IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH ARPAIO, Plaintiff, v. BARACK OBAMA, ET AL. Defendants.	Case 1:14-cv-01966

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I. INTRODUCTION

President Barack Obama announced on November 20, 2014 that he, on his own claimed authority, is granting legal status in the United States and the legal right to work in the United States to approximately 4.7 million nationals of other countries who have entered the country illegally or have illegally remained in the United States. This is in addition to the approximately 1.5 million illegal aliens eligible for President Obama's prior June 15, 2012, DACA Executive Action.

Among many weaknesses of the Defendants' Opposition to the Motion for Preliminary Injunction, is that the Defendants' Opposition and their arguments simply do not relate to the case at bar.

A) Defendants present this case as an abstract policy disagreement and therefore portray the disagreement as non-justiciable.

B) The Executive Branch has no legislative authority to set policy other than by

employing the authority delegated to it by Congress.

C) The exercise of authority delegated from Congress must comply with the procedural requirements of the Administrative Procedures Act ("APA").

D) Defendants have not complied with the APA.

E) It is not an abstract policy agreement whether the APA has been violated or followed.

F) By arguing this is merely policy disagreement, Defendants confess that their actions are *ultra vires*, in violation of the U.S. Constitution and the underlying substantive statutes.

G) Second, pursuant to 5 U.S.C. § 706(2) of the APA, this Court must hold unlawful and set aside any agency action that is

> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

H) Therefore, it is mandatory, by statute, upon the Defendants that they conform their exercise of delegated authority to the statutory terms and the APA in substance.

I) Faithfulness and adherence to the underlying statutes is a review commanded by Congress under the APA. The issue is grounded in the APA, not in policy disputes.

J) Third, Defendants attempt to wield authority delegated to them by Congress in violation of the Non-Delegation Doctrine as recognized by this Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g by* 195 F.3d 4 (D.C. Cir. 1999), *modified by Michigan v. United States EPA*, 213 F.3d 663 (D.C. Cir. 2000) (limiting the scope of *American Trucking*, stating "[w]here the scope increases to immense proportions … the standards must be correspondingly more precise") (citations

omitted) *cert. granted sub nom. American Trucking Ass'ns, Inc. v. Browner*, 120 S. Ct. 2193 (2000).

II. DEFENDANTS HAVE OFFERED NO EVIDENCE OR AFFIDAVITS AND THUS PLAINTIFF'S AFFIDAVITS AND FACTUAL RECITATIONS ARE UNCONTROVERTED.

The Defendants have not offered any affidavits, declarations or evidence in support of their Opposition to a preliminary injunction. Thus the sworn Declaration of Plaintiff is uncontroverted and must at this stage of the proceeding be accepted as true in any event. As this honorable Court ruled on December 18, 2014, "at this stage of the proceedings, in opposition to the defendants' motion to dismiss, the Court need not make any credibility determinations and must accept as true the factual allegations made by the plaintiff."

However, the Defendants' positions in their Opposition to preliminary injunction, in the operative Memoranda orders, and the OLC legal opinion depend extensively upon unsupported assertions of facts and effects that they contend will or will not occur. The majority of Defendants' Opposition consists of simply arguing "I don't believe it."

Thus, the Defendants effectively concede the factual allegations of the Plaintiff supported by sworn declarations.

III. STANDARD OF REVIEW AND GOVERNING LAW

Plaintiff set forth the standard of review and governing law for a preliminary injunction in his motion. Specifically, the following governing law relates to the initial issue of standing:

Pursuant to 5 USCS § 702, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. The APA confers a general cause of action upon persons adversely affected or aggrieved by an agency action within the meaning of a relevant statute, but

restricts that cause of action if the relevant statute precludes judicial review.

Even though Army surveillance was generalized, and involved only observation of public demonstrations, the Supreme Court upheld as a basis for standing "a present inhibiting effect on their full expression and utilization of their First Amendment rights. *Laird v. Tatum* 408 U.S. 1, 28, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Defendants there argued that the surveillance was no more intrusive than what a reporter might observe at a public political event. The plaintiffs could not of course predict which of them if any would be subject to any such surveillance. Nevertheless, the potential inhibiting effect on citizens was sufficient for standing. *Id.*

Concerning standing, the Honorable Ellen Segal Huvelle of this Court recently upheld standing against a similar component of the Defendants Executive Action Amnesty programs in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, ("WATA") U.S. District Court for the District of Columbia, Civil Action No. 14-529, Memorandum Order November 21, 2014, the Honorable Ellen Huvelle, attached hereto. In upholding "competitor standing" by workers likely to be displaced by foreign workers, Judge Huvelle recited the following governing law:

> "To establish constitutional standing, plaintiff must demonstrate that (1) it has suffered an injury-in-fact, (2) the injury is fairly traceable to the defendant's challenged conduct, and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). Plaintiff bears the burden of establishing each element of standing. *See Lujan*, 504 U.S. at 561. However, on a motion to dismiss, the Court "'must accept as true all material allegations of the Complaint, and must construe the Complaint in favor of the complaining party.'" *Ord v. Dist. Of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975))."

As here, DHS attempted to assert a more exacting and rigorous requirement of standing than exists under governing law. DHS in the *WATA* case asserted the same kind of rigid

complaints to standing as here: "DHS argues that plaintiff has failed to provide sufficient detail of the three named members' training and employment circumstances to establish an injury-in-fact arising from competition. (Mot. at 13.) In particular, plaintiff did not enumerate the specific positions to which its named members applied or planned to apply in the future, their qualifications for the job, or whether the position applied for was filled by an OPT student on a seventeen-month STEM extension. *Id.* "

However, such a rigid showing is simply not required for standing. As Judge Huvelle ruled:

> "These omissions are not, however, fatal to plaintiff's standing, ***for such a close nexus is not required***. *See Honeywell Intern Inc. v. EPA*, 374 F.3d 1363, 1368 (D.C. Cir. 2004) (chemical manufacturer had standing because the challenged regulation ***could*** lead customers to seek out the manufacturer's competitors in the future); *Int'l Union of Bricklayers and Allied Craftsmen*, 761 F.2d at 802 (D.C. Cir. 1985) (standing found ***despite lack of details regarding specific future jobs*** as to which U.S. bricklayers would compete with foreign laborers); *Int'l Longshoremen's and Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989) (union had standing to challenge Immigration and Naturalization Service regulation ***without pleading specific job opportunities lost*** to Canadian longshoremen). *Cf. Sierra Club v. Jewell*, 764 F.3d 1, at *6 (D.C. Cir. 2014) (plaintiff's members need not set foot on disputed property to have interest in enjoying it for the purpose of establishing injury)."
>
> "In *Mendoza*, for example, the Court held that plaintiffs had standing, but were not required to show that they applied for and were denied a specific position that was filled by a competitor. 754 F.3d 1002. …."

(Emphases added.) Thus, the precision in pleading standard desired by DHS is more than what is actually required under the law of standing.

> As stated in *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942 1953, 20 L.Ed.2d 947, 'in terms of Article III limitations on federal court jurisdiction, ***the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context*** and in a form historically viewed as capable of judicial resolution.' Or, as we put it in *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 the gist of the standing issue is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

> presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'

Laird v. Tatum, 408 U.S. 1, 26, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) *(Emphasis added.)*

> One need not wait to sue until he loses his job or until his reputation is defamed. To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their deterrent effect.

Id. at 26

The U.S. Supreme Court has held that "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The court's "general power to adjudicate in specific areas of substantive law . . . is properly raised by a [FRCP Rule] 12(b)(1) motion," *Palmer v. United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999), and the burden of establishing the court's subject matter jurisdiction resides with the party seeking to invoke it. See *McNutt v. Gen. Motors Acceptance Corp. of Ind*., 298 U.S. 178, 189 (1936); *see also Reynolds*, 846 F.2d at 748 (providing that jurisdiction need only be established by a preponderance of the evidence).

In terms of factual allegations, for the purposes of Plaintiff's motion, the Court must accept as true the unopposed affidavits[1] (Exhibit C) of the Plaintiff. Notwithstanding this, the factual assertions of the Plaintiff in his sworn declarations are uncontroverted, as Defendants have failed to proffer any sworn evidence of their own. In this regard, it is clear that Defendants are unwilling to swear to anything for fear of attesting to their misleading statements under oath.

In opposition to the Defendants' FRCP Rule 12(b)(1) challenge to Article III standing – as cited in a Minute Order by Judge Howell in this case on December 18, 2014, at 10:44 EDT, denying live testimony -- "at this stage of the proceedings, in opposition to the defendants'

[1] Plaintiff will file his supplemental affidavit tomorrow, December 18, 2014.

motion to dismiss, the Court need not make any credibility determinations and must accept as true the factual allegations made by the plaintiff."

Notwithstanding the legal standards for a preliminary injunction motion, when deciding a motion to dismiss for lack of subject matter jurisdiction, the court generally assumes all factual allegations are true and draws all reasonable inferences as plead in the complaint in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800,* 814-19 (1982); *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (stating that "unchallenged allegations of the complaint should be construed favorably to the pleader").

IV. STANDING MANDATED BY ALLEGATIONS TAKEN AS TRUE

In addition to Plaintiff's sworn affidavit attached to his motion, the allegations of the Complaint in paragraphs 27 through 32 must be taken as ***fact*** for the present purposes of a FRCP Rule 12(b)(1) challenge to standing. Furthermore, pursuant to the Court's order granting leave to file an amended affidavit, Sheriff Arpaio will submit on December 19, 2014, a further affidavit making the following supplemental recitation of non-conclusory and actual fact:

A) Plaintiff Joe Arpaio as Sheriff has been severely affected by increases in the influx of illegal aliens motivated by Defendant Obama's policies of offering amnesty.

B) Plaintiff has a direct economic interest in the Defendants' Executive Actions.

C) The financial impact of illegal aliens in Maricopa County, Arizona was at least $9,293,619.96 in the costs of holding illegal aliens in the Sheriff's jails from February 1, 2014, through December 17, 2014, for those inmates flagged with INS "detainers."

D) Under current law, Plaintiff Arpaio will turn over those committing crimes in Arizona who turn out to be citizens of foreign countries to DHS to be deported. By contrast, under the Defendants' new programs, those persons will not be subject to deportation (based on newly-committed crimes, at least not without due process). Therefore, those persons committing crimes will serve out their criminal sentences in Plaintiff Arpaio's jails, costing his office even more money.

E) After years of experience with floods of illegal immigrants crossing the border into his jurisdiction as Sheriff, Arpaio has many years of empirical, real-world experience and evidence showing how the Defendants' programs will directly impact his operations.

F) Plaintiff Arpaio has been severely affected and damaged by Defendant Obama's release of criminal aliens onto the streets of Maricopa County, Arizona.

G) The Office of the Sheriff has already been directly harmed and impacted adversely by the Defendants' June 2012 DACA program.

H) The Office of the Sheriff will be similarly harmed by the Defendant's new November 20, 2012, Executive Order effectively granting amnesty to illegal aliens.

I) Based on years of real-world, empirical evidence, prior damage will be severely increased by virtue of Defendant Obama's Executive Order of November 20, 2014, which is at issue.

J) Plaintiff Joe Arpaio is adversely affected and harmed in his office's finances, workload, and interference with the conduct of his duties, by the failure of the executive branch to enforce existing immigration laws,

K) Defendant Obama's past promises of what is in effect amnesty and his DACA amnesty have directly burdened and interfered with the operations of the Sheriff's Office

L) Defendants' new amnesty executive actions have greatly increased the burden and disruption of the Sheriff's duties.

M) Experience has proven as an empirical fact that millions more illegal aliens will be attracted into the border states of the United States

N) Experiences and records of the Sheriff's office show that many illegal aliens – as distinct from law-abiding Hispanic Americans – are repeat offenders, such that Plaintiff Arpaio's deputies and other law enforcement officials have arrested the same illegal aliens for various different crimes.

O) Plaintiff Arpaio has turned illegal aliens who have committed crimes over to ICE, totaling 4,000 criminals in his jails for state crimes in just an eight-month period. However, over 36 percent keep coming back.

P) Defendants are not, in fact, deporting illegal aliens convicted of crimes in the State of Arizona. The Plaintiff has booked perpetrators of state-law crimes into his jails, discovered that they are not citizens or Lawful Permanent Residents (LPRs) and then handed those criminals over to ICE at DHS for deportation. Those same illegal aliens placed in DHS custody are then re-arrested for new state-law crimes in Arizona relatively soon thereafter.

Q) As a result, Defendants will not lower the crime rate by reallocating resources.

R) The DACA program which started June 15, 2012, has already severely and negatively impacted Arpaio's office finances, workload, resources, and exposure to more calls about criminal incidents.

S) Arpaio's empirical evidence provides a solid predictive basis for what the impact will be from the November 20, 2014, executive actions.

T) The President's policies and statements over six years encouraging illegal aliens to come and seek the promised amnesty actually causes an increase in crime in Maricopa County, Arizona, including among those who lack any respect for U.S. laws.

U) Moreover, Sheriff Arpaio has also been threatened with death threats by some of the same illegal aliens, which is a constitutional violation against him.

V) Moreover, because under the "Motor Voter" law, deferred action recipients will be presented with an application to register to vote at the same time they obtain a driver's license, hundreds of thousands of the 5 million will either believe that they are entitled to vote because government officials are inviting them to register or won't care about breaking U.S. law having already broken U.S. law to enter the country unlawfully. This impacts Plaintiff directly since he, an elected official, has a reputation for being tough on illegal immigrants.

W) Because Sheriff Arpaio is an elected official, Plaintiff will be harmed by illegal aliens voting against him who can register to vote only because they have and will easily receive an Employment Authorization Card under Defendants' executive actions, which gives rise to a drivers' license which allows them to register to vote.

V. DEFENDANTS' CHALLENGE TO PLAINTIFF'S STANDING

Defendants futilely challenge standing by the Plaintiff on the following meritless grounds:

A) Defendants characterize the case as an abstract disagreement over policy.

B) Defendants argue that "Plaintiff has failed to allege any concrete injury whatsoever to the Maricopa County Sheriff's Office."

C) Defendants argue that "Plaintiff has failed to allege any concrete injury … traceable to the DHS policies challenged in this case," and that "Plaintiff fails entirely to connect these alleged harms to the DHS policies challenged in this litigation."

D) Although Defendants acknowledge that the Complaint alleges "harm that the Sheriff's Office allegedly incurs as a result of illegal immigration," Defendants dismiss those allegations as being speculative.

E) Defendants further object under "the general principle that 'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.' *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973)." Defendants further argue that "the challenged DHS policies neither direct Plaintiff to take any action nor restrain him in the performance of any of his duties."

F) Defendants argue that more illegal aliens will not flood Maricopa County because they will realize they don't qualify for the technical terms of Defendants' programs.

G) Defendants argue that in some mysterious way, never explained, granting benefits to some illegal aliens will allow them to allocate resources to deporting others.

H) Defendants also challenge whether illegal aliens who break the law to enter the United States, and cross through or enter Arizona without a job, without connections

to the community, and without a bank account, and without any financial support are associated with an increase in crime in Arizona and Maricopa County in particular.

I) Defendants argue that Plaintiff's complaint is with the long-standing refusal of the Executive Branch to enforce the law, rather than with the instant, recent programs.

J) Plaintiff's injury would not be redressable by this litigation, because "Enjoining DACA and DAPA, as Plaintiff seeks to do, would not compel the ultimate removal of any alien."

Defendants' arguments are without merit.

The Plaintiff has standing under the controlling precedent in this Circuit of *Mendoza v. Perez* (D.C. Cir., Record No. 13-5118, Page 9, June 13, 2014)

> The requirements for standing differ where, as here, plaintiffs seek to enforce procedural (rather than substantive) rights. When plaintiffs challenge an action taken without required procedural safeguards, they must establish the agency action threatens their concrete interest. *Fla. Audubon Soc'y*, 94 F.3d at 664. It is not enough to assert "a mere general interest in the alleged procedural violation common to all members of the public." *Id.*
>
> Once that threshold is satisfied, the normal standards for immediacy and redressability are relaxed. *Lujan*, 504 U.S. at 572 n.7. Plaintiffs need not demonstrate that but for the procedural violation the agency action would have been different. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005). Nor need they establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest. *Id.* Rather, if the plaintiffs can "demonstrate a causal relationship between the final agency action and the alleged injuries," the court will "assume[] the causal relationship between the procedural defect and the final agency action." *Id.*

While it is clear that standing requires more than "a mere general interest in the alleged procedural violation common to all members of the public," the Plaintiff has clearly alleged a specific injury to his office's finances, resources, and workload, and also personally. He is not a random citizen.

First, the APA provides a bright-line statutory requirement as explained elsewhere, and

the case is simply not a dispute over policy. The case, governed by the APA, does not implicate any of the prudential considerations Defendants assert because Congress has legislated and provided a cause of action under the APA. Compliance with the APA, including the APA's requirement to conform with the subject matter legislation, is not a disagreement about policy or politics. It is a statutory cause of action.

Second, Plaintiff has quite obviously pled concrete injury, which allegations must be accepted as true at this stage. The Plaintiff has provided in his sworn .s that – based on many decades of experience – the Sheriff's Office has and will incur additional expenses, workload, drain on its resources, and danger to personnel out on patrol, as well as many other enumerated injuries.

Third, Plaintiff has quite obviously pled that the concrete injury has already been caused by Defendants' June 2012 DACA program and will be caused by Defendants' November 2014 executive actions, which allegations must be accepted as true at this stage. Arpaio alleges under oath that the June 15, 2012, DACA program has already caused the adverse effects that he claims will be repeated now after the November 20, 2014, Executive Action Amnesty. Plaintiff is challenging the 2012 DACA. Plaintiff alleges and avers under oath that his Office has already experienced from the 2012 DACA program increased expenses, workload, drain on resources, and risk for patrolling personnel.

Fourth, while Defendants strive mightily to tar the Plaintiff's allegations as "speculative," Sheriff Arpaio's office has decades of real-world experience and empirical evidence in how increases in criminal activity within Maricopa County, Arizona, are correlated with Federal policies and programs that are perceived by nationals of foreign countries as an engraved invitation to come to the United States for current or future amnesty. What Defendants seek to

characterize as "speculative" is actually the most compelling, real-world experience possible based on personal knowledge and belief.

Contrary to the assertions of the Defendants, a reasonable inference or prediction of an injury satisfies standing. "According to NRDC, the Guidance exacerbates these injuries by delaying or suspending future air quality improvements. Any such effect, EPA counters, is purely hypothetical because it may never approve an alternative. "*Natural Resources Defense Council v. Environmental Protection Agency*, 643 F.3d 311 (D.C. Cir. July 1, 2011).

