PRESIDENT OBAMA'S DAPA EXECUTIVE ACTION: EPHEMERAL OR ENDURING?

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On November 20, 2014, President Obama announced his executive order on immigration, Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Controversy immediately ensued. Never before has an executive action deferred deportation of up to five million people, nor has one received such public outrage. Since its announcement, there have been two primary judicial challenges to the executive action: United States v. Juarez-Escobar *and* Texas v. United States. *The latter case investigates whether DAPA's broad executive discretion is consistent with the congressional intent of various immigration statutes. While the district court in* Texas v. United States *granted a preliminary injunction on Administrative Procedure Act grounds, the court has not yet addressed whether DAPA violates the Constitution. The weight of the court's forthcoming decision is undeniable. Given the widespread reach of DAPA and the public controversy surrounding it, the executive action warrants a detailed exploration of its substance and its precarious future.*

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INTRODUCTION

On November 20, 2014, President Obama announced a landmark executive action on immigration that would prioritize the removal of certain categories of aliens while deferring deportation for others.[1] Other presidents have similarly acted to defer deportation of non-citizens. Over the last 35 years, Presidents Carter, Reagan, George H.W. Bush, and Clinton have issued wide-reaching executive orders of their own.[2] This latest policy, however, known as Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), would affect the greatest number of people yet, and has garnered the most antagonism from states, the media, and Congress.[3] In total, DAPA would defer the deportation of up to five million undocumented immigrants.[4] Since its announcement, there have been two primary judicial challenges to DAPA: *United States v. Juarez-Escobar*[5] and *Texas v. United States*.[6] The former case reads as an advisory opinion, making it non-justiciable.[7] Thus it falls short of invalidating President Obama's executive action. The latter case focuses on whether DAPA's broad executive discretion is consistent with congressional intent in various immigration statutes. While the district court in *Texas v. United States* granted a preliminary injunction on Administrative Procedure Act ("APA") grounds,[8] the court has not yet addressed the plaintiffs' argument that the executive action violates the Constitution's Take Care Clause.[9] Plaintiffs argued that because the Take Care Clause stipulates that the President shall "take care that the laws be

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1. *See generally* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al. 3–5 (Nov. 20, 2014) [hereinafter DAPA Memo], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., Immigration & Customs Enforcement, et al. (Nov. 20, 2014) [hereinafter Enforcement Memo], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (outlining revised enforcement priorities); *see also* Karl S. Thompson, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf (providing a legal framework to underpin the executive action).

2. *See infra* Part I (highlighting some of the more salient ones).

3. *See* AM. IMMIGRATION COUNCIL, EXECUTIVE GRANTS OF TEMPORARY IMMIGRATION RELIEF, 1956–PRESENT (2014), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final.pdf; *see also infra* Part III (detailing a key state challenge to DAPA).

4. Ilya Somin, *Obama, Immigration, and the Rule of Law [Updated with Additional Material on Precedents for Obama's Action, and a Response to Timothy Sandefur]*, VOLOKH CONSPIRACY (Nov. 20, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/.

5. 25 F. Supp. 3d 774 (W.D. Pa. 2014).

6. No. 1:14-CV-00254, 2015 WL 648579 (S.D. Tex. Dec. 3, 2014).

7. *See infra* Part II.

8. *See* Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

9. *Id.* at *61.

faithfully executed,"[10] DAPA is unconstitutional in that it effectively abdicates the role of the Executive.[11]

Even if DAPA does survive *Texas v. United States* and other judicial challenges, it could face continued roadblocks from the legislative branch. In early 2015, House Republicans unsuccessfully tried to block the executive action by stripping funding from the Department of Homeland Security ("DHS").[12] Due to DAPA's wide-reaching effect and the controversy over DAPA's constitutionality, future congressional impediments to DAPA's implementation will likely arise in the coming months and years.

This Note will explore the substance of DAPA and its precarious future. Part I reviews past executive actions on immigration from the 1980s to today, and discusses DAPA's specific provisions. Part II analyzes how the first judicial attempt to invalidate the executive action—*United States v. Juarez-Escobar*—failed. Part III will discuss the preliminary injunction order in *Texas v. United States* and its implications for DAPA's future. The Conclusion describes continuing obstacles to the executive action, and summarizes DAPA's current legal posture.

I. EXECUTIVE ACTIONS ON IMMIGRATION, THEN AND NOW

In order to fully understand DAPA, it must first be placed in its historical context. For several decades, the executive branch has exercised prosecutorial discretion in the form of deferred action in immigration enforcement.[13] In 1980, President Carter paroled 123,000 Haitians and Cubans into the United States during a period known as the Mariel Boatlift.[14] President Reagan's signing of the Immigration Reform and Control Act ("IRCA") in 1986 provided a pathway to citizenship for up to three million unauthorized immigrants, but excluded spouses and children who did not qualify.[15] Reagan's 1987 executive order provided a route to citizenship for 100,000 noncitizen children of such immigrants,[16] demonstrating the Executive's focus on avoiding "split-eligibility" families.[17] In 1990, President George H.W. Bush issued an executive action deferring deportation of up to 1.5 million unauthorized spouses and children of individuals

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10. U.S. CONST., art. II, sec. 3.

11. *See* Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *61 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

12. *See, e.g.*, Alex Rogers, *How House Conservatives Lost the Homeland Security Fight*, TIME (Mar. 3, 2015), http://time.com/3730810/homeland-security-funding/.

13. Daniel Arellano, Note, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 ARIZ. L. REV. 1139, 1146 (2012).

14. AM. IMMIGRATION COUNCIL, *supra* note 3, at 5.

15. *Id.* at 1.

16. *Id.* at 1, 6.

17. Today, such families are called "mixed-status families." *See, e.g.*, AM. IMMIGRATION COUNCIL, A GUIDE TO THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION 11 (2014), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/a_guide_to_the_immigration_accountability_executive_action_final.pdf.

legalized under IRCA.[18] Bush's executive action thus ensured the cohesion of immigrant families.[19] And prior to DAPA, President Obama signed an executive order known as Deferred Action for Childhood Arrivals, granting two-year renewable reprieves from deportation, and work authorizations, to certain undocumented individuals who came to the United States at a young age.[20]

In 2014, President Obama announced an executive action on immigration affecting more people than ever before[21] with DAPA as its centerpiece.[22] The President's program prioritizes the removal of aliens who present threats to national security, public safety, or border security,[23] and, conversely, grants low-priority undocumented immigrants a three-year reprieve from deportation.[24] The sweeping action may be partially explained by the DHS's estimate that of the approximately 11.3 million undocumented aliens present in the United States, the agency only has the resources to remove fewer than 400,000 per year.[25]

To qualify for DAPA, an individual must: (1) have continuously resided in the United States since January 1, 2010; (2) have been physically present in the United States on November 20, 2014, and at the time of making his or her request for consideration of DAPA with U.S. Citizenship and Immigration Services; (3) have had *no* lawful status on November 20, 2014; (4) have had a U.S.-citizen or Lawful Permanent Resident ("LPR") son or daughter on November 20, 2014; and (5) not be a removal "enforcement priority."[26] Further, each applicant must undergo a comprehensive background check of all relevant national security and criminal databases, including those of the DHS.[27] The DHS will permit qualifying individuals to apply for work authorization, enabling them to work in the United States for a three-year period.[28] Individuals who receive such work authorization

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18. AM. IMMIGRATION COUNCIL, *supra* note 3, at 7. These latter two executive actions were known collectively as the "Family Fairness" policy. *Id.* at 1–2.

