IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The STATE OF TEXAS, *et. al*.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
JOSEPH R. BIDEN, JR.,	§	CIVIL ACTION NO. 3:22–cv–00780-M
in his official capacity as	§	
President of the United States, *et al.*,	§	
	§	
Defendants,	§	
	§	
and	§	
	§	
TIMOTEO, UZIAS, ANTONIO,	§	
MAGDALENA, MARTA, and ELIZABETH,	§	
	§	
Defendant-Intervenors.	§	

MOTION TO DISMISS UNDER FED. R. CIV. P. 12
AND BRIEF IN SUPPORT

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INTRODUCTION

Nearly two years ago, Texas and a group of other States brought this challenge to the reopened Central American Minors ("CAM") Program, alleging that this small family reunification program threatened to cause a "population boom" in their States that would "strain [their] ability to provide essential services," such that "all services will come at a higher cost." Am. Compl. ¶¶ 78, 84, ECF No. 14.[1] Despite these dire warnings, and the fact that the CAM Program had been reopened for nearly a year when the States filed this case, they failed to identify any specific harms they had suffered and alleged vague future harms relating to "illegal aliens." They were also notably silent about any harm they had suffered during the years when the original CAM Program was in existence.

Today, two and a half years after the CAM Program reopened and with the benefit of jurisdictional discovery, the discovery confirms that the States have no evidence to support their allegations of harm. Indeed, no State but Texas even tries to show such injury, and Texas now concedes it has never tracked data on CAM beneficiaries within its borders.[2] Federal data underline what was always true of the CAM Program: it remains a small family reunification program through which a couple hundred children and their relatives have arrived or may arrive in Texas in the near future.[3] Texas's claims about the speculative harms it *could* suffer if tens or hundreds of thousands of individuals were to quickly arrive in the State should be rejected for what they are: a blatant attempt to manufacture standing to impose by judicial decree a policy preference that lost at the ballot box. The Supreme Court recently held that Texas lacked standing to pursue

[1] The States made the same claims in their original complaint when they initiated the case, *see* Compl. ¶¶ 69, 75, ECF No. 1.

[2] *See* Declaration of Linda B. Evarts ("Evarts Decl."), Ex. A (Texas's Resp. to Defs.' Jurisdictional Disc. Reqs., Req. for Admis. No. 3).

[3] *See id.*, Ex. F (Defs.' Resps. to Pls.' First Set of Jurisdictional Disc. Reqs., Resp. to Interrog. No. 2).

a similar immigration policy challenge and cautioned lower courts to "remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer." *United States v. Texas*, 143 S. Ct. 1964, 1972 n.3 (2023). The same is true here.

This case must be dismissed because no State has Article III standing, *see* Fed. R. Civ. P. 12(b)(1), as demonstrated by the evidence supporting this factual attack. At a minimum, all States other than Texas must be dismissed because two years into this action, they have agreed not to argue that they are harmed by the CAM Program, *see* Joint Stip., ECF No. 106, and their continued presence is contrary to the interests of judicial economy and may prejudice the parties. Finally, even if the Court determines that the States have borne their burden to prove their standing at this juncture, the States' *ultra vires* claim (Count 1) must be dismissed because it relies on an erroneous statutory interpretation, *see* Fed. R. Civ. P. 12(b)(6).

RELEVANT BACKGROUND[4]

The CAM Program has always been small, and the parole portion of the program—which is the only aspect the States challenge here[5]—comprised less than half of beneficiaries who entered the United States between the program opening in 2014 and the close of the parole portion of the program in 2017.[6] During that time period, a total of 1,465 children and family members were

[4] In light of prior briefing in this case discussing the history and structure of CAM, *see, e.g.*, Mot. to Intervene at 1-4, ECF No. 19, Defendant-Intervenors focus here on background directly relevant to the motions to dismiss.

[5] *See* Evarts Decl., Ex. A (Texas's Resp. to Defs.' Jurisdictional Disc. Reqs., Req. for Admis. Nos. 13-17). As discussed in prior briefing in this case, under the CAM Program, USCIS first considers whether the beneficiary meets the definition of a refugee under U.S. law; if they do not, USCIS considers whether the beneficiary merits a discretionary exercise of parole on a case-by-case basis. *See* Evarts Decl., Ex. B (U.S. Citizenship & Immigr. Servs., Notice of enhancements to the Central American Minors Program, 88 Fed. Reg. 21,694, 21,696 (Apr. 11, 2023)).

[6] *See* Evarts Decl., Ex. C (Vivian Yee & Kirk Semple, *Policy Under Trump Bars Obama-Era Path to U.S. for Central American Youths*, N.Y. Times (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/us/trump-central-american-refugees.html).

granted parole in the United States.[7] Notably, even Plaintiffs concede that the original program had a "low" number of applications. *See* Am. Compl. ¶¶ 57, 62 (describing 9,916 total CAM applications).

The small scale of the CAM Program is a necessary consequence of its design.[8] Parents are not free to apply on their own, but rather must obtain the assistance of a U.S. State Department-approved agency.[9] Children and family members in Central America must complete a series of steps, which entail scheduling and attending multiple in-person appointments and waiting for the results of DNA tests.[10] USCIS officers who are not stationed in Central America must travel there to conduct required interviews, and they must elicit sensitive information from children who are often traumatized and lack the benefit of counsel.[11] And with respect to parole, qualifying parents in the United States must prove they can and will financially support their children.[12] Those who are approved for parole must complete a medical examination (at their own expense) with one of a limited number of authorized physicians before they can be cleared to travel.[13] Given all of the above, it is little wonder that historically processing of CAM applications took more than 400 days from the date of filing to travel, with up to an additional year of waiting to file an application at the outset.[14]

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[7] *Id.*

[8] *See* Declaration of Erlinda Garcia ("Garcia Decl.") ¶¶ 5-16.

[9] Evarts Decl., Ex. D (U.S. Citizenship & Immigr. Servs. Ombudsman, *Recommendation on the Central American Minors (CAM) Refugee/Parole Program* at 38 (Dec. 21, 2016)).

[10] *Id.* at 38-42.

[11] *Id.* at 26 n.174, 27; Garcia Decl. ¶ 10.

[12] Garcia Decl. ¶ 12; Evarts Decl., Ex. B (88 Fed. Reg. at, 21,702).

[13] *See* Garcia Decl. ¶ 13.

[14] Evarts Decl., Ex. D (*Recommendation on the Central American Minors (CAM) Refugee/Parole Program* at 20); *see also* Garcia Decl. ¶ 15.

When the Biden Administration reopened the CAM Program in 2021, it retained the basic structure of application processing.[15] Unsurprisingly, the reopened CAM Program retained its small size: fewer than 500 children and family members in total have entered the United States as CAM parolees during the 2.5 years since the program's reopening.[16] Most of those individuals were destined for non-Plaintiff states.[17] Federal data shows that a total of 94 CAM parolees have entered Texas and another 86 have been authorized for parole pending completion of processing in Central America.[18] Texas keeps no data on how many CAM parolees are in the state.[19]

Nonetheless, for those families who are able to apply and to complete the lengthy processing, the CAM Program has been and remains a crucial pathway enabling parents in the United States to reunite with their children and ensure their children's safety. *See* Mot. to Intervene at 9-11, ECF No. 19; Mot. to Intervene at 6-8, ECF No. 111. Without the CAM Program, children in danger in Central America who have parents in the United States will have little choice but to make the harrowing land journey to the United States—as many CAM beneficiaries did when the program was terminated in 2017 before their applications were processed.[20]

RELEVANT PROCEDURAL HISTORY

Eight States filed this case on January 28, 2022. Compl., ECF No. 1. Thereafter, on March 14, 2022, the States filed an Amended Complaint that alleged the same facts and claims but added

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[15] *See* Evarts Decl., Ex. E (U.S. Citizenship & Immigr. Servs., *Central American Minors (CAM) Program* (June. 23, 2023), https://www.uscis.gov/CAM).