In the 2011 *NRDC v. EPA* case, Plaintiff claimed members living in air quality non-attainment areas. The members alleged – but could not possibly prove to the standards of proximate causation – that ambient air quality affected their health either individually nor to any medical diagnosis or medical certainty. The EPA further objected that it was highly speculative to claim that allowing an alternative means of attaining air quality that would be necessity is "not less stringent" could cause any harm to the plaintiffs. Nevertheless, this Circuit only three years ago found standing to challenge agency action.

Furthermore, it is clear that only a partial contribution making a problem worse is sufficient for standing. *Id.* Making an existing problem worse clearly establishes standing. *Id.* For example, in *Natural Res. Def. Council v. Envtl. Prot. Agency* (D.C. Cir., 2014), Plaintiffs were persons living in the general region around power plants that might conceivably switch to the fuels challenged under the challenged administrative rule, but it was unknown if any of the plants actually would use the fuels in question:

> "Once EPA promulgated the Comparable Fuels Exclusion, it was " 'a hardly-speculative exercise in naked capitalism' " to predict that facilities would take advantage of it to burn hazardous-waste-derived fuels rather than more expensive fossil fuels. *Id.* (inferring that "motor carriers would respond to the hours-increasing provisions by requiring their drivers to use them and work longer days" (quoting *Abigail*

> *Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006))). And the Intervener does not dispute that, as it turned out, many facilities did just that.

Therefore, a predictive, strong "inference" that harm will result to the Plaintiff from the agency action is routinely held to be sufficient to constitute standing.

Fifth, Sheriff Arpaio is not suing as just a random citizen complaining that someone else was not prosecuted, but as an elected Sheriff and government official whose resources and budget are directly harmed. Defendants contend that the Defendants' actions do not direct Sheriff Arpaio to take any action nor restrain him in the performance of his duties. That is incorrect. Under current law, the Sheriff's Office hands nationals of foreign countries who violate laws over to the DHS (ICE) for deportation. Under Defendants' new programs, because illegal aliens who break the law are not subject to deportation, they have and will remain imprisoned in Sheriff Arpaio's jails, costing the Sheriff's Office money.

Indeed, if the Court applied the Defendants' approach to standing on this point, then the U.S. Government would not have had standing to challenge Arizona's SB1070 law in *Arizona v. United States*, 132 S. Ct. 2492 (2012). There, Arizona's SB1070 law did not prohibit the U.S. Government from taking any action nor require the U.S. Government to do anything by Arizona's state-level statute. SB1070 simply agreed with Federal immigration law and encouraged Arizona personnel to hand illegal aliens over to DHS in compliance with existing law. Yet speculation that the U.S. Government might be encouraged to more faithfully execute existing laws in its enforcement activities by SB 1070 gave the U.S. Government standing to sue the State of Arizona. Clearly there was no standing by the United States to sue Arizona if we followed the Defendants' analysis here.

Sixth, Sheriff Arpaio has real world experience and empirical evidence that illegal aliens

are in fact attracted to enter or cross through Arizona, committing a trail of crimes along the way, regardless of whether they have read the fine print of U.S. immigration policies or whether they technically qualify for the latest Federal program encouraging illegal immigration. It is an empirical fact that illegal aliens who do not qualify for current amnesty or deferred action programs do not know or care if they qualify, but are motivated to enter the country on the expectation that if one group of illegal aliens is granted amnesty, they will get amnesty in the next wave or the next program.

Seventh, injury to sustain standing need not be all-or-nothing, a light switch. Defendant's actions will make the injury to Sheriff Arpaio's office worse than it was in recent years. While there is a long-standing problem with the Executive Branch's flagrant refusal to obey or enforce the law, the fact that Defendants' programs will make the problem worse is sufficient for standing. Past problems provide an empirical basis that the problem will get worse.

As explained in this Circuit in *Natural Resources Defense Council v. Environmental Protection Agency*, 643 F.3d 311 (D.C. Cir. July 1, 2011), "In any event, even assuming that a resulting program were perfectly equivalent, the delay in improving air quality would still injure NRDC members." So mere delay in enforcement is sufficient to establish standing as to persons living vaguely in the vicinity of plants which might or might not choose to use the alternative fuel, who might or might not be medically affected in ways that cannot be proven medically or as proximate causation. "

Furthermore, this Circuit in 2011 considered in its standing analysis whether anyone else would have standing: "Were EPA to prevail, although NRDC might well have standing to bring an as-applied challenge to any particular "not less stringent" determination, no one would have standing to challenge EPA's authority to allow alternatives in the first place. Especially given

that Congress enacted Subpart 2 for the very purpose of curtailing EPA discretion, *see Am. Trucking*, 531 U.S. at 484-86, 121 S. Ct. 903, it would be ironic indeed if the application of standing doctrine allowed EPA to effectively maintain that very discretion. Neither precedent nor logic requires us to adopt such a counterintuitive approach to standing." *Id.*

Eighth, Defendants are compelled under law enacted by Congress to remove illegal aliens. The Defendants' unconstitutional executive actions illegally contravene current law to relieve the Executive Branch from the obligation imposed by Congressional enactment. Therefore, enjoining the Defendants' programs would leave in place current law, under which they are indeed compelled to deport nationals of foreign countries unlawfully present in the country. However, enjoining the program would also immediately signal to potential future trespassers that they cannot expect to receive amnesty.

Lujan v. Defenders of Wildlife,, 504 U.S. 555, 562, 112 S.Ct. 2130 (1992) explains that where a plaintiff's asserted injury arises from the government's allegedly unlawful regulation [of a third party]" the critical question is how the third party would respond to an order declaring the government's action illegal.

VI. DEFENDANTS DID NOT OPPOSE WHAT PLAINTIFF SEEKS: DEFENDANTS' PROGRAMS ARE NOT ENFORCEMENT DISCRETION

Defendants extensively brief and argue the case as grounded only on the Executive Branch's inherent authority to engage in enforcement discretion.

Fatal to the Defendants' argument, however, is the reality that Defendants June 2012 DACA and November 2014 Executive Action Amnesty are not exercises of prosecutorial discretion.

As analyzed and explained by U.S. District Judge Arthur J. Schwab, in *United States v. Elionardo Juarez-Escobar*, in the United States District Court for the Western District of

Pennsylvania (Criminal Case No. 14-0180, December 16, 2014), Defendants' Executive Actions do not qualify as prosecutorial discretion or enforcement discretion. *See*, Exhibit A, attached.

VII. DEFENDANTS PROGRAMS ARE UNCONSTITUTIONAL OR UNLAWFUL: DEFENDANTS ADMIT THAT PROGRAMS ARE UNLAWFUL

As Plaintiff briefs already in the Motion, the Executive Branch has no authority to set policy in this area, as Defendants claim. As further analyzed and explained by U.S. District Judge Arthur J. Schwab, in *United States v. Elionardo Juarez-Escobar*, in the United States District Court for the Western District of Pennsylvania (Criminal Case No. 14-0180, December 16, 2014), the Defendants' programs are unconstitutional. Judge Schwab ruled that:

President Obama contended that although legislation is the most appropriate course of action to solve the immigration debate, his Executive Action was necessary because of Congress's failure to pass legislation, acceptable to him, in this regard. This proposition is arbitrary and does not negate the requirement that the November 20, 2014 Executive Action be lawfully within the President's executive authority. It is not.

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown*, 343 U.S. at 587.

Congress's lawmaking power is not subject to Presidential supervision or control. *Youngstown*, 343 U.S. at 587. Perceived or actual Congressional inaction does not endow legislative power with the Executive. This measurement - - the amount/length of Congressional inaction that must occur before the Executive can legislate - - is impossible to apply, arbitrary, and could further stymie the legislative process.

President Obama stated that the only recourse available to those members of Congress who question his wisdom or authority in this regard would be to "pass a bill" and that "the day I sign that bill into law, the actions I take will no longer be necessary." Presidential action may not serve as a stop-gap or a bargaining chip to be used against the legislative branch. While "the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," it does not include unilateral implementation of legislative policies. *Utility Air Regulatory Group v. E.P.A.*,134 S.Ct. 2427, 2446 (Jun. 23, 2014).

This Executive Action "cross[es] the line," constitutes "legislation," and effectively changes the United States' immigration policy. The President may only "take Care that the Laws be faithfully executed . . . "; he may not take any Executive Action that creates laws. U.S. Const., Art. II, § 3.

VIII. PAST DEFERRED ACTION DOES NOT MAKE DEFERRED ACTION LEGAL

Plaintiff also rejects the validity of the Defendants' deferred action programs as being grounded mainly on past practice. The fact that the Executive Branch has acted unlawfully in the past does not make its actions lawful now. Contrary to public discussions out of court about reactions to different Presidents, Plaintiff's counsel has actually sued the prior Bush Administration over various matters and does not accept these practices as lawful no matter who engaged in them.

Defendants argue on Page 8 of the Opposition that Congress specified specific circumstances in which deferred action status will be available. Fatal to their Executive Actions now, however, Congress has not authorized deferred action in the situations and in the wide breadth involved here.

IX. IN THE UNLIKELY EVENT THAT PRESIDENT OBAMA'S SO-CALLED EXECUTIVE ACTIONS ARE NOT DEEMED UNCONSTITUTIONAL, WHICH IT UNDOUBTEDLY IS, PRESIDENT OBAMA AND THE OTHER DEFENDANTS ACTED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT (APA) THROUGH WHAT IN EFFECT AMOUNTS TO HIS ILLEGAL RULE-MAKING.

President Obama has attempted to nullify the law of the United States, enacted by Congress, with regard to immigration and the presence of aliens who are working in the country, by ordaining Executive Actions followed by "guidance" Memoranda ("Memoranda orders") being issued by the Secretary of the Department of Homeland Security, Jeh Charles Johnson.

As mentioned above, the primary and dominant feature of these executive actions is that the Defendants have established a complex regime to confer affirmative benefits upon approximately 40% of the estimated citizens of foreign countries residing illegally in the U.S.

It is true that a Congressionally-enacted statute does allow the Attorney General (apparently now the Secretary DHS) to make a "determination" – that is, an individualized decision on a case-by-case basis – whether to grant an Employment Authorization Card to a person whose deportation has been deferred. However, the Defendants have erected a complex regulatory scheme whose centerpiece "Holy Grail" is the coveted right to work in the United States. Even though a statute allows the granting of work permit if the Attorney General "determines" it to be appropriate, the Defendants are still setting up a regulation under which that power will be exercised. This scheme replaces the Attorney General's "determin[ation]" with a set of broad criteria intended to automatically cover approximately 40% of all illegal aliens.

Under the Executive Actions and applicable administrative guidance, an undocumented immigrant is automatically eligible for deferred action if he or she applied for deferred action and if he or she:

> (1) is not an enforcement priority under Department of Homeland Security Policy;

> (2) has continuously resided in the United States since before January 1, 2010;
> (3) is physically present in the United States both when Homeland Security announces its program and at the time of application for deferred action;
> (4) has a child who is a U.S. citizen or Lawful Permanent Residence; and
> (5) presents "no other factors that, in exercise of discretion, make[] the grant of deferred action inappropriate."

Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *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*, 38 Op. O.L.C., 25, November 19, 2014, citing Johnson Deferred Action Memorandum at 4.

The Department of Homeland Security has issued an operative Memorandum to reflect the priorities for deportation referenced in President Obama's November 20, 2014 Executive Action. Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, November 20, 2014. Individuals who may otherwise qualify for deferred deportation under the Executive Action, will not be permitted to apply for deferred action if they are classified in one of the three (3) categories of individuals who will be prioritized for deportation. The Secretary of the Department of Homeland Security provided that the civil immigration enforcement priorities (apprehension and removal) will be as follows:

- Priority 1 (threats to national security, border security, and public safety), which includes those who: are engaged in or suspected or terrorism or espionage; are apprehended attempting to enter the United States; have been convicted of an offense involving gangs; have been convicted of a felony "other than a state or local offense for which an essential element was the alien's immigration status"; and have been convicted of an "aggravated felony";
- Priority 2 (misdemeanants and new immigration violators), which includes those who have been: convicted of three or more misdemeanor offenses arising out of

three separate incidents (other than minor traffic offenses or state or local offenses involving their immigration status); convicted of a "significant misdemeanor"; apprehended after "unlawfully entering or re-entering the United States and cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014"; and found to have significantly abused the visa or visa waiver programs; and

- Priority 3 (other immigration violations), which includes those who have been issued a final order of removal on or after January 1, 2014.

Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (emphasis added).

The operative Memoranda set forth that individuals in all three (3) of these priority groups should be removed from the United States unless they qualify for asylum or other forms of relief. Further, undocumented immigrants who are not within these categories may be removed "provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id.* All decisions regarding deportation are to be based on the totality of the circumstances. *Id.*

These operative Memoranda orders thus establish complex and detailed rules governing broad categories of persons and circumstances. The very nature of these Executive Actions is to create a standardized approach which produces exactly the same result in each and every case and there is only one possible outcome which is granted to all whom meet the general criteria. All those who meet the criteria get the "Holy Grail" of the right to work in the United States, creating a magnet for more millions of illegal aliens to rush the borders.

The millions of persons who meet the regulatory criteria get only one possible result: they are granted deferred action and are entitled to both remain in the United States and are given the legal right to work as well. Those who do not meet the regulatory criteria do not get that result,

and receive no change from their current status. This extends beyond prosecutorial discretion and replaces individual decision-making with mass standardization. Ultimately, President Obama's so-called Executive Actions are rule-making subject to the provision of the APA.

X. THE EXECUTIVE ACTIONS AND MEMORANDA ARE NOT GENERAL STATEMENTS OF POLICY BUT ARE RULE-MAKING AND NOT POLICY.

Defendants argue that their Executive Actions and Memoranda Orders "reflect[] a general statement of policy by the agency, a type of agency action that the APA explicitly exempts from the notice-and-comment requirements." Defs. Opp. at p.33. It is thus Defendants' position that if they label the Executive Actions "general statements of policy" that they circumvent the legislative process. This argument has no merit. Pursuant to the above facts, and well-established law, Defendants' operative Memoranda orders are legislative rules that must comply with the APA's procedural and substantive requirements and are not general statements of policy.

This Circuit has rejected the proposition that an agency can escape judicial review under Section 704 by labeling its rule an "informal" guidance document *Better Gov't Ass'n v. Dep't of State,* 780 F.2d 86, 93 (D.C. Cir. 1986); *see also Continental Airlines, Inc. v. CAB*, 173 U.S. App. D.C. 1, 522 F.2d 107, 124 (D.C. Cir. 1974) ("The label an agency attaches to its action is not determinative."). Since the labeling of the Executive Actions is thus irrelevant, the actions themselves must be compared to previous court holdings.

In *Nicholas v. INS*, 590 F.2d 802, 807-08 (9th Cir. 1979), the U.S. Court of Appeals for the Ninth Circuit held that Immigration and Naturalization Service's[2] ("INS")'s 1978 "instructions" regarding deferred action constituted a substantive rule requiring rule-making formalities under the APA. Further, in *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), the U.S.

[2] Recently re-organized into the United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE).

Supreme Court held that the Bureau of Indian Affairs ("BIA") could not create "eligibility requirements" for allocating funds among Native Americans without complying with the APA requirements to establish the criteria as regulations. *Id.* at 230 - 236. Here, like the BIA, the DHS created eligibility criteria in a similar fashion. DHS' criteria determine the right of millions of people to remain in the United States. Since eligibility to receive funding triggers the APA under *Ruiz*, then eligibility for deferred action also does.

Second, the operative Memoranda orders are also legislative rules subject to the rulemaking requirements of the APA because they are substantive rules. A rule is substantive (and hence must comply with the APA) "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citation omitted) In *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) the D.C. Circuit held that the primary distinction between a substantive rule and a general statement of policy . . . turns on whether an agency intends to bind itself to a particular legal position. *Id.*; *see also American Bus Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980).

Even more, the Memoranda orders are legislative rules subject to the rulemaking requirements of the APA because each order "puts a stamp of agency approval or disapproval on a given type of behavior," as analyzed by *Chamber of Commerce v. DOL*, 174 F.3d 206, 212 (D.C. Cir. 1999). In *Chamber of Commerce*, this Circuit held that the Department of Labor promulgated a substantive rule when it told employers that they could avoid 70-90% of workplace inspections if they participated in a new "Cooperative Compliance [Executive Action]." 174 F.3d at 208.

Here, similarly, the Defendants establish criteria and Executive Actions so that those who participate are designated lower-risk and can avoid enforcement and prosecutorial action by their participation in the Executive Action, thereby allocating enforcement activity. As a result, the Defendants must comply with the rule-making procedures imposed by the APA, including posting a precise Notice of Proposed Rule-Making (NPRM) in the Federal Register and receiving, reviewing, and analyzing public comments before finalizing any regulation.

Thus, for the reasons shown above, Defendants' Memoranda orders are subject to the provisions of the APA.

a. President Obama's In Effect Illegal Rule-Making Violates Federal Law Because Notice Of The Rule-Making Should Have Been Published In The Federal Register For Public Comment, As It Affects A Wide Swath Of People And Businesses, And The Substantive Rule Was Not Published At Least Thirty Days Before Its Effective Date.

The APA establishes the procedural requirements for notice-and-comment rule-making. 5 U.S.C. § 553(b) of the APA states that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). Finally, "the required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d).

Congress passed the APA in an effort "to improve the administration of justice by prescribing fair administrative procedure." David B. Chaffin, Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of United States*

Steel and Western Oil & Gas, 1982 Duke L.J. 461, 462 (1982), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2809&context=dlj.[3]

> There are several reasons for immediately invalidating a challenged rule following a finding of noncompliance with section 553. First because section 553 procedures serve to educate agencies and apprise them of the public interest the rule may be inaccurate and contrary to the public interest, and thus unworthy of being extended. Second, enforcement of a rule that results from improper procedure runs afoul of fundamental notions of democratic government. Third, leaving the rule temporarily in effect may have undesirable effects on the procedures on remand.

Id. at 471. "When a court allows such a rule to remain in force, it extends the life of an illegitimate exercise of power and [ ] promotes abuses of [ ] power." *Id.* at 474.

"Since the enactment of the APA, numerous rules have been challenged on the ground that the promulgating agency did not comply with the procedural requirements of section 553." *Id.* at 464. "Most courts sustaining such procedural challenges immediately invalidate the rule and remand the case to the agency with instructions to follow proper section 552 procedures. The [D.C. Circuit] followed this practice in *Tabor v. Joint Board for Enrollment of Actuaries*[, 566 F.2d 705 (D.C. Cir. 1977)]." *Id.* at 464-66.