19. *See id.*

20. *See id.* at 10.

21. *Compare* AM. IMMIGRATION COUNCIL, *supra* note 3, at 3–10 (the 2012 Deferred Action for Childhood Arrivals executive order affected up to 1.8 million people), *with* Somin, *supra* note 4 (up to five million could qualify for DAPA).

22. *See generally Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 3, 2015), http://www.uscis.gov/immigrationaction.

23. *See* Enforcement Memo, *supra* note 1, at 3–5 (outlining revised enforcement priorities).

24. *See* DAPA Memo, *supra* note 1, at 4–5 (outlining DAPA eligibility).

25. Thompson, *supra* note 1, at 1.

26. *See* DAPA Memo, *supra* note 1, at 4; *see also* Enforcement Memo, *supra* note 1, at 3–5 (defining who is an "enforcement priority"). The individual must also merit a favorable exercise of discretion to be granted DAPA relief. *Id.* That is, the executive action does not bar the executive branch from denying deferred action in individual cases. *See id.*

27. *See* DAPA Memo, *supra* note 1, at 4; *Fixing Our Broken Immigration System Through Executive Action—Key Facts*, DEP'T OF HOMELAND SEC. (Jan. 5, 2015), http://www.dhs.gov/immigration-action# [hereinafter DHS Fact Sheet].

28. *See* DAPA Memo, *supra* note 1, at 4–5 (construing Section 274A(h)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(h)(3), as providing authority to the DHS to grant work authorization).

must pay taxes.[29] The executive action claims that it does not create any substantive rights against future action (a claim that, as discussed in Part III, at least one court has rejected).[30]

For unauthorized immigrants who have long-established residency in the United States and have U.S.-citizen or LPR sons or daughters, deportation threatens immigrant family stability.[31] For fiscal years 2013 and 2014, Immigration and Customs Enforcement ("ICE") removed nearly 368,000 and 441,000 persons, respectively, making the total removed over the course of Obama's presidency approximately two million.[32] President Obama's DAPA emphasizes family cohesion, like other executive actions before it, such as those of the Reagan and Bush eras.[33] President Reagan's 1987 executive order paved the way for legal status for 100,000 noncitizen children; and President's George H.W. Bush's 1990 executive action deferred deportation of up to 1.5 million unauthorized spouses and children of legalized individuals.[34] All three actions display the Executive's policy emphasis on preserving the cohesion of immigrant families.[35] Despite the immigration policy similarities among the Reagan, Bush, and Obama eras, the political reactions to the past and current executive actions contrast sharply.[36] For example, before Reagan issued the 1987 executive order, faith groups lobbied him fiercely, urging that the 1986 IRCA was insufficient on its own to preserve immigrant families.[37] Neither Reagan's nor Bush's executive actions in the 1980s and 1990s were met with claims of presidential overreach,

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29. DHS Fact Sheet, *supra* note 27.

30. DAPA Memo, *supra* note 1, at 5. *But cf.* Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *37–56 (S.D. Tex. Feb. 16, 2015) (accepting the states' argument that the executive action is a "substantive" or "legislative" rule made without the requisite notice and comment rulemaking procedures), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

31. *See, e.g.*, NAT'L IMMIGRATION FORUM, KEEPING FAMILIES TOGETHER: THE PRESIDENT'S EXECUTIVE ACTION ON IMMIGRATION AND THE NEED TO PASS COMPREHENSIVE REFORM 1–2 (2014), *available at* http://immigrationforum.org/wp-content/uploads/2014/12/120914-National-Immigration-Forum-Statement-for-Record-Final-Corrected.pdf.

32. *Id.* at 1.

33. *See* AM. IMMIGRATION COUNCIL, *supra* note 3, at 1–2.

34. *See, e.g.*, Max Ehrenfreund, *Your Complete Guide to Obama's Immigration Executive Action*, WASH. POST (Nov. 20, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/ ("President Reagan and later President George H.W. Bush relied on [prosecutorial discretion] when they unilaterally exempted roughly 1.5 million undocumented immigrants from deportation after passing a law granting amnesty to millions more. The action was not especially controversial at the time.").

35. *See* AM. IMMIGRATION COUNCIL, *supra* note 3, at 1–2; *cf.* NAT'L IMMIGRATION FORUM, *supra* note 31, at 1–2.

36. *See* Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action on Immigration*, THE HILL (Oct. 2, 2014, 12:00 PM), http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on.

37. *See, e.g.*, *id.* ("U.S. Catholic bishops criticized the government's 'separation of families,' especially given Reagan's other pro-family stances.").

threats of impeachment, lawsuits, or government shutdowns.[38] DAPA is a very different story—it has set off a firestorm of controversy.[39]

II. *JUAREZ-ESCOBAR*: AN EARLY AND INEFFECTUAL ATTEMPT TO DECLARE DAPA UNCONSTITUTIONAL

The political backlash to DAPA was not isolated to Congress and the public—at least one court reviewed the constitutionality of DAPA sua sponte. A 2014 opinion from the U.S. District Court for the Western District of Pennsylvania—*United States v. Juarez-Escobar*[40]—was the first to rule on President Obama's 2014 executive action. But because issues not before the court raised sua sponte are generally not justiciable, the case reads as an advisory opinion, and falls short of invalidating the executive action.[41] Still, the case warrants discussion because it demonstrates the controversy surrounding DAPA and highlights potential challenges to its constitutionality.

The separation of powers doctrine precludes federal courts from issuing advisory opinions.[42] In order for a case to be justiciable and not result in an advisory opinion, two criteria must be met. First, there must be an actual dispute between adverse litigants—that is, a "case" or "controversy."[43] Second, there must be a substantial likelihood that a federal court decision in favor of the claimant will produce a change or have an effect.[44] Advisory opinions thus closely align with disfavored dicta. In *Juarez-Escobar*, given that the court raised the issue of DAPA and its constitutionality sua sponte, and did not set DAPA aside despite declaring it unconstitutional,[45] neither criterion was met.[46]

Juarez-Escobar was a criminal prosecution of an individual who reentered the United States illegally after the DHS deported him.[47] During the sentencing phase of the trial, the court, on its own motion, sought supplemental briefing on the applicability of President Obama's executive action to the

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38. *See, e.g.*, *id.* ("If voters thought Bush overstepped his authority, the [1990] midterm elections didn't show it.").

39. *See infra* notes 92–96 and accompanying text.

40. 25 F. Supp. 3d 774, 775 (W.D. Pa. 2014).

41. *See* Jonathan H. Adler, *District Court Declares Obama Immigration Action Unconstitutional (Updated)*, VOLOKH CONSPIRACY (Dec. 16, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/16/district-court-declares-obama-immigration-action-unconstitutional/.

42. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96 (1968).

43. U.S. CONST., art. III, sec. 2, cl. 1; *see also* United States v. Johnson, 319 U.S. 302, 304 (1943) ("[T]he absence of a genuine adversary issue between parties" makes a case non-justiciable, "especially when [a court] assumes the grave responsibility of passing upon the constitutional validity of legislative action.").

