen or legal permanent resident.[107] Additionally, undocumented immigrants face disproportionate poverty levels, and more than half of undocumented

[104] Mackenzie Weinger, *Hannity: I've "Evolved" on Immigration and Support a "Pathway to Citizenship,"* POLITICO (Nov. 8, 2012, 6:17 PM), https://www.politico.com/blogs/media/2012/11/hannity-ive-evolved-on-immigration-and-support-a-pathway-to-citizenship-149078.
[105] Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR. (Nov. 16, 2023), https://www.pewresearch.org/short-reads/2023/11/16/what-we-know-about-unauthorized-immigrants-living-in-the-us/; *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.
[106] *Profile of the Unauthorized Population: United States*, *supra* note 105 (62% of undocumented immigrants have resided in the United States for ten or more years).
[107] *Id.* (33% of undocumented immigrants reside with at least one U.S. citizen child under eighteen years of age, and 18% of undocumented immigrants are married to U.S. citizens or legal permanent residents).

immigrants are uninsured.[108] And this failure to extend legal status to undocumented immigrants is likely detrimental to the United States' broader economic health.[109]

Despite the need to address this critical issue, Congress has not passed meaningful immigration reform in nearly forty years, when it provided a pathway to citizenship for nearly 2.7 million people through the Immigration Reform and Control Act.[110] In fact, the closest Congress has come in recent history to negotiating meaningful comprehensive immigration reform was in the early 2010s, when building political momentum —as exemplified by Sean Hannity's call for action—seemed to prime action.[111] Seeking to take advantage of this window of opportunity, a bipartisan coalition of legislators, deemed the "Gang of Eight," passed a proposal through the Senate that would have built on the efforts of IRCA and renewed a pathway to citizenship for millions of undocumented immigrants in the United States.[112] Despite passing through the Senate in a resoundingly bipartisan vote, the bill died in the House of Representatives—stamping the hope that Congress would finally act to provide security and stability for immigrants across the country.[113]

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[108] *Id.* (53% of undocumented immigrants are uninsured); *see A Portrait of Unauthorized Immigrants in the United States*, Report, PEW RSCH. CTR. (Apr. 14, 2009), https://www.pewresearch.org/hispanic/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/#:~:text=A%20third%20of%20the%20children,%2Dborn%20adults%20(10%25).

[109] *Citizenship for Undocumented Immigrants Would Boost U.S. Economic Growth*, CTR. AM. PROGRESS (June 14, 2021), https://www.americanprogress.org/article/citizenship-undocumented-immigrants-boost-u-s-economic-growth/ ("Providing a pathway to citizenship for all undocumented immigrants in the United States would boost U.S. gross domestic product (GDP) by a cumulative total of $1.7 trillion over 10 years and create 438,800 new jobs …. Ten years after implementation, those annual wages would be $14,000 higher, and all other American workers would see their annual wages increase by $700").

[110] Nancy Rytina, *U.S. Immigration and Naturalization Service, Office of Policy and Planning*, IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001, https://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf.

[111] Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES (Nov. 30, 2012), https://www.nytimes.com/2012/12/01/us/dream-act-gives-young-immigrants-a-political-voice.html.

[112] Will Weissert & Adriana Gomez Licon, *Immigration Reform Stalled Decade After Gang of 8's Big Push*, AP (Apr. 3, 2023, 8:09 AM), https://apnews.com/article/immigration-asylum-trump-biden-gang-of-eight-3d8007e72928665b66d8648be0e3e31f.

[113] *Id.*; Dara Ling, *The Summer 2014 Death of Immigration Reform in Congress*, VOX (June 4, 2015, 2:49 PM), https://www.vox.com/policy-and-politics/2014/6/30/18080446/immigration-reform-congress-2014-house-john-boehner-obama.

Coming off the heels of Congress's failure to pass immigration relief, the Obama administration quickly moved to step in.[114] Just a few months after the death of the comprehensive bill, the administration announced that it intended to expand its use of deferred action to provide protection from deportation and work authorization to the undocumented parents of U.S. citizens and lawful permanent residents, referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[115] This program sought to provide protection from deportation and work authorization to as many as 3.6 million undocumented parents—keeping families together and promoting greater economic stability within communities by allowing immigrants to seek safer and more secure employment.[116]

DAPA would have also provided several tangible benefits for the states by increasing labor force participation and increasing the earnings of impoverished families and communities.[117] Specifically, implementing DAPA could have resulted in a six percent reduction in the national poverty rate, amounting to about 100,000 fewer families living in poverty across the country.[118] This drop in poverty rates among immigrant communities would have reduced the demand for public benefits and social services,[119] particularly in states with large populations of

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[114] Weissert & Licon, *supra* note 112; Ling, *supra* note 113 ("On June 30, 2014, after reports indicated that Speaker Boehner was officially giving up on immigration reform for the year, President Obama gave a Rose Garden address promising to look into executive actions he could take to change immigration on his own. And on November 20, President Obama announced sweeping changes to the immigration system via executive action.").
[115] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), https://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html.
[116] RANDY CAPPS, HEATHER KOBALL, JAMES D. BACHMEIER, ARIEL G. RUIZ SOTO, JIE ZONG, & JULIA GELATT, MIGRATION POL'Y INST. & URBAN INST., DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF DAPA'S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN 1 (2016), https://www.migrationpolicy.org/sites/default/files/publications/DAPA-Profile-FINALWEB.pdf [hereinafter DAPA POTENTIAL EFFECTS ON FAMILIES AND CHILDREN REPORT].
[117] *Id.* at 13, 15–16.
[118] *Id.* at 17.
[119] While federal law severely restricts immigrant eligibility for many public benefits, U.S. citizen children of undocumented immigrants are still able to seek services, and analysts estimated that the new status of their parents would have enabled child enrollment in important public benefits. KATHERINE FENNELLY, IMMIGRANT LAW CENTER OF MINNESOTA, THE ECONOMIC AND FISCAL IMPACTS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) AND DEFERRED ACTION FOR PARENTS OF AMERICANS (DAPA) 6 (2016).