In *Tabor*, experienced actuaries challenged regulations establishing standards and qualifications for persons performing actuarial services for pension plans to which . . . (ERISA) applies. The actuaries argued, *inter alia*, that the Joint Board had violated section 553 by failing to publish a statement of basis and purpose with the rules. [Although] the district court granted the Board's motion for summary judgment[,] [t]he Court of Appeals for the [D.C. Circuit]

[3] (Citing Senate Comm. On The Judiciary, Administrative Procedure Act: Report Of The Committee On The Judiciary, S. Rep. No. 752,79th Cong., 1st Sess. 7 (1945), *reprinted in* Legislative History Of The Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 1, 187 (1946)).

reversed, vacating the rules and remanding the case to the Board 'to enable it to adopt new rules accompanied by a contemporaneous statement of basis and purpose.' *Id.* at 466.

Moreover, in *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980), the this Circuit held that the Administrator in that case "erred in declining to adhere to the notice-and-comment requirements of section 553 of the APA." This Circuit emphasized "that judicial review of a rule promulgated under an exception to the APA's notice-and-comment requirement must be guided by Congress's expectation that such exceptions will be narrowly construed." *Id.*

In *Am. Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980), the D.C. Circuit found that section 553 "was one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.'" 627 F.2d at 528.

In sum, this Circuit has found it "commonplace that notice-and-comment rule-making is a primary method of assuring that an agency's decisions will be informed and responsive." *New Jersey*, 626 F.2d at 1045. Accordingly, this Circuit ruled that "the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *Id.*

If President Obama, in "'carrying out [his] 'essentially legislative task,' ha[d] infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, [he would] thereby have 'negated the dangers of arbitrariness and irrationality in the formulation of rules . . . ." *See id.* (quoting *Weyerhaeuser Co. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

As such, at a minimum, President Obama's proposed illegal rule-making should have been made available for public comment, as it is unlawful to have not done so by intentionally not publishing it in the Federal Register.

President Obama, however, decided to ignore the commonplace practice of following the procedures listed in the section 553 of the APA. As President Obama's in effect illegal rule-making will affect a swath of people and businesses, the President "must always learn the . . . viewpoints of those whom its regulations will affect. . . . [P]ublic participation . . . in the rule[-]making process is essential in order to permit administrative agencies to inform themselves." Chaffin, *supra* at 471.[4] (Exhibit B).

Accordingly, the Court should invalidate President Obama's in effect illegal rule-making, as it is consistent with the D.C. Circuit's past decisions and remedies in a plethora of cases concerning section 553 violations.

b. President Obama Violated APA, 5 U.S.C. § 706 Because His In Effect Illegal Rule-Making Conflicts With Congressional Law.

The APA prohibits federal agencies from authorizing what Congress has prohibited. *See, e.g., Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Defendant Obama and the other Defendant's DACA and Executive Action Amnesty directly conflicts with congressional law and is thus an illegal and invalid agency action pursuant to 5 U.S.C. §§ 702-06.

Pursuant to 5 U.S.C. § 706(2), the APA requires this Court to hold unlawful and set aside any agency action that is:

[4] "[A] rule of broad scope affects many individuals and therefore requires consideration of a wide variety of viewpoints to define the public interest." Chaffin, *supra* at 471.

> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; [or] (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

Concerning the substance of agency action, an agency cannot promulgate a rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Specifically, an agency's rule cannot conflict with what Congress has said in Congressional enactments. *Id.* § 706(2)(A).

XI. DEFENDANTS' EXECUTIVE ACTIONS AND MEMORANDA ORDERS CONFLICT WITH CONGRESSIONAL ENACTMENTS

a. Congressional Law on Detention and Removal of Illegal Aliens.

Under 8 U.S.C. § 1225, every person who is not legally present in the United States "shall" be "inspected" by immigration officers (DHS personnel) and if the officer determines that the individual is not clearly and beyond a doubt entitled to be admitted, the individual "shall be detained" for removal proceedings. 8 U.S.C. § 1225(a)(1), (3), (b)(2)(A).

This imposes a mandatory duty on the executive branch. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422, at * 8 (N.D. Tex. Apr. 23, 2013) (holding that 8 U.S.C. § 1225 imposes a mandatory duty and explaining that "[t]he Supreme Court has noted that Congress's use of the word 'shall' in a statute imposes a mandatory duty on an agency to act.") (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008)).

This mandatory duty extends to the removal of any undocumented immigrant present in violation of federal law, unless Congress provides a specific exception. *See* 8 U.S.C. §§ 1182, 1227(a)(1), 1229(b), 1254 (setting standards for inadmissibility and categories for deportability, along with limited statutory exceptions, such as cancellation of removal and temporary protected status). Thus, Congress has provided that it is illegal for undocumented immigrants to be in the United States and has required the executive branch to remove those individuals.

b. Congressional Law On Undocumented Parents Of U.S. Citizen Or Legal Permanent Residents.

Congress has further enacted an elaborate statutory scheme governing the lawful presence of undocumented parents of U.S. citizens or legal permanent residents. *See, e.g.*, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255.

Title 8 specifies a precise mechanism by which parents of U.S. citizens may apply to stay in the country lawfully. In particular, the parents must meet certain strict requirements: they must (i) wait until their child turns twenty-one (21), (ii) voluntarily leave the country, (iii) wait 10 more years, and then (iv) obtain a family-preference visa from a U.S. consulate abroad. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255. Congress also has provided that it is "unlawful" for anyone to hire an "unauthorized alien." Id. § 1324a(a)(1). Congress specifying the proper mechanism prevents DHS from now creating its own. *See, e.g., API v. EPA*, 198 F.3d 275, 278 (D.C. Cir. 2000) ("[I]f Congress makes an explicit provision for apples, oranges and bananas, it is most unlikely to have meant grapefruit.").

c. **Defendant's Memoranda Orders Are Not "In Accordance With" The Laws Enacted By Congress.**

Defendants' Memoranda orders create legal rights for millions of undocumented immigrants and do so by rewriting the immigration laws and contradicting the priorities adopted by Congress.

First, contrary to 8 U.S.C. § 1225's requirements, Defendants have now ordered that immigration officers shall *not* "inspect[ ]" or institute "removal proceedings" against 4 to 5 million of the eleven million undocumented immigrants in the United States. Defendants have thus over-ruled the operation of 8 U.S.C. § 1225 for nearly 40% of the estimated illegal aliens that 8 U.S.C. § 1225 commands them to deport.

Furthermore, Defendants have announced that all 5 million of these illegal aliens will receive work permits, without following the mandatory procedures for classifying a category of undocumented immigrants as work-eligible. *See, e.g.*, 8 U.S.C. § 1324(a) (barring any hiring of an "unauthorized alien"); 8 C.F.R. § 274a.12 (providing, by regulation, narrowly defined "[c]lasses of aliens authorized to accept employment").

Authorizing work permits for an entire category of millions of individuals legally prohibited from employment exceeds any discretion Defendants have to issue work permits and contradicts Defendants' statutory duties to deport those persons. Thus, Defendant Obama and the other Defendants' Executive Actions violate the requirements of the APA because the reversal of the executive branch's positions in conflict with existing regulations and law is necessarily arbitrary, capricious, arbitrary, an abuse of discretion, unreasonable, and otherwise not in accordance with law. If the previously promulgated regulations were well grounded in law and fact, then a dramatic departure from those regulations most likely cannot also be well grounded in law and fact.

As such, the DHS operative Memoranda Orders violate the aforementioned provisions in 5 U.S.C. § 706, and they are therefore unlawful and invalid. *See, e.g. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law [or] in excess of statutory jurisdiction [or] authority.") (quoting 5 U.S.C. §§ 706(2)(A), (C)).

XII. EVEN IF THERE WAS PROPER NOTICE-AND-COMMENT RULE-MAKING, WHICH THERE WAS NOT, A RATIONAL BASIS FOR THE SUBSTANTIVE RULE DOES NOT EXIST.

Requirements of administrative rationality flow from several sources, principally the Due Process Clause of the Fifth Amendment and the APA. *See* Adrian Vermuele, Rationally Arbitrary Decisions (in Administrative Law), Harvard Pub. L. Working Paper No. 13-24 at *3 (Mar. 2013),[5] 5 U.S.C. § 706 states, in relevant part, that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

> As relevant here, the APA, requires that agencies (1) must act within the bounds of their delegated statutory mandates; (2) must provide 'substantial evidence' or at least a reasoned evidentiary basis for their factual findings; (3) and, most crucially for my purposes, must offer reasons for their policy choices, reasons that connect the facts found to the choices made. The last requirement stems most directly from Section 706(2)(A) of the Act, requiring courts to set aside agency action that is 'arbitrary, capricious, [or] an abuse of discretion[, also known as 'rationality review'].

Vermuele, *supra* at 3.

> In a recent decision, *New York v. Nuclear Regulatory Commission* (681 F.3d 471 [D.C. Cir. 2012]), the Court of Appeals for the District of Columbia Circuit -- the nation's premier administrative-law tribunal -- went so far as to use language incautiously suggesting that an agency assessing the environmental consequences of its action must articulate an expected harm analysis that 'examine[s] both the probability of a given harm occurring and the consequences of that harm if it does occur.'

Id. at 4.

[5] available at http://www.law.harvard.edu/faculty/faculty-workshops/faculty-workshop-secure/vermeule.faculty.workshop.spring2013.pdf .

Although the scope of review under the arbitrary and capricious standard is narrow and the court is not empowered to substitute its judgment for that of the agency, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), the agency must provide a "rational connection between the facts found and the choice made" so as to afford the reviewing court the opportunity to evaluate the agency's decision-making process. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 220 (D.C. Cir. 2013); *see also Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

While 'we have long held that agency determinations based upon highly complex and technical matters are entitled to great deference,' *Domestic Secs., Inc. v. SEC*, 333 F.3d 239, 248 (D.C. Cir. 2003) (quotation marks and brackets omitted), 'we do not defer to the agency's conclusory or unsupported suppositions.' *Muwekma Ohlone Tribe*, 707 F.3d at 220; *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004).

Even as a matter of policy, which Defendants miserably argue gives them the right to override Congress and do as they please, the Executive Actions and operative Memoranda orders are unconstitutional as failing the rational basis test for the exercise of delegated authority in administrative law. Defendant Obama and the other Defendants' justification for granting amnesty is that the amount of resources and effort it would take to track down and deport illegal aliens is excessive. However, not granting work permits would encourage many illegal aliens to voluntarily return home if they find it difficult to find employment in the United States. Thus is no rational basis for the executive branch to grant employment authorization to work within the United States as part of granting amnesty or deferred removal of illegal aliens.

XIII. A MULTITUDE OF POLICY CONSIDERATIONS WARRANT THE INVALIDATION OF PRESIDENT OBAMA'S IRRATIONAL SO-CALLED EXECUTIVE ACTIONS AND EVEN IF THE EXECUTIVE ACTIONS AT ISSUE ARE POLICY, WHICH THEY ARE NOT LEGALLY, THERE IS NO RATIONAL BASIS FOR THEM.

There are many policy reasons why President Obama's executive amnesty will cause immediate harm. For one, the Obama administration is hiring 1,000 new workers to quickly process applications for amnesty. As the new workers in Crystal City, Virginia, clearly won't have any expertise in immigration, they will rubber-stamp every application.

The 5 million illegal aliens slated to receive amnesty will also be granted a work permit, technically called an Employment Authorization Card. The card can be used in most states to receive a driver's license. Under the "Motor Voter" law, people are encouraged by the government to register to vote while getting a driver's license. When officials invite them to register to vote, illegal aliens with little understanding may accept the invitation. Illegal aliens could think they wouldn't be asked to register if they shouldn't. Moreover, our voting registration system runs mostly on the honor system. Nobody investigates until there is a complaint. Even if due to misunderstanding, we could have millions of illegal aliens actually voting in the 2016 election. The amnesty to illegal aliens could start tilting elections as early as 2015.

In addition, many businesses will face legal jeopardy when they hire employees because of President Obama's lawlessness. Approximately 5 million new illegal aliens may now show up at your business applying for a job holding an "Employment Authorization Card." This is a modern work permit—it is the same work permit that legal immigrants get when they come to the country honorably, above board and playing by the rules. As such, a business will not know if the applicant is legally in the country or not, as there is no clue how or why a person got the

work permit.

President Obama does not have the legal authority to implement if so-called executive action, and as a result, we will have 5 to 6 million illegal aliens throughout the country presenting Employment Authorization Cards (historically an Employment Authorization Document) to get jobs, placing employers in an untenable and risky position. On the one hand, it is illegal to hire an employee or independent contractor who is an illegal alien. If a lawbreaker's work permit is invalid, then the employer is breaking the law by hiring him or her. On the other hand, it is illegal to discriminate in the workplace based upon nationality, citizenship or immigration status. In the "Alice in Wonderland" world of immigration policy, it is illegal to ask if a job applicant is legally present in the country.

Thus, one has no way of knowing if an individual job applicant has a valid work permit as a lawful immigrant or an unconstitutional executive action work permit. Therefore, businesses may be forced into breaking federal law, based on whether the president does or does not have the legal power to grant amnesty to illegal aliens. For the time being, employers must accept an Employment Authorization Card as legitimate until the courts rule otherwise.

In sum, Defendants' Executive Actions are not rationally based and they do not even legally qualify as policy, which Defendants maintain in their opposition justifies their deviation from the strictures rule-making under the APA, notwithstanding the unconstitutionality of their conduct.

For the aforementioned reasons, Defendants' so-called Executive Actions must be ruled null and void.

XIV. CONCLUSION

The Court should grant Plaintiff's motion and enter a preliminary injunction that, during the pendency of this suit, orders Defendants to cease and desist and not initiate the plans for Executive Actions directed by the President to DHS and his Attorney General. This will work no harm to Defendants, as the status quo of existing law enacted by Congress will be preserved. It is not right or just that the President and the other Defendants circumvent the will of the people in our Republic, simply because they believe that the new Congress will not tow the line to their goals for immigration reform.

Dated: December 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2014 a true and correct copy of the foregoing Reply to Defendants' Opposition to Motion for Preliminary Injunction (Civil Action Nos. 14-cv-1966) was submitted electronically to the District Court for the District of Columbia and served via CM/ECF upon the following:

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 14-0180
ELECTRONICALLY FILED

v.

ELIONARDO JUAREZ-ESCOBAR,

Defendant.

MEMORANDUM OPINION AND ORDER OF COURT RE: APPLICABILITY OF PRESIDENT OBAMA'S NOVEMBER 20, 2014 EXECUTIVE ACTION ON IMMIGRATION TO THIS DEFENDANT

On November 20, 2014, President Obama announced an Executive Action on immigration, which will affect approximately four million undocumented immigrants who are unlawfully present in the United States of America. This Executive Action raises concerns about the separation of powers between the legislative and executive branches of government. This core constitutional issue necessitates judicial review to ensure that executive power is governed by and answerable to the law such that "the sword that executeth the law is in it, and not above it." Laurence Tribe, *American Constitutional Law*, 630 (3ed.-Vol. 1) (2000), quoting James Harrington, *The Commonwealth of Oceana* 25 (J.G.A. Pocock ed. 1992)(originally published 1656).

The Court, in this Memorandum Opinion, addresses the applicability of this Executive Action to Elionardo Juarez-Escobar, an undocumented immigrant, who has pled guilty to re-entry of a removed alien in violation of 8 U.S.C. § 1326, and who is awaiting sentencing.

I. Introduction[1]

Defendant is approximately 42 years of age. He was born in Honduras and his first language is Spanish. On October 21, 2005, Defendant was arrested in Lordsburg, New Mexico, by the United States Border Patrol. He was subsequently issued an Expedited Removal Order (via an administrative procedure), and was formally removed from the United States on December 5, 2005.

During the change of plea hearing held by this Court, Defendant testified, through a court-appointed interpreter, and with the assistance of court-appointed counsel, that he returned to the United States in the following manner: At an unknown time after 2005, Defendant traveled by land from Mexico and entered into the United States through Texas. While in Texas, Defendant saw an advertisement in a local newspaper for transportation vans. Defendant responded to the advertisement and paid an individual to drive him from Texas to New York. Once in New York, a friend drove Defendant to Pittsburgh to be re-united with his brother.

Defendant's brother is a citizen of the United States and owns a landscaping business in Pittsburgh. Defendant has worked for his brother's landscaping business for at least two (2) years. He has also done painting and construction work for friends while he has resided in the United States. Defendant presumably came to the United States in an attempt to make money and in search of a better quality of life than he had in Honduras. Defendant attempted to "file" income taxes for "a couple of years," but was unable to do so because he does not have a Social Security number.

[1] Much of the information known about Defendant and set forth in Section "I.," *infra.*, was obtained via a Pre-Plea Presentence Investigation Report. Doc. No. 20. This Court ordered the Probation Office to prepare this Report on September 10, 2014, covering Defendant's criminal and work history. This Report, like all Presentence Investigation Reports, was filed under seal. Much of what is contained in the Report was reiterated by Defendant at his change of plea hearing. Id. Defendant communicated with his Counsel and the Court through a certified court-appointed interpreter.

On April 7, 2014, Defendant was stopped by a New Sewickley Township Police Officer after he drove his vehicle around a traffic stop. The Officer noticed open beer cans in the back seat of the vehicle and observed that Defendant might be intoxicated. Henry Gomez, a minor, was also present in the vehicle. Defendant failed field sobriety tests and submitted to a blood test at Heritage Valley Medical Center-Beaver. His blood alcohol level was .180%, which is above Pennsylvania's legal limit of alcohol of .08%. Defendant was released pending the filing of a criminal complaint. As a result of this encounter, Defendant was charged with two (2) counts of Driving under the Influence of Drugs or Alcohol, Corruption of Minors, Selling/Furnishing Liquor to a Minor, and Driving Without a License.[2] CR 208-2014/T468050-2.

On June 23, 2014, Defendant's immigration status was referred to the United States Department of Homeland Security ("Homeland Security"). Homeland Security determined that Defendant was unlawfully present in the United States because he had been removed from the United States on December 5, 2005, and had thereafter re-entered the country without the permission of the United States Attorney General or the Secretary of the Department of Homeland Security.

II. Procedural Posture

A. How Defendant's Case Came to be before this Court

Defendant appears before this Court, in part, because of arguably unequal and arbitrary immigration enforcement in the United States.

As noted above, a New Sewickley Township Police Officer arrested Defendant and Homeland Security was notified of his potential undocumented status following his arrest. The

[2] During the October 21, 2014, change of plea hearing, Defendant denied purchasing alcohol for a minor or providing alcohol to the minor passenger. Defendant stated that the minor passenger "had not been drinking." Defendant also denied that he was driving without a license and contended that he had an international driver's license.