[16] *See id.*, Ex. F (Defs.' Resps. to Pls.' First Set of Jurisdictional Disc. Reqs., Resps. to Interrogs. Nos. 1(d), 1(e), 9, 10).

[17] *See* Garcia Decl. ¶¶ 20-21.

[18] Evarts Decl., Ex. F (Defs.' Resps. to Pls.' First Set of Jurisdictional Disc. Reqs., Resp. To Interrog. No. 2).

[19] *Id.*, Ex. A (Texas's Resp. to Defs.' Jurisdictional Disc. Reqs., Resp. to Req. for Produc. No. 3).

[20] Garcia Decl.¶ 19; *see also* Evarts Decl., Ex. B (88 Fed. Reg. at 21,700).

seven additional State Plaintiffs. *See* Am. Compl. The States' Amended Complaint warns that CAM will cause a "sudden influx" into their territories—the inevitable result of an "immeasurable" population of qualifying parents. *Id.* ¶¶ 79, 81. They claim they will suffer "irreparabl[e] harm" due to the "strain on the Plaintiff States' resources," and there will be a "rapid[] decline" in the States' ability to provide essential social services, and "all services will come at a higher cost." *Id.* ¶¶ 78-84. As for Texas, it alleges that CAM beneficiaries[21] "will cause it to incur significant costs in issuing driver's licenses" and thereby "impose significant financial harm on Texas." *Id.* ¶ 18 (internal citations and quotation marks omitted). Texas claims a variety of other impending harms due to its expenditures on "illegal aliens," *see id.* ¶¶ 11-17; *see also* Supp. Compl. ¶¶ 8-14, 59, ECF No. 110, apparently on the theory that CAM parolees are likewise undocumented (they are not[22]), or that the presence of a program that allows children to fly to reunite with their parents encourages immigrants to cross the U.S.-Mexico border without inspection (an outcome CAM was designed to deter[23]).

After the filing of the Amended Complaint, the parties engaged in a one-year period of jurisdictional discovery.[24] In July 2023, the Court admonished the parties to provide a comprehensive report on jurisdictional discovery and the Plaintiffs to "inform the Court of the

[21] The Amended Complaint does not distinguish between CAM parolees and refugees, or between parolees who entered as a result of the CAM Program reopening and those who entered pursuant to the settlement agreement in *S.A. v. Trump*, Case No. 18-03539, 2019 WL 1593229 (N.D. Cal. Apr. 12, 2019).

[22] *See* Evarts Decl., Ex. B (88 Fed. Reg. at 21,701).

[23] *See id.* (88 Fed. Reg. at 21,695 ("The CAM Program was designed to address this increase [in unaccompanied children from El Salvador, Guatemala, and Honduras irregularly crossing the U.S. southern border] by providing an alternative to irregular migration for children seeking to reunify with certain family members. Protecting children and providing them with the stability of their families are the driving forces behind the CAM Program[.]").

[24] *See* Joint Advisory re: the Parties' Resolution of the Matter of Jurisdictional Disc., ECF No. 49; Order, Aug. 22, 2022, ECF No. 50; Joint Status Rep. re: Jurisdictional Disc., ECF No. 88; Order, Aug. 21, 2023, ECF No. 107; Evarts Decl., Ex. F (Defs.' Resps. to Pls.' First Set of Jurisdictional Disc. Reqs.); *id.*, Ex. A (Texas's Resps. to Defs.' Jurisdictional Disc. Reqs.).

likelihood of their pursuing this matter." Order, July 20, 2023, ECF No. 102. A few weeks later, the parties stipulated that the States would seek to establish harm for the purposes of Article III standing and equitable relief based only on the alleged injury to Texas. Joint Stip., ECF No. 106. The parties further stipulated that the States would not submit evidence of injury to any other Plaintiff "at any stage of this case, including after any remand" unless the parties exchanged "new reciprocal discovery regarding injuries or harm to any such State for purposes of standing or scope of relief." *Id.*

Thereafter, Texas produced its responses to Defendants and Defendant-Intervenors' jurisdictional discovery requests, in which it conceded that it "does not track any information based on the status of being a CAM beneficiary," and it has "no documents specifically regarding CAM beneficiaries."[25] Texas failed to identify any changes to the State's budgeting, programs, or services in response to the termination of the original CAM Program in 2017.[26] Texas stated its injuries are "the same for all its claims for relief" and "arise from costs imposed by the increased presence of aliens in Texas"—specifically, costs related to "driver's licenses," "healthcare," and "education."[27] Of the 220 pages Texas produced in discovery, the only costs identified are those associated with undocumented immigrants, unaccompanied children, and Deferred Action for Childhood Arrival ("DACA") recipients; nearly half of the pages are declarations from Texas's other legal challenges to immigration programs.[28]

[25] Evarts Decl., Ex. A (Texas's Resps. to Defs.' Jurisdictional Disc. Reqs., Resp. to Req. for Produc. No. 3 & Resp. to Req. for Admis. No. 3).

[26] *See id.* (Resp. to Req. for Admis. No. 12).

[27] *See id*. (Resp. to Interrog. No. 11).

[28] *See id.*, Ex. G (Documents Produced by Texas in Discovery, TEXAS_CAM_000001-220).

Meanwhile, the jurisdictional discovery produced by the federal government shows that a total of 94 approved CAM parolees have parents in Texas and another 86 beneficiaries with parole applications pending in Central America have parents in Texas.[29] As for nationwide CAM data, a total of 1,243 CAM beneficiaries have been recommended for parole into the United States since the program restarted in 2021[30]—such that they can anticipate traveling to the United States *if* they successfully complete medical and security checks.[31]

LEGAL STANDARDS

"Federal courts are courts of limited jurisdiction"; if jurisdiction is not conferred by the Constitution or a statute, they lack the power to adjudicate the claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As such, federal courts "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). If a court determines that it lacks subject matter jurisdiction, and thus constitutional or statutory power to adjudicate the case, it must dismiss the action. Fed. R. Civ. P. 12(h)(3); *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998); *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted).

Where, as here, the defendant challenges subject matter jurisdiction based on facts outside the complaint, "no presumptive truthfulness attaches to plaintiff's allegations," and the Court must resolve matters outside the pleadings, including disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981). The plaintiff bears the burden of proving "the existence of subject-

[29] *See id.*, Ex. F (Defs.' Resps. to Pls.' First Set of Jurisdictional Disc. Reqs., Resp. to Interrog. No. 2).

[30] *Id.*, (Resp. to Interrog. No. 1(h)).

[31] *Id.*, Ex. B (88 Fed. Reg. at 21,696); *id.*, Ex. D (*Recommendation on the Central American Minors (CAM) Refugee/Parole Program* at 40, 42).

matter jurisdiction by a preponderance of the evidence and is obliged to submit facts through some evidentiary method to sustain his burden of proof." *Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (internal quotation marks omitted). The Court "has significant authority to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Residents Against Flooding v. Reinvestment Zone No. Seventeen, Houston*, 260 F. Supp. 3d 738, 754-55 (S.D. Tex. May 9, 2017) (citations and internal quotation marks omitted), *aff'd*, 734 F. App'x 916, 922 (5th Cir. 2018); *see Williamson*, 645 F.2d at 413 (on appeal, a lower court's findings of fact are accepted unless they are "clearly erroneous").