potential DAPA beneficiaries.[120] DAPA could have also brought incidental benefits to the state by allowing individuals to come out of the shadows; enabling individuals to secure employment with health insurance benefits, open bank accounts, and obtain state identification cards and driver's licenses.[121] Of likely greatest import to states, DAPA could have significantly increased tax revenues flowing to the states' coffers.[122]

In the face of congressional inaction, DAPA was the Obama administration's innovation by necessity. But as a bold maneuver, this policy also quickly drew criticism as presidential overreach. In keeping with the trend of increased state pushback after *Massachusetts v. EPA*, twenty-seven states—led by the State of Texas—sued the U.S. Department of Homeland Security (DHS), challenging the DHS's exercise of authority in implementing DAPA. The states refused to accept DHS's actions as an exercise of prosecutorial discretion, instead arguing that: 1) DAPA violated the procedural requirements of the Administrative Procedures Act; 2) DHS lacked the authority to implement the program; and 3) DAPA was an "abrogation of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'"[123]

But before the U.S. Court of Appeals for the Fifth Circuit could even begin to address the state's challenge, it needed to determine whether the states could even pursue this case.[124] The question of state standing was central to the DAPA case. Ultimately, the U.S. Supreme Court affirmed, by an equally divided Court, the U.S. Court of Appeals for the Fifth Circuit's decision finding that the states had standing to sue the federal government over DAPA and granting their

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[120] DAPA POTENTIAL EFFECTS ON FAMILIES AND CHILDREN REPORT, *supra* note 116. When looking at population statistics from 2009–13, estimates indicate that the states with the largest DAPA-eligible populations included, in descending order: California (1.1 million people); Texas (560,000 people); and New York (230,000 people). *Id.*
[121] *Cf.* FENNELLY, *supra* note 119, at 9 (detailing how DACA recipients, who receive the same benefits that DAPA sought to provide, saw drastic increases in health insurance enrollment (6% insured to 56% insured), banking, and securing state identification and licenses).
[122] *See, e.g.*, *id.* at 10 (calculating that, following the implementation of DACA and DAPA, the State of Minnesota would have received an almost seven million dollar increase in taxes paid).
[123] Texas v. United States, 809 F.3d 134, 149 (5th Cir. 2015).
[124] *Id.* at 150.

request for an injunction on DHS's implementation of DAPA as litigation continued. While a final decision on the merits of the case was set to continue through the courts, the litigation came to an end once the Trump administration took office and officially rescinded DAPA, bringing an end to DAPA and extinguishing the hope of families across the country.[125]

The DAPA case marked a key turning point for state influence over immigration matters. By leveraging the deferential standing doctrine provided to states, a coalition of state attorneys general was able to bring the actions of the federal executive to a complete halt—and they did so on the mere "speculation [of] the financial impact of immigrant populations in Texas."[126] Given the speculative nature of the states' alleged standing, it was contested whether DAPA *actually* caused the states an injury in fact was central to the court's decision, particularly given the benefits the states could reap from such a program.[127] In other words, the court in the DAPA case needed to determine the interest at stake that provided the states standing to challenge the federal executive's use of prosecutorial discretion to implement DAPA.

The state's lawyers articulated three major theories under its standing argument. First, Texas claimed that DAPA would force the state to incur additional financial costs as a result of providing DAPA recipients driver's licenses and vague costs to public services, such as healthcare, education, and law enforcement.[128] To support its argument, Texas estimated that it would lose "millions of dollars" providing DAPA recipients driver's licenses, as these individuals would become eligible for licenses under pre-dating state law.[129] Second, the states argued that they had *parens patriae* standing to protect the economic and commercial interests of

[125] Tal Kopan, *Trump Administration Reveres DAPA in "House Cleaning"*, CNN (June 16, 2017, 6:37 PM), https://www.cnn.com/2017/06/16/politics/dhs-scraps-dapa-keeps-daca-deferred-action/index.html.
[126] Baude & Bray, *supra* note 3, at 167.
[127] Brief for the Petitioners at 18–19, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 836758.
[128] Brief for the Respondents at 14–15, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 1213267.
[129] *Id.* at 19.

its residents, as "DAPA [would subject] the plaintiff States] citizens to … labor-market distortions, by granting eligibility for work authorization to millions of aliens."[130] Lastly, the States appealed to principles of "special solicitude" by arguing that, in addition to the financial costs, the states were "institutional plaintiffs asserting an institutional injury" because DAPA affected the states' quasi-sovereign interests by imposing pressure on them to change their requirements for driver's licenses to bar DAPA recipients.[131] In summary, the states were advancing arguments of standing that relied on three pillars of supposed state interest: the speculative financial costs to the state, the best interest of its residents, and the burden DAPA supposedly placed on the states' rights to create and enforce their own legal code.[132]

When determining that the states had standing, however, the Fifth Circuit only adopted two of the three pillars in its decision. Describing a kind of domino effect of burden that entitled the state to special solicitude, the court agreed with Texas's "driver's license theory" that DAPA would be incredibly costly to the state, and these increased costs would affect the states' quasi-sovereign interests "by imposing substantial pressure on them to change their laws, which provide for issuing driver's licenses to some aliens and subsidizing those licenses."[133] In doing so, the court adopted the "cost only" analysis advocated by Texas that relied on an incredibly speculative and limited characterization of the effects of DAPA.