Commonwealth of Pennsylvania is not a "sanctuary state." There is very little "official" information concerning "sanctuary cities" or "sanctuary states." In *Veasey v. Perry*, 13-CV-00193, 2014 WL 5090258, *17, fn 149 (S.D. Tex. October 09, 2014), a Federal Judge for the United States District Court for the Southern District of Texas defined "sanctuary cities" as "cities that have refused to fund law enforcement efforts to look for immigration law violators, leaving that to the federal government. S.J. of Tex., 82nd Leg., R.S. 8 (2011) (designating the elimination of sanctuary cities as a legislative emergency)."

Had Defendant been arrested in a "sanctuary state" or a "sanctuary city," local law enforcement likely would not have reported him to Homeland Security. If Defendant had not been reported to Homeland Security, he would likely not have been indicted for one count of re-entry of a removed alien in violation of 8 U.S.C. § 1326.

Further, neither a federal indictment nor deportation proceedings were inevitable, even after Immigration and Customs Enforcement ("ICE"), a division of Homeland Security, became involved. In 2013, ICE personnel declined to bring charges against thousands of undocumented immigrants who had previous criminal convictions.[3]

Therefore, Defendant possibly would not be facing sentencing and/or deportation if he had been arrested under the same circumstances, but in another city/state or if different ICE personnel had reviewed his case.

[3] The Court notes that an Immigration Enforcement Report, for the fiscal year 2013, by ICE, indicates that ICE reported 722,000 encounters with undocumented immigrants, most of whom came to their attention after incarceration for a local arrest. However, this Report also notes that the ICE officials followed through with immigration charges for only 195,000 of these individuals. Among those released by ICE, 68,000 had criminal convictions, and 36,007 of the convicted undocumented immigrants freed from ICE custody, in many instances, had multiple convictions, some of which included: homicide, sexual assault, kidnapping, aggravated assault, aggravated assault, stolen vehicles, dangerous drugs, drunk or drugged driving, and flight/escape. See FY 2013 ICE Immigration Removals, December 2013 accessed through http://www.ice.gov/removal-statistics/.

B. Procedural History to Date

Defendant has been incarcerated since July 22, 2014, when he was arrested and detained by Homeland Security. On July 29, 2014, a grand jury returned an indictment against Defendant for one count of re-entry of a removed alien in violation of 8 U.S.C. § 1326. Doc. No. 1. Defendant appeared before United States Magistrate Judge Maureen P. Kelly for an Initial Appearance and, a few days later, for an Arraignment. Doc. Nos. 6, 12. Defendant, through a court-appointed interpreter, and with assistance of counsel, pled not guilty to the charge. Doc. No. 13.

The Court was informed of Defendant's decision to change his plea to guilty and proceed to sentencing in late August, 2014. The Court scheduled a hearing thereon for October 21, 2014, based upon the availability of a certified court-appointed interpreter. 09/09/2014 Text Order. The Court ordered the United States Probation Office to file a Pre-Plea Presentence Investigation Report addressing Defendant's criminal and work history in preparation for the change of plea and sentencing hearing. Doc. No. 19.

On October 21, 2014, the Court held a hearing, which Defendant, his counsel, and Assistant United States Attorney Eberle attended. Doc. No. 24. There was no plea agreement in this case.

During the hearing, the Court informed Defendant of his rights, and the consequences of waiving those rights, including potential deportation, if Defendant pled guilty. Id. The Assistant United States Attorney outlined that Defendant had been physically removed from the United States in 2005, and had been informed, at that time, that he could not re-enter the United States without obtaining permission from the United States Attorney General or the Secretary of the Department of Homeland Security prior to any re-entry into the country. Defendant was found

to be "in the United States" as a result of his April 7, 2014, encounter with law enforcement. Defendant did not have permission from the United States Attorney General or the Secretary of the Department of Homeland Security to be in the United States.

During the change of plea hearing, Defendant accepted responsibility for his actions, evidenced that he understood his rights, and proceeded to waive his right to a trial and pled guilty to one count of re-entry of removed alien, as charged in the indictment. Doc. No. 25. The Court asked the Assistant United States Attorney to inquire into whether Defendant's employers had reported Defendant's wages for federal tax purposes. The sentencing hearing will be scheduled by this Court.

Historically, this Court has sentenced defendants who are charged with unlawfully re-entering the United States to time-served (normally within an advisory sentencing guideline range of 0-6 months) and one (1) year supervised release with the added condition that the defendant shall not re-enter the United States, without lawful authorization. The Court also customarily orders that supervised release be suspended due to anticipated removal/deportation.

In this case, Defendant's applicable advisory guideline range, based upon an offense level of 6 and a criminal history category of I, is 0-6 months imprisonment. Doc. No. 20. The date of January 22, 2015, six (6) months after Defendant's detention by Homeland Security, marks the end of this time period. A term of supervised release of not more than one (1) year may also be imposed as part of Defendant's sentence. Id.

C. Request for Legal Briefing by This Court

On November 24, 2014, in light of the recently announced Executive Action, the Court requested counsel for the Government and for Defendant to brief the following issues, on or before noon on December 5, 2014:

1. Does the Executive Action announced by President Obama on November 20, 2014, apply to this Defendant?
    A. If yes, please provide the factual basis and legal reasoning.
    B. If no, please provide the factual basis and legal reasoning.
2. Are there any constitutional and/or statutory considerations that this Court needs to address as to this Defendant? If so, what are those constitutional and/or statutory considerations, and how should the Court resolve these issues?

Doc. No. 26. The Court also invited any interested *amicus* to submit briefs by the same date. Id. Any party could file a response thereto on or before noon on December 11, 2014. Id.

The Government, in its four (4) page response thereto, contended that the Executive Action is inapplicable to criminal prosecutions under 8 U.S.C. § 1326(a), and argued that the Executive Action solely relates to civil immigration enforcement status. Doc. No. 30.

Defense Counsel indicated that, as to this Defendant, the Executive Action "created an additional avenue of deferred action that will be available for undocumented parents of United States citizen[s] or permanent resident children."[4] Doc. No. 31, 3. In addition, Defense Counsel noted that the United States Citizenship and Immigration Services ("USCIS") "has announced that certain citizens of Honduras living in the United States are eligible to extend their Temporary Protected Status (TPS) so as to protect them from turmoil facing the citizens of that nation." Id. at 5.

[4] As of this writing, it is still unknown whether this Defendant is the father or step-father of a United States citizen or permanent resident. In addition, as Defense Counsel points out in his Brief, the "parental" form of deferred action, as described by President Obama in his Executive Action, will not be available for at least 180 days. However, depending on the length of sentence imposed by this Court, and/or the options that Defendant may choose given the status of his criminal case (which will be discussed *infra*.), the 180 days may elapse before Defendant appears before an Immigration Judge in a civil removal proceeding.

III. Is President Obama's November 20, 2014 Executive Action on Immigration Constitutional or Unconstitutional?

A. Separation of Powers Under the Constitution

Under our system of government in the United States, Congress enacts laws and the President, acting at times through agencies, "faithfully execute[s]" them. U.S. Const., Art. II, § 3 (the "Take Care Clause"; also known as the "Faithful Execution Clause").

In *N.L.R.B. v. Canning,* the United States Supreme Court reiterated that:

> [T]he separation of powers can serve to safeguard individual liberty . . . and that it is the "duty of the judicial department" – in a separation-of-powers case as in any other – "to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

573 U.S. ___, 134 S.Ct. 2550, 2559-60 (Jun. 26, 2014).

The Court requested that the parties provide briefs to assist the Court in determining whether the Executive Action on immigration announced on November 20, 2014, would impact the sentencing of this Defendant. Specifically, this Court was concerned that the Executive Action might have an impact on this matter, including any subsequent removal or deportation, and thereby requiring the Court to ascertain whether the nature of the Executive Action is executive or legislative.

B. Substance of the Executive Action

On November 20, 2014, President Obama addressed the Nation in a televised speech, during which he outlined an Executive Action on immigration. Text of Speech: http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration. President Obama stated that the immigration system is "broken," in part because some "play by the rules [but] watch others flout the rules." President Obama outlined that he had taken actions to secure the borders and worked with Congress in a failed attempt to reach a legislative solution. However, he stated that lack of substantive legislation necessitated that his

administration take the following actions "that will help make our immigration system more fair and more just":

> First, we'll build on our progress at the border with additional resources for our law enforcement personnel so that they can stem the flow of illegal crossings, and speed the return of those who do cross over.
>
> Second, I'll make it easier and faster for high-skilled immigrants, graduates, and entrepreneurs to stay and contribute to our economy, as so many business leaders have proposed.
>
> Third, we'll take steps to deal responsibility with the millions of undocumented immigrants who already live in our country.

As to this third action, which may affect Defendant, President Obama stated that he would prioritize deportations on "actual threats to our security." The President also announced the following "deal":

> If you've been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you're willing to pay your fair share of taxes -- you'll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law. That's what this deal is.

Thus, in essence, the President's November 20, 2014 Executive Action announced two different "enforcement" policies: (1) a policy that expanded the granting of deferred action status to certain categories of undocumented immigrants; and, (2) a policy that updated the removal/deportation priorities for certain categories of undocumented immigrants.

1. Deferred Action

The first policy (on deferred action) provides that individuals who fall within each of these proscribed categories would not be deported by President Obama's administration. ("All we're saying is that we're not going to deport you."). According to the President, his Executive Action does not grant citizenship, the right to permanent residence, or entitlement to benefits of citizenship, and does not apply to individuals who: (1) have "recently" come to the United

States; or (2) those who might come in the future. However, the Executive Action does "create" substantive rights, including legal work authorization documentation, access to social security numbers, and other tangible benefits.

This Executive Action has been implemented through Memoranda by the Secretary of the Department of Homeland Security. Ex. Jeh Charles Johnson, Secretary, U.S. Department of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents*, November 20, 2014. Under the Executive Action and applicable administrative guidance, an undocumented immigrant would be eligible for deferred action if he or she applied for deferred action and if he or she:

(1) is not an enforcement priority under Department of Homeland Security Policy;

(2) has continuously resided in the United States since before January 1, 2010;

(3) is physically present in the United States both when Homeland Security announces its program and at the time of application for deferred action;

(4) has a child who is a U.S. citizen or Lawful Permanent Residence; and

(5) presents "no other factors that, in exercise of discretion, make[] the grant of deferred action inappropriate."

Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *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*, 38 Op. O.L.C., 25, November 19, 2014, citing Johnson Deferred Action Memorandum at 4.

2. Removal Deportation Priorities

The Department of Homeland Security has issued a Memorandum to reflect the priorities for deportation referenced in President Obama's November 20, 2014 Executive Action, which will become effective on January 5, 2015. Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, November 20, 2014. Individuals who may otherwise qualify for deferred deportation under the Executive Action, will not be permitted to apply for deferred action if they are classified in one of the three (3) categories of individuals who will be prioritized for deportation. The Secretary of Homeland Security provided that the civil immigration enforcement priorities (apprehension and removal) will be as follows:

- Priority 1 (threats to national security, border security, and public safety), which includes those who: are engaged in or suspected or terrorism or espionage; are apprehended attempting to enter the United States; have been convicted of an offense involving gangs; have been convicted of a felony "other than a state or local offense for which an essential element was the alien's immigration status"; and have been convicted of an "aggravated felony";
- Priority 2 (misdemeanants and new immigration violators), which includes those who have been: convicted of three or more misdemeanor offenses arising out of three separate incidents (other than minor traffic offenses or state or local offenses involving their immigration status); convicted of a "significant misdemeanor"; apprehended after "unlawfully entering or re-entering the United States and cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014"; and found to have significantly abused the visa or visa waiver programs; and

- Priority 3 (other immigration violations), which includes those who have been issued a final order of removal on or after January 1, 2014.

Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (emphasis added).

The Memorandum sets forth that individuals in all three (3) of these priority groups should be removed from the United States unless they qualify for asylum or other forms of relief.[5] Further, undocumented immigrants who are not within these categories may be removed "provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." Id. All decisions regarding deportation are to be based on the totality of the circumstances. Id.

C. Differentiation Between Executive Action and Executive Order

Authority for Executive Actions and Orders must be based upon: (1) the Constitution; (2) statutes or treaties; or (3) the President's inherent authority to ensure that the laws are "faithfully executed." These powers are limited, even during times of national crisis. Tribe, *American Constitutional Law* at 670-71. Although the Framers of the Constitution and Congress have not defined the instruments of Presidential authority, including executive orders and executive actions, these terms are not interchangeable. John Contrubis, *Executive Orders and Proclamations*, Congressional Research Service Report for Congress (95-772 A)(updated March 9, 1999).

The House Government Operations Committee has provided the following description of an Executive Order:

[5] The Brief submitted on behalf of Defendant noted that certain citizens of Honduras living in the United States are eligible to extend their Temporary Protected Status ("TPS") so as to protect them from turmoil facing the citizens of that country. Defendant is a citizen of Honduras. Doc. No. 31. Given just these facts, this Court does not know as of this writing if Defendant would be among the individuals who would be eligible to qualify for asylum or other forms of relief.

> Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law . . . . In the narrower sense Executive [O]rders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.

Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study on the Use of Presidential Powers* (Comm. Print 1957). Executive Orders are required to be published in the Federal Register. 44 U.S.C. § 1505.

Federal Courts can review the constitutionality of Executive Orders. In two instances, Federal Courts have found that specific Executive Orders were unconstitutional. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the United States Supreme Court found that President Truman's Executive Order authorizing the Secretary of Commerce to control operation of the majority of the country's steel mills was unconstitutional because President Truman acted without constitutional or statutory authority); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), rehearing denied, 83 F.3d 442 (D.C. Cir. 1996) (the United States Court of Appeals for the District of Columbia Circuit found a 1995 Executive Order issued by President Clinton, which prevented employers who were performing under federal contracts from hiring strike breakers, to be unlawful because it impermissibly prevented employers from hiring their chosen workers).

Executive Actions do not have a legal definition. Executive Actions have been used by Presidents to call on Congress or his Administration to take action or refrain from taking action (*e.g.,* Executive Actions, issued in January 2014 by President Obama, re. boosting federal background-checks for firearm purchases). Executive Actions are not published in the Federal Register.

D. President Obama's Historic Position that Executive Action/Executive Orders on Immigration Would Exceed His Executive Authority

President Obama has stated that he is constrained from issuing an Executive Action/Order on immigration because such action would exceed his executive powers as demonstrated by the following:

- America is a nation of laws, which means I, as the President, am obligated to enforce the law. I don't have a choice about that. That's part of my job. But I can advocate for changes in the law so that we have a country that is both respectful of the law but also continues to be a great nation of immigrants. . . . With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed . . . [W]e've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. And then the judiciary has to interpret the laws. There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President. March 28, 2011, http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall
- . . . sometimes when I talk to immigration advocates, they wish I could just bypass Congress and change the law myself. But that's not how a democracy works. What we really need to do is to keep up the fight to pass genuine, comprehensive reform. That is the ultimate solution to this problem. That's what I'm committed to doing. May 10, 2011, http://www.whitehouse.gov/the-press-

office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas

- Now, I swore an oath to uphold the laws on the books. . . . Now, I know some people want me to bypass Congress and change the laws on my own. . . . Believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how - - that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written. July 25, 2011, http://www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza

President Obama's statements evidence that prior to November 20, 2014, he viewed an Executive Action, similar to the one issued, as beyond his executive authority.

President Obama has also evidenced that systematic categories of delayed deportations would be impracticable and unfair.

- [T]here are those in the immigrants' rights community who have argued passionately that we should simply provide those who are [here] illegally with legal status, or at least ignore the laws on the books and put an end to deportation until we have better laws. . . . I believe such an indiscriminate approach would be both unwise and unfair. It would suggest to those thinking about coming here illegally that there will be no repercussions for such a decision. And this could lead to a surge in more illegal immigration. And it would also ignore the millions of people around the world who are waiting in line to come here legally. Ultimately, our nation, like all nations, has the right and obligation to control its borders and set laws for residency and citizenship. And no matter how decent

> they are, no matter their reasons, the 11 million who broke these laws should be held accountable. July 1, 2010, http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform

While President Obama's historic statements are not dispositive of the constitutionality of his Executive Action on immigration, they cause this Court pause. The Court must examine whether this Executive Action is within the President's executive authority, and whether it would unjustly and unequally impact this Defendant in light of this Court's obligation to avoid sentencing disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. § 3553(a)(6).

E. The Obama Administration's Justification for the Executive Action

1. Opinion of the Office of Legal Counsel

On November 19, 2014, the Office of Legal Counsel of the United States Department of Justice issued a Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, which addressed the following: (1) whether, in light of Homeland Security's limited resources to remove undocumented immigrants, it would be permissible for the Department to implement a policy "prioritizing the removal of certain categories of aliens over others"; and (2) whether it would be permissible for Homeland Security to extend deferred action to certain aliens who are the parents[6] of children who are present in the United States. 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*, 38 Op. O.L.C ___.

[6] The Memorandum Opinion does not state whether grandparents are included within the term "parents." If not, such an arbitrary and anti-grandparent position demonstrates a lack of true understanding of "family."

The Office of Legal Counsel advised that the then proposed Executive Action would be within the lawful scope of Homeland Security's discretion to enforce immigration laws because:

- Congress has passed legislation permitting certain classes of individuals to be eligible for deferred action (*e.g.*, immediate family of Lawful Permanent Residents who were killed on September 11, 2001), USA PATRIOT Act of 2001, Pub. L. No. 107-56 § 423(b), 115 Stat. 272, 361;
- Congressional legislation emphasizes uniting undocumented immigrants with lawfully present family members;
- Congress "has never acted to disapprove or limit" categorical deferred action;
- Congress has enacted legislation "appearing" to endorse deferred deportation programs;
- The Executive Action reflects considerations within the Agency's expertise;
- The Executive Action is of temporary duration; and
- Immigration officials retain discretion to screen undocumented immigrants on a case-by-case basis to determine whether their application for deferred deportation is approved, thereby avoiding the creation of a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens.

2. President Obama's Justification

President Obama contended, in his televised address, that his Executive Action is "lawful" and akin to actions taken by other Presidents, both Republican and Democratic. The sole citation to authority in the President's speech was from the Old Testament. Exodus 22:21 (paraphrased by President Obama as "we shall not oppress a stranger, for we know the heart of a stranger – we were strangers once, too."). President Obama has stated: (1) that his Executive Action was justified by Congressional inaction, and (2) that his Executive Action is authorized by his prosecutorial discretion to defer immigration actions.