Pursuant to Rule 12(b)(6), the Court must dismiss for failure to state a claim upon which relief can be granted where a claim fails to meet the plausibility standard in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Specifically, the claim must be dismissed if the facts pleaded "do not permit the court to infer more than the mere possibility of misconduct"; in such cases "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (cleaned up).

In addition to considering the complaint, a court considering a Rule 12(b)(6) motion to dismiss may consider "'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice'" including "publicly-available documents and transcripts produced by [government agencies], which [a]re matters of public record directly relevant to the issue at hand." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *see also* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Legislative history and "records and reports of administrative bodies" are properly subject to

judicial notice. *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); *see, e.g.*, *BG Gulf Coast LNG, LLC v. Sabine-Neches Navig. Dist. of Jefferson Cnty.*, 587 F. Supp. 3d 508, 520 n.11 (S.D. Tex. 2022) (on Rule 12(b)(6) motion, taking judicial notice of agency's feasibility study published in Federal Register); *Kovac v. Wray*, 363 F. Supp. 3d 721, 732 n.3 (N.D. Tex. 2019) (on Rule 12(b)(6) motion, taking judicial notice of agency's statements before a Congressional committee).

ARGUMENT

A. Plaintiffs Lack Article III Standing and This Case Must be Dismissed under Rule 12(b)(1)

Texas is the only Plaintiff that produced evidence of harm it claims to suffer from the reopened CAM Program. Because all other States have agreed not to present any evidence that they suffer harm from the CAM Program, Joint Stip., ECF No. 106, this case must be dismissed if Texas lacks standing, *see Superior MRI Servs.*, 778 F.3d at 504.

Under Article III of the Constitution, federal courts have jurisdiction over a dispute "only if it is a case or controversy. This is a bedrock requirement." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks and citation omitted); *see also Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008). To establish standing for each claim, "a plaintiff must show: (1) it has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury." *Barbour*, 529 F.3d at 544 (quoting *Houston Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 617 (5th Cir. 2007)).

As a legal matter, Texas's theory of harm is not cognizable or redressable under recent Supreme Court precedent holding that Texas lacked Article III standing in an analogous case. That alone is a sufficient basis on which to dismiss this case. Moreover, as a factual matter, the evidence

Texas produced of harms it claims to suffer as a result of the CAM Program does not come close to meeting its burden to demonstrate that it has Article III standing. At a minimum, Plaintiffs other than Texas, which have opted not to produce any evidence that they suffer harm from the CAM Program, should be dismissed.

1) Texas Cannot Demonstrate Cognizable and Redressable Injury Under Binding Supreme Court Precedent

As a matter of law, Texas's injuries are neither cognizable nor redressable under recent Supreme Court precedent, and the case must be dismissed for lack of standing on this basis alone. In *United States v. Texas* ("*Priorities*"), the Supreme Court held that Texas and Louisiana lacked Article III standing to challenge a policy prioritizing detention and removal of certain undocumented immigrants and deprioritizing detention and removal of others. *United States v. Texas* ("*Priorities*"), 143 S. Ct. 1964, 1968-70 (2023). Texas and other States challenged the policy, asserting Article III standing based on the indirect effects of the policy: they claimed that the policy increased the number of removable non-citizens in their States, which in turn increased state spending on social services. *Id*. at 1969. The States relied on substantially the same evidence that Texas produced in this case.[32] *Id.* The district court held that Texas had Article III standing and the policy violated the law and vacated the policy. *Id*. The Fifth Circuit declined to stay the judgment, and the Supreme Court granted *certiorari* before the merits judgment on appeal. *Id.*

The Supreme Court reversed, reasoning that "federal policies frequently generate indirect effects on state revenues or state spending," and where a State asserts that the "federal law has

[32] The district court held in its findings of fact following a bench trial that Texas had incurred costs related to providing education and healthcare to non-citizens whom it claimed would have been removed but for the challenged federal policy of prioritizing some non-citizens for removal and deprioritizing others. *Texas v. United States*, 606 F. Supp. 3d 437, 459-465 (S.D. Tex. 2022), *rev'd*, *Priorities*, 143 S. Ct. at 1976. Here, Texas produced in jurisdictional discovery one of the declarations upon which the *Priorities* court relied, with the district court caption at the top. *See* Evarts Decl., Ex. G (Documents Produced by Texas in Discovery, TEXAS_CAM_000207).

produced only those kinds of indirect effects, the State's claim for standing can become more attenuated." *Id*. at 1972 n.3. In such cases, in which the "asserted injury arises from the government's unlawful regulation (or lack of regulation) of someone else, *much more* is needed to establish standing." *Id.* at 1964 (emphasis added) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). Emphasizing that Article III's irreducible minimum requirements are imperative to safeguard the separation of powers and to "'prevent the judicial process from being used to usurp the powers of the political branches,'" the Supreme Court held that even if the States had incurred some pocketbook injury, such injury was not "legally and judicially cognizable" under Article III because the States' challenge interfered with the Executive's inherent Article II discretion. *Id.* at 1969-70, 1972-73 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). This was especially true in a context implicating "foreign-policy objectives," which are the domain of the political branches. *Id*. at 1972. The States' asserted injury was also not of a type "traditionally redressable in federal court" where there was no "precedent, history, or tradition" of federal courts ordering the Executive to exercise its discretionary authority to achieve the States' preferred results, and "courts generally lack meaningful standards" for assessing the propriety of the Executive's discretionary policy that requires "balanc[ing] many factors." *Id.* at 1970-72.

While *Priorities* specifically concerned the Executive's discretionary authority with respect to its policies relating to detention and removal of non-citizens, its reasoning applies with equal force here. Congress expressly invested the Executive with substantial discretion to grant parole "under such conditions as [the Executive] may prescribe" and until such time as "the purposes of such parole shall, in the opinion of [the Executive], have been served[.]" 8 U.S.C. §

1182(d)(5)(A).[33] The federal government did in fact balance many factors in devising the challenged CAM Program policy, including the dangers and costs of irregular migration and the interests of children seeking to reunify with certain family members.[34] Tellingly, just as in *Priorities*, there is no precedent, history, or tradition of federal judicial interference with any of the parole programs that the executive branch has created over the past seven decades. *See* Part B.2.b, *infra* (describing historical uses of parole programs). Indeed, a judicial order forcing the Executive to exercise its discretionary parole authority in a particular way would interfere not only with the Executive's inherent Article II discretion but also with the discretion Congress expressly granted to the Executive in the parole statute. Just as Texas's asserted injury was neither cognizable nor redressable in *Priorities*, the same is true here. The action must be dismissed under Rule 12(b)(1).

2) In Addition, Texas's Evidence Fails to Meet Its Burden to Prove It Has Standing

As a factual matter, even if Texas's asserted injuries were of a type that could be cognizable and redressable under Article III (they are not), Texas cannot meet its burden to demonstrate its standing by a preponderance of the evidence. *See Superior MRI Servs.*, 778 F.3d at 504. As described at Part A.1, *supra*, the Supreme Court recently cautioned that where a State seeks to show indirect injury based on federal regulation of third-parties, "much more is needed" to support its standing. *Priorities*, 143 S. Ct. at 1971 (internal quotation omitted); *see also Clapper*, 568 U.S. at 409, 414 (unsupported speculation about some "*possible* future injury" is insufficient, especially where it "rest[s] on speculation about the decisions of independent actors") (internal quotation omitted); *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) ("[W]here a causal relation between

[33] Although the statute refers to the "Attorney General," authority was transferred to the Secretary of Homeland Security upon the creation of the Department of Homeland Security. *See* 8 U.S.C. § 1103(a).