For instance, it was unclear how exactly Texas was determining the alleged costs, particularly when the state was poised to profit from the license application fees it could now bring in.[134] Instead, Texas alleged that the influx of new driver's license applications would require the state to hire new employees, purchase additional office equipment, and open

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[130] *Id.* at 30–31.
[131] *Id.* at 31–34.
[132] Texas v. United States, 809 F.3d 134, 153 (5th Cir. 2015).
[133] *Id.* at 152–53.
[134] Reply Brief for Intervenors-Respondents Jane Does at 6, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 1426629.

additional driver's license facilities.[135] However, under its estimates, "[o]ver two years of employment, assuming 50 five-day workweeks per year, these employees would only have to process an average 1.62 applications daily, leaving their time mostly free to do other profitable work and offset any putative additional costs."[136] Rather than demonstrate clear and evident consequences the state would have to bear because of DAPA, Texas's alleged factual injury relied heavily on the speculative costs of an assumed influx of license applications that may require the state to increase its administrative capacity.

Additionally, the state articulated—and the court supported—a characterization of injury that excluded the benefits of DAPA that would flow directly to the states. The court found that the benefits brought to the states from increasing income from vehicle registration; reducing expenses by enabling more auto insurance enrollment; and increasing tax revenue while decreasing reliance on social services as a result of work authorization were too attenuated to offset the "direct" costs of DAPA.[137] As the court explained, "[t]he only benefits that are conceivably relevant are the increase in vehicle registration and the decrease in uninsured motorists, but even those are based on the independent decisions of DAPA beneficiaries and are not a direct result of the issuance of licenses."[138] However, the court did not reconcile how the states are still able to establish standing when the alleged cost is based on the independent decisions of the state on how to respond to DAPA, from deciding how to administratively manage its motor vehicle offices to whether the state would act legislatively to exclude DAPA beneficiaries from license eligibility. In both situations, the cost that is being borne by the state is

[135] *Id.*
[136] *Id.* at 7.
[137] *Texas v. United States*, 809 F.3d at 155–156.
[138] *Id.* at 156.

the result of the state acting as the ultimate decisionmaker for itself—seemingly indicating that the supposed costs of DAPA are really the costs of the state exercising its own prerogatives.

In relying on the finding of standing under the driver's license theory, the Fifth Circuit stated that it was unnecessary to provide an analysis of the state's *parens patriae* standing argument.[139] While the court did not engage in a meaningful deconstruction of *parens patriae* standing in this case—nor do courts seem willing to allow *parens patriae* standing in cases where states are suing to prohibit the federal government from acting in a certain way[140]—the willingness of the attorneys general to advance this argument is quite revealing as to their aspirations in pursuing this case. In arguing that it was against each states' public interest to provide legal status to undocumented parents, the attorneys general specifically defined their constituency as "citizens" threatened by granted work authorization to include undocumented immigrants.[141]

In advancing such a narrow definition of their constituency and their constituency's, the states ignored the reality that undocumented immigrants already comprise a large portion of the workforce, often in dangerous and risky occupational fields.[142] In Texas alone, an estimated 1.1 million unauthorized immigrant workers made up almost nine percent of the state's total labor force in 2014, concentrated in industries like agriculture, hospitality, and construction.[143] While providing work authorization to undocumented parents may have altered the dynamics of certain

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[139] *Id.* at 150.
[140] *See* Hessick & Marshall, *supra* note 9, at 91–94.
[141] Brief for the Respondents at 15, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 1213267.
[142] Jess Manuel Krogstad, Mark Hugo Lopez, & Jeffrey S. Passel, *A Majority of Americans Say Immigrants Mostly Fill Jobs U.S. Citizens Do Not Want*, PEW RSCH. CTR. (June 10, 2020), https://www.pewresearch.org/short-reads/2020/06/10/a-majority-of-americans-say-immigrants-mostly-fill-jobs-u-s-citizens-do-not-want/ (estimating that 7.6 million undocumented immigrants worked in the United States as of 2017, accounting for about 5% of all U.S. workers); Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?*, NAT'L LIBR. MED. (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831347/ (finding that immigrants are more likely to work in risky jobs than U.S.-born workers, in part due to lower English-language ability and education attainment).
[143] Travis Putnam Hill, *In Texas, Undocumented Immigrants Have No Shortage of Work*, TEX. TRIB. (Dec. 16, 2016, 1:00 AM), https://www.texastribune.org/2016/12/16/undocumented-workers-finding-jobs-underground-econ/.

employment fields within the state, it may also have enabled the state to enforce its laws more effectively by allowing workers to come out of the shadows, enabling workers to leave abusive workplaces for safer employment, and providing workers more security to come forward and report abusive conditions.

When the narrowly articulated *parens patriae* argument is contextualized by the speculative nature of the alleged financial injury, it starts to seem like the loosely defined costs of the "driver's license theory" are merely a cover for the specific political aims of the attorneys general. This view is further supported by the explicit statements of the attorney general. Just four days after filing the DAPA suit, then-Texas Attorney General Greg Abbott admitted "we're not suing for that economic harm. It's the way that Texas has been impacted that gives us standing. What we're suing for is actually the greater harm, and that is harm to the constitution by empowering the president of the United States to enact legislation on his own without going through Congress."[144] What General Abbott was literally saying was that the alleged economic harm—the harm that the Fifth Circuit largely relied on to find standing—was not the state interest that he was trying to vindicate.[145]

Nor is the supposed federalism interest he was appealing to of particular relevance to states' concerns under federalism. It was not that the President was acting in a way that burdened the states' autonomy or role as the key decisionmaker for its residents. Rather, General Abbott

[144] Reply Brief for Intervenors-Respondents Jane Does at 4, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 1426629.

