IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 14-10049

CHRISTOPHER L. CRANE; DAVID A. ENGLE; ANASTASIA MARIE CARROLL; RICARDO DIAZ; LORENZO GARZA; FELIX LUCIANO; TRE REBSTOCK; FERNANDO SILVA; SAMUEL MARTIN; JAMES D. DOEBLER; THE STATE OF MISSISSIPPI, by and through Governor Phil Bryant,

Plaintiffs – Appellants/Cross-Appellees,

v.

JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; THOMAS S. WINKOWSKI, in His Official Capacity as Director of Immigration and Customs Enforcement; LORI SCIALABBA, in Her Official Capacity as Director of United States Citizenship and Immigration Services,

Defendants – Appellees/Cross-Appellants.

On Appeal from the United States District Court for the Northern District of Texas

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AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE, INC. IN SUPPORT OF PETITION FOR REHEARING EN BANC

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Circuit Rule 29-2, the undersigned counsel of record certifies that, in addition to the persons and entities disclosed in the parties' certificates of interested persons, the following have an interest in this *amicus curiae* brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Immigration Reform Law Institute, Inc. (IRLI)

IRLI is a non-profit legal education and advocacy law firm working to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI provides expert immigration-related legal services to public officials, the legal community, and the general public. IRLI's vision is a nation where our borders are secure, the American people are no longer disadvantaged and harmed by the deleterious effects of unlawful immigration, and legal immigration levels are consistent with the national interest. No publicly-held corporation owns any IRLI stock. Interested party Kris W. Kobach is also *Of Counsel* for IRLI.

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STATEMENT REGARDING *EN BANC* CONSIDERATION

Pursuant to Local F.R.App. P. 35, *amicus* IRLI respectfully submits additional argument and analysis to show that a grant of rehearing *en banc* will meet the requirements of both Fed. R. App. P. 35 section (b)(1)(A) (conflict with a very recent decision by another Circuit panel creates a need to secure and maintain uniformity), and section (b)(1)(B) (a question of exceptional national importance—whether the U.S. Department of Homeland Security (DHS) has the discretionary power to grant illegal aliens a reprieve from removal through the Deferred Action for Childhood Arrivals (DACA) Directive, notwithstanding an absence of federal statutory or regulatory authority). The Court's *en banc* power to recall and reform a mandate even after issuance is well established. *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979).

ARGUMENT

I. The Petitioners meet the criteria of FRAP 35 for *en banc* review.

The Plaintiffs-Appellants-Cross-Appellees (hereafter Petitioners[1]) include two distinct parties: (a) Ten individuals serving as immigration enforcement agents and deportation officers with the Immigration and Customs Enforcement bureau of DHS

[1] FRAP 35 and Local FRAP 35 provide for a "suggestion" of rehearing *en banc*, contingent upon a favorable polling of the court. IRLI uses the terms "petition" and "petitioner" for brevity.

(ICE officers) and (b) the State of Mississippi. *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015); Amended Complaint at ¶¶ 9-21.

IRLI concurs with Petitioners that the holdings of the subject panel are in such extensive conflict with those of a recent prior panel in *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657 (5th Cir. Tex. May 26, 2015) that rehearing *en banc* is essential. IRLI supports the arguments of the immigration agents who, following the May 26, 2015 panel opinion, now seek rehearing *en banc*. In particular, IRLI notes that panel's findings that the President's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Directive does not constitute discretionary non-enforcement, that the INA provisions at issue (under which the agents conduct inspections, admissions, and removals of aliens) are congressional mandates to the agency and the agents, and that the conflict as alleged between the policy and the law is susceptible to judicial review. *See* Petition for Rehearing *En Banc* at 6-12.

IRLI directs the major part of its argument to errors made in the arbitrarily disparate treatment of of Mississippi's claims of economic injury vis-à-vis its Fifth Circuit sister states Texas and Louisiana, whose claims happened to be heard in the Southern rather than the Northern District of Texas proceeding below.

II. Unlike the panel in *Texas v. United States*, the panel in *Crane v. Johnson* failed to apply the correct standard for consideration of the factual record in a Rule 12(b)(1) proceeding.

The request for rehearing *en banc* arises from the District Court's grant, without prejudice, of Defendant's motion to dismiss based on a claimed lack of standing of the plaintiffs, and the court's consequent dismissal for lack of subject matter jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, ECF 23, Defendant's Motion to Dismiss and Memorandum in Support (N.D. Tex. Nov. 11, 2012). That dismissal was sustained by the Fifth Circuit on April 7, 2015. *Crane v. Johnson*, 783 F.3d 244 (5th Cir 2015). The Circuit panel which affirmed the dismissal failed to correctly assess the factual record on appeal, making the panel's analysis of the injury alleged by the ICE officers and the State of Mississippi clearly erroneous.