44. For example, in *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), the Supreme Court said that federal courts could not review Civil Aeronautics Board decisions awarding international air routes because the President could simply disregard or modify such a judicial ruling under § 801 of the Civil Aeronautics Act.

45. *See Juarez-Escobar*, 25 F. Supp. 3d at 788.

46. *See* Adler, *supra* note 41.

47. *Juarez-Escobar*, 25 F. Supp. 3d at 777.

defendant's situation.[48] Given that President Obama issued DAPA while *Juarez-Escobar* was pending, the court thought it appropriate to request briefing on the issue from the parties.[49]

The court's opinion maintained that DAPA was unconstitutional because it eclipsed prosecutorial discretion and constructed an inflexible framework for considering deferred action applications.[50] The court reasoned that whereas prosecutorial discretion requires a case-by-case determination, DAPA rigidly grants "quasi-United States citizen[]" status to an entire class of individuals and thus constitutes unconstitutional "unilateral legislative action."[51]

It is not apparent why it was necessary for the court to request the supplemental briefing and reach the constitutional question regarding the executive action with regard to the defendant's sentence. The defendant did not raise DAPA as a defense or open the door for the court to consider the constitutionality of the executive action. There was no case or controversy as to the executive action's lawfulness, and the *Juarez-Escobar* opinion did not invalidate DAPA.[52] Thus, it is an advisory opinion.[53]

Although *Juarez-Escobar* did not effectively invalidate the executive action, in a future similar case in which a defendant actually asserts DAPA as a defense, a judge could reexamine the constitutionality of President Obama's executive action without running afoul of established advisory opinion doctrine.

III. *TEXAS V. UNITED STATES* AND THE FUTURE OF DAPA

A. Preliminary Issues and the APA Claim

More promising for DAPA opponents is the ongoing case of *Texas v. United States*.[54] In this case, 26 states[55] including Arizona, sued the DHS on two central grounds: (1) failure to follow notice and comment rulemaking procedures they allege were required by the APA in promulgating DAPA, and (2) violation of the Constitution's Take Care Clause.[56] In their complaint, the states claimed that the executive action threatens "the rule of law, presidential power, and the

48. *Id.* at 779.

49. *See id.*; Adler, *supra* note 41.

50. *Juarez-Escobar*, 25 F. Supp. 3d at 786–88.

51. *Id.* at 787–88.

52. Adler, *supra* note 41; *see Juarez-Escobar*, 25 F. Supp. 3d at 779–80.

53. *See* Adler, *supra* note 41 (arguing that the bizarre procedural posture of the case shows that it is merely an advisory opinion).

54. No. 1:14-CV-00254, 2015 WL 648579 (S.D. Tex. Dec. 3, 2014).

55. The plaintiffs are: Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin; the Governors of Idaho, Maine, Mississippi, and North Carolina; and the Attorney General of Michigan. *See* Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *1 n.1 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

56. Amended Complaint for Declaratory and Injunctive Relief at 26–29, Texas v. United States, No. 1:14-CV-00254 (S.D. Tex. Dec. 9, 2014). Plaintiffs also alleged a separate APA violation under 5 U.S.C. § 706. *Id.* at 29.

structural limits of the U.S. Constitution."[57] The states added that "the unilateral suspension of the Nation's immigration laws is unlawful" and demanded the court's "immediate intervention."[58] The states sought a preliminary injunction,[59] which was granted on February 16, 2015.[60] The court agreed to block implementation of DAPA while litigation continues.[61]

Unlike in *Juarez-Escobar*, a final merits decision in *Texas v. United States* will not be an advisory opinion.[62] The states can demonstrate that the case is an actual dispute between adverse litigants and that the federal court decision will bring about some change or have some effect.[63] In its preliminary injunction order, the court adopted the plaintiffs' argument that they had standing.[64] The court concluded that inasmuch as the executive action generated a new class of individuals eligible to apply for driver's licenses, DAPA will cause substantial costs for states.[65]

In looking ahead to the merits,[66] the court in *Texas v. United States* maintained that Congress "knows how to delegate discretionary authority," yet expressly limited the discretion given to the DHS.[67] The court rejected the DHS's claim that § 103 of the Immigration and Nationality Act[68] and § 402 of the Homeland Security Act of 2002,[69] combined with inherent executive discretion, provide the kind of broad agency discretion required to sustain DAPA.[70] The court concluded that, as a general matter of statutory interpretation, if Congress had intended to empower the DHS to defer deportation of up to five million

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57. *Id.* at 3.

58. *Id.* at 4.

59. Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support, Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579 (S.D. Tex. 2015).

60. Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

61. *Id.*

62. *See supra* notes 42–44 and accompanying text.

63. *Id.*; *see also Texas*, 2015 WL 648579, at *9–34 (finding that plaintiffs have standing). The states initially raise the issue of the lawfulness of the executive action, signaling that there is a case or controversy. *See* Amended Complaint for Declaratory and Injunctive Relief at 26–29, Texas v. United States, No. 1:14-CV-00254 (S.D. Tex. Dec. 9, 2014). Also, if the court were to declare the executive action unconstitutional, the plaintiffs would find redress in that they would not have to use their resources to issue DAPA recipients certain "licenses and benefits." *Id.* at 26; *see also infra* note 65 and accompanying text.

64. *Texas*, 2015 WL 648579, at *9–34; *see also* Mass. v. EPA, 549 U.S. 497, 520 (2007) (noting that states receive "special solicitude" in the standing analysis).

65. *Texas*, 2015 WL 648579, at *11–17. Nor was the states' injury a mere generalized grievance. *See id.* at *14 (citing Wyoming v. Oklahoma, 502 U.S. 437, 448 (1992); Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ., 584 F.3d 253, 261–62 (6th Cir. 2009)).

66. A court ruling on a motion for a preliminary injunction will consider, among other factors, the plaintiffs' likelihood of success on the merits. *See, e.g.*, *id.* at *37.

67. *Id.* at *47.

68. 8 U.S.C. § 1103(a)(3) (2012).

69. 6 U.S.C. § 202.

70. *Texas*, 2015 WL 648579, at *46–48.

undocumented immigrants through such statutes, it would have done so more explicitly.[71]

Nor was the court persuaded by the DHS's argument that the plaintiffs' claim is not subject to judicial review because an agency's non-enforcement decisions are presumptively unreviewable under the APA.[72] The court noted that where an agency goes beyond mere prosecutorial discretion and adopts a policy so extreme that it amounts to an "abdication of its statutory responsibilities," the presumption of unreviewability is rebutted.[73] The court admitted that a "[r]eal or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty."[74] Nevertheless, the court found that DAPA surpasses mere inadequate enforcement and amounts to "an announced program of non-enforcement of the law that contradicts Congress' statutory goals"—in short, a "complete abdication."[75] The court wrote that an agency "cannot enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them."[76] The court concluded that the presumption of unreviewability was either inapplicable or rebutted in the case, and went on to rule that, at least as a preliminary matter, DAPA appears to be a legislative rule promulgated without the requisite notice and comment procedures.[77]

B. The Looming Constitutional Debate at Trial

Because the court's decision rested on APA grounds, it did not reach the plaintiffs' argument that the executive action violates the Take Care Clause.[78] Even while declining to rule on the constitutional question at the preliminary injunction stage, however, the court left open the possibility of ruling on the Take Care Clause issue at trial when it has a full factual record before it.[79]

The parties' arguments in their preliminary injunction briefs foreshadow the coming fight. The plaintiffs argued that historical evidence[80] and Supreme Court precedent[81] supported the use of the Take Care Clause to enjoin the government's action. The plaintiffs contended that the Founding Fathers devised the Take Care Clause expressly to preclude the President from being able to

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71. *See id.* at *48.