[145] While General Abbott would go on to become Governor of Texas during this litigation, his motivations in initiating the suit are still relevant. Jay Root, *Abbott Crushes Davis in GOP Sweep*, TEX. TRIB. (Nov. 4, 2014), https://www.texastribune.org/2014/11/04/abbott-crushes-wendy-davis-gop-sweep/. His motivations were the catalyst point for this litigation, as he laid the foundation for the suit. As an additional point of note, as Governor, Greg Abbott led a coalition of Republican Governors in submitting an amici curiae brief to the Supreme Court arguing that DAPA represented an act of "unilateral executive lawmaking that is unrivaled in American history and thus a unique threat to the sovereignty of the Governors' States." Brief of Governor Abbott, Governor Bentley, Governor Christie, Governor Daugaard, Governor Martinez, and Governor Walker as Amici Curiae in Support of Respondents at 2, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 1377726.

was seemingly concerned with an inherently horizontal federalism balance of power: that between the legislature and the executive. Admittedly, some scholars have argued that states are well-positioned to intervene in this type of horizontal federalism issue because presidential powers have expanded to the point where Congress cannot challenge them.[146] Following this argument, the "states have a direct regulatory interest in preventing unlawful executive action because a declaration that a federal executive action is unlawful prevents that action from preempting state law or from otherwise affecting how states conduct themselves."[147]

This line of argumentation supporting state intervention could be applicable here, as the Obama administration was acting in response to the failure of Congress to legislate. However, a critical point distinction may be that the President was acting in response to Congress's failure to address a pressing issue facing our nation and doing so within the confines of previous presidential precedent and the limited authority already granted by Congress.[148] Additionally, the idea that states could step in whenever the federal executive was acting in a way that could affect how states conduct themselves is simply too broad to constitute a practical and implementable standing principle. This would be a free-for-all of standing, as "[s]tates encompass enough people, places, and things that any significant administrative policy can be said to affect a state in some way."[149] As the DAPA case exemplifies, a critical aspect of strategically offensive state-led litigation is the appropriation of principles of federalism in crafting standing arguments.

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[146] Miller, *supra* note 3, at 28.
[147] Hessick & Marshall, *supra* note 20, at 95.
[148] Brief for Petitioners at 50, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 836758 ("Since 1997, DHS has used deferred-action policies for battered spouses and victims of human trafficking; foreign students displaced by Hurricane Katrina; widows and widowers of U.S. citizens; and, under DACA, individuals who came to the United States as children and have long made this country their home …. And Congress has enacted a series of statutes recognizing that the Secretary may accord "deferred action" for aliens in defined categories, and encouraged him to do so more often.").
[149] Baude & Bray, *supra* note 3, at 168.

By loosening the bounds of standing through special solicitude and speculative factual injuries under the guise of federalism, the courts have opened the floodgates to the strategically offensive political interjections of the attorneys general. With courts willing to find injury where states may not even face financial costs from federal actions or where states may have to deny future applicants to public universities, there are open questions as to where the boundaries are for state standing, and relatedly, the breadth of strategically offensive litigation against the federal executive.

B. States Unsuccessful Challenges to Federal Executive Immigration Policies

While courts since DAPA have been willing to continue finding state standing on strategically offensive state-led litigation on immigration matters, recent action from the Supreme Court seems to indicate that the Court wants to reign in these suits. Just this past year, the Supreme Court held in an 8-1 opinion that the States of Texas and Louisiana could not challenge the immigration enforcement guidelines set by the U.S. Department of Homeland Security (DHS) because the states lacked a judicially cognizable interest in the prosecutorial guidelines that was redressable by the courts—meaning they lacked standing.[150] After years of the court providing states a wide latitude to challenge the federal executive's ability to regulate immigration matters, *United States v. Texas* seems to provide guidance on the outer limits of this deferential form of state standing.[151]

United States v. Texas was a unique case—or as the Supreme Court described, "an extraordinarily unusual lawsuit"[152]—because the states were challenging a quintessential aspect of federal executive authority: the ability to take care and enforce the law by exercising

[150] United States v. Texas, 599 U.S. 670 (2023).
[151] *See generally* Baude & Bray, *supra* note 3, for a discussion on how the past term of the Supreme Court changes or informs state standing doctrine.
[152] *United States v. Texas*, 599 U.S. at 686.

prosecutorial discretion through enforcement guidelines.[153] In the context of immigration enforcement, DHS typically sets enforcement guidelines by dictating priority categories for prosecution and deportation.[154] As the Department has explained, these guidelines allow DHS to efficiently and effectively allocate its resources and attention on prosecuting individuals who pose the greatest risk to safety and security.[155] Notably, DHS enforcement guidelines are not Department action subject to the requirements of the Administrative Procedure Act—there is no need for public review or comment because this is the type of executive-decision-making required for DHS to carry out its mission.