F. The November 20, 2014 Executive Action on Immigration is Unconstitutional

In determining whether the Executive Action is applicable to this Defendant, this Court must first determine whether the Executive Action is constitutional. The Court is bound to ensure that the Constitution's structural safeguards are preserved. *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 241 (3d Cir. 2013), *citing Baker v. Carr*, 369 U.S. 186, 211 (U.S. 1962). This role cannot be shared with other branches of government "anymore than the president can share his veto power or Congress can share its power to override vetoes." *Id. See also United States v. Nixon*, 418 U.S. 683, 704-05 (1974).

1. Inaction by Congress Does Not Make Unconstitutional Executive Action Constitutional

President Obama contended that although legislation is the most appropriate course of action to solve the immigration debate, his Executive Action was necessary because of Congress's failure to pass legislation, acceptable to him, in this regard. This proposition is arbitrary and does not negate the requirement that the November 20, 2014 Executive Action be lawfully within the President's executive authority. It is not.

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown*, 343 U.S. at 587.

Congress's lawmaking power is not subject to Presidential supervision or control. *Youngstown*, 343 U.S. at 587. Perceived or actual Congressional inaction does not endow legislative power with the Executive. This measurement - - the amount/length of Congressional inaction that must occur before the Executive can legislate - - is impossible to apply, arbitrary, and could further stymie the legislative process.

The temporal limits of so called "inaction" is arbitrary because of considerations such as when the "clock" on inaction would begin and how long inaction would have to persist before otherwise unlawful legislative Executive Action would become lawful. For example, would it be permissible for a President, who was dissatisfied with a high tax rate on long term capital gains (as limiting economic growth), to instruct the IRS to only collect taxes at a rate of 15% rather than the legislative prescribed 20% rate, or defer prosecution of any taxpayer who pays at least 15% but not the full 20%, unless Congress "pass a bill" lowering the rate within a specified time period? Both this IRS scenario and the Executive Action at issue in this case violate the separation of powers.

President Obama stated that the only recourse available to those members of Congress who question his wisdom or authority in this regard would be to "pass a bill" and that "the day I sign that bill into law, the actions I take will no longer be necessary." Presidential action may not serve as a stop-gap or a bargaining chip to be used against the legislative branch. While "the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," it does not include unilateral implementation of legislative policies. *Utility Air Regulatory Group v. E.P.A.,*134 S.Ct. 2427, 2446 (Jun. 23, 2014).

Further, President Obama's belief that this Executive Action is within his executive authority is not dispositive because "the separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" *N.L.R.B.*, 719 F.3d at 241, *citing Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 130 S.Ct. 3138, 3155 (2010), *quoting New York v. United States*, 505 U.S. 144, 182 (1992). Likewise, Congress's alleged "failure" to pass

legislation invalidating or limiting past Executive Actions or Orders relating to deferred action does not evidence that such exercises are lawful, and does not constitute a grant of legislative authority to the Executive.

This Executive Action "cross[es] the line," constitutes "legislation," and effectively changes the United States' immigration policy. The President may only "take Care that the Laws be faithfully executed . . . "; he may not take any Executive Action that creates laws. U.S. Const., Art. II, § 3.

2. Executive Action Goes Beyond Prosecutorial Discretion – It is Legislation

Presidents and certain members of their administrative agencies may exercise prosecutorial discretion over certain criminal matters on a case-by-case basis. Prosecutorial discretion, in the context of immigration, applies to a broad range of discretionary enforcement decisions, including the following:

- whether to issue, serve, file, or cancel a Notice to Appear;
- whom to stop, question, and arrest;
- whom to detain or release;
- whether to settle, dismiss, appeal, or join in a motion on a case; and
- whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.

Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*.

President Obama invoked this discretion when he stated that his Executive Action allowed his administration to "prioritize" deportations on "actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."

However, President Obama's November 20, 2014 Executive Action goes beyond prosecutorial discretion because:

(a) it provides for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination; and

(b) it allows undocumented immigrants, who fall within these broad categories, to obtain substantive rights.

First, the Executive Action establishes threshold eligibility criteria before undocumented immigrants can apply for deferred action status (*i.e.,* deferred deportation). The Office of Legal Counsel acknowledged that this class-based program and threshold criteria was problematic, but concluded that the program does not "in and of itself" cross the line between executing the law and "rewriting it." Despite the so-called case-by-case determination of eligibility for deferred deportation (ex. passing a criminal background check), the threshold criteria will almost wholly determine eligibility. Such formulaic application of criteria, especially given the wide breadth of the program, in essence, substantively changes the statutory removal system "rather than simply adapting its application to individual circumstances."[7] Id.

Secondly, the Executive Action goes beyond temporarily deferring deportation for specified groups of undocumented immigrants. Secretary Johnson, in his Memorandum on prosecutorial discretion, stated that deferred action is legally valid if it is on a case-by-case basis and "may be terminated at any time at the agency's discretion." Johnson, *Exercising*

[7] According to the White House, the Executive Action will apply to more than 4 million undocumented immigrants. http://www.whitehouse.gov/issues/immigration/immigration-action. There are an estimated 11.2 million unauthorized immigrants in the United States. Pew Research Center estimates based on residual methodology, applied to 2012 American Community Survey, accessed through http://www.pewresearch.org/fact-tank/2014/11/20/those-from-mexico-will-benefit-most-from-obamas-executive-action/.

Prosecutorial Discretion, 2. The Executive Action provides for a process by which undocumented immigrants will become quasi-United States citizens, such that the status given to those within President Obama's Executive Action could not be "terminated at any time."

Individuals who qualify under the Executive Action are invited to apply for deferred action status. Those individuals will be permitted to apply for work authorization documentation if they can demonstrate "economic necessity," and they will temporarily cease accruing "unlawful presence" for the purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214(d)(3) cited in 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*, 13. The Administration has based the Executive Action, in large part, on the "humanitarian interest in promoting family unity." Id. at 26. This overarching-value will render any rescission of the Executive Action, by legislation or withdrawal by another Administration, arguably unjust as it would violate core American familial values to abruptly deport these individuals, who are "families," not "felons," and have been allowed to deepen and strengthen already existing ties to their lawfully present American family members and the wider community.

3. Conclusion

President Obama's unilateral legislative action violates the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, is unconstitutional.

IV. Is the Executive Action Applicable to this Defendant?

A. The Three Priorities for Removal

On the other hand, if President Obama's Executive Action is constitutional, the Court must determine its applicability to this Defendant. As noted above, the Department of Homeland Security created a Memorandum, which sets forth implementation of President Obama's Executive Action into three (3) priority groups for removal.

Priority 1 for removal does not apply to this Defendant for the following reasons: There is no evidence that this Defendant posed or poses a threat to national security, border security, and/or public safety, by engaging in, or being suspected of, terrorism or espionage. This Defendant was not apprehended while attempting to enter the United States. There is no evidence that this Defendant has ever been convicted of an offense involving gangs or is a member of a gang. Finally, there is no evidence that he was convicted of a felony "other than a state or local offense for which an essential element was the alien's immigration status," nor has he been convicted of an "aggravated" felony.

Likewise, Priority 2 for removal does not appear to apply to this Defendant. Although Priority 2 specifically referenced undocumented immigrants who had illegally re-entered the United States, it only applies to those who have not been in the United States continuously since January 1, 2014. Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*. This Defendant re-entered the United States "sometime after 2005" and was arrested in 2014, as noted above. Thus, it is probable that Defendant has been continuously present in the United States since January 1, 2014.

In addition, Priority 2 also indicates that the undocumented immigrant has to have been convicted of three (3) or more misdemeanor offenses arising out of three (3) separate incidents

(other than minor traffic offenses or state or local offenses involving their immigration status). Here, there is no evidence Defendant has been convicted of three (3) or more offenses arising out of three separate incidents. Thus, Defendant does not appear to fall into the Priority 2 category.

Finally, an undocumented immigrant may fall be classified within Priority 3 if said person has been issued a final order of removal on or after January 1, 2014. This has not yet occurred in Defendant's case, and thus, he does not fall within Priority 3 for removal.

Therefore, if the Executive Action is constitutional, its deportation/removal priorities do not apply to Defendant in this case. As such, once the Executive Action is fully implemented, this Defendant arguably should not be in a "deportation mode" before this Court.[8]

B. The Government's Position that the Executive Action Does Not Apply to Defendant

In its well-written brief, the Government argues that the November 20, 2014 Executive Action on immigration is inapplicable this Defendant, even if Defendant is not a priority for deportation. In short, the Government posits that the Executive Action only impacts civil proceedings, not criminal proceedings, such as the matter at bar. In support of this argument, the Government cites Secretary Johnson's Memorandum *Policies for Apprehension, Detention and Removal of Undocumented Immigrants*, which it is "arguably relevant to the issues before [this Court]." Doc. No. 30. The Government argues that because this particular Memorandum does not "mention § 1326(a) proceedings" – the very proceeding this Court is conducting with respect

[8] Although Defendant does not appear to fall within any of the three (3) Priority Deportation Categories, under President Obama's November 20, 2014 Executive Action, he possibly is not eligible for deferred deportation. The Court notes that Defendant may not have any dependents living in the United States, and if so, he is not a part of the class or subcategory of undocumented immigrants that are eligible for deferred deportation under President Obama's November 20, 2014 Executive Action. This is but one example of the dichotomy between DHS policy and the President's Executive Action, which makes it difficult to discern what the law is with respect to individuals such as this Defendant.

to this Defendant – this Court need not consider the Memorandum, the Executive Action, or anything else that has taken place in the United States that impact immigration law.

While this Court notes that Secretary Johnson's Memoranda certainly discuss the President's new "civil" immigration policies, and while this Court is aware that this Defendant is before this Court on a criminal matter, the Court disagrees that the Executive Action (and its ten (10) supporting Memoranda) does not impact this criminal proceeding.

First, the Court notes that while deportation or removal is imposed by an immigration judge via a civil proceeding, the civil proceeding often arises after – or as a result of – the individual being convicted of a crime. In this instant matter, the civil proceeding may commence because Defendant has committed the crime of re-entry of a removed alien in violation of 8 U.S.C. §1326. Thus, this Court, which arguably has no control over the imposition of the "deportation sanction" (which is left to the civil immigration judge via a separate proceeding), cannot ignore the fact that what happens here, in this criminal proceeding, significantly and determinatively impacts what happens there, in a civil proceeding.

In addition, the United States Supreme Court has acknowledged that deportation is a "drastic measure," see *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010), and described the close nexus between the findings of a federal district court judge in a criminal immigration violation proceeding, and the outcome in a civil immigration proceeding, in this manner:

> We have long recognized that deportation is a particularly severe "penalty*,"* *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 1478–1481. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus,

> we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F.2d 35, 38 (C.A.D.C. 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U.S., at 322, 121 S.Ct. 2271 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions").

Id. at 365-66.

In light of the impact this Court's criminal proceeding may have on the civil proceeding, and given the Supreme Court's own view on the inextricability between the two proceedings, the Government's argument does not convince this Court that it should ignore the November 20, 2014 Executive Action merely because the President's speech and the Department's Memoranda reference "civil" proceedings.

Moreover, as this Court has also noted, there seems to be an arbitrariness to Defendant's arrest and criminal prosecution for violation of 8 U.S.C. § 1326. Many cities (and some states), in the past, have declared themselves "sanctuary cities," which essentially meant if an undocumented immigrant was arrested for a minor offense, local law enforcement would not automatically notify ICE.

Now, one of the other ten (10) Memoranda by Secretary Johnson implementing the Executive Action, titled "Secure Communities," actually terminates the Secure Communities program, as follows:

> I am directing U.S. Immigration and Customs Enforcement (ICE) to discontinue Secure Communities. ICE should put in its place a program that will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks. However, ICE should only seek the transfer of an alien in the custody of state or local law enforcement through the new program when the alien has been convicted of an offense listed in Priority 1 (a), (c), (d), and (e) and Priority 2 (a) and (b) of the November 20, 2014 Policies for the

> Apprehension, Detention and Removal of Undocumented Immigrants Memorandum, or when, in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security. In other words, unless the alien poses a demonstrable risk to national security, enforcement actions through the new program will only be taken against aliens who are convicted of specifically enumerated crimes.

Johnson, *Secure Communities,* November 20, 2014, 2.

Thus, if Defendant had been arrested within the confines of a "sanctuary city," or if he had been arrested by local police on or after the implementation of the Executive Action, ICE would not have sought "to transfer Defendant into its custody," because this Defendant would not have been convicted of an offense listed in Priority 1 or Priority 2.

Accordingly, Defendant's current criminal prosecution and the civil deportation hearing that will undoubtedly follow as a result of this criminal proceeding, arguably are arbitrary and random.

C. Defendant's Position that the Executive Action May Apply to Him, or that He May Have Some Other Claim Enabling Him to Remain in the United States

In his Brief, Defendant's counsel concedes that the Executive Action has raised statutory and constitutional considerations, "but not directly in regard to this criminal matter." Doc. No. 31, 6. Presumably, this statement is in line with what the Government counsel argues – that the Executive Action has no direct bearing on this criminal proceeding. As this Court has discussed in "IV. B." above, the impact this criminal proceeding has on the civil proceeding cannot be ignored. Nor can the arbitrary nature and application of the Executive Action on those undocumented immigrants who may or may not be specifically identified, either by the three (3) Priority groups slated for speedy deportation, or by the new and newly expanded groups who "qualify" for deferred action status, be ignored.

However, despite suggesting the Executive Action may have no direct application to these proceedings, Defendant notes that the Executive Action: (1) expands deferred action to certain childhood arrivals; (2) creates an additional "avenue of deferred action" for the undocumented parents of United States citizens and permanent resident children; and (3) sets priorities for removal among the undocumented immigrants who pose "national security, border security and public safety threats." Doc. No. 31, 3.

Defendant argues, and this Court agrees (see above at "IV. A."), that Defendant does not fall within any of the three (3) priorities (Priority 1, Priority 2, or Priority 3) announced in the Executive Action or the supporting Memoranda issued by Secretary Johnson. Doc. No. 31, 4. Defendant argues that because he does not fall within any of the Priorities, ICE can choose: (1) not to pursue his removal; (2) to grant him deferred action status; or (3) some other form of relief from potential removal from the United States.

Defendant's counsel also notes that Defendant may or may not be a parent or step-parent, but if he is, Defendant suggests that familial relationship would bolster his non-deportation and/or deferred action status request. Id. Defendant's counsel also notes that because Defendant is a citizen of Honduras, his return to that country may subject him to possibility of "torture," and if he can prove this to an immigration judge, he may be granted relief from removal pursuant to "the Convention Against Torture (8 C.F.R. 208.16-18)." Doc. No. 31, 5.

Finally, Defendant, in his Brief, notes that the Executive Action presently faces a legal challenge with regard to "the constitutionality of its policies." Doc. No. 31, 6. Presumably, Defendant is referring to the lawsuit filed by 17 States against the Federal Government and its key Administrators who oversee customs and immigration in this country. *See State of Texas et al., v. United States of America, et al.*, 1:2014cv00254 (filed December 3, 2014). Defendant

notes that this lawsuit challenges (*inter alia)* the President's authority to enact the "expansive grants" of deferred action status with the Executive Action.

Again, because of the effect the November 20, 2014 Executive Action has had on the rights of the undocumented immigrants such as Defendant in this case, the Court finds that the relevant law is "unsettled," and the Court has serious concerns about the impact its sentence may have on the rights of this particular Defendant.

D. Analysis of the Applicability of the Executive Action to Defendant

As noted many times above, while Defendant does not fall within the three (3) Priorities for deportation/removal from the United States, he likewise is not conclusively within one of the newly created and/or expanded categories for deferred action status. If Defendant were to fall within the newly created category (parents of a U.S. Citizen and/or permanent resident child), or if he were part of the expanded category (Deferred Action for Childhood Arrivals, "DACA"), he may be entitled to additional "benefits" or "rights" as an undocumented immigrant. For example, he may be entitled to the substantive work benefit and entitlements offered through the Executive Action.

The bottom line for this Defendant is that although he does not fall into <u>any</u> newly created or expanded deferment category, he does not fall into any of the three (3) Priority categories either. Thus, he is in "no-man's land" under the Executive Action. However, based on the information obtained by this Court so far as it pertains to this Defendant, the Court concludes he is more "family" than "felon."

E. Constitutional Arguments that the Executive Action Should Apply to Defendant

Not only has the Court considered whether the President exceeded his constitutional authority by issuing the November 20, 2014 Executive Action – and, as noted above, concludes

that he did -- but the Court also concludes that the Executive Action may violate the inherent and constitutional rights of some of the undocumented immigrants, such as this Defendant. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his [or her] status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this county is unlawful, have long been recognized as persons guaranteed due process of law by the Fifth and Fourteenth Amendments.").

Although it may seem counterintuitive that the Constitution, a document created to protect the citizens of this Nation, can endow undocumented immigrants illegally residing in this country with any constitutional rights, the Supreme Court of the United States has ruled that these individuals are entitled to be treated humanely and, at least on a procedural level, are to be afforded with certain constitutional rights and protections.

For example, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that undocumented immigrants, who, by pleading guilty to a crime, would face the "automatic" civil penalty of deportation in a collateral proceeding, are entitled to effective assistance of counsel under the Sixth Amendment. The Supreme Court has also concluded that undocumented immigrants possess a Fifth Amendment right to due process where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction and there must be some meaningful review of the administrative proceeding. *United States v. Mendoza-Lopez*, 481 U.S. 828, 841 (1987) ("Persons charged with crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer.").

In *Padilla*, the Supreme Court, summarizing the Nation's legislative history with respect to the treatment of undocumented immigrants, noted that:

> The Immigration Act of 1917 (1917 Act) brought "radical changes" to our law. S.Rep. No. 1515, 81st Cong., 2d Sess., pp. 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . ." 39 Stat. 889. And § 19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid*. Congress did not, however, define the term "moral turpitude."
>
> While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." *Id*., at 890.
>
> This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier v. United States*, 793 F.2d 449, 452 (2nd Cir. 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis."

559 U.S. 361-362 (footnotes omitted).

The plurality of the Supreme Court in *Padilla* further explained:

> In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F.2d 449. See also *United States v. Castro*, 26 F.3d 557 (C.A.5 1994). In its view, seeking a JRAD was "part of the sentencing" process, *Janvier*, 793 F.2d, at 452, even if deportation itself is a civil action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

> However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5–year period prior to 1996, *INS v. St. Cyr*, 533 U.S. 289, 296, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. See 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See § 1101(a)(43)(B); § 1228.