72. *Id.* at *50; *see also* Heckler v. Chaney, 470 U.S. 821, 830–35 (1985) (construing 5 U.S.C. § 701(a)(2) and the presumption of unreviewability of agency non-enforcement).

73. *Texas*, 2015 WL 648579, at *50 (quoting *Heckler*, 470 U.S. at 833 n.4).

74. *Id.* (quoting Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997)).

75. *Id.*

76. *Id.*

77. *Id.* at *51–56.

78. *Id.* at *61–62.

79. *Id.* at *61–62, n.110.

80. Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support at 7–8, Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254) (discussing the power of English kings in the late seventeenth century effectively to nullify laws of Parliament, and arguing that the Take Care Clause was primarily an effort to ensure that the President would not have similar power).

81. *Id.* at 8–9.

suspend or dispense with congressional acts.[82] The government could not cloak such extreme activities under the disguise of prosecutorial discretion.[83] In contrast, the government argued that precedent precluded the plaintiffs from stating a separate cause of action under the Take Care Clause not tied to an APA claim.[84] The government stated that none of the cases the plaintiffs cited[85] offered a judicially cognizable basis to contest the executive action by using the Take Care Clause as a cause of action.[86] The government emphasized that where the Take Care Clause did surface in the cases the plaintiffs cited,[87] "it was in the context of an affirmative defense."[88]

In sum, unlike in *Juarez-Escobar*, DAPA is fully justiciable in *Texas v. United States*, and a final merits decision in the case will not be an advisory opinion. As of this writing, the plaintiff–states have sought and received a preliminary injunction based on their APA claim, and an appeal of that order is pending.[89] But at trial, the court may rule on the constitutional question of whether

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82. *Id.* at 7–8.

83. *See id.* at 9.

84. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 30–31, Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254).

85. Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Medellin v. Texas, 552 U.S. 491 (2008); Angelus Milling Co. v. Comm'r of Internal Revenue, 325 U.S. 293 (1945); DaCosta v. Nixon, 55 F.R.D. 145 (E.D.N.Y. 1972); Catano v. Local Bd. No. 94 Selective Serv. Sys., 298 F. Supp. 1183 (E.D. Pa. 1969).

86. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 30 n.25, Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254).

87. The government reasoned that the plaintiffs relied in error on *Heckler v. Chaney*, 470 U.S. 821 (1985), to bring an independent cause of action under the Take Care Clause. While the Supreme Court in *Heckler* did refer to the Take Care Clause in its opinion, the government emphasized that the Court ultimately limited its analysis to the issue of non-enforcement under the APA. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 31, Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254).

88. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 30 n.25, Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254); *see also* Defendants' Sur-Reply In Opposition to Plaintiffs' Motion for Preliminary Injunction at 18–20, Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254) (disapproving of plaintiffs' contention that *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) establishes the availability of a separate cause of action under the Take Care Clause); *id.* at 19 (quoting *Dalton v. Specter*, 511 U.S. 462, 473 (1994)) (*Youngstown* "involved the conceded *absence* of *any* statutory authority, not a claim that the President acted in excess of such authority"; unlike in *Youngstown*, "'claims simply alleging that the President has exceeded his statutory authority' are not constitutional claims subject to judicial review").

89. *See* Texas v. United States, No. 15-40238 (5th Cir. Feb. 23, 2015). Oral argument on the motion to stay the preliminary injunction will take place on April 17, 2015. *DOJ Files Fifth Circuit Merits Brief in* Texas v. United States, IMMIGRATIONPROF BLOG (Mar. 31, 2015), http://lawprofessors.typepad.com/immigration/2015/03/doj-files-fifth-circuit-brief-in-texas-v-united-states.html.

DAPA violates the Take Care Clause.[90] *Texas v. United States* thus may be able to accomplish what *Juarez-Escobar* was unable to do and defeat DAPA via a constitutional argument.

CONCLUSION

DAPA faces challenges from all angles. The merits decision in *Texas v. United States* is still forthcoming, and an appeal of the preliminary injunction order before the Fifth Circuit is underway.[91] DAPA could also be undermined by a Republican-led Congress that passes a new immigration law or a budgetary measure designed to block or defund executive action. Congress has already attempted this—it tried to impede all funding for Obama's executive action.[92] During a recent congressional vote regarding the DHS's funding, Republican opponents including Speaker John Boehner (R-OH) and Representative Mick Mulvaney (R-SC) vociferously expressed their disapproval of what they see as the exponential growth of executive power at the expense of Congress.[93] The GOP lost the funding fight[94] (for now[95]). But Congress has the authority to block the executive order by statute—the question is whether it has the political wherewithal to do so. President Obama has promised that, if a bill defunding the DHS were ever to pass out of Congress, he would veto it.[96] But who knows what the new President in 2016 would do in that situation?

The future survival of the executive action remains uncertain. Two legal challenges to the executive action—*United States v. Juarez-Escobar* and *Texas v.*

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90. *See* Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *61–62, n.110 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

91. *See* Texas v. United States, No. 15-40238 (5th Cir. Feb. 23, 2015).

92. *See* Rogers, supra note 12.

93. Rebecca Shabad & Cristina Marcos, *House Passes Bill to Defund Obama's Immigration Orders*, THE HILL (Jan. 14, 2015, 12:06 PM), http://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders. Boehner made a rare speech on the House floor, arguing that President Obama contradicted his own previous public opposition to such an executive action. *Id.* Boehner quoted over 20 separate statements made by President Obama where he had said he lacked authority to pursue broad executive action on immigration without Congress. *Id.* "We are dealing with a president who has ignored the people, ignored the Constitution, and even his own past statements," said Boehner. *Id.*

94. *See* Raul Labrador, *Labrador on Homeland Security Funding: 'We Lost Because' Democrats, White House 'Outsmarted Ineffective GOP Leadership'*, DAILY SIGNAL (Mar. 6, 2015), http://dailysignal.com/2015/03/06/labrador-homeland-security-funding-lost-democrats-white-house-outsmarted-ineffective-gop-leadership/. Seventy-five Republicans in the House joined 182 Democrats to overcome a provision that would have blocked DAPA in the Fiscal 2015 DHS spending bill. *Id.*

95. It is probable that this debate will resurface the next time DHS funding comes up for renewal. *See* Elise Foley, *Senate Democrats Put DHS Funding Pressure Back On John Boehner*, HUFFINGTON POST (March 2, 2015, 5:59 PM), http://www.huffingtonpost.com/2015/03/02/dhs-funding-boehner_n_6785210.html.