Even under the broad and nearly indiscriminate guidelines set by the Trump administration, states seemed to broadly accept that the federal executive was acting under their authority by creating enforcement guidelines.[156] Critical to the Trump administration's punitive immigration enforcement regime were its interior enforcement guidelines. In a stark departure from the Obama administration, the Trump era enforcement orders did not create any sort of inherent hierarchy of categories of unauthorized immigrants to prioritize for enforcement

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[153] U.S. DEPARTMENT OF HOMELAND SECURITY, GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAWS 2 (2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [hereinafter GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAWS].

[154] Muzaffar Chishti & Randy Capps, *Biden Immigration Enforcement Priorities Emphasize a Multi-Dimensional View of Migrants*, MIGRATION POL'Y INST. (Oct. 28, 2021), https://www.migrationpolicy.org/article/biden-immigration-enforcement-priorities.

[155] *Secretary Mayorkas Announces New Immigration Enforcement Priorities*, Press Release, U.S. DEPARTMENT OF HOMELAND SECURITY (Sept. 30, 2021), https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities.

[156] Unlike Texas and Louisiana's response to the Biden administration's enforcement guidelines, state attorney generals did not pursue wholesale challenges to the Trump administration's use (or, potentially more accurately described, lack of use) of prosecutorial discretion. Rather, and as is further discussed in this section, state attorneys general challenged discrete aspects of the administration's immigration enforcement strategy. Additionally, state attorneys general engaged in what this Article would characterize as defensive actions by providing guidance and model policies to public institutions—such as state-run colleges, libraries, hospitals, clinics, courthouses, shelters, and labor agencies—on how to protect immigrant's identifying information and respond to ICE enforcement activities. Michelle Wiley, *Attorney General Becerra Releases New Guidelines on Complying With "Sanctuary" Policies*, KQED (Sept. 30, 2018), https://www.kqed.org/news/11695539/attorney-general-becerra-releases-new-guidelines-on-complying-with-sanctuary-policies. Underlying this approach is the assumption that the state needed to accept the enforcement priorities of the administration and that the state's response was limited to the state's own activities.

activity.[157] Rather, the Trump administration stated that its enforcement priorities would target unauthorized immigrants who: had been convicted of any criminal offense; had been charged with any criminal offense; *had committed acts that constitute a chargeable criminal offense*; had willfully committed fraud in any official matter before a government agency; had abused public benefits; had final orders of removal; or where otherwise considered a public safety or national security risk.[158]

These broad-reaching immigrant categories were determined to be "equally important for removal"—meaning broad swaths of the immigrant community suddenly now fell under enforcement priorities.[159] As legal scholar Bill Ong Hing remarked, as "American[s] witnesse[d] the unfolding of President Trump's [Immigration and Customs Enforcement (ICE)] … embodied by Executive Orders, unleashed ICE agents, Border Wall construction proposals, and the President's funding wish list, fear …[spread] throughout immigrant communities" that they would be deported.[160] And many immigrants suddenly did find themselves subject to removal, despite years of approved legal presence in the United States.[161] After President Trump authorized a series of executive orders giving ICE broader authority to implement these

[157] Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 312 (2018).
[158] *See DHS Released a Memo Implementing President Trump's Executive Order on Interior Enforcement*, AM. IMMIGR. LAWS. ASS'N (Feb. 20, 2017), http://www.aila.org/infonet/leaked-dhs-memo-implementing-president-trump [https://perma.cc/AZ6E-SJP6] (emphasis added to highlight the malleable definition of priority enforcement guidelines. If an ICE agent could determine that someone had engaged in acts that could constitute a crime—making a determination without a judge or prosecutor—then that individual could be considered a priority for removal).
[159] Hing, *supra* note 157.
[160] *Id.* at 311.
[161] *See, e.g.*, *id.* at 299 ("Amanda and Juan Aristondos, residents of Fort Smith, Arkansas, fled Guatemala in 2008 and unsuccessfully sought asylum in the United States. However, because they had two children who were United States citizens--one battling cancer--Obama ICE officials regularly stayed their deportation. That all changed when President Trump issued his executive orders, after which the couple's request to further stay their deportation was denied.").

enforcement guidelines, including authority to pursue immigrants without criminal records, the number of interior arrests made by ICE rose thirty percent.[162]

More specifically, during the Trump administration, more than 100,000 interior arrests were made in fiscal year 2020, and more than 140,000 arrests were made in each preceding fiscal year of his presidency.[163] Immigrant communities in states all across this country were living under a constant state of fear, and still, state attorney generals did not go so far as to broadly challenge the President's authority to set the guidelines that created this situation.[164] Instead, states seemingly pursued more narrow challenges, including questioning the legality of the Trump administration's engaging in immigration enforcement at or near courthouses.[165]

After years of the hardline approach under President Trump, the Biden administration attempted to significantly recalibrate DHS's immigration enforcement priorities. While developing the final form of its immigration enforcement priorities, the Biden administration issued interim ICE priorities that focused on national security and public safety threats, focusing on individuals who had committed aggravated felonies.[166] As described by the Migration Policy Institute, the guidelines were "categorical in nature in that they excluded from enforcement

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[162] John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), https://www.pewresearch.org/short-reads/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/; Tal Kopan, *Trump's Executive Orders Dramatically Expand Power of Immigration Officers*, CNN (Jan. 28, 2017), https://www.cnn.com/2017/01/28/politics/donald-trump-immigration-detention-deportations-enforcement/index.html.

[163] Gramlich, *supra* note 162.

[164] Hing, *supra* note 157, at 296–98.