Id. at 363-64 (footnotes omitted).

This historical review of the legislation enacted by Congress demonstrates that neither this Court, nor any executive, can "cancel" an undocumented immigrant's removal/deportation from this country if that non-citizen commits a removable offense. However, the *Padilla* Court recognized that when Congress stripped the JRAD procedure from immigration law, an undocumented immigrant's right to effective assistance of counsel under the Sixth Amendment grew in importance. Thus, the *Padilla* Court concluded:

> It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the "mercies of incompetent counsel." *Richardson*, 397 U.S., at 771, 90 S.Ct. 1441. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Id. at 374.

Having discerned that an undocumented immigrant's right under the Sixth Amendment to counsel appears well-settled, this Court next turns its attention to the due process rights afforded

to undocumented immigrants under the Fifth Amendment.[9] The Supreme Court in *Mendoza-Lopez*, 481 U.S. 828 (1987), held that a person – even an undocumented immigrant – who stands charged with a crime is entitled to have the factual and legal determinations upon which his or her conviction is based, subjected to the scrutiny of an impartial judicial officer.

In the *Mendoza-Lopez* case, the Supreme Court concluded that Congress did not intend the validity of a deportation order to be contestable under 8 U.S.C. § 1326 (setting forth the penalties for re-entry of removed aliens). 481 U.S. at 837 ("That Congress did not intend the validity of the deportation order to be contestable in a § 1326 prosecution does not end our inquiry.") The Supreme Court noted that in all other aspects of our justice system, when a determination, made in an administrative proceeding, plays a "critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." *Id.*, at 837-38, *citing Estep v. United States*, 327 U.S. 114, 121–122 (1946); *Yakus v. United States*, 321 U.S. 414, 444, (1944); *cf. McKart v. United States*, 395 U.S. 185, 196–197 (1969).

More recently, in reliance upon the Supreme Court's decision in *Mendoza-Lopez*, the United States Court of Appeals for the Tenth Circuit and the United States District Court of the Southern District of New York have concluded that if an underlying deportation order violates a

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[9] In *Mathews v. Diaz*, the Supreme Court framed the scope of Due Process rights afforded to undocumented immigrants as follows:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51, 70 S.Ct. 445, 453-455, 94 L.Ed. 616, 627-629; *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140, 143; see *Russian Fleet v. United States*, 282 U.S. 481, 489, 51 S.Ct. 229, 231, 75 L.Ed. 473, 476. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. *Wong Yang Sung*, *supra*; *Wong Wing*, *supra*.

Matthews, 426 U.S. 67, 77 (1976).

defendant's due process rights, that underlying order cannot form the basis for the prior deportation element in the illegal re-entry charge. *See U.S. v. Perez-Madrid*, 71 Fed.Appx. 795, 798 (10th Cir. 2003) ("[T]o prevail on a collateral challenge to a prior deportation hearing the defendant has the burden to demonstrate "that the deportation hearing was fundamentally unfair, and that it deprived him of a direct appeal."); *United States v. Nieto-Ayala*, 05 CR. 203 (LMM), 2005 WL 2006703, *5 (S.D.N.Y. August 18, 2005) ("[T]he underlying deportation order violated defendant's due process rights and therefore cannot be the basis for the prior deportation element in the illegal reentry charge.").

Turning to the facts of this case, it is important to note that on October 21, 2014, this Defendant pled guilty to the felony offense of re-entry of a removed alien in violation of 8 U.S.C. § 1326. He was represented by his current counsel, Alonzo Burney, a well-respected criminal defense lawyer, appointed to represent Defendant pursuant to the Criminal Justice Act. On November 20, 2014, the Executive Action on immigration was announced by President Obama. On November 24, 2014, the Court ordered the parties in this case to brief the impact, if any, the Executive Action of November 20, 2014 would have on this Defendant. Doc. No. 26. On December 3, 2014, Defendant's counsel, Attorney Burney, filed a Motion to Appoint Counsel specifically stating that "counsel has need of expert assistance in immigration law to file such a brief and continue competent representation of the defendant." Doc. No. 28. The Motion also stated, "[h]erein counsel does not possess the necessary background in immigration law to file the brief [ordered by the Court at document 26]." Id. The Court promptly granted the Defendant's request for assistance and an immigration attorney was appointed.[10]

[10] This request by Attorney Burney, a criminal defense lawyer, who sought – and was given – assistance from an immigration attorney underscores Justice Alito's concurrence in *Padilla, supra*., where he noted that a "criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other

Given the statements made by Attorney Burney in his Motion to Appoint Counsel, the Executive Action has changed the legal landscape and accomplished criminal counsel, such as Attorney Burney, are recognizing the need to consult with attorneys experienced in immigration matters. Because the Executive Action was announced shortly after this Defendant's change of plea hearing, this Court is willing to consider a request to withdraw his guilty plea, should Defendant choose to file the same.

Moreover, while this Court fully acknowledges that in 2002, when Congress created the Department of Homeland Security and charged this new Department with the responsibility for prioritizing the removal of certain undocumented immigrants,[11] Congress did not leave the Department totally devoid of any guidelines as to how to prioritize deportation among the millions of undocumented immigrants. As the Supreme Court noted in *Arizona v. United States*:

> Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U.S.C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§ 1301–1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, § 1324a.

132 S.Ct. 2492, 2499 (2012).

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hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea." 559 U.S. at 387-88. It also underscores the inextricable nexus between criminal proceedings for the crime of "reentry of a removed alien" that occur in the federal district courts and which nearly always result in guilty pleas, and the subsequent deportation of person through an administrative proceeding, which generally takes place outside the purview of the district courts.

[11] See Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)).

However, the Executive Action issued by the President on November 20, 2014 essentially conferred deferred action status[12] on a group of undocumented immigrants who were parents to legal permanent residents or citizens of the United States. Deferment action recipients may apply for a work authorization documentation if they can demonstrate an "economic necessity for employment" (8 C.F.R. § 274a.12(c)(14); see 8 U.S.C. § 1324a(h)(3)), and they will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Thus, by creating a subgroup of undocumented immigrants who were parents to legal permanent residents or citizens of the United States, and instructing that they be given deferred action status, the Executive Action endowed this "parent-group" with greater rights than this Defendant.

As noted above, Defendant does not fall into any of the three (3) Priorities outlined in the Department of Homeland Security's Memorandum regarding *Policies for the Apprehension Detention and Removal of Undocumented Immigrants*. Thus, under the Executive Action, he is not a person that the Department would necessarily wish to deport in an expedited fashion.

However, this Defendant, possibly is not "a parent" as defined in a different Department of Homeland Security's Memorandum (*Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children and with respect to Certain Individuals Whose are the Parents of U.S. Citizens or Permanent Residents*), also dated November 20, 2014. Therefore, this Defendant is possibly not entitled to the deferred action status that would enable him to defer deportation.

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[12] "Deferred action" as explained by the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee,* "developed without express statutory authorization" and was originally "known as nonpriority and is now designated as deferred action." 525 U.S. 471, 484 (1999). The Supreme Court Court went on to note that "[a]pproval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." *Id.*

Although this Court recognizes that the Memorandum providing the basis for the Executive Action on immigration has opined that the Executive branch can create such subcategories of undocumented immigrants, the Court has concerns that some familial bonds are treated differently than others.

Here, this Defendant appears to have been in the United States – and possibly continuously – from 2005 to the present. He works for and has a close bond with his brother. In light of the fact that Defendant does not fall into any of the three (3) Priority removal categories, this Court concludes that he is more "family" than "felon," and consistent with the over-arching sentiment behind the Executive Action, Defendant may be eligible for deferred action status and its substantial rights and benefits.

V. Conclusion

This Court must determine the applicability, if any, of the Executive Action upon this Defendant. Thus, first the Court must determine whether the Executive Action is constitutional.[13] The Court holds that the Executive Action is unconstitutional because it violates the separation of powers and the Take Care Clause of the Constitution. If, however, the Executive Action is lawful, the Court must determine if the Executive Action applies to this Defendant, who does not fall within one of the three (3) Priorities requiring deportation. The record is undeveloped as to whether Defendant falls among the newly created "parent" category for deferred action or has some other argument for deferred action. Thus, the Court sets forth the following schedule:

[13] The Court has not discussed any issues relating to the application of the Administrative Procedure Act ("APA") to this Executive Action.

VI. Order of Court

AND NOW, this 16th day of December, 2014, IT IS HEREBY ORDERED THAT:

1. On or before January 6, 2015, Defendant shall file a notice/motion (with supporting brief) of his decision to proceed in one of the following manners:
    a. Seek to withdraw his guilty plea in light of the Executive Action;
    b. Continue to sentencing on or before January 22, 2015, to time-served (approximately six (6) months imprisonment (the high end of the guideline range)) – with one year of supervised release to be served in the United States, so that he may pursue his rights (if any) pursuant to the Executive Action, or otherwise; or
    c. Continue to sentencing on or before January 22, 2015, to time-served, with suspended supervised release, and with instruction to the United States Marshal Service to deliver Defendant to ICE.
2. The Government shall file a Response to Defendant's notice/motion on or before January 12, 2015; and
3. This Order does not impinge the right to file any other request or motion.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Registered ECF Counsel and Parties

Exhibit B

THE IMPERIAL PRESIDENCY

OBAMA'S AMNESTY QUASHED BY CHRISTMAS?

Exclusive: Larry Klayman explains status of Sheriff Joe's suit against president

Published: 6 days ago

LARRY KLAYMAN (HTTP://WWW.WND.COM/AUTHOR/LKLAYMAN/) About | Email (mailto:lklayman@wnd.com) | Archive (http://www.wnd.com/author/lklayman/?archive=true)

Freedom Watch's court hearing on Dec. 22, 2014, in a case styled Arpaio v. Obama (14-cv-1966) before the U.S. District Court for the District of Columbia, could be the only hope to stop Obama's imperial fiat amnesty to illegal aliens. Republicans led by Speaker John Boehner are eagerly funding Obamacare and President Obama's unconstitutional executive amnesty for another year. (See www.freedomwatchusa.org. (http://www.freedomwatchusa.org))

That's why in the lawsuit we brought for Sheriff Joe Arpaio, we have asked the federal court in Washington, D.C., to block Obama from implementing executive amnesty by issuing a preliminary injunction. The judge has ordered an expedited hearing schedule. In principle, Freedom Watch could actually put a halt to Obama's amnesty in its tracks before Christmas, but the Honorable Beryl Howell may want to write her decision over the holidays. In any event, we expect a quick ruling.

There are so many reasons why Obama's executive amnesty will cause immediate harm. Besides the obvious (and important), there are some things you aren't hearing about. The Obama administration is hiring 1,000 new workers to quickly process applications for amnesty. The new workers in Crystal City, Virginia, clearly won't have any expertise in immigration. They will just be rubber-stamping every application.

The 5 million illegal aliens slated to receive amnesty will also be granted a work permit, technically called an Employment Authorization Card. The card can be used in most states to receive a driver's license. Under the "Motor Voter" law, people are encouraged by the government to register to vote while getting a driver's license. When officials invite them to register to vote, illegal aliens with little understanding may accept the invitation. They could think they wouldn't be asked to register if they shouldn't.

Our voting registration system runs mostly on the honor system. Nobody investigates until there is a complaint. Even if due to misunderstanding, we could have millions of illegal aliens actually voting in the 2016 election. The amnesty to illegal aliens could start tilting elections as early as 2015.

Many businesses will face legal jeopardy when they hire employees because of President Obama's lawlessness. Approximately 5 million new illegal aliens may now be showing up at your business applying for a job holding an "Employment Authorization Card."

This is a modern work permit. It is the same work permit that legal immigrants get when they come to the country honorably, above board and playing by the rules. So a business will not know if the applicant is legally in the country or not. There is no clue how or why a person got the work permit.

As a former federal prosecutor, let me give some warning. Obama's "Executive Action" on Nov. 20, 2014, granted amnesty – and the right to work – to as many as 4.7 million illegal immigrants. That's on top of the roughly 1 to 1.5 million illegal aliens to whom Obama gave amnesty in June 2012 under his Deferred Action for Childhood Arrivals

Of course, Obama does not have the legal authority to do this as president. As a result, we will have 5 to 6 million illegal aliens all over the country presenting Employment Authorization Cards (historically an Employment Authorization Document) to get jobs, cards I believe are invalid.

Help Larry Klayman with his class-action suit against Obama's use of the NSA to violate Americans' rights (http://superstore.wnd.com/specialty-items/Legal-Defense-Fund-to-Support-Already-Filed-Class-Action-Lawsuits-Against-Obama-NSA-Violations)

But employers are in an untenable and risky position. On the one hand, it is illegal to hire an employee or independent contractor who is an illegal alien. If a lawbreaker's work permit is invalid, then the employer is breaking the law by hiring him or her.

On the other hand, it is illegal to discriminate in the workplace based upon nationality, citizenship or immigration status. Also, in the "Alice in Wonderland" world of immigration policy, it is illegal to ask if a job applicant is legally present in the country. So you have no way of knowing if an individual job applicant has a valid work permit as a lawful immigrant or an unconstitutional executive action work permit.

Therefore, businesses may be forced into breaking federal law either way, based on whether the president does or does not have the legal power to grant amnesty to illegal aliens. For the time being, employers must accept an Employment Authorization Card as legitimate until the courts rule otherwise.

But to cover themselves, I believe employers may want to bring lawsuits. If a business has hired non-citizens on work permits, or had job candidates apply on work permits, or are likely to have non-citizens apply, they should consider filing a lawsuit to get clarification.

We are confident that however Judge Howell rules at this first stage, in the end, the courts will overturn Obama's actions. Obama argues that he has the power to waive the law under prosecutorial discretion. But prosecutorial discretion does not mean granting benefits. Obama's programs grant many new benefits to illegal aliens, like the right to work. Declining prosecution does not mean granting a person the right to stay in the United States.

Imagine this: A defendant is accused of breaking and entering into your house while you are away for the holidays. The prosecutor decides to drop the case because the only eyewitness is legally blind. Now, does that give the accused a right to start living in your house from now on? Declining to prosecute for breaking and entering does not transform a defendant into a tenant. The accused might not go to jail, but he cannot live in your house as a result.

If employers want to consider filing lawsuits, I invite them to contact Freedom Watch at www.freedomwatchusa.org (http://www.freedomwatchusa.org). Time is of the essence to use our judicial system to right the wrongs Obama and his minions have caused to our immigration system and to our nation as a whole.

Media wishing to interview Larry Klayman, please contact media@wnd.com (mailto:media@wnd.com).

Note: Read our discussion guidelines (/discussion-guidelines/) before commenting.

22 Comments WND Login

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momprayn • 3 days ago

Grateful for all your steady, persistent, patriotic efforts and will pray about it, but having said that -- don't expect it to go anywhere as all the others at this point in time. For all intents and purposes, we are already living under a dictatorship with the Congress rendered irrelevant (even next year) -- lawlessness and injustice abounds and rules, courts packed in their favor, judges & all important agencies have been taken over by our enemies - either complicit or being threatened, bought off - whatever it takes.
All the efforts of our enemies for decades are paying off and they are now in their very end game of shutting us down for good - by 2016 with the global help of the U.N., Muslim Brotherhood and our own Congress.
More and more are waking up to these hard cold facts, and more next year when they see for themselves that Congress stays with the status quo and promotes Obama's/Dems goals that will destroy us. All of us need to start concentrating on what to do about it since it's unprecedented and will take drastic actions in this new era that will determine in the next two years what our future will be re our Constitutional Republic - which is already crumbled and about buried.
Time for a second American Revolution.

1 • Reply • Share ›

EaglesGlen • 5 days ago

Funny how (almost all) American government at all levels have enslaved American citizens to pay all that

we pay government for goods and services we American citizens don't receive and illegal aliens do even though illegal aliens are not public charge.
What a BIG unfunded mandate by the fed.

3 • Reply • Share ›

EaglesGlen • 5 days ago
I think the U.S. Fed ought to charge each illegal that has occupied America over 30 or so, an daily occupancy tax so great there is no profit in working illegally. And every time they bump into law enforcement they can pay their taxes.

4 • Reply • Share ›

Al Bumen • 5 days ago
An estimated 9 million aliens have illegally made their way into US territory between 1990 and 2007.

2 • Reply • Share ›

rennyangel2 • 5 days ago
Thanks, Joe and Larry. Someone, not Boehner obviously. has to protect the republic and its legal citizens and legal aliens.

10 • Reply • Share ›

GeorgeRA • 5 days ago
With Obamanasty's illegal aliens what is the need for aliens?

4 • Reply • Share ›

Jimh77 • 6 days ago
Vote Wisely 2016

What if 20 Million Illegal Aliens were
deported from America ?

Tina Griego, journalist for the Denver Rocky
Mountain News wrote a column titled, "Mexican Visitor's Lament".

I interviewed Mexican journalist Evangelina
Hernandez while visiting Denver last week. Hernandez said, "illegal aliens
pay rent, buy groceries, buy clothes. What Happens to your country's economy if
20 million people go away?" Hmmm, I thought, what would happen?

So I did my due diligence, buried my nose as a
reporter into the FACTS I found below.

It's a good question it deserves an honest
answer. Over 80% of Americans demand secured borders and illegal migration
stopped. But what would happen if all 20 million or more vacated America ? The

see more

16 • Reply • Share ›

Areminder ➚ Jimh77 • 5 days ago
Please verify if these figures come from the "National Policy Institute" or some other source so it can be cited along with you.

1 • Reply • Share ›

Jimh77 ➚ Areminder • 5 days ago
Here ya go with links, just have to replace the (DOT) with . remove spaces.

What if 20 Million Illegal Aliens
Vacated America ?

January 27, 2012
at 11:14am

What if they left

Best on the
subject to present date.

What if 20 Million
Illegal Aliens Vacated America ?

I, Tina Griego,
journalist for the Denver Rocky Mountain News wrote a column titled,
"Mexican Visitors Lament"

see more

1 • Reply • Share ›

SPOOK'S SPOOK ➚ Jimh77 • 5 days ago
Now it's the land of the fleeced and the home of the lame. Wake up people, stop being sheeple.
1 • Reply • Share ›

Jimh77 ➚ Areminder • 5 days ago
I printed the story with links, on hold pending approval, I'll clean up the links. They probably won't approve it.
1 • Reply • Share ›

This comment was deleted.