96. *See, e.g.*, Lauren French, *Barack Obama Threatens to Veto Attacks On His Immigration Policy*, POLITICO (Jan. 29, 2015, 8:50 PM), http://www.politico.com/story/2015/01/barack-obama-immigration-114752.html.

United States—have posed the greatest threat to the action's survival. Whereas the former fails to invalidate President Obama's executive action because it is within advisory opinion, the latter case offers a bold ruling, detailing how the DHS's executive discretion used to issue the executive action conflicts with congressional intent. While *Texas v. United States* does not address the plaintiffs' argument that the executive action violated the Take Care Clause, the preliminary injunction halts the implementation of the executive order until the issue is further litigated. All that aside, the future of DAPA may well rest not in the courts, but in the legislative and executive branches.

THE MODEL ENTITY TRANSACTION ACT: A STEP TOWARD IMPROVING ARIZONA'S BUSINESS ENVIRONMENT

Christopher Sloot*

In 2014, the Arizona State Legislature passed the Arizona Entity Restructuring Act ("AERA"), overhauling Arizona's entity-level transaction statutes. AERA organizes, simplifies, and expands Arizona's entity-level transaction procedures. This Note will cover AERA's development, its broadly inclusive definition of "entity," the five specific transactions it permits, and why AERA is the first step toward a more business-friendly Arizona.

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INTRODUCTION

"Why do corporations choose Delaware?"[1] Delaware's advanced and flexible corporations law, business-savvy courts, and state legislature are some of

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1. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007).

the most-cited reasons.[2] Corporations and other business entities are attracted to states whose laws, among other things, provide the freedom to transact quickly and efficiently. With this in mind, the Arizona State Legislature passed the Arizona Entity Restructuring Act ("AERA") in 2014. By reducing transaction costs and increasing business freedom, AERA is a step toward a more business-friendly Arizona.

As of 2013, Arizona experienced higher unemployment rates than the United States overall and continued to experience a 2.1% net job loss relative to pre-recession levels—conversely, the United States as a whole has experienced a net job gain of 1.8% relative to pre-recession levels.[3] High-wage sectors make up a smaller portion of Arizona's industrial composition than the national average, while sectors that pay average to below-average wages make up a larger portion of Arizona's industrial composition than the national average.[4] As a result, in 2013 the average earnings per employee in Arizona were 10.4% less than the national average.[5] Additionally, even though Arizona was the 15th most populous state in the country in 2014,[6] only five Fortune 500 companies[7] and 2% of the Inc. 5,000[8] were organized in Arizona. Business-friendly laws, like AERA, have the potential to lure entrepreneurs and existing business owners to Arizona, and this increase will lead to more employment opportunities particularly high-wage employment opportunities.[9]

This Note proceeds in three parts. Part I explains the history and policy objectives behind AERA, and details the transactions entities may engage in under the new law. Part II examines two barriers AERA must overcome before it is able to reduce transaction costs, and encourage corporations and other business entities to organize in Arizona. Lastly, Part III predicts that AERA is simply one of a number of improvements that Arizona will make in order to revitalize the business environment in the state. Part III provides specific examples of some of the other projects that Arizona has undertaken to accomplish this goal.

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2. *Id.*

3. Joint Econ. Comm., U.S. Cong., Economic Snapshot: Arizona 2 (2015).

4. *Industrial Composition*, ARIZONA INDICATORS, http://arizonaindicators.org/economy/industrial-composition (last updated Jan. 23, 2015).

5. *Id.*

6. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2014 POPULATIONS ESTIMATES (2014), *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

7. Mike Sunnucks, *Only 5 Arizona Companies Make Fortune 500 List After Loss of US Airways*, PHX. BUS. J. (June 2, 2014, 4:00 PM), http://www.bizjournals.com/phoenix/news/2014/06/02/only-5-arizona-companies-make-fortune-500-list.html.

8. *The 2014 Inc. 5000*, INC., http://www.inc.com/inc5000/list/2014/ (last visited Apr. 5, 2015).

9. *See* Russ Wiles, *PetSmart Deal Further Thins Arizona's Corporate Ranks*, USA TODAY (Dec. 16, 2014, 7:20 AM), http://www.usatoday.com/story/money/business/2014/12/16/arizona-petsmart-mergers-acquisitions/20469543/ (noting that "losing a corporate headquarters, often leav[es] the state with fewer high-paying jobs, less corporate involvement in the local community and diminished visibility in business circles").

By aiming to reduce entity-level transaction costs and increase business freedom in the state, AERA simplifies, organizes, and expands Arizona's entity-level transaction statutes. Before entrepreneurs, existing business owners, and attorneys choose where to organize a particular business entity, they should consider AERA and the goals AERA's drafters sought to accomplish with its provisions, as these goals provide insight into the ongoing evolution of Arizona's business environment. Ultimately, as a result of AERA and other forthcoming changes to Arizona's business landscape, the number of entrepreneurs and existing business owners that choose to organize in Arizona should increase.

I. THE ARIZONA ENTITY RESTRUCTURING ACT REVAMPS ARIZONA'S ENTITY-LEVEL TRANSACTIONS STATUTES

In 2010, in response to concerns that Arizona's entity-restructuring laws had become outdated compared to those in other states,[10] the Business Law Section[11] of the State Bar of Arizona formed the Mergers and Conversions Committee in order to overhaul Arizona's entity-level restructuring statutes.[12] Shortly after the Committee was formed, the group decided on the Model Entity Transactions Act ("Model Act") as a template for Arizona's new entity-transaction statutes.[13] The National Conference of Commissioners on Uniform State Laws drafted the Model Act in order to provide a comprehensive statutory framework for changing the form of an entity via a merger, conversion, interest exchange, or domestication.[14] The Model Act simplifies the process for engaging in each of these transactions, eliminating unnecessary steps that discouraged certain entities from transacting altogether.[15] Further, the Model Act enables all entities to engage in all relevant transaction types, rather than precluding certain entities from

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10. Interview with Terence W. Thompson, Co-Chair, Mergers & Conversions Comm., in Phx., Ariz. (Jan. 7, 2015) [hereinafter Thompson, Interview] (explaining that before AERA, Arizona's entity-level restructuring statutes had become outdated in our present economy, but have become the vanguard of Arizona entity-level restructuring statutes).

11. The purpose of the Business Law Section of the State Bar of Arizona is to "further the development of [business law] and all its branches to cooperate in obtaining uniformity with respect to both legislation and administration in all matters within [business law and] to simplify and improve the application of justice in [business law]." *Business Law Mission*, STATE BAR OF ARIZONA, http://www.azbar.org/sectionsandcommittees/sections/businesslaw (last visited Jan. 5, 2015).

12. Thompson, Interview, *supra* note 10.

13. MODEL ENTITY TRANSACTIONS ACT (2007), *available at* http://www.uniformlaws.org/shared/docs/entity_transactions/meta_final_2014.pdf; Terence W. Thompson et al., *Mergers, Interest Exchanges, Conversions, Domestications and Divisions*, *in* CORPORATE PRACTICE § 14:2 (2014). The Model Act was last modified in 2007 and is promulgated jointly by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. *Id.*

14. COUNCIL OF STATE GOV'T, *Model Entity Transactions Act*, *in* 2011 SUGGESTED STATE LEGISLATION 98, *available at* http://ssl.csg.org/dockets/2011cycle/2011volume/2011volumedrafts/modelentitytransactions2011vol.pdf.