[34] *See* Evarts Decl., Ex. B (88 Fed. Reg. at 21,698-701).

injury and challenged action depends upon the decision of an independent third party … 'standing … is ordinarily substantially more difficult to establish.'" (quoting *Lujan*, 504 U.S. at 562)).

Texas has produced no evidence to show that a CAM parolee has used any of the social services on which its theory of harm is predicated, let alone that the State has actually incurred any unreimbursed expenses because of a CAM parolee.[35] Texas's "evidence" amounts to no more than a chain of hypotheticals related to speculative future expenses; this is far too attenuated to demonstrate standing. *See Louisiana ex rel. Landry v. Biden*, 64 F.4th 674, 677-78 (5th Cir. 2023) (States cannot base standing "on a chain of hypotheticals" that "federal agencies may (*or may not*)" take certain actions that "may (*or may not*) burden the States.").

a) Texas Cannot Prove That It Suffers an Injury

To support its injury, Texas relies on state spending on three types of social services: driver's licenses; health care; and education.[36] The bulk of its evidence—declarations submitted in other federal court cases challenging different immigration policies—suffer from (a) false assumptions about a CAM parolee population boom,[37] (b) assumptions based on data relating to materially different populations, and (c) omission of offsetting revenues, among other errors. As described by experts Cyierra Roldan, Dr. Leighton Ku, Dr. Patricia Gándara, and Dr. Gary Orfield, Texas fails to provide evidence of any actual injury it has suffered or will suffer as a result of CAM parolees.[38]

[35] Evarts Decl., Ex. A (Texas's Resps. to Defs.' Jurisdictional Disc. Reqs., Resp. to Req. for Admis. No. 3).

[36] *See* Evarts Decl., Ex. G (Documents Produced by Texas in Discovery, TEXAS_CAM_000001-220).

[37] A CAM parolee "population boom" has never existed and never will. *See* Garcia Decl. ¶¶ 6-16.

[38] *See* Declaration of Cyierra Roldan ("Roldan Decl."); Declaration of Leighton Ku ("Ku Decl."); Declaration of Patricia Gándara and Gary Orfield ("Gándara & Orfield Decl.").

i) *Driver's License Evidence*

Far from proving that CAM parolees will generate "significant" costs for Texas, the evidence Texas has produced shows that it is likely to enjoy net revenue gains from any CAM parolees who apply for driver's licenses. *See* Roldan Decl. ¶¶ 12-25. Texas charges a $33 fee per driver's license, and it spends approximately $3 per license to complete the identity and immigration status verifications, produce the card, and mail the card to the applicant. *See id.* ¶¶ 12, 14-16. To the extent Texas asserts that it subsidizes the costs of driver's licenses, Texas relies entirely on speculation about additional personnel and infrastructure costs it may incur *if* there were at least a twenty-fold increase in the number of CAM beneficiaries and *if* all of those beneficiaries applied for driver's licenses (notwithstanding that many are likely too young to drive).[39] *See* Roldan Decl. ¶¶ 17-23. Given the historical size of the CAM Program and structural limitations on its growth, *see* Garcia Decl. ¶¶ 6-16, Texas's calculations are pure fantasy. Moreover, Texas's figures do not make sense when compared with actual data about Texas's driver's license expenditures for the 5.3 million people who used the State's driver's license services in the last fiscal year. Roldan Decl. ¶¶ 26-33. Notably, Texas's cost estimates omit the revenues Texas obtains from driver's license fees, not to mention related fees Texas generates from new drivers. *See id.*

ii) *Healthcare Evidence*

CAM parolees are unlikely to use the healthcare services at issue at all, and Texas's assertions about CAM parolees causing a strain on state resources find no support in its evidence. *See* Ku Decl. ¶¶ 11-24. Texas relies on evidence that undocumented immigrants use various

[39] Evarts Decl., Ex. G (Documents Produced by Texas in Discovery, TEXAS_CAM_000102 ¶ 8).

emergency healthcare services,[40] but undocumented immigrants are not representative of the CAM parolee population; CAM parolees as a group are much more likely to have private health insurance because their parents have legal statuses that make them eligible for work authorization and CAM parolees are themselves eligible for work authorization if they are working-age.[41] Ku Decl. ¶ 18 & n.22. But even assuming arguendo that *all* CAM parolees in Texas were reliant on publicly-subsidized medical programs, they would constitute a negligible fraction of the 5.56 million people enrolled in Medicaid and Children's Health Insurance Program ("CHIP") in Texas. *Id.* ¶ 15. And average expenditures on Medicaid/CHIP for the CAM parolee population would likely be much lower than average Medicare/CHIP expenditures for the general population because immigrant children are typically healthy. *Id.* ¶ 19. Finally, Texas's healthcare evidence is misleading because it double counts expenditures and ignores federal funding that offsets most of the State's costs. *Id.* ¶¶ 21-22.

iii) *Education Evidence*

Far from straining the State's ability to provide educational services, *see* Am. Compl. ¶ 81, CAM parolees may actually generate net revenues for Texas when federal funding offsets are accounted for, *see* Gándara & Orfield Decl. ¶¶ 21-22. Texas's evidence relies on state spending on unaccompanied minors, a population with different characteristics from CAM parolees, many of whom are unlikely to be of grade school age. *Id.* ¶ 19-20.[42] With respect to bilingual education costs, while Texas claims (without explanation) that it spends thousands more annually per student

[40] *See* Evarts Decl., Ex. G (Documents Produced by Texas in Discovery, TEXAS_CAM_000112-192).

[41] *See also* Evarts Decl., Ex. H (U.S. Citizenship & Immigr. Servs., *Employment Authorization* (Sept. 6, 2013), https://www.uscis.gov/employment-authorization); *id.*, Ex. E (U.S. Citizenship & Immigr. Servs., *Central American Minors (CAM) Program* (June. 23, 2023), https://www.uscis.gov/CAM).

[42] *See* Evarts Decl., Ex. D (*Recommendation on the Central American Minors (CAM) Refugee/Parole Program* at 43).

to provide bilingual education, those costs find no support in its evidence and the actual cost of bilingual education is much less. Gándara & Orfield Decl. ¶¶ 13-20, 29. Moreover, Texas ignores that bilingual education costs may not be relevant at all for the small number of CAM parolees entering the State; the State does not mandate that bilingual education be provided past the fifth grade; and even eligible students do not always participate in it. *Id.* ¶ 18. With respect to general education costs, Texas's evidence is misleading: the cost associated with adding one or two students is far smaller than Texas's per capita costs because a school's fixed costs for facilities and staffing do not significantly increase in response to a few additional students. *Id.* ¶¶ 14, 21. And Texas ignores that the federal government provides major educational funding that offsets the State's costs to some extent and may result in a net gain to Texas.[43] *Id.* ¶¶ 21-28.