SPOOK'S SPOOK ➚ Jimh77 • 5 days ago
What happened to #2?
• Reply • Share ›

barbaranc • 6 days ago
Larry, you & Joe are honorable hard working men. Thank you both for standing up for our country. I pray you get an honest judge who will hear the facts of the case & not one bought & paid for by Obama or Holder.
7 • Reply • Share ›

Steve Weinstein ➚ barbaranc • 6 days ago
It will be thrown on its face & he knows it because Arpaio has no standing.
1 • Reply • Share ›

Areminder ➚ Steve Weinstein • 5 days ago
Who could have more standing than the sheriff who must investigate the crime, arrest the criminals, feed, clothe and house (imprison) them until their trials, and allocate his own financial resources away from the protection and investigation of the legal residents and citizens of his county in so doing?
2 • Reply • Share ›

dmxinc ➚ Steve Weinstein • 5 days ago
According to people like you, no one in our country has "standing."

We're supposed to just sit there and let our country go away.

Not on your life.
3 • Reply • Share ›

harrydweeks ➚ Steve Weinstein • 5 days ago
If it does get thrown out, it won't be because of Arpaio's standing . I live in AZ. and can tell you that everyday we have murders, robberies, drug arrests, gang shootings, abductions and hundreds of illegals coming across our border. As a result the state budgets are stressed, police , fire and prison budgets can't even begin to handle the influx. So, if in your opinion, the Sheriff of the largest county in AZ. doesn't have standing, who the hell does ?
7 • Reply • Share ›

Areminder ➚ harrydweeks • 5 days ago

Currently, according to some judges, nobody. That's the problems with a lawless government.

May God Bless and protect you and yours, and those around you. When the darkness seems to be winning is often when God sends His light, if we'll but totally turn to Him and ask Him for it.

3 ^ | v • Reply • Share ›

momprayn ➚ Areminder • 3 days ago

AMEN !

^ | v • Reply • Share ›

357x6 • 6 days ago

Godspeed, Larry.

5 ^ | v • Reply • Share ›

PaganTeaPartier • 6 days ago

The way I like to describe it is, "The President can Pardon the bank robber, but he can't let him keep the money."

9 ^ | v • Reply • Share ›

Areminder ➚ PaganTeaPartier • 5 days ago

This administration would send eric holder to organize demonstrations shouting the money belongs to the people, not the banks, so recognize the humanity of the robber and let him keep his fair share.

2 ^ | v • Reply • Share ›

PAGE/EDUCATION/)

MONEY (HTTP://WWW.WND.COM/(

DIVERSIONS (HTTP://WWW.WND.COM/(

(HTTP://WNDBOOKS.WND

WHISTLEBLOWER (HTTP://SUPERSTORE.WN

wnd/?subject=questions)

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mr. JOE ARPAIO, Elected SHERIFF of Maricopa County, State of Arizona

Plaintiff,

v.

Mr. BARACK HUSSEIN OBAMA, acting as President of the United States of America

and

Mr. JEH CHARLES JOHNSON, acting as Secretary of the U.S. Department of Homeland Security

and

Mr. LEON RODRIQUEZ, acting as Director of the U.S. Citizenship and Immigration Services

Defendants.

Case 1:14-cv-01966

DECLARATION OF SHERIFF JOE ARPAIO,
IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION

Pursuant to 28 U.S.C. §1746, I, Joe Arpaio, hereby declare under penalty of perjury that the following is true and correct:

1) I am over the age of 18 years old and mentally and legally competent to make this affidavit sworn under oath.
2) By this lawsuit, I am seeking to have the President and the other defendants obey the U.S. Constitution, which prevents the Obama Administration's executive order from having been issued in the first place.
3) The unconstitutional act of the President's amnesty by executive order must be enjoined by a court of law on behalf of not just myself, but all of the American

people.

4) If President Obama's amnesty created by the President's executive order, which was announced on November 20, 2014, is allowed to go into effect, my Sheriff's office responsible for Maricopa County, Arizona, and the people of Maricopa County will suffer significant harm.

5) This unconstitutional act by the president will have a serious detrimental impact on my carrying out the duties and responsibilities for which I am charged as sheriff.

6) Specifically, Obama's amnesty program will severely strain our resources, both in manpower and financially, necessary to protect the citizens I was elected to serve.

7) For instance, among the many negative effects of this executive order, will be the increased release of criminal aliens back onto streets of Maricopa County, Arizona, and the rest of the nation.

8) In addition, the flood of illegal aliens into Arizona will cost my Sheriff's office money and resources to handle.

9) Attached to the Complaint in this case are several news releases from my office giving details of the impacts in my jurisdiction. I attach these news releases again as exhibits to this Declaration, and incorporate herein the statements from my office in the attached news releases. I affirm the accuracy of the news releases attached.

10) President Obama's June 15, 2012, amnesty for adults who arrived illegally as children, which Obama has called Deferred Action for Childhood Arrivals (DACA), has already caused an increased flood of illegal aliens into Arizona in 2014.

11) The increased flow of illegal aliens into U.S. border states has been stimulated by the hope of obtaining U.S. citizenship because of President Obama's six (6) years of

promising amnesty to those who make it to the United States.

12) The increased flow of illegal aliens has caused a significant increase in property damage, crime, and burdened resources in Maricopa County, throughout Arizona, and across the border region.

13) Landowners report large-scale trespassing on their land by illegal aliens transiting from the border into the interior of the country, associated with destruction of property, theft, crimes of intimidation, trespassing, and disruption of using their land.

14) The Sheriff's office witnesses and experiences a noticeable increase in crime within my jurisdiction in Maricopa County, Arizona, resulting from illegal aliens crossing our Nation's border and entering and crossing through border States.

15) Within my jurisdiction, my office must respond to all such reports and investigate.

16) My deputies must be out on the streets, risking their lives, to police the County.

17) I performed a survey of those booked into my jails in Arizona.

18) I found out that over 4,000 illegal aliens were in our jails over the last 8 months, arrested for committing crimes in Maricopa County under Arizona law, such as child molestation, burglary, shoplifting, theft, etc.

19) I found that one third of the 4,000 illegal aliens arrested in Maricopa County had already been arrested previously for having committed different crimes earlier within Maricopa County under Arizona law.

20) These are criminals whom I turned over to ICE for deportation, yet they were obviously not deported or were deported and kept returning to the United States.

21) Some had been in Maricopa County 6, 7, 8 times, and sometimes as many as 25 times.

22) Yet they keep coming back. I want to know why they are not being deported?

23) I am aware that the President claims that he must grant amnesty to illegal aliens because of a lack of resources for enforcing the immigration laws.

24) However, from my perspective and experience, the Federal government is simply shifting the burden and the expense to the States and the Counties and County offices such as mine.

25) I am also aware that the President claims he must grant amnesty to some illegal aliens in order to focus deportation efforts on those illegal aliens who have criminal records or are dangerous.

26) However, I know from my experience in law enforcement in Arizona that that argument is disingenuous.

27) The Obama Administration is evidently not deporting dangerous criminals even when I hand them over to Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security.

28) Even when illegal aliens are booked into my jail for committing crimes in Maricopa County under Arizona State law, and my office hands those criminal over to ICE to be deported, the Obama Administration still does not deport those criminals.

29) In many cases, my Sheriff's office has undertaken the work and expended the resources to apprehend these persons for violating Arizona law.

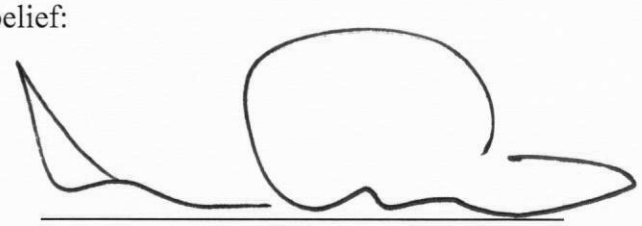
30) Therefore, the problem is not a lack of resources by the Department of Homeland Security, but a lack of desire by the Obama Administration to enforce the law.

31) When you look at the interior of the United States, where ICE is responsible for enforcement, and take the 11 million illegal aliens estimated to be in the country, ICE

has locked up only about 1% of that total.

I hereby swear under oath and penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief:

Dated: December 1, 2014



Mr. JOE ARPAIO, Elected SHERIFF of
Maricopa County, State of Arizona
550 West Jackson Street
Phoenix, Arizona 85003

Exhibit 1

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: November 5, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF ARPAIO MEETS WITH U.S. REPRESENTATIVE SALMON ON POSSIBLE CONGRESSIONAL HEARING ON FEDERAL GOVERNMENT RELEASE OF CRIMINAL ALIENS ONTO AMERICAN STREETS

SHERIFF COMPILES FIGURES TENTH MONTH IN A ROW DOCUMENTING RELEASE OF CRIMINAL ALIENS BACK INTO MARICOPA COUNTY BY IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

(Maricopa County, AZ, November 4, 2014): Sheriff Joe Arpaio of Maricopa County, AZ met with Congressman Matt Salmon (AZ-05) on Monday, November 3, to discuss the possibility of launching a congressional hearing into why Immigration and Customs Enforcement (ICE) keeps releasing illegal aliens charged of crimes back onto the streets of our communities. The Sheriff had previously called for a congressional hearing into this matter.

For the tenth month in a row, Maricopa County Sheriff Joe Arpaio has compiled the disturbing figures that reveal the number of criminal aliens taken by ICE who are arrested again and return to the Maricopa County jail system.

In October 2014, 307 illegal immigrants were arrested by Sheriff's deputies and police officers in Maricopa County and given detainers, or holds by ICE. Of that number, 96 are repeat offenders, having had prior bookings with detainers placed on them, or 31.2% of the total. Among those are two illegal aliens who have been booked into the Sheriff's jails 19 times each, one of which had 11 prior detainers, and, extraordinarily, 4 within the last year. These statistics mirror with rather remarkable consistency what has happened every month of 2014.

During that same month, two California deputy sheriffs were shot and killed by an illegal alien who had previously been incarcerated in Maricopa County jails four times, going back a number of years, and had been deported by ICE twice.

"An individual with this history," Arpaio says, "convicted and deported more than once, should not have been able to get back into this country to commit these murders."

Adding the figures from October onto the numbers already accumulated means that of the 4,172 ICE detainers placed on incoming criminal offenders, 1478, or 35.4%, are repeat offenders.

"We have been compiling and presenting these figures over and over, month after month," says Sheriff Arpaio, "and it seems that no one is paying attention, because of the underlying issues. These policies are contentious and difficult, and it's easier to bury your head in the sand and ignore them. But that's not good enough, not good enough for the public and the public safety, not good enough for national policy.

"Politicians and other officials have to stand up," states Arpaio, "and do their duty, popular or not. The situation is untenable and unacceptable, and that's why, after trying to get a real response from Homeland Security and ICE for months, I contacted Representative Salmon to see what he can do. We met and I will say, without going into specifics at this time, that his response was most encouraging, and I am confident we will be working together to resolve this serious problem before long."

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Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: October 27, 2014

CONTACT: Sheriff Joe Arpaio

ARPAIO CONCERNED WITH FEDS AFTER TWICE DEPORTED ILLEGAL ALIEN KILLS TWO CALIFORNIA SHERIFF'S DEPUTIES

Suspect Arrested in Maricopa County Four Times

(Maricopa County, AZ) The controversy surrounding an illegal alien who has been charged with killing two California sheriff's deputies and wounding another has taken on fresh urgency as Sheriff Joe Arpaio reveals the details of his prior four arrests by Maricopa County local law enforcement.

Moreover, says the Sheriff, the history surrounding this one illegal alien exposes the inherent dishonesty and ineptitude surrounding the federal government approach to illegal immigration.

For the past 9 months, Sheriff Arpaio, whose jails constitute the third largest system in the country, has been demanding that Immigration and Customs Enforcement (ICE) explain why the agency keeps releasing illegal aliens convicted of crimes back onto the streets of Maricopa County, located just 30 miles from the border. In pursuit of answers, the Sheriff has written to DHS Secretary Jeh Johnson, the head of ICE, and the DHS Inspector General, never receiving an adequate response.

"I am calling for a congressional hearing," states Arpaio, "to find out why illegal aliens arrested by my deputies and other police officers for often serious crimes are handed over to ICE, only to end up back in my jail, arrested again on more charges. Either ICE is letting these individuals go out the back door, free to commit more crimes, or is the border so open that even though they're being deported they turn around and immediately return?"

The statistics are daunting: For the past 9 months, back to the beginning of 2014, of the approximately 4,000 ICE detainers placing on incoming criminal offenders arrested by local police and Sheriff's deputies in Maricopa County, a stunning 1,382, translating to 38% of the total, were repeat offenders. Nor were these necessarily minor crimes, but encompass the full range of criminal offenses, including kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, dangerous drugs, and more.

Now we have the case Marcelo Marquez, known by his alias Luis Bracamonte to the Maricopa County Sheriff's Office (MCSO), which has had him in custody 4 times. Incarcerated for the first time in the county in 1996 for the sale of narcotic drugs and other felonies, he spent 4 months in Arpaio's Tent-City Jail before being released to ICE in 1997. His fate from that point on, whether he was deported or released, is unknown.

In the very next year, 1998, Marquez/Bracamonte was arrested for possession of narcotic drugs and misconduct involving weapons and possession of marijuana. For reasons unknown, he was not held buy ICE but instead released from jail to the streets.

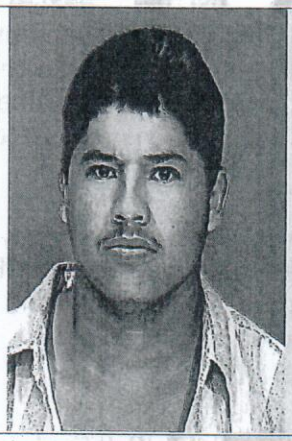
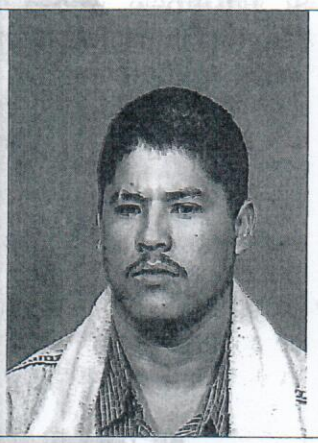
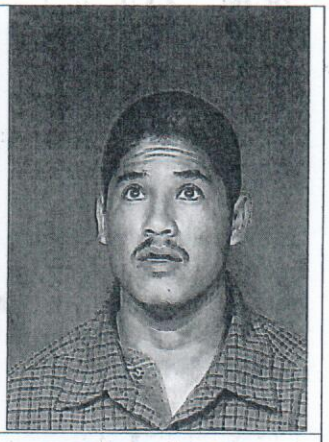
Marquez/Bracamonte was arrested yet again on May 4, 2001 for the sale of narcotic drugs and possession of marijuana for sale. He was released to ICE 3 days later.

What ICE did with him is unknown, but what is certain is that not even 3 months later, on July 26, 2001, he was arrested for failure to appear on drug charges. Marquez/Bracamonte posted bond and was released.

At that point, it appears that Marquez/Bracamonte left Arizona for California or another state, for that is where his history with MCSO ends.

"Now this situation," Arpaio states, "which has always been intolerable, has resulted in tragedy, with 2 sheriff's deputies dead and a third wounded. Now, maybe, I will get the answers I have been calling for month after month. Now, maybe, ICE and the federal government will be called to account for their actions."

MUG SHOTS

Polaroid Picture not Available			
09/27/1996	01/05/1998	05/04/2001	07/26/2001

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: October 6, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF JOE ARPAIO DEMANDS FEDERAL GOVERNMENT STOP RELEASING CRIMINAL ALIENS IN MARICOPA COUNTY

THE SHERIFF STATES THIS IS A FORM OF "BACKDOOR AMNESTY" BY THE ADMINISTRATION, TO BE FOLLOWED BY OBAMA'S ISSUING BROADER AMNESTY AFTER ELECTION

ARPAIO STANCE IN STARK CONTRAST TO HUNDREDS OF JAILS NATIONWIDE REFUSING TO HOLD ILLEGAL ALIENS FOR ICE

(Maricopa County, AZ) For the ninth month in a row, Maricopa County Sheriff Joe Arpaio is demanding that Immigration and Customs Enforcement (ICE) explain why the agency keeps releasing illegal aliens convicted of crimes back onto the streets of Maricopa County, located just thirty miles from the border.

The Sheriff's call comes in the face of a growing national refusal by local law enforcement agencies to hold illegal aliens in jail after disposition of their crimes for 48 hours on behalf of ICE. According to published reports, two hundred twenty-five jails from coast to coast have so far adopted this posture.

Sheriff Arpaio could not help but note the irony that as increasing numbers of local law enforcement agencies refuse to work with the federal government, his attempts to do exactly that, including his offer to assist ICE in halting the release of criminal aliens and, beyond that, construct a workable, smart policy to deal with this issue, are ignored. Having served in the Drug Enforcement Administration for over twenty-five years, including stints as the regional director and diplomatic attaché in Mexico, Central and South America, and then as the director in Texas and then Arizona, Arpaio contends he is uniquely qualified to help in this effort.

"The law is being flouted by both the federal government and local law enforcement," states the Sheriff, "for different reasons, to suit their own purposes. That is simply not right. The law needs to be enforced because it is the law and because it is the right thing to do. Deport illegal aliens, and especially criminal aliens, and secure the border so we make sure they don't come

back. Until this is accomplished, I repeat my demand, as I have repeatedly done in letters to the Secretary of Homeland Security Johnson, the DHS Inspector General, and the head of Immigration Control and Enforcement, for an investigation as to how and why these criminal aliens are neither kept in jail nor deported.

Meanwhile, criminal aliens continue to plague the streets of Maricopa County, as demonstrated by the Maricopa County Sheriff's Office, which has compiled figures that show that of the 318 illegal immigrants arrested by local law enforcement in Maricopa County in September 2014, 105, or 33% of the total group, are repeat offenders. This mirrors what has happened every month of this year, when at least one-third of all illegal immigrants arrested by Sheriff's deputies and police officers are repeat offenders. In fact, adding the totals for 2014 together, of the 3,865 ICE detainers placed on incoming criminal offenders, a stunning 1,382, translating to 36% of the whole, were repeat offenders.

The release of criminal aliens back in the community is a form of "backdoor amnesty," says the Sheriff, "to be followed after the November elections by President Obama issuing an executive order granting widespread amnesty to millions of illegal aliens."

Nor are the crimes committed by criminal aliens insignificant. One such individual arrested in September, a verified Mexican Mafia prison gang member with seven prior arrests including aggravated assault with a weapon, arson, riot, and five INS detainers, had also been charged with six counts of murder in 2004. He received a seventeen-year sentence. Now somehow out of prison, he has been arrested again.