15. *Id.*

engaging in certain transactions.[16] For instance, very few states allow corporations to convert into another entity type or to domesticate in another state, something that is allowed under the Model Act.[17] The Model Act also provides a simple framework for entities of different types to engage in these transactions with one another—known as "cross-entity transactions." In sum, "[t]he point of the procedures [in the Model Act] is to end with an entity that continues the business of those entities it succeeds without extinguishing obligations incurred by these entities in a seamless, nondisruptive transfer."[18] With the Model Act's policies and principles in mind, the Arizona committee sought to design a statute tailored to Arizona's unique needs that similarly reduced costs, increased efficiency, and expanded business freedom.[19]

AERA was drafted and designed to correct three deficiencies in Arizona's previous entity-level transactions statutes.[20] First, AERA organizes the entity-level transactions statutes—mergers, interest exchanges, conversions, domestications and divisions—into a single location, making it easier for out-of-state business owners and attorneys to locate the steps required to complete a particular transaction in Arizona.[21] Second, AERA allows both foreign and domestic entities to engage in a broader range of transactions within the state of Arizona, increasing business freedom and flexibility.[22] And third, AERA standardizes the procedural requirements for entity-level transactions across all entity types, simplifying cross-entity transactions.[23] In addition to correcting the law's preexisting deficiencies, the drafters intended the statute to be inclusive, applying to all organizations that fall under AERA's broad definition of what constitutes an "entity."[24] In 2014, the

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16. *Id.* For a general description of the limitation placed on certain entities before AERA, see Email from Raj Gangadean, Co-Chair, Mergers & Conversions Comm., Bus. Law Section, State Bar of Ariz., to author (Jan. 5, 2015, 1:50PM MST) (on file with author) (explaining that there is no justification for Arizona permitting transactions for certain entity types but not for others).

17. COUNCIL OF STATE GOV'T, *supra* note 14, at 99.

18. *Id.* For example, Connecticut enacted the Connecticut Entity Transactions Act, which is based on the Model Act, because it created an "efficient" way for businesses to engage in new transactions. *April 2014-Connecticut Entity Transactions Act*, Murtha Cullina (Apr. 23, 2014), http://www.murthalaw.com/news_alerts/1385-april---connecticut-entity-transactions-act.

19. Thompson et al., *supra* note 13 ("[C]onsiderations to Arizona—such as the allocation of filing authority between the Arizona Corporation Commission and the Arizona Secretary of State depending on the type of entity—required that the Arizona statute vary from the Model Act in certain respects.").

20. Gangadean, *supra* note 16.

21. *Id.*

22. *Id.*

23. *Id.*

24. Arizona Entity Restructuring Act, 2014 Ariz. Legis. Serv. Ch. 193 (West); Thompson et al., *supra* note 13, § 14:6. Terence Thompson, who worked on the statute, also noted that its drafters intended for the statute to apply broadly. Thompson, Interview, *supra* note 10. Hence, the statute is written to include *any* type of recognized entity. *Id.*

bill passed without a single nay vote in either chamber,[25] and on January 1, 2015, AERA took effect.

A. What Is an Entity?

AERA permits mergers, interest exchanges, conversions, domestications, and divisions by organizations defined in the statute as "entit[ies]."[26] AERA's definition of "entity" includes: corporations, partnerships, limited liability companies ("LLCs"), business trusts, unincorporated associations, and cooperatives.[27] "Any other person that has a separate legal existence or has the power to acquire an interest in real property in its own name" is also an "entity" under AERA's broad "catch-all" provision.[28] Hence, under AERA's inclusive concept of what constitutes an "entity," a wide variety of organizations can engage in mergers, interest exchanges, conversions, domestications, and divisions in the state of Arizona.

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25. *Bill Status Overview*, ARIZ. STATE LEGISLATURE, http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/bills/sb1353o.asp&Session_ID=112 (last visited Jan. 5, 2015).

26. ARIZ. REV. STAT. ANN. § 29-2102(17) (2015).

27. *Id.* § 29-2102(a)–(g). Unlike the Model Act, AERA defines business corporations and for-profit corporations for purposes of the statute in order to ensure that AERA recognizes the wide variety of for-profit corporations that states, including Arizona, allow. Thompson et al., *supra* note 13, § 14:6 (2014). "Corporation means a business corporation or a nonprofit corporation." ARIZ. REV. STAT. ANN. § 29-2102(10). "Business corporation means a business corporation, a close corporation, a professional corporation, a business development corporation and a benefit corporation." *Id.* § 29-2102(5). "Nonprofit corporation means a nonprofit corporation, a cooperative marketing association, an electric cooperative nonprofit membership corporation, a nonprofit electric generation and transmission cooperative corporation, a fraternal or benevolent society or a corporation sole." *Id.* § 29-2102(31). Lastly, a "cooperative," though not defined by AERA or the Model Act, is generally a "self-organized collective undertaking by similarly situated people who pool financial resources to procure goods or services, govern the undertaking based on democratic principles, and operate on a nonprofit basis." Thompson et al., *supra* note 13, § 14:6.

28. ARIZ. REV. STAT. ANN. § 29-2102(17)(h); *see also* Thompson et al., *supra* note 13, § 14:6 (noting that the "workhorse of AERA's definition of 'entity' is the 'catchall' provision"). AERA excludes only four things from its definition of "entity": (1) an individual; (2) a testamentary, inter vivos, or charitable trust; (3) a decedent's estate; and (4) a governmental body. ARIZ. REV. STAT. ANN. § 29102(17)(h)(i)–(iv). Under the Model Act, the exclusion of individuals from the Act's definition of "entity" bars sole proprietorships from engaging in any one of transactions provided for in the Act. Thompson et al., *supra* note 13, § 14:6. Under Arizona law, however, it is possible that a sole proprietorship could be included within AERA's concept of "entity." *Id.* Specifically, a "proprietorship might be a large and long-standing business operation, using one or more trade names as its face to the world, with numerous employees or 'associates,' multiple locations, diverse products or services, and an array of assets, contracts, and obligations," in which case it could be viewed as an "unincorporated association." *Id.*

B. Mergers, Interest Exchanges, Conversions, and Domestications

Under AERA, one or more foreign or domestic entities may merge with one or more other foreign or domestic entities, so long as any foreign entity that is a party to the merger is permitted to do so by the laws in its jurisdiction.[29] A "merger" is defined as an entity-level transaction in which "two [or more] entities combine into one, and the rights and obligations of each merging entity become the rights and obligations of the surviving entity."[30]

AERA also permits domestic and foreign entities to engage in interest exchanges with one another so long as the law that governs the foreign entity permits the foreign entity to engage in interest exchanges.[31] Interest exchanges involve one entity acquiring all of the interests in another entity, making the acquired entity a wholly owned subsidiary of the acquiring entity.[32] Specifically, AERA permits one Arizona entity to acquire all of one or more classes of interest of a domestic or foreign entity.[33] AERA also allows a domestic or foreign entity to acquire all of one or more classes of interest of an Arizona entity.[34] For example, an Arizona entity could acquire all of the shares of stock of an Arizona corporation, an Arizona LLC, a California partnership, or a membership interest in an Australia nonprofit corporation.[35]