[165] *See Attorney General James Wins Lawsuits Against Trump Administration's Illegal Policy of Making ICE Arrests at State Courthouses*, Press Release, OFFICE OF NEW YORK STATE ATTORNEY GENERAL (June 10, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-wins-lawsuit-against-trump-administrations-illegal-policy; Nina Shapiro, *Washington State Attorney General Bob Ferguson Sues Trump Administration Over Courthouse Immigration Arrests*, SEATTLE TIMES (Dec. 17, 2019, 11:46 AM), https://www.seattletimes.com/seattle-news/washington-state-attorney-general-bob-ferguson-sues-trump-administration-over-courthouse-immigration-arrests/.

[166] Chishti & Capps, *supra* note 154; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, INTERIM GUIDANCE: CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL PRIORITIES 4–5 (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

individuals outside these three groups and endorsed the detention and deportation of those in the priority groups."[167]

Just two months after DHS's interim immigration enforcement guidelines were announced, Texas Attorney General Ken Paxton and Louisiana Attorney General Jeff Landry—both Republican attorney generals—sued the Biden administration, alleging that the administration was "refusing to take custody of [noncitizens] convicted of serious crimes."[168] The attorneys general further alleged that the administration was allowing noncitizens already convicted of felony offenses to "roam free in the United States."[169] Contrary to this characterization, ICE enforcement under the Biden administration's interim guidance proved more effective at removing individuals with criminal records than the previous administration.[170] While ICE arrests did fall to 74,000 during the first year of the Biden administration (as compared to the typical 140,000 during the Trump era), the number of arrests of noncitizens with aggravated felony convictions nearly doubled as compared to the last year of the Trump administration.[171]

Building on this momentum—and with the state litigation percolating in the background—DHS issued its final immigration enforcement guidance in September 2021.[172] The final guidelines set three priority categories for enforcement: threats to national security, border

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[167] Chishti & Capps, *supra* note 154.
[168] Complaint at 35, Texas v. United States, 606 F.Supp.3d. 437 (S.D. Tex., 2022) (No. 6:21-cv-00016), 2021 WL 1309766.
[169] *Id.* at 1.
[170] Stef W. Knight, *ICE Arrests and Deportations Fall Under Biden*, AXIOS (Mar. 11, 2022), https://www.axios.com/2022/03/11/ice-arrest-deportation-number-biden-immigration (additionally, 66% of ICE deportations were of individuals with previous convictions in 2021, up from 56% from the last year of the Trump administration, and about 49% of all ICE arrests in 2021 were of individuals with previous convictions).
[171] *Id.* While interior arrests have fallen under the Biden administration, immigration advocates have raised concern that ICE officials are not implementing the guidance in the way the Biden administration was hoping. Joel Rose, *Biden's Limits on ICE Offered Hope. But Immigrant Advocates Say He's Broken Promises*, NPR (Jan. 21, 2022), https://www.npr.org/2022/01/21/1073162105/biden-limits-ice-immigrant-advocates.
[172] GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAWS, *supra* note 153.

security, and public safety.[173] Under the "public safety" category, DHS proposed a novel approach for determining whether an individual should be subjected to removal, allowing immigration officials to implement a totality of circumstances assessment that looked at an array of aggravating and mitigating factors, including immigration status, criminal history, family ties, and previous military service, among other factors.[174] Rather than taking a pure categorical approach that explicitly prioritized entire groups of individuals for enforcement while excluding others, the Biden administration sought to implement a more holistic and thorough assessment of each case.[175]

By deprioritizing enforcement against noncitizens who have built lives and connections to communities here, DHS stated that the new guidelines allowed the agency to better focus its limited resources and time on removing individuals who most endangered communities and the country.[176] And the effectiveness of the interim guidelines seemed to indicate that the final iteration of the Department's immigration enforcement policies would do just that. Still, Texas and Louisiana alleged that DHS was failing to comply with the immigration enforcement mandates stipulated in federal law and that the Department's failure to comply with the law imposed costs on the States.[177]

As in other strategically offensive state-led cases against the federal executive's immigration actions, the question of standing was central to the case. At the district court level, the states were able to establish standing financially and as *parens patriae*[178]—a particularly, and

[173] *Id.* at 3–4.
[174] *Id.*; Chishti & Capps, *supra* note 154.
[175] Chishti & Capps, *supra* note 154.
[176] *Secretary Mayorkas Announces New Immigration Enforcement Priorities*, *supra* note 155 ("There is also recognition that the majority of the more than 11 million undocumented or otherwise removable noncitizens in the United States have been contributing members of our communities across the country for years. The fact an individual is a removable noncitizen will not alone be the basis of an enforcement action against them.").
[177] United States v. Texas, 599 U.S. 670, 674 (2023).
[178] Texas v. United States, 606 F.Supp.3d 437, 467 (2022).

unusually, broad finding of standing given courts' previous hesitancy to expound on *parens patriae* standing when states sued the federal executive over immigration matters.[179] Specifically, the court found that the state possessed a quasi-sovereign interest in "protecting its citizens from the criminal activity of [noncitizens] subject to mandatory detention under federal law," and that Texas had demonstrated injuries to this interest by showing that noncitizens ICE declined to detain "have already committed, and are committing, more crimes in Texas."[180]

In summary, the district court relied on four categories of injury that Texas had suffered as a result of DHS's enforcement guidelines:

> First, the court calculated the dollars-and-cents cost that Texas had to bear in order to supervise criminal [noncitizens] who were released in violation of §§ 1226(a), (c) …. Second, it noted the costs associated with criminal recidivism …. Third, it found that some juvenile offenders who "are not detained by ICE because of the Final Memorandum" will attend Texas public schools (and at least one juvenile due to be released will do so) …. Fourth, it concluded that the hundreds of millions of dollars that Texas annually spends on healthcare for [unauthorized noncitizens] would increase when some criminal [noncitizens] not detained "because of the Final Memorandum" make use of those services.[181]