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice…."). While a district court is "empowered to consider matters of fact which may be in dispute," a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction "should be granted only if it appears certain that

the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

The federal defendants "filed their motion to dismiss without any supporting affidavits or testimony," and thus made "a facial attack on the Court's subject-matter jurisdiction." *Crane v. Napolitano*, 920 F. Supp. 2d 724, 732 (N.D. Tex. 2013) (citing *Warth*, 422 U.S. at 501).[2]

III. The *Crane v. Johnson* panel erred by construing evidence of particularized injury presented by the State of Mississippi in favor of the federal agency defendants.

On appeal in the Fifth Circuit, the *Crane* panel reaffirmed the dismissal of Mississippi because its evidence of economic injury was "conjectural and based on speculation." *Crane*, 920 F.Supp. at 744. The *Crane* panel found that,

> Mississippi submitted no evidence that any DACA-eligible immigrants resided in the state. Nor did Mississippi produce evidence of costs it would incur if some DACA-approved immigrants came to the state…. Article III standing … mandates that Mississippi show a "concrete and particularized" injury that is "fairly traceable" to DACA. To do so, Mississippi was required to demonstrate that the state will incur costs because of the DACA program. Because Mississippi's claim of injury is not supported by any facts, we agree with the district court that Mississippi's injury is purely speculative. Mississippi has failed to carry its burden to establish standing.

Crane, 783 F.3d at 252.

[2] If the party merely files a *Rule 12(b)(1)* motion, it is considered a facial attack, and the court looks only at the sufficiency of the allegations in the pleading and assumes them to be true. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)..

The Petition for Rehearing *En Banc* correctly points out the "sharp contrast" between the panel's acceptance of very similar factual allegations of economic injury by Texas and 25 other States at the preliminary motions stage of that litigation in the Southern District of Texas, and the treatment of subject case in the Northern District, wherein a different panel deemed the jurisdictional allegations to be waived, favoring the federal defendants. Petition for Rehearing *En Banc* at 12-14, *citing Crane*, 733 F.3d at 10-12.

Mississippi supported its claim of economic injury by presenting an official report of the state Office of the State Auditor (OSA), that the presence of illegal aliens as of 2006 was costing the state more than $25 million annually in government expenditure, net of state tax revenue collected from this population. Brief of Appellants at 11-12, *citing* ROA 113 (¶¶62-63); ROA 133-135. The state also presented evidence that the figure was likely an underestimate of the true cost to the State, due to exclusion of "the costs of certain state welfare programs" from the cost-benefit analysis. *Id.* The OSA report also alleged that fiscal costs related to the issuance of drivers licenses to DACA beneficiaries were being incurred. ROA 136; 145.

In the Fifth Circuit, "economic injury" to a state government is sufficient to establish injury-in-fact. *Texas v. United States*, 497 F.3d 491, 497 (5th Cir. 2007). Mississippi's allegations were not "speculation" under its standard meaning: A theory

asserted about a matter where evidence is not sufficient for certain knowledge. *See* e.g. Black's Law Dictionary, 7th Ed. at 1407(1999). In contrast, extrapolation is "predicting an unknown from the known data. It uses history and the current population to predict growth." *See* Black's Law Dictionary, Online 2d Edition (2015); *see also, e.g., In re Chevron U.S.A.*, 109 F.3d 1016, 1020 (5th Cir. Tex. 1997) (The applicability of inferential statistics have long been recognized by the courts.) At the motion to dismiss stage, the Supreme Court has clarified that evidence of economic injury need not be a certainty; a plaintiff need only show that the challenged action "inflicted a sufficient likelihood of economic injury to establish standing…." *Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (citing *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971)).[3] Extrapolation of the continuing nature of fiscal costs out six years beyond the range of the baseline empirical data presented by Mississippi plaintiff was particularly appropriate because of the "presum[ption] that general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

Mississippi correctly noted that its analysis of accumulated costs was based on empirical data from past expenditures, not speculation. Brief of Appellants at 14. By extrapolation from this empirical data, the fiscal harm to the State had continued to

[3] The Fifth Circuit has characterized the requisite quantum of economic injury for standing purposes as an "identifiable trifle." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996).

accumulate as illegal alien migration into Mississippi continued over the previous six years. As the population of illegal alien DACA beneficiaries in Mississippi appeared starting in 2012, the higher fiscal burdens associated with the DACA beneficiary subclass would also accumulate. ROA 113-114 (¶66). That extrapolation over six years from their 2006 report could be ascertained through discovery. Brief of Appellants at 14.[4]

In affirming dismissal, the *Crane* panel refused to accept this record supporting the Plaintiffs' allegations as true, as required by *Warth v. Selden*. Rather than construing these material allegations in favor of Mississippi, the panel reaffirmed that such evidence was only "speculative." *See Crane*, 920 F. Supp. 2d at 745-746 ("Mississippi's asserted fiscal injury is purely speculative because there is no concrete evidence that the costs associated with the presence of illegal aliens in the state of Mississippi have increased or will increase as a result of the Directive or the Morton Memorandum.").