In addition to mergers and interest exchanges, AERA also permits entities to seamlessly convert to an entity of a different type.[36] In a conversion, an entity of one type converts to an entity of another type.[37] Specifically, under AERA's conversion provision, not only may an existing Arizona entity change its type, but a non-Arizona entity may also change its structure and domesticate in Arizona.[38] For instance, an Arizona LLC that wished to incorporate could do so under AERA. Similarly, a Pennsylvania LLC could incorporate in Arizona under AERA.[39]

A separate section of AERA permits entities to domesticate.[40] In a domestication, a foreign entity may change its domicile to Arizona, or vice versa.[41]

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29. ARIZ. REV. STAT. ANN. § 29-2201(A)–(B). "[A] domestic entity means an entity formed under the laws of Arizona governing that type of entity." Thompson et al., *supra* note 13, § 14:5. "[A] foreign entity means an entity formed under the laws of some other state or country." *Id.*

30. Gangadean, *supra* note 16.

31. ARIZ. REV. STAT. ANN. § 29-2301 (2015).

32. Gangadean, *supra* note 16.

33. Thompson et al., *supra* note 13, § 14:30.

34. *Id.*

35. *Id.* But keep in mind that a foreign entity may acquire a domestic entity in Arizona only if the law of the foreign entity's jurisdiction permits that foreign entity to do so. *Id.*

36. ARIZ. REV. STAT. ANN. § 29-2401 (2015).

37. Gangadean, *supra* note 16 ("For example, if authorized by the laws of the relevant foreign jurisdictions, a conversion under AERA could involve a Delaware corporation converting into an Arizona limited liability company, or it could involve an Arizona corporation converting into a Nevada limited partnership.").

38. Thompson et al., *supra* note 13, § 14:30.

39. *See id.*

40. ARIZ. REV. STAT. ANN. § 29-2501 (2015).

For example, an Arizona corporation may become a California corporation, and a Nevada corporation may become an Arizona corporation so long as Nevada law permits it to do so.[42] Significantly, while domestication has existed for some time as a type of entity-level transaction, AERA eliminates unnecessary steps that Arizona entity-transaction statutes once required. For instance, in order to domesticate a Delaware LLC into an Arizona LLC, Arizona entity-transaction statutes used to require the Delaware LLC first to form an Arizona LLC, and then merge the Delaware LLC with the Arizona LLC.[43] According to Raj Gangadean, co-chair of the Merger and Conversion Committee, now "this transaction [can] be accomplished without the unnecessary complexity and extra steps."[44]

C. Divisions

With AERA, Arizona became the first state explicitly to allow entities to engage in divisions.[45] In fact, even the Model Act upon which AERA was based does not include divisions among the transactions that it facilitates.[46] The drafters of AERA made the decision to include divisions based, in part, on their belief that allowing entities to divide could unlock value.[47] Consider, for example, the relationship between eBay and PayPal. Since 2002, PayPal has been subsidiary of eBay.[48] In 2014, despite PayPal's success, superstar investor Carl Icahn said, "PayPal's a jewel and eBay is covering up its value."[49] Similarly, Elon Musk, cofounder of PayPal and current head of Tesla Motors and SpaceX, was quoted as saying: "[PayPal] will get cut to pieces by Amazon payments or by other systems like Apple and startups if it continues to be part of eBay . . . . It will either wither or be spun out."[50] In 2014, eBay answered these concerns and announced that it would split from PayPal.[51] Analysts speculate that the split will allow PayPal to reach its full growth potential because PayPal will be able to focus solely on

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41. Gangadean, *supra* note 16.

42. Thompson et al., *supra* note 13, § 14:50.

43. Gangadean, *supra* note 16.

44. *Id.*

45. ARIZ. REV. STAT. ANN. § 29-2501. To date, since Arizona introduced divisions in AERA on January 1, 2015, only Pennsylvania has followed Arizona's lead. *See* Perry Patterson, Thomas Thompson & Adam Wicks, *Pennsylvania Significantly Updates Laws Governing M&A/Conversion*, JD SUPRA BUS. ADVISOR (Nov. 19, 2014), http://www.jdsupra.com/legalnews/pennsylvania-significantly-updates-laws-75008/.

46. *See* MODEL ENTITY TRANSACTIONS ACT 2 (2007) (listing only mergers, interest exchanges, conversions, and domestications as transactions that fall within the scope of the act; not divisions).

47. Thompson, Interview, *supra* note 10 (explaining that divisions have the potential to unlock value).

48. Margaret Kane, *eBay Picks up PayPal for $1.5 Billion*, CNET (July 8, 2002, 8:00 AM), http://news.cnet.com/2100-1017-941964.html.

49. *Id.*

50. Steven Bertoni, *Ebay and PayPal to Split: Carl Icahn and Elon Musk Wish Comes True*, FORBES (Sept. 30, 2014, 9:14 AM), http://www.forbes.com/sites/stevenbertoni/2014/09/30/ebay-and-paypal-to-split-carl-icahn-and-elon-musk-wish-comes-true/.

51. *Id.*

payment systems, where it currently holds a distinct competitive advantage.[52] Additionally, because PayPal will no longer be a subsidiary of eBay, the move should help PayPal attract top executive talent, as "few CEO types want to run a subsidiary of a larger company."[53] Therefore, to the extent that AERA's division provision makes it easier for entities to spin off, and decreases the tax consequences entities suffer as a result of a spin-off, it is likely to have a positive effect on Arizona's economy. Since Arizona introduced divisions in AERA, Pennsylvania has followed its lead,[54] and other states may too.

An AERA division results in a single entity dividing into two or more entities, leaving the rights and obligations of the dividing entity to be allocated among the surviving entities.[55] Put simply, "divisions are essentially a merger in reverse."[56] Under AERA, an Arizona entity may divide into one or more foreign or domestic entities of any type (e.g., corporation, LLC, etc.) in such a way that the dividing entity will continue to exist, as will one or more new entities.[57] Conversely, an Arizona entity may also divide into two or more new foreign or domestics entities in such a manner that the dividing entity ceases to exist—again, regardless of the resulting entities.[58]

AERA also sets forth the rules for the allocation of obligations in divisions.[59] Although a dividing entity may allocate assets in any way it chooses,[60] AERA stipulates that all entities created by way of a division are jointly and severally liable for the obligations of the dividing entity.[61] This rule is subject to two exceptions: (1) if a creditor consents to the allocation of various obligation to one or more of the resulting entities, and the plan of division explicitly states such, then the other resulting entities are no longer jointly and severally liable for the debt; or (2) if a court or other tribunal rules that a particular debt is to remain the obligation of a particular creditor, then the other resulting entities are no longer jointly and severally liable as to that particular debt.[62] AERA further provides that resulting entities may mitigate the risk of joint and several liability by allowing them to enter into indemnity agreements among themselves.[63]

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52. *See id.*
53. *Id.*
54. Patterson, Thompson & Wicks, *supra* note 45.
55. Gangadean, *supra* note 14.
56. *Id.*
57. Thompson et al., *supra* note 13, § 14:60. Under AERA's division statute, for example, "an Arizona corporation could divide in such way that the Arizona corporation continues to exist and also in the process creates (a) another Arizona corporation, (b) an Arizona limited liability company, (c) an Ohio partnership, (d) a Canadian nonprofit corporation, or (e) any other type of Arizona or foreign entity." *Id.*
58. Thompson et al., *supra* note 13, § 14:60.
59. ARIZ. REV. STAT. ANN. §§ 29-2602, 3603, 2605, 2607 (2015).
60. *Id.* § 29-2607(A)(4)(b).
61. *Id.* § 29-2607(A). This provision was included in order to satisfy the interests of creditors. *Id.*
62. *Id.* § 29-2607(B)(1)–(2).
63. *Id.* § 29-2607(C).