Basically, the states asserted that because DHS was not arresting every noncitizen who was removable under the law, they would be forced to continue to incarcerate or provide social services to these noncitizens.[182]

The Supreme Court, however, was not swayed by the states' arguments, and ultimately found that the states lacked standing to maintain a suit requesting that the federal executive "alter its arrest policies so as to make more arrests."[183] However, rather than extensively reviewing why the alleged injuries are not, in fact, injuries giving rise to a cognizable interest, the Court focused extensively on the impact this suit would have on the federal executive's powers.[184]

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[179] Hessick & Marshall, *supra* note 20, at 91–94.
[180] *Texas v. United States*, 606 F.Supp.3d at 467.
[181] *United States v. Texas*, 599 U.S. at 716–17 (Alito, J., dissenting).
[182] *Id.* at 674.
[183] *Id.* at 686.
[184] In focusing on the powers of the federal executive and the proper role of the federal judiciary, the Court noticeably neglected to provide a "special solicitude" analysis. *Id.* at 688–89 (Gorsuch, J., concurring).

First, the Court cited that there was no precedent, history, or tradition of courts ordering the federal executive to make more arrests or initiate more prosecutions.[185] Then, the Court emphasized the importance of enforcement discretion for the federal executive, finding that "[i]n light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies."[186]

Finally, the Court pressed that it would be improper for the federal judiciary to intervene in issues of the federal executive's arrest and prosecution policies. Specifically, the Court cited that it simply did not have meaningful standards for assessing the propriety of the federal executive's enforcement decisions.[187] In keeping with scholars William Baude and Samuel L. Bray's previously discussed warning that the growing expansiveness of state standing doctrine could create a scenario where any federal action would constitute an injury upon the states,[188] the Court argued that:

> The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. *We decline to start the Federal Judiciary down that uncharted path*.[189]

Moreover, the Court punctuated that standing doctrine is a critical check on the federal judiciary that keeps the federal courts from usurping the powers of the political branches.[190] Throughout its decision in *United v. Texas*, the Court seemed deeply concerned with the proper exercise of its

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[185] *Id.* at 677.
[186] *Id.* at 680. The Court also noted that, over the past 27 years, all five Presidential administrations have determined that "resource constraints necessitated prioritization in making immigration arrests." *Id.*
[187] *Id.* at 679.
[188] Baude & Bray, *supra* note 3, at 168 ("Taken too far, these arguments could obliterate any demand for proper parties. States encompass enough people, places, and things that any significant administrative policy can be said to affect a state in some way. Call this the state-as-a-super-big-person problem— and think in your mind of the massive human-shaped sovereign on the frontispiece of Thomas Hobbes's Leviathan.").
[189] *United States v. Texas*, 599 U.S. at 681 (emphasis added).
[190] *Id.* at 676.

own authority—potentially revealing concerns that this iteration of standing had officially stepped over the line of credibility.

Given the context that the states have seemingly grown ever more empowered to bring suit against the federal executive since *Massachusetts v. EPA*, the Court's focused reflections on the proper role of the court, the purpose of standing, and the importance of federal executive discretion on prosecutorial matters could be interpreted as a warning that the era of " near-automatic" standing for states may be coming to an end.[191] However, this Article is skeptical of such a broad reading of *United States v. Texas*. Of primary concern is the fact that the Supreme Court did not fully dissuade states of the notion that this action caused injury. In fact, the Court stipulated that monetary costs are clearly an injury, and then went on to provide examples where the states may have a proper claim as a result of the Executive Branch's failure to make more arrests.[192] This includes a, potentially pointed, caveat that a state-led challenge to federal executive policy that involves both arrest and prosecution priorities *and* provisions of legal benefits or legal status may be proper because the challenged policy would implicate more than the federal executive's traditional enforcement discretion—teeing the Court up to easily dismiss any standing concerns in the DACA case percolating in the Fifth Circuit.[193]

Additionally, while the decision to not find state standing was a resounding 8-1 vote, there are important differences in how the different factions of the Court addressed the standing issue. Justices Gorsuch, Thomas, and Barrett focused more on the technical issues of redressability, finding that 8 U.S.C. § 1252(f)(1) prohibited the lower courts from issuing orders restraining federal officials from enforcing certain immigration laws.[194] In fact, the concurring

[191] Miller, *supra* note 3, at 25.
[192] *United States v. Texas*, 599 U.S. at 676, 682–84.
[193] *Id.* at 683.
[194] *Id.* at 690 (Gorsuch, J., concurring) (In … [*Garland v. Aleman Gonzalez*], we held that § 1252(f)(1) 'prohibits lower courts from ... order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or

Justices seemed open to finding that the states had a cognizable interest—a sufficient injury for standing—as a result of the speculative costs the states would have to bear as a result of the enforcement guidelines.[195] So, despite the surprising headline that the Court denied standing to Texas and Louisiana in this case, *United States v. Texas* seemed far less concerned with questions of legitimate state injury than one would expected.