iv) *Texas Celebrates Population Growth—Except for CAM*

Texas's theory of injury based on per person social services spending rests on the premise that the State is harmed by population growth—contrary to accepted wisdom and abundant evidence that state officials have celebrated Texas's population growth both before and after filing this case. *See* Evarts Decl., Ex. I, Greg Abbott, (@GregAbbott_TX), Twitter (Feb. 8, 2022, 1:09 PM), https://twitter.com/GregAbbott_TX/status/1491112044447543297. ("Texas is brimming with promise. We continue to lead as a top state for population growth[.]"); *id.* Ex. J, Greg Abbott, (@GregAbbott_TX), Twitter (Jan. 6, 2022, 11:28 AM), https://twitter.com/GregAbbott_TX/status/1479127787076296733, ("Texas is growing faster than any other state in America."); *Id.* Ex. K, Greg Abbott, (@GregAbbott_TX), Twitter (Dec. 31, 2019, 12:22 PM), https://twitter.com/GregAbbott_TX/status/1212061448685309952 ("Texas had the

[43] Because Texas fails to provide the data on which its assertions and figures are based, actual state spending after federal funding reimbursements cannot be ascertained. *See* Gándara & Orfield Decl. ¶¶ 13-17, 20.

biggest population increase of any state in America last year. The beauty of American government is that people can live in the state they like best & that provides the best opportunity."). As Governor Abbott put it, "More people are choosing Texas because it is the best state to live, work, & raise a family," Evarts Decl., Ex. J, and the small number of CAM beneficiaries who reunite with their family members in Texas apparently agree. Nothing in Texas's evidence suggests that these CAM beneficiaries impose unique burdens on the State that make them any different than the hundreds of thousands of other new arrivals every year whom Texas celebrates.

To the extent that Texas and the other States' allegations suggest that they view the arrival of CAM parolees differently because of their alienage, *see, e.g.*, Am. Compl. ¶¶ 2-3, 11-16, 19-20, 22-24, 26-27, 30-34 (referring no fewer than 40 times to "illegal" immigrants); *see also* Supp. Compl. ¶¶ 3-4, 8-13 (repeatedly referencing same), discrimination based on alienage would, of course, be unlawful and thus an impermissible basis for standing. *See* U.S. Const. amend. XIV, § 1; *see also Shaw v. Reno*, 509 U.S. 630, 642 (1993) (express classifications based on race are "immediately suspect" due to concerns that they are "in fact motivated by illegitimate notions of racial inferiority or simple racial politics" (internal citations omitted)).

In short, Texas has failed to demonstrate the "much more" necessary to support its standing to challenge a federal regulation based on indirect effects on third parties.

b) Texas Cannot Demonstrate That its Claimed Injury is Fairly Traceable to the CAM Program

Even assuming *arguendo* that Texas suffered an actual injury, it cannot prove that such injury is "fairly traceable to the defendant's allegedly *unlawful* conduct" *California v. Texas*, 141 S. Ct. at 2113 (internal quotations omitted). Texas's evidence relies on costs associated with services for undocumented immigrants and unaccompanied minors. But CAM parolees are

neither.[44] Moreover, Texas has failed to produce any evidence showing that these populations are representative of CAM parolees. Notably, CAM parolees have different characteristics that are relevant to whether they will use the services at all, and if so, to what extent. *See* Part A.2.a, *supra*. Texas's evidence of spending on different populations fails to demonstrate any injury "fairly traceable" to CAM parolees, and that traceability problem independently defeats Texas's standing in this case. *See Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015) (finding no standing where Mississippi failed to trace claimed injury directly to challenged policy as opposed to undocumented immigration generally; injury was "purely speculative"); *see also California v. Texas*, 141 S. Ct. at 2116-17 (finding no standing where Texas did not establish that its "pocketbook injur[y] "in the form of the increased use of (and therefore cost to) state-operated medical insurance programs" and other expenses was "directly traceable to any actual or possibly unlawful Government conduct"); *see generally Louisiana ex. rel. Landry*, 64 F.4th at 677-78 (States cannot base standing "on a chain of hypotheticals" that "federal agencies may (*or may not*)" take certain actions that "may (*or may not*) burden the States.").

c) Texas Cannot Demonstrate That its Claimed Injury is Redressable

Finally, Texas lacks standing because its asserted injuries—an increase in the number of people using certain services and corresponding costs to the State—would not be redressed by its requested remedy of setting aside or enjoining CAM, *see* Am. Compl., Prayer for Relief. Even if the States were successful in setting aside or enjoining the use of parole under the CAM Program, such relief would curtail but one set of procedures the Executive uses to implement its discretionary parole authority under 8 U.S.C. § 1182(d)(5)(A). The requested remedies would not,

[44] *See* Evarts Decl. Ex. B (88 Fed. Reg. at 21,696, 21,698, 21,701 (CAM "[p]arolees are allowed to temporarily enter the United States" for a three-year period and are eligible for work authorization)).

however, enjoin the Executive's discretionary authority under the parole statute. *See* Part B, *infra*. Indeed, the requested remedies would do nothing to prevent the same CAM families from being considered for and granted parole into the United States through another set of procedures. *See* Evarts Decl., Ex. B (88 Fed. Reg. at 21,698 n.23 (all non-citizens may apply for advance parole using Form I-131)). Nor would the requested remedies prevent CAM parolees from entering Texas via the U.S.-Mexico border (with or without inspection) to reunite in safety with their parents—an expected outcome that the CAM Program was expressly designed to avoid.[45] Notably, after the original CAM Program was terminated, a "significant number" of CAM beneficiaries came by land to the United States to join their parents, *see id.*, Ex. B (88 Fed. Reg. at 21,700); Garcia Decl. ¶ 19. Where the State's requested remedy would be ineffective, the injury is not redressable. *See Priorities*, 143 S. Ct. at 1978 (Gorsuch, J., concurring) ("A judicial decree rendering the [challenged policy] a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion.").

3) At Minimum, All Other State Plaintiffs Fail to Demonstrate Harm and Should be Dismissed

"[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). While a Court "need not" assess the standing of all parties where at least one party has demonstrated standing to raise each claim for relief, *see, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998) (internal quotation marks omitted), courts retain the discretion to analyze the standing of each party and they do so where they can "sensibly winnow[]" down the case and

[45] *See* Evarts Decl., Ex. B (88 Fed. Reg. at 21,695); *see also id.*, Ex. D (*Recommendation on the Central American Minors (CAM) Refugee/Parole Program* at 8-13 (describing how the CAM Program was a "significant component of the U.S. government's response" to the 1300% increase over a three-year period in the number of unaccompanied minors from El Salvador, Honduras, and Guatemala making the dangerous journey to the U.S. southern border)).

thereby conserve judicial resources. *See, e.g.*, *M.M.V. v. Garland*, 1 F.4th 1100, 1110-1111 (D.C. Cir. 2021) (affirming lower court's dismissal of some plaintiffs' claims notwithstanding that other plaintiffs had standing); *see also Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795, 802 (10th Cir. 2011) ("nothing . . . suggests that a court *must* permit a plaintiff that *lacks* standing to remain in a case whenever it determines that a co-plaintiff has standing"); *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091-92 (D. Ariz. 2011) (collecting cases).

Nearly two years into the case and after this Court admonished Plaintiffs to proceed with this matter or to dismiss it,[46] 13 of the 14 Plaintiffs have declined to meaningfully proceed but still refuse to dismiss the case.[47] These States ("the dormant Plaintiffs") will not now or in the future provide evidence of any injury they suffer from the CAM Program—absent a reopening of reciprocal discovery at some later stage, which could be on remand after appeal. *See* Joint Stip., ECF No. 106.