D. Procedural Requirements

One of the primary goals of AERA was to standardize and simplify the procedural requirements for entity-level transactions across all entity types—this differs from Arizona's former entity-level transaction statutes, which often imposed different procedural requirements for different entities.[64] In pursuit of this goal, AERA requires the same simple procedure of all entity types that wish to complete a merger, interest exchange, conversion, domestication, or division.[65] Specifically, any entity that wishes to complete one of these transactions must approve a plan of interest in accordance with their governing statutes and organization documents, and file a statement with the appropriate filing authority that specifies the particular transaction in which the entity wishes to engage, if any.[66] Each of these transactions becomes effective on the date and time of delivery of the statement, unless the resulting entity (or entities, in the case of a division) is not a domestic filing entity.[67] If the resulting entity is not a domestic filing entity, then the transaction is complete after the entity signs the statement specifying the transaction in which it wishes to engage.[68]

II. WILL AERA ENCOURAGE INCORPORATION IN ARIZONA?

Because AERA's drafters were sufficiently able to organize, authorize, and standardize Arizona's entity-transaction statutes, they have probably reduced some of the red tape that may have prohibited or discouraged entities from conducting business in Arizona in the past. Nevertheless, it is not a foregone conclusion that AERA will immediately encourage a flood of entities to organize in Arizona. At least two factors could impede the process. First, in order for AERA to reduce transaction costs, attorneys and business people must take the time to learn how AERA operates.[69] When a group of attorneys has practiced a system for a long period of time, some refuse to adjust.[70] Further, even for those attorneys and business persons who want to learn, adjustment takes time.

Second, AERA cannot operate at its full potential unless other states around the country adopt entity-transaction laws that permit entities to engage in similar transactions.[71] Currently, six states and the District of Columbia have

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64. Gangadean, *supra* note 16.

65. *Id.*

66. ARIZ. REV. STAT. ANN. §§ 29-2402, 2403, 2405, 2502, 2503, 2505, 2602, 2603, 2605 (2015).

67. *Id.* §§ 29-2405, 2505, 2605.

68. *Id.*

69. Interview with May Lu, Mergers & Conversions Comm., in Phx., Ariz. (Jan. 7, 2015) [hereinafter Lu, Interview] (explaining that one of the questions she has about the statute is whether attorneys will bother to learn it).

70. *See* William J. Carney, George B. Shepherd, & Joanna Shepherd Bailey, *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123 (2012) (explaining that part of the reason Delaware continues to dominate the market for incorporations is because lawyers do not take the time to learn the laws in other states.).

71. Lu, Interview, *supra* note 69 (explaining that one of the questions she has about the statute is whether attorneys will bother to learn it).

adopted statutes based on the Model Act.[72] Although the Model Act has not yet been widely adopted, it is slowly gaining steam among the states.[73] Yet because the Model Act simplifies the transaction process and allows businesses to react quickly to changes in the economy, some states may believe that the Model Act gives businesses too much freedom, providing a way for businesses quickly to leave one state for another.[74] States with a robust incorporation market may not be inclined to make it easier for businesses to leave the state.[75] Nevertheless, it is difficult for existing business owners and entrepreneurs to predict how a business will grow into the future, and the most favorable methods of organization under the law will vary depending on the development of the business. Because AERA and statutes like it provide business owners with the freedom to reorganize quickly and efficiently as business continues to develop, it is likely that existing business owners and entrepreneurs will attempt to remain in states with laws like AERA whenever possible. Therefore, in order to remain competitive in the market for new and existing businesses, states may not have a choice but to adopt laws based on the Model Act.

III. IS AERA THE FIRST STEP TOWARD A MORE BUSINESS-FRIENDLY STATE?

AERA was not intended to make waves across the business community in Arizona. Though AERA does make some substantive changes to Arizona's entity-level transactions statutes, it primarily simplifies and updates some of the laws that already existed. As progressive as it is, AERA is also poised to be just the first step in a series of reforms aiming to make Arizona a more business-friendly state. When the State Bar of Arizona selected the Mergers and Conversions Committee that eventually wrote AERA, it also established an LLC Subcommittee and tasked it with revising and rewriting Arizona's LLC statute. An overhaul to the LLC statute would be major development in the Arizona business community.[76] And an even bigger change may be on the horizon: the Arizona Supreme Court recently created a Business Court Advisory Committee to determine what a court focused

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72. *Model Entity Transactions Act*, UNIF. LAW COMM'N, http://www.uniformlawcommission.com/Act.aspx?title=Entity%20Transactions%20Act,%20Model%20(2007)%20(Last%20Amended%202013) (last visited Jan. 20, 2015). These states include, Alaska, Idaho, Arizona, Kansas, Pennsylvania, and Connecticut. *Id.* Pennsylvania is the most recent state to overhaul its law in favor the Model Act. *Id.*

73. Idaho is the latest to introduce a bill based on the Model Act to its state legislature. *Id.*

74. Lu, Interview, *supra* note 69 (explaining that certain states may believe that the adoption of something similar to the Model Act will only allow businesses to leave).

75. *Id.*

76. Since 1975 when LLCs were adopted as an acceptable entity structure in the United States, they have gained wide popularity in the world of business organizations law. Rodney D. Chrisman, *LLCs are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004–2007 and How LLCs were Taxed for Tax Years 2002–2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 459–60 (2010) (stating that the LLC is "the most popular form of new business entity in the United States").

solely on business disputes could look like in Arizona.[77] Because businesses like certainty, they would be attracted to states with courts that specialize in business matters. Additionally, a business court would provide Arizona with a more substantial body of case law, which would give businesses more guidance for the future. AERA may be just the start of a push from Arizona lawmakers to transform Arizona into a more business-friendly state.

CONCLUSION

AERA is a good first step, if modest. It eliminates some of the reasons that business entities may have organized in states other than Arizona by reducing transaction costs, and by providing business entities with greater freedom and flexibility to choose how and where to structure an entity. With that said, the combination of AERA, a brand new LLC statute that similarly simplifies and enhances LLC law, and a forum focused solely on business disputes, would give existing business owners and entrepreneurs even more reason to organize new and existing businesses in the state of Arizona. Accordingly, AERA and the forthcoming changes to Arizona's business environment should serve to increase the number of business entities organized in the state.

77. Nick Blumberg, *Arizona Debates Special Courts for Business Cases*, KJZZ (May 15, 2014), http://kjzz.org/content/29728/arizona-debates-special-courts-business-cases.