On May 26, 2015 the panel in *Texas v. United States* made additional findings as to injury to a State that directly conflict with the adverse construction of Mississippi's standing allegations. 2015 U.S. App. LEXIS 8657. First, a "forced

[4] For example, the State submitted other evidence that "multiple criminal alien beneficiaries of the Directive have already imposed costs on the jail facilities that housed them." ROA 369-371 (¶¶ 6-17).

choice between incurring costs and changing a state's fee structure" constitutes injury as "pressure to change state law." *No. 15-40238*, at *27. Second, potential economic activity conducted by illegal aliens cannot be offset against their fiscal costs to the state. Id. at *29. Third, the designation of lawful presence for a formerly illegal alien population is "itself" a cause of injury to a state, and likely an irreversible one. Id. at *58. These clarifications by the *Texas* panel strongly support the conclusion that Mississippi adequately alleged an economic injury under the sufficient likelihood standard, i.e. additional cumulative fiscal costs for each year in which DACA beneficiaries were present in the state, beginning in 2012.

IV. The *Crane v. Johnson* panel erred in waiving Mississippi's standing evidence submitted at the appellate level.

On appeal, the Fifth Circuit preemptively rejected supplemental briefing on jurisdiction by counsel for Mississippi supportive of a finding of concretized injury. *See* Petition for Rehearing *En Banc* at 12 (noting the panel brushed aside Mississippi's showing of costs) and 13 (noting the panel declared that Mississippi waived an argument because it failed to raise it previously). *Crane*, 783 F.3d at 252, n. 32 and 34. The additional briefing concerned only subject matter jurisdiction. The panel justified its refusal to consider these arguments by reference to the Fifth Circuit's waiver doctrine. *Id.* (citations omitted). However, "the issue of a federal court's subject matter jurisdiction cannot be waived." Fed.R.Civ.P. 12(h)(3); *Coury v. Prot*,

85 F.3d 244, 248 (5th Cir. 1996). The *Crane* panel thus erred by refusing to recognize that this new briefing was offered for the purpose of refuting the government's challenge to jurisdiction. Rehearing should be granted to harmonize the panel rulings.

V. The *Crane v. Johnson* panel failed to consider Mississippi's standing under the APA.

In addition to their other claims, Mississippi and the ICE agent plaintiffs alleged a violation of both the substantive and procedural protections of the APA. *See* Amended Complaint at 21-23. The *Crane* panel ignored the District Court findings of APA standing: (1) "There is law to apply so that judicial review is available to ensure that DHS complies with the law pursuant to 5 U.S.C. § 701(a)(2)". *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788, at *59 (citing *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985); (2) "the Directive and related provisions of the Morton Memorandum are sufficiently final to warrant judicial review," Id. at *61; and (3) the DACA directives and memorandum "constitute final agency action for which judicial review is available," Id. at *63. In contrast, the *Texas* panel found that the United States was not likely to succeed on its challenge to APA standing. 2015 U.S. App. LEXIS 8657, at *74. If Texas, 25 other States, and the immigration agents have APA standing based on aggrievement by the agency's DACA/DAPA policies, nothing in the reasoning of either panel justifies the arbitrary exclusion of Mississippi from judicial review of its own important APA claims.

CONCLUSION

Harmonization of the treatment of the jurisdictional claims of Mississippi vis-à-vis Texas and Louisiana, in a controversy of undisputed national importance, is an additional reason why the Court of Appeals should rehear this appeal *en banc*.

DATE: June 29, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.App.P. 32(a)(7)(c), the attached *amicus curiae* brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010, in 14 point font size, Times New Roman, and contains 2,240 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

June 29, 2015
Date

/S/MICHAEL M. HETHMON
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015, I electronically filed a copy of the foregoing Brief *Amicus Curiae* using the ECF System for the United States Court of Appeals for the Fifth Circuit, which will send notification of that filing to all counsel of record in this litigation.

June 29, 2015
Date

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