The standing analysis is open and shut for the 13 dormant Plaintiffs. Defendant-Intervenors have brought a factual challenge to their standing under Rule 12(b)(1), demonstrating that the CAM Program is and always has been a small program, and parents commit to financially supporting CAM parolees, such that the States will not incur any significant costs associated with services for CAM parolees. Indeed, given offsetting federal and fees revenues, the States may well have a net gain in revenue associated with CAM parolees. *See* Roldan Decl. ¶¶ 12-25; Ku Decl. ¶¶ 18, 22. Under this circuit's precedent, Plaintiffs responding to a Rule 12(b)(1) factual challenge to their standing are "obliged to submit facts through some evidentiary method to sustain

[46] *See* Order, July 20, 2023, ECF No. 102.

[47] One Plaintiff, the State of Arizona, dismissed its claims earlier this year. Notice of Voluntary Dismissal, ECF No. 87.

[their] burden of proof." *Superior MRI Servs.*, 778 F.3d at 504 (internal quotation marks omitted). The 13 dormant Plaintiffs have failed to meet their burden and are subject to dismissal.

Moreover, fundamental fairness and judicial economy favor dismissing the dormant Plaintiffs. The allegations of injury in Plaintiffs' Amended Complaint are no model of clarity and have already created confusion. *Compare* Am. Compl., Prayer for Relief (requesting that the Court "[e]njoin the Defendants from carrying out the CAM Program" and "set [the Program] aside to the extent that it provides any benefits outside of the contours of the Refugee Admissions Program"), *with* Pls.' Opp'n to Mot. to Intervene at 5 & n.2, ECF No. 36 (revealing that some aspects of the CAM Program, including grants of CAM parole, are outside the scope of the States' challenge). It was not until Defendant-Intervenors received Texas's jurisdictional discovery responses that they were assured that Texas does not challenge the refugee portion of the CAM Program or grants of CAM parole to beneficiaries already in the United States.[48] But the 13 dormant States have not committed to these limitations on the scope of their challenge. They sit on the sidelines while Texas has committed itself to a theory of injury and theory of the case, but if they are not pleased with the results of Texas's approach, they may well seek to reopen jurisdictional discovery and take another bite of the apple—prejudicing the parties who have been actively litigating, as well as burdening the Court. Just as intervention in a case should be denied where a party has failed to timely make its interest known, *see* Fed. R. Civ. P. 24(a), (b) (requiring "timely motion"), so too should the 13 dormant Plaintiffs be prevented from charting a new course for this case at some point in the future (including post-appeal).

[48] Evarts Decl., Ex. A (Texas's Resps. to Defs.' Jurisdictional Disc. Reqs., Resps. to Reqs. for Admis. Nos. 13-17).

Moreover, permitting the dormant Plaintiffs to proceed may complicate any remedial analysis the Court must undertake. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) ("In each case, courts *must* balance the competing claims of injury and must consider the effect *on each party* of the granting or withholding of the requested relief." (internal quotation marks omitted and emphasis added)). Notably, even after the dormant Plaintiffs stipulated that they would not introduce evidence of harm they suffer, they continued to assert that *all* States are harmed by the recent CAM enhancements. *See* Supp. Compl. ¶¶ 41-47. Without evidence of injury from the dormant Plaintiffs, the Court will be unable to effectively consider the impact of any relief on each party, as it must do.

B. Claim One Is Predicated on a Misreading of the Parole Statute and Must be Dismissed

Plaintiffs' first claim must be dismissed for failure to state a claim under Rule 12(b)(6) because it is predicated on an error of law. Plaintiffs contend that Defendants' implementation of the CAM Program—"to the extent that it uses parole and operates outside of the Refugee Admissions Program"—constitutes *ultra vires* action that is "not in accordance with law" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See* Am. Compl. ¶¶ 85-88. The gravamen of Plaintiffs' claim is that the CAM Program is contrary to law for two legal reasons: (1) it is a programmatic parole program—that is, all applicants who meet the program criteria and are not granted refugee status are *considered* for parole, *see id*. ¶¶ 85-88; and (2) the Executive has defined the terms "urgent humanitarian reasons" and "significant public benefit" more broadly than is permissible under the statute, *see id.* ¶¶ 48-51, 86. Plaintiffs are wrong on the law on both counts.[49]

[49] The States do not appear to allege that, as a factual matter, the actual granting of parole under the reopened CAM Program violates the statute. In its discovery responses, Texas clarifies that "it is not challenging any grants of parole (*i.e.*, orders) and is only challenging the rules of the reopened CAM program announced in March 2021 and the subsequent rules implementing it." *See* Evarts Decl., Ex. A (Texas's Resps. to Defs.' Jurisdictional Disc. Reqs., Resp. to Req. for Admis. No. 14). Defendant-Intervenors' Rule 12(b)(6) motion

Under *Chevron*, a court reviewing an agency's construction of a statute that it administers must first consider whether "the intent of Congress is clear," and if so, "that is the end of the matter." *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Here, the intent of Congress is clear on the face of the statute.

If, however, the Court determines that the statute is "silent or ambiguous," the second *Chevron* step requires the Court to determine whether the agency has made a "permissible construction of the statute." *Id.* at 843. "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. The court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

1) Based on the Plain Text of the Parole Statute, the CAM Program is a Lawful Exercise of the Executive's Discretionary Parole Authority

To begin, Congress has authorized the Executive to exercise discretionary parole authority, as follows:

> The [Executive branch] may . . . *in his discretion parole into the United States* temporarily *under such conditions as he may prescribe* only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, *in the opinion of the [Executive]*, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (emphasis added) (revised 1996). Notably, the statute does not define the terms "case-by-case," "urgent humanitarian reasons," or "significant public benefit." Nor has

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is directed only to the questions of law underpinning Plaintiffs' claim, not any question of fact. *See* Fed. R. Civ. P. 12(b)(6).

Congress imposed any limits on the number of individuals to whom the Executive may grant parole under Section 1182(d)(5) for "urgent humanitarian reasons" or "significant public benefit."

Rather, Congress has conferred substantial discretion upon the Executive branch in the exercise of its statutory parole power. In addition to the multiple explicit references to the Executive's discretionary authority in the text of Section 1182(d)(5)(A), Congress has also conferred upon the Secretary of Homeland Security the authority to "issue such instructions" and "perform such other acts as he deems necessary for carrying out his authority" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1103(a)(1), (3), which includes "[e]stablishing and administering rules . . . governing the granting of . . . parole," *see* 6 U.S.C. § 202(4).

Plaintiffs assert in their pleadings that Congress has significantly cabined the Executive's parole authority, *see* Am. Compl. ¶ 48 ("the INA provides the *specific instances* where the government may use its authority to parole individuals into the United States" (emphasis added)). But the plain text of the statute speaks for itself. Congress granted the Executive authority (a) to prescribe the conditions under which parole is to be granted; (b) to grant parole in its discretion so long as each parole decision is made on a "case-by-case basis for urgent humanitarian reasons or significant public benefit"; and (c) to determine when the "purposes of such parole" have been served. 8 U.S.C. § 1182(d)(5)(A).