Rather, we can probably conclude from the argumentation put forward by both factions that there is a core area of federal executive operation that must be protected from state-led disruption. Although the two factions characterize it differently, both seem primarily concerned with the implications of allowing the state to challenge the federal executive purely on the issue of prosecutorial discretion.[196] The majority paints the issues as one about whether the federal executive has the power to operate freely in its discretion, while the concurrence focuses on the consequences of allowing classwide remedies that could fundamentally disrupt the ability of the federal executive to manage and execute immigration enforcement.[197]

Regardless, *United States v. Texas* seems to be less indicative of the Court finally pulling the reigns on the states, and actually more protective of a deep core of federal executive functioning. As such, this case may provide a new boundary on state standing, but it is doubtful that this case will become the anti-*Massachusetts v. EPA*—marking the end of this era of state standing. For one, the Court refused to take the opportunity to chastise the state attorneys general for bringing forward speculative injuries. Additionally, the Court seemed to characterize this case

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otherwise carry out the specified statutory provisions.' …. Put simply, the remedy that would ordinarily have the best chance of redressing the States' harms is a forbidden one in this case.").

[195] *Id.* at 688 ("But, again, the district court found that the Guidelines impose "significant costs" on the States …. The Court today does not set aside this finding as clearly erroneous. Nor does anyone dispute that even one dollar's worth of harm is traditionally enough to "qualify as concrete injur[y] under Article III." …. Indeed, this Court has allowed other States to challenge other Executive Branch policies that indirectly caused them monetary harms.").

[196] See *id.* at 684 ("This case is categorically different, however, because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law.")

[197] *Id.* at 690.

as so beyond the mainstream that it had no choice but to deny standing.[198] Consequently, even after the failure of the attorneys general to specifically secure standing in *United States v. Texas*, attorneys general still have their general tool available for engaging in strategically offensive lawsuits against the federal executive. While the attorneys general may have reached the absolute end of their strategically offensive line against the federal executive on immigration matters, there is still plenty of room for their continued challenges and influence.

IV. Conclusion: The Implications of Increasing State Attorneys General Influence in Immigration Policy

Despite harping on the strategically offensive use of state attorney general power, this Article concedes that states, and consequently state attorney generals, play an important role in checking the federal government, particularly the federal executive, which some scholars have argued has grown in power so much that Congress cannot effectively control it.[199] "If exercised properly, *serious* state-led litigation against the federal government (and the 'credible' threat of such litigation) could go a long way toward persuading the federal government to respect states as the counterweight the framers envisioned and to exercise appropriate 'restraint[].'"[200]

But the question that then arises is whether the attorneys general are pursuing *serious* efforts to vindicate the interests of federalism, or whether they are simply using the third rail of politics to raise their profile. Again, state attorneys general are statewide officers. In pushing back against the actions of the federal executive, seemingly more because of politics and policy interests than the vindication of our constitutional design, attorneys general may be undermining allocations of power under federalism and their own credibility as state actors.

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[198] *Id.* at 686 "(the States have brought an extraordinarily unusual lawsuit. They want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit; indeed, the States cite no precedent for a lawsuit like this.").
[199] Miller, *supra* note 3, at 27–29; Lin, *supra* note 9, at 646–649.
[200] Lin, *supra* note 9, at 649 (emphasis added).

This is particularly true when looking more deeply at the interests, and the oversights, of state attorneys general in pursuing these suits. Looking at how the State of Texas benefits from Deferred Action for Childhood Arrivals (DACA), we can begin to unravel the contradictions of state interest at play in the most recent lawsuit to halt the program. Nearly 20% of the roughly 580,000 DACA recipients reside in Texas.[201] If DACA is terminated, 5,000 workers would lose their jobs monthly in Texas over the course of two years, many in the healthcare and teaching sectors.[202] Additionally, 5,000 U.S. citizen children and 1,000 U.S. citizen spouses of DACA recipients could see their loved ones become subject to deportation each month.[203] Most directly impactful to the state, Texas stands to lose an estimated $140 million in state and local taxes if DACA ends.[204]

With so much at stake for Texas should DACA end, why is Texas leading the charge to end this program? Just as with DAPA, the attorney general of Texas seems focused on a speculative "costs-only" analysis of DACA, alleging that it has standing on the basis of experiencing increased healthcare, education, and social services costs incidentally related to the program.[205] In doing so, the attorney general is choosing to pursue a narrow definition of public interest—one that excludes the immigrant residents of their state and their families. And by giving credence to this articulation of injury and standing, the courts are enabling state attorneys general to impose this political choice on communities all across the country.

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[201] *Key Facts on Deferred Action for Childhood Arrivals (DACA)*, KFF (Apr. 13, 2023), https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-deferred-action-for-childhood-arrivals-daca/.
[202] Uriel J. García, *With Another DACA Court Ruling Looming, Texas Recipients Who Are Now Adults Worry About Their Jobs and Futures*, TEX. TRIB. (June 9, 2023), https://www.texastribune.org/2023/06/09/texas-daca-court-ruling/#:~:text=Congressional%20efforts%20to%20protect%20DACA%20recipients%20fail&text=If%20DACA%20were%20ended%2C%205%2C000,Zuckerberg%20that%20advocates%20for%20immigration.
[203] *What Happens If DACA Ends?,* FWD.US (Aug. 22, 2022), https://www.fwd.us/news/what-if-daca-ends/.
[204] Skyler Korgel, *Celebrating a Decade of DACA in Texas*, EVERY TEXAN (Sept. 29, 2022), https://everytexan.org/2022/09/29/celebrating-a-decade-of-daca-in-texas/.
[205] Benenson, *supra* note 8.

While the courts may not serve as a constraint on state attorney general power, this does not mean that we must accept the growing influence of state attorneys general on immigration matters as the inevitable consequence of the growing politicization of litigation and loose standing principles. Political actions may be met with political consequences, and state-led litigation ending such an important and generally supported program like DACA may be the tipping point needed to motivate the political branches and voters to finally act to pass immigration reform and rein in the state attorneys general.