As an initial matter, the exercise of discretion Congress authorized necessarily entails determining the manner in which the Executive is to receive and consider applications from individuals seeking a grant of parole. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."). The

CAM Program is but one example of the Executive's implementing procedures providing how individuals may apply for parole consideration.[50] Other such procedures include the Cuban Family Reunification Parole (CFRP) Program,[51] the Haitian Family Reunification Parole (HRFP) Program,[52] and Uniting for Ukraine (U4U).[53] Like the CAM Program, these parole programs allow individuals who meet certain eligibility criteria defined by the Executive to apply for a grant of parole into the United States. Plaintiffs argue that "an entire program that *categorically* considers applicants" for parole is "directly contrary to the plain text" of the statute. *See* Am. Compl. ¶ 87. They are wrong. The statute expressly leaves to the Executive's discretion the determination of the "conditions" under which parole may be granted, 8 U.S.C. § 1182(d)(5)(A).

Similarly, the exercise of discretion authorized by Congress necessarily entails defining the terms "significant public benefit" and "urgent humanitarian reason," as necessary to determine whether granting parole to a particular individual serves those purposes. *Knauff*, 338 U.S. at 543-44. Lest there be any doubt as to whether Congress granted such authority to the Executive when it declined to define the terms, the statute expressly leaves to the "opinion" of the Executive the determination as to when those purposes "have been served." *Id.* Plaintiffs' pleadings suggest that the terms "significant public benefit" and "urgent humanitarian reason" *should* be limited to non-citizens "who do not qualify for an admission category but have an urgent need for medical care" or "who qualify for a visa but are waiting for it to become available." *See* Am. Compl. ¶ 51. But

[50] For example, any non-citizen abroad can be considered for advance parole by submitting Form I-131. *See* Evarts Decl., Ex. B (88 Fed. Reg. at 21,696 n.21).

[51] U.S. Citizenship & Immigr. Servs., *The Cuban Family Reunification Parole Program* (Aug. 11, 2023), https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program.

[52] U.S. Citizenship & Immigr. Servs., *The Haitian Family Reunification Parole (HFRP) Program* (Aug. 11, 2023), https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program.

[53] U.S. Citizenship & Immigr. Servs., *Uniting for Ukraine* (Sept. 20, 2023), https://www.uscis.gov/ukraine.

the plain text of the statute contains no such limitations, nor does it limit the total number of individuals who may be granted parole—regardless of whether Plaintiffs believe it *should* do so, *see id.* ¶ 87.

Finally, to the extent Plaintiffs' pleadings imply that the CAM Program is outside the scope of the Executive's authority because it "admit[s]" CAM beneficiaries into the United States on a "permanent[]" basis, *see, e.g.*, *id.* ¶ 49, Plaintiffs provide no factual support for their conclusory assertion. Their assertion is properly disregarded because it is directly contradicted by the April 2023 Federal Register Notice, which is incorporated by reference into the States' pleadings.[54] *See In re Enron Corp. Sec.*, 238 F. Supp. 3d 799, 815-16 (S.D. Tex. 2017) (on a Rule 12(b)(6) motion, allegations directly contradicted by documents incorporated by reference may be disregarded, and collecting cases). The Federal Register Notice specifies that "[p]arole is *not* an admission of the individual to the United States," and CAM parolees "may join their qualifying parents or legal guardians in the United States for a *temporary* period of three years." Evarts Decl., Ex. B (88 Fed. Reg. at 21,698 (emphasis added)). The Federal Register Notice also identifies the eligibility criteria that applicants must satisfy in order to be considered for parole, and it discusses various factors the Executive has identified as relevant to the determination of whether granting parole to a particular applicant would satisfy a "significant public benefit" or "urgent humanitarian reason." *Id.* (88 Fed. Reg. at 21,698-701).

[54] *See* Supp. Compl. ¶¶ 26-41 (directly challenging the Federal Register Notice). It is well established that "documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [plaintiff's] claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (internal quotation marks omitted and cleaned up); *see also Funk*, 631 F.3d at 783 (same).

In short, in reopening the CAM Program, the Executive has acted well within the bounds of the plain text of the parole statute and related statutes conferring broad parole authority on the Executive. The plain text confers discretionary authority on the Executive to create (or reopen) a program, such as the CAM Program, that articulates eligibility criteria and procedures under which individuals may apply to be considered for a grant of parole. The plain text also confers discretionary authority on the Executive to define the meaning of the terms "significant public benefit" and "urgent humanitarian reason," as necessary to determine in each case whether to grant parole to the particular individual. Where, as here, "the intent of Congress is clear," "that is the end of the matter." *Chevron*, 467 U.S. at 842.

2) To the Extent the Statute Contains Any Ambiguity, the Executive's Interpretation is Permissible and Therefore Lawful

At a minimum, the DHS's interpretation of the parole statute is reasonable and permissible under *Chevron* step two, and "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. As the Supreme Court has explained, "*Chevron* is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (internal quotation marks omitted). Moreover, "a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency" because "the agency is the more politically accountable actor" and "the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

To the extent a court finds a "statute is subject to differing interpretations," then it "must examine its legislative history, predecessor statutes, pertinent court decisions, and post-enactment administrative interpretations." *Salazar v. Maimon*, 750 F.3d 514, 519 (5th Cir. 2014) (internal citations omitted and cleaned up); *see* pp. 8-9 (Legal Standards), *supra* (Court may take judicial notice of matters of public record on a Rule 12(b)(6) motion).

a) Predecessor Statutes and Legislative History

Plaintiffs' pleadings imply that, notwithstanding the broad statutory language and Congress's failure to define the key statutory terms, the legislative history requires reading narrowing language into the parole provision. *See* Am. Compl. ¶¶ 49-51. They are incorrect. The prior incarnations of the parole provision demonstrate that Congress has, since the 1950s, left the task of defining the key statutory terms to the Executive, and the legislative history confirms that Congress specifically considered and rejected an amendment that would have constrained Executive authority with a narrow definition of the statutory terms:

The first codification of the Executive's parole authority in Section 212(d)(5) of the INA dates back to 1952. That predecessor statute established that the "Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States." INA, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952). Then, just as now, Congress did not define the key statutory terms "emergent" or "public interest." *See id.*

Congress left the wording of the parole provision unchanged until 1980, when it passed the Refugee Act and thereby established for the first time a permanent legal process to admit people to the United States as refugees. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. In passing the Act, Congress added a restriction to the parole authority, which prevented the Attorney General

from paroling a refugee into the United States "unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee." 94 Stat. at 108 (codified at INA § 212(d)(5)(B)). The legislative history makes clear, however, that the restriction did not otherwise limit the Executive's long-standing parole authority. Specifically, the conference report adopted by both chambers accompanying the final legislation stated that "[t]he Conferees, in accepting the House limitation on the parole of refugees, recognize that it does not affect the Attorney General's authority under section 212(d)(5) of the INA to parole aliens who are not deemed to be refugees." H.R. Rep. No. 96-781, at 20 (1980) (Conf. Rep.).

Congress's most recent amendment to the parole provision was in 1996 when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Division C, § 602(a), 110 Stat. 3009-546, 3009-689 (1996). In IIRIRA, Congress replaced the language requiring that parole be granted for "emergent reasons or for reasons deemed strictly in the public interest," with the current statutory language requiring the Attorney General to grant parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* Notably, when the House Judiciary Committee was working on the legislation that would eventually become IIRIRA, it considered—and rejected—an amendment that would have narrowly defined when parole was authorized for "an urgent humanitarian reason" or "for a reason deemed strictly in the public interest." H.R. Rep. No. 104-469, pt. 1, at 77-78 (1995) (proposing that parole be limited to cases involving certain medical emergencies and those involving individuals assisting the U.S. government in a law enforcement activity or where the parolee was to be criminally prosecuted). Before the bill was brought to the Floor of the U.S. House of Representatives for a

vote, the language narrowly defining when parole could be used was stripped from the bill. *Compare id.*, *with* IIRIRA § 602, 110 Stat. at 3009-689. The legislation that ultimately passed both chambers of Congress and was signed into law as IIRIRA left the key statutory terms undefined. IIRIRA § 602, at 3009-689.

In their Amended Complaint, Plaintiffs quote from a House Report opining that "further, specific limitations on the Attorney General's discretion are necessary," *see* Am. Compl. ¶ 49, but they fail to mention that the "specific limitations" Congress considered—precisely and narrowly defining the circumstances under which the Executive could grant parole—were rejected. Far from demonstrating that limits must be read into the parole provision that do not appear in the statutory text, it is black letter law that "Congress' rejection of the very language that would have achieved the result" urged here "weighs heavily against" such interpretation. *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006); *see also Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355, 361–62 (5th Cir. 2009) (*en banc*) (holding Congress's failure to amend a statute despite opportunities to do so upheld the statute's traditional interpretation).

b) Past Administrative Practice, Congress's Response

Moreover, Plaintiffs' pleadings are notably silent on the seven-decade long history of the Executive's use of the parole authority to create programs substantially similar to the CAM Program, as well as the fact that Congress has acquiesced in, or even ratified the results of, such programs. As demonstrated below, the Executive has used parole in a similar manner: (a) before the enactment of the Refugee Act of 1980, (b) after the Refugee Act and before the enactment of IIRIRA in 1996, and (c) during the nearly 30 years since the enactment of IIRIRA. As Justice Kavanaugh observed in his concurrence in *Biden v. Texas*, "every President since the late 1990s has employed the parole option," and "[b]ecause the immigration statutes afford substantial

discretion to the Executive, different Presidents may exercise that discretion differently. That is Administrative Law 101." 142 S. Ct. 2528, 2548 (2022) (Kavanaugh, J., concurring).

The following is a non-exhaustive list of "programmatic" parole programs since the 1950s:

- In the mid-1950s, resident Eisenhower directed his Attorney General to permit the entry of 32,000 Hungarians under Section 1182(d)(5)(A) following the revolution of October 1956.[55]
- Between 1962 and the end of 1979, over 690,000 Cubans entered the United States under Section 1182(d)(5)(A) after the United States severed diplomatic relations with Cuba.[56]
- Between 1975 and the mid-1980s, the Attorney General authorized or extended parole programs 10 times, enabling hundreds of thousands of people from Vietnam, Cambodia, and Laos who were fleeing Communist takeovers to enter the United States.[57]
- In 1994, the United States and Cuba signed an accord under which the United States agreed to admit at least 20,000 Cubans per year, many of whom were to be paroled through the Special Cuban Migration Program. The United States later began granting parole to certain categories of Cubans held at Guantanamo Bay.[58]
- In 2006, the George W. Bush administration created the Cuban Medical Professionals Parole Program, allowing Cuban doctors and other medical professionals to request parole in the United States for themselves and their dependents.[59]
- In 2007, the George W. Bush administration created the Cuban Family Reunification Parole Program enabling certain eligible Cuban nationals to come to the United States to reunite with their family members, as part the United States' commitment to provide a minimum of 20,000 travel documents to Cubans annually.[60]

[55] Cong. Rsch. Serv., 96th Cong., Review of U.S. Refugee Resettlement Programs and Policies 9 (Comm. Print 1980).

[56] *Id.* at 13.

[57] *Id.*

[58] U.S. Gen. Accounting Off., *GAO/NSIAD-95-211, U.S. Response to the 1994 Cuban Migration Crisis* 3-4, 7-8 (1995), https://www.gao.gov/assets/nsiad-95-211.pdf.

[59] U.S. Citizenship & Immigr. Servs., *Cuban Medical Professional Parole (CMPP) Program* (Jan. 19, 2017), https://www.uscis.gov/humanitarian/humanitarian-parole/cuban-medical-professional-parole-cmpp-program.

[60] U.S. Citizenship & Immigr. Servs., Cuban Family Reunification Program, 72 Fed. Reg. 65,588 (Nov. 21, 2007).

- In 2014, the Obama administration created the Haitian Family Reunification Parole Program to reunite families and address humanitarian and protection needs.[61]
- In 2022, the Biden administration created United for Ukraine, a parole program designed to "fulfill[] the President's commitment to welcome Ukrainians fleeing Russia's invasion of Ukraine."[62]

Both before and after 1996, Congress has never acted to curtail any programmatic use of the parole authority. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute" and adopts or ratifies that interpretation when it does not act to amend the statute and instead re-enacts it without change.); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

Far from indicating disapproval, Congress has repeatedly ratified programmatic uses of the parole authority that are materially indistinguishable from the CAM Program, further confirming the lawfulness of the executive's interpretation of the parole statute. *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) ("The failure of Congress to alter or amend . . . creates a presumption in favor of the administrative interpretation . . ."); *see also Lorillard*, 434 U.S. at 580. For example:

- In 1958, Congress authorized Hungarians paroled into the United States to adjust their status and be admitted to the United States. *See* Hungarian Refugee Act, Pub. L. No. 85-559, 72 Stat. 419 (1958).
- In 1966, Congress enacted the Cuban Adjustment Act (CAA), which granted past and future Cuban parolees the ability to adjust status to lawful permanent residence after one year. Pub. L. No. 89-732, 80 Stat. 1161 (1966).
- In 1996, Congress reaffirmed the CAA, mandating that it stay in place until the President determines that a democratically elected government in Cuba is in

[61] U.S. Citizenship & Immigr. Servs., Implementation of Haitian Family Reunification Parole Program, 79 Fed. Reg. 75,581, 75,582 (Dec. 18, 2014).

[62] U.S. Dep't of Homeland Sec., *Uniting for Ukraine* (Sept. 22, 2023), dhs.gov/ukraine.

power. IIRIRA, Pub. L. No. 104-208, Division C. § 606(a), 110 Stat. 3009-546, 3009-695 (1996).

- In 2021 (Public Law 117-43) and 2022 (Public Law 117-128), Congress extended benefits to Afghans and Ukrainians, respectively, who had already been paroled in through one of the programs created by the Biden Administration, and to certain Afghans and Ukrainians who might be paroled into the United States sometime in the future. Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43, 135 Stat. 344 (2021); Additional Ukraine Supplemental Appropriations Act, 2022, Pub. L. No. 117-128, 136 Stat. 1211 (2022).

To the extent any ambiguity exists in the parole statute, a consideration of the predecessor statutes, legislative history, seven decades of administrative practice, and Congress's acquiescence in and ratifications of that administrative practice, confirm that the Executive's interpretation of Section 1182(d)(5)(A) is permissible and therefore lawful. Plaintiffs' first claim must be dismissed. Fed. R. Civ. P. 12(b)(6).

CONCLUSION

In light of the foregoing, Defendant-Intervenors respectfully request that the Court dismiss this case with prejudice under Federal Rule of Civil Procedure 12(b)(1), or at a minimum, dismiss all Plaintiffs other than Texas. In the alternative, Defendant-Intervenors respectfully request that the Court dismiss Count 1 with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

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Certificate of Service

The undersigned certifies that on October 16, 2023, I electronically filed the foregoing document with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the CM/ECF system. I hereby certify that I have served the documentation on all counsel by a manner authorized by Federal Rule of Civil Procedure 5(b)(2) via the Court's CM/ECF filing system.

/s/ *Linda B. Evarts*
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