That individual is hardly alone in his multiple arrests. This month alone, two different criminal aliens have each had fifteen prior arrests, while two others account for eleven each. Another has fifteen and one more has sixteen, a total topped last month by one individual who had been arrested twenty-five times. Furthermore, as has been noted month after month, the offenses committed by criminal aliens have run the gamut of serious crimes, including kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, dangerous drugs, and more.

"The situation is not only intolerable," says Sheriff Arpaio, "but it is also getting worse. The growing conflict between the federal government and local law enforcement over what to do about illegal aliens and criminal aliens is endangering the citizens of the United States. Combine that with the ongoing threat of an open border, through which not only criminals but also terrorists can enter this country, and we have a major problem that demands immediate attention. My office and I stand ready, as always, to help in any way possible to protect the American people and the integrity of our nation."

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

Ph: 602-876-1801
Switchboard: 602-876-1000
www.mcso.org

550 West Jackson Street
Phoenix, AZ 85003

September 23, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, DC 20258

Dear Secretary Johnson:

Thank you for your response dated September 3, 2014.

I appreciate your offer to meet in Washington, DC. Prior to that meeting I would like to stress, once again, that what I primarily seek is not a procedural review by DHS, but a thorough investigation into a very serious and pressing problem. The situation to which I have referred several times in my letters, to not only you, but also to ICE Principal Deputy Assistant Secretary Winkowski and DHS Inspector General John Roth, in which Immigration and Customs Enforcement keeps releasing illegal aliens who have already been convicted of crimes and then arrested, yet again, by local law enforcement back on the streets of Maricopa County. This policy endangers both law enforcement officers and the public by not keeping such criminal offenders in jail or deporting them and making sure they cannot so readily cross the border again.

As I have previously written, I am ready to deploy the considerable resources of my agency to help in this investigation. I have ICE officers in my jails and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County. It should be noted that, in the past, your organization trained and certified 150 of my deputies, giving them the authority to enforce our illegal immigration laws; a partnership that highlighted my commitment to assist the federal government in taking on this most serious issue.

As for me, after serving as the regional director for the U.S. Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as, in Texas and Arizona, and 22 years as the elected sheriff of the third largest Sheriff's Office in the country – located only thirty miles from the border, I understand the difficulties in securing that border, as well as, dealing with the complex issue of illegal immigration. I agree to assist in any way possible in order to resolve these problems.

Sincerely,

Joseph M. Arpaio
Sheriff

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: September 4, 2014 **CONTACT:** Sheriff Joe Arpaio

SHERIFF ARPAIO PETITIONS THE FEDERAL GOVERNMENT TO STOP RELEASING ILLEGAL ALIENS CHARGED WITH CRIMINAL OFFENSES

(Phoenix, AZ,)For the eighth time in as many months, Maricopa County Sheriff Joe Arpaio is pressing his demand in a letter expedited to the Inspector General of Homeland Security that Immigration and Customs Enforcement (ICE) explain why the agency continually releases illegal aliens convicted of crimes back onto the streets of Maricopa County, the most populated Arizona county located just thirty miles from the border. In addition, Arpaio's letter reiterates his intention to renew his call for a congressional investigation if answers and action are not forthcoming.

The Maricopa County Sheriff's Office, headed by Arpaio, has compiled figures showing that of the 379 illegal immigrants arrested by local law enforcement in Maricopa County in August 2014, 128, or 33.7% of the total group, are repeat offenders. This mirrors what has happened every month of this year, when at least one-third of all illegal immigrants arrested by Sheriff's deputies and police officers are repeat offenders. In fact, adding the totals for 2014 together, of the 3,547 ICE detainers placed on incoming criminal offenders, a stunning 1,277, translating to 36% of the whole, were repeat offenders.

These crimes are not insignificant.

In August alone, one illegal alien with 12 prior arrests, including four ICE detainers, was arrested yet again, and this time on attempted murder charges. That crime was hardly unique in its violence or seriousness, for many illegal aliens have been charged with committing every variety of crime including kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, dangerous drugs, and more.

And it is not just the severity of the offense but also the number of times many offenders have been arrested.

550 West Jackson Street, Phoenix, Arizona 85003 | Phone (602)876-1801 | Fax: (602)258-2081 | Media Contact: mediarequest@mcso.maricopa.gov

Again this August, one illegal alien had 25 prior arrests, with nine prior ICE detainers, before being arrested this time. He is hardly alone: Some illegal immigrants have been arrested, not once, not twice, but multiple times, some more than a dozen. In point of fact, the 128 repeat offenders in July account for 214 separate charges.

Arpaio notes that he has no doubt the Department of Homeland Security Secretary Johnson, the head of ICE and the DHS Inspector General, are tired to receiving his letters. Nevertheless, the Sheriff has pledged to not give up and to make certain that appropriate action is taken.

Arpaio, who has worked in Mexico and on the US border for twelve years as the top US Drug Enforcement Administration official, and for the past twenty-two years as the Sheriff of Maricopa County, vows to continue fighting international crime – and that includes keeping the people of Maricopa County safe from the serious criminals that ICE keeps releasing on our streets.

The answer is not complicated, says Arpaio: "Do what the law says by deporting these criminals, and then make sure they don't come back."

Now, notes Arpaio, we face another issue on our border - the potential that terrorists will enter America to attack us.

"Everyone in the world knows the border is open," says Arpaio. "Don't you think the terrorists know it, too?"

In his letter to the Inspector General, the Sheriff offered to help the federal government in any way possible to get these criminals put away or deported, and beyond that, to construct a workable, smart policy to deal with these issues. The Sheriff's Office already has ICE officers working in his jail system, and other ICE agents cross-certified by the Sheriff to act as deputy sheriffs in order to enforce the laws of Maricopa County.

###

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 3, 2014

Joseph M. Arpaio
Sheriff, Maricopa County
550 West Jackson Street
Phoenix, Arizona 85003

Dear Sheriff Arpaio:

Thank you for your June 30 and August 4, 2014 letters.

You are correct that on June 25 I visited the U.S. Customs and Border Protection's Processing Center in Nogales, Arizona. While there I met with Governor Jan Brewer and Nogales Mayor Arturo Garino.

Since taking office, I have been reviewing our existing immigration and border enforcement practices and procedures in order to assess how the Department of Homeland Security can conduct its important enforcement mission more humanely within the confines of the law. As part of that effort, we have been meeting with a range of external stakeholders including Members of Congress, law enforcement, and non-governmental organizations. If you visit Washington, I would be pleased to meet with you to discuss the issues you raise.

Sincerely,

Jeh Charles Johnson

September 3, 2014

Inspector General John Roth
Office of Inspector General/Mail Stop 0305
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528-0305

Dear Inspector General Roth:

I am writing to you once again in the matter of illegal aliens being summarily released back by Immigration Control and Enforcement (ICE) into my jurisdiction of Maricopa County, Arizona, without undergoing the due process of law, despite so many having had prior criminal records, despite being in this country illegally.

For the eighth month in a row, the facts reveal that of the 379 illegal immigrants arrested by local law enforcement in Maricopa County in August 2014 and given detainers by ICE, no fewer than 128, or 33.7% of the total, are repeat offenders. Furthermore, those 128 repeat offenders account for a total of 214 prior bookings. Over the months their crimes span the range of serious offenses, including aggravated assault with a deadly weapon, armed robbery, kidnapping, molestation of a child, sexual abuse, dangerous drugs, conspiracy and even attempted murder.

In fact, August saw one illegal alien with 12 prior arrests, including 4 ICE detainers, arrested once more on a charge of attempted murder. Another illegal alien, also arrested in August, had already totaled 25 prior arrests, including 9 detainers.

After eight months of looking into this issue and adding up the numbers, the Maricopa County Sheriff's Office has found 2014 that of 3,547 ICE detainers placed on individuals arrested by local law enforcement in Maricopa County and booked into my jails on criminal charges, a stunning 1,277, or 36%, more than one-third, were repeat offenders.

These statistics point to only two contingencies: First, ICE is quietly releasing them rather than detain and either charge them and try them here or deport them to their own countries, and second, that the border is so porous that even for those deported, they quickly return to this country to break more laws. The truth is that both of these situations are happening: ICE is releasing illegal aliens back onto the streets, and the border is open for easy passage.

Putting aside the outrageous flaunting of both the law and ICE's own protocols, I am personally concerned because ICE's actions endanger both my deputy sheriffs and the county's other law enforcement officers who are keeping our streets safe and the public they protect. This situation is hardly a new development, extending far beyond the 8 months covered in this study. My office's investigation shows that

many of these individuals were released, sometimes many times, some more than a dozen, some more than twenty times, going back years. Thus, the problem and the awareness of the problem is not a recent matter, but a long-term issue.

In the course of 2014, I have written to you, to ICE Principal Deputy Assistant Secretary Winkowski and to Homeland Security Secretary Jeh Johnson. Replies, on the rare occasions when they have been forthcoming, are limited to benign, bureaucratic statements, designed to lead nowhere. I want real responses to a very serious problem, and I once more ask that your office conduct an investigation.

As I written over and over, I am ready to deploy the considerable resources of my organization to help in this investigation. I will state once again that I have ICE officers in my jails, and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County. As for me, after serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas and Arizona, I understand very well both the difficulties in securing the border as well as dealing with the complex issue of illegal immigration, and am always ready to work to resolve these problems.

I look forward to hearing from you.

Thank you.

Exhibit 2

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: August 14, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF JOE ARPAIO DEMANDS DHS INSPECTOR GENERAL INVESTIGATE FEDERAL GOVERNMENT'S ONGOING RELEASE OF ALIEN CRIMINALS IN MARICOPA COUNTY

(Phoenix, AZ) After monthly studies going back seven months, and sending the statistics showing how Immigration and Customs Enforcement (ICE) is releasing illegal aliens convicted of crimes back onto the streets of Maricopa County to DHS Secretary Jeh Johnson in an attempt to get answers, Sheriff Joe Arpaio is now demanding an investigation by the DHS Inspector General.

The seven-month total compiled by the Maricopa County Sheriff's Office reveals that for 2014 thus far, of the 3,168 ICE detainers placed on incoming criminal offenders arrested by local law enforcement, incarcerated in the county jail, and passed to ICE, a stunning 1,149, or 36.3%, were repeat offenders. The crimes committed by these individuals included the range of serious and dangerous crimes, including though not limited to kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, various drug felonies, and more. Some of the immigrants have been arrested multiple times, some more than a dozen.

As Sheriff Arpaio has pointed out to Secretary Johnson in his four letters accompanying the figures, this dismal situation can only exist if ICE is not deporting criminals, as required by law, or if the borders are so open that the deported criminals easily return to the U.S.

Of course, the answer is some combination of the two factors.

"I've been writing to Secretary Johnson, offering my help and asking for answers and receiving nothing but bureaucratic form letters in return," says the Sheriff. "This is more than a serious situation, this is dangerous and intolerable, and I have no choice but to request that the Inspector General for Homeland Security look into the matter. And if I receive the same sort of useless response from the Inspector General as I have received the past seven months," states the Sheriff, "then I will no option but to call for a congressional investigation."

The Department of Homeland Security just admitted that it did wrongly release hundreds of criminal aliens in 2013, blaming congressional budgetary constraints for the reason. In the wake of that admission, politicians have called for changes to ICE's actions.

Regardless, as the Sheriff points out, DHS's explanation does not account as to why the releases persist, what criteria is used to determine which criminals are released, how far back these practices can be traced, and more – and the Sheriff is not satisfied.

The Sheriff's letter sent today to DHS Inspector General John Roth is attached.

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

Ph: 602-876-1801
Switchboard: 602-876-1000
www.mcso.org

550 West Jackson Street
Phoenix, AZ 85003

August 13, 2014

Inspector General John Roth
Office of Inspector General/Mail Stop 0305
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528-0305

Dear Inspector General Roth:

Despite the report released today by your office – or, more accurately because of it – I am writing you to insist that your office conduct a more thorough and broad-reaching investigation.

Your report covers the actions of Immigration Customs and Enforcement (ICE) for one year, 2013, and the agency's release of thousands of illegal aliens, including hundreds with criminal records, instead of pursuing prosecution or deportation. The reason given for these transgressions, to cut to the chase, is budgetary.

The Maricopa County Sheriff's Office has conducted our own investigation into the matter for the past seven months, from the beginning of 2014, and has recorded that of 3,168 ICE detainers placed on individuals arrested by local law enforcement in Maricopa County and booked into my jails on criminal charges, a stunning 1,149, or 36.3%, more than one-third, were repeat offenders.

The significance of this cannot be overstated, as ICE has released these people who end up back on the streets of my county, endangering both my deputy sheriffs and police officers who keep those streets safe and the public they protect. And we are not talking about 2013 and those budget constraints, for our seven-month investigation covers 2014. Furthermore, our study shows that these individuals were released, sometimes many times, some more than a dozen, some more than twenty times, going back years. Thus, the problem and the awareness of the problem is not a recent matter, but a long-term issue.

This is far from my first attempt to ask the Department of Homeland Security to take notice. As you will see by the accompanying letters, I have written to Secretary Jeh Johnson four times, (the most recent having been dispatched August 4) each letter accompanied by a new set of statistics that bolster our case. Though ICE Principal Deputy Assistant Secretary Winkowski has sent replies, they have been general, bureaucratic statements and thus nonresponsive in any meaningful way. I want real answers to a very serious issue, and so I request that your office conduct an investigation, in the hope that answers will be forthcoming and I will not have to demand a congressional inquiry.

As I wrote Secretary Johnson, I am prepared to deploy the considerable resources of my organization to help in this investigation. As you might know, I have ICE officers in my jails, and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County. As for me, after serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas and Arizona, I understand very well both the difficulties in securing the border as well as dealing with the complex issue of illegal immigration, and am always ready to work to resolve these problems.

I look forward to hearing from you.

Sincerely,

Joseph M. Arpaio
Sheriff

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: August 5, 2014

CONTACT: Sheriff Joe Arpaio

FOR 7TH MONTH IN ROW, SHERIFF JOE ARPAIO DEMANDS FEDS EXPLAIN WHY THEY CONTINUE TO RELEASE ALIEN CRIMINALS IN MARICOPA COUNTY

SHERIFF MAY CALL FOR CONGRESSIONAL INVESTIGATION IF DHS KEEPS STALLING

(Phoenix, AZ, August 5, 2014): For the seventh time in seven months, Maricopa County Sheriff Joe Arpaio is pressing his demand in letters sent to Secretary of Homeland Security Jeh Johnson that Immigration and Customs Enforcement (ICE) explain why the federal government keeps releasing illegal aliens convicted of crimes back onto the streets of Maricopa County. This time, however, the Sheriff may insist on a congressional investigation if answers and action are not forthcoming.

Figures compiled by the Maricopa County Sheriff's Office show that in July 2014 of the 393 illegal immigrants arrested by local law enforcement in Maricopa County, 139, or 35.3% of the total group, are repeat offenders. This continues the unbroken pattern recorded by the Sheriff's Office since the start of the year. In fact, adding the totals for 2014 together, of the 3,168 ICE detainers placed on incoming criminal offenders, a stunning 1,149, translating to 36.3% of the whole, were repeat offenders.

Furthermore, the crimes committed by these individuals spanned the range of serious and dangerous offenses, including though not limited to kidnapping, aggravated assault with a deadly weapon, armed robbery, child molestation, sexual abuse, conspiracy, various drug felonies, and more. Some illegal immigrants have been arrested multiple times, some more than a dozen. In point of fact, the 139 repeat offenders in July account for an astonishing 500 separate charges.

As the Sheriff has written to Secretary Johnson month after month, the only way this situation can exist is if ICE is not deporting criminals, as the law requires, or if the borders are so porous that the deported criminals virtually immediately return to the U.S. Of course, the answer is some combination of those two factors.

"I have said it before and I will say it again," states Sheriff Arpaio, "this situation is intolerable. It violates federal policy. It knowingly, needlessly places the citizens of Maricopa County in danger. I have written Secretary of Homeland Secretary Jeh Johnson several times always sending him the facts and figures that we have assembled, asking for an explanation. While I have received perfunctory responses from a deputy official, we have not received anything resembling a satisfactory answer.

"The Obama Administration is going to great lengths to ensure the well-being of the young illegal immigrants crossing our borders, and a reasonable case can be made for that on humanitarian grounds. The people of Maricopa County should be worthy of the same concern. Don't we deserve real answers? Don't we deserve real action?"

In addition to asking for a meeting with Secretary Johnson, Sheriff Arpaio has also offered to assist ICE, which has officers working in his jail system and whose agents are cross-certified by the Sheriff to act as deputy sheriffs in order to enforce the laws of Maricopa County, in investigating and resolving these issues.

"I previously served as the regional director for the US Drug Enforcement Administration (DEA), which was part of the U.S. Department of Justice. I served in Mexico, Central and South America, as well as in Texas and Arizona," says the Sheriff. "I know the border, I know the issues, I know the people on both sides of the border. I am ready to help solve the problems this country faces."

In his letter to the Secretary, Arpaio relates the story of one illegal immigrant to personify the horrific reality behind these statistics. Armando Rodriguez was arrested on February 13, 2014 and charged with theft and giving false information to a law enforcement officer. This was not Mr. Rodriguez's first arrest; indeed, he had been previously arrested on two separate occasions, beginning some thirteen years ago – a long time, not incidentally, to be living illegally in this country. In those instances, the charges included a variety of drug and burglary offenses. Thus, by the time of his February 13, 2014 arrest, Mr. Rodriguez, in addition to his

current charges, had already compiled a record worthy of deportation under ICE guidelines. Nonetheless, he was released, for whatever reason, despite being given an ICE detainer. The result was that just five months later, on July 29, 2014, Mr. Rodriguez was arrested yet again and this time his charges were two counts of sexual conduct with a minor, three counts of attempted sexual conduct with a minor, kidnapping, aggravated assault, sexual abuse, molestation of a child, and furnishing obscene material to a child. It is hard to think of more terrible crimes, crimes that in this instance, assuming the charges are proved true, could not have been committed if the federal government had done what it should have done - deported Armando Rodriguez.

Once again, Sheriff Arpaio vows to maintain the pressure on the federal government to not only get answers but also force changes in policy and procedure to protect the people of Maricopa County and the entire United States.

"We're done just sending letters and waiting for a satisfactory response," Arpaio says. "If we don't get real action, not just the usual Washington bureaucratic refrain, may insist that Congress step up and look into the matter. We must solve this problem." (see attached for previous letters sent to Homeland Security Secretary Johnson) ###

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

Ph: 602-876-1801
Switchboard: 602-876-1000
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550 West Jackson Street
Phoenix, AZ 85003

August 4, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20258

Dear Secretary Johnson:

Thank you for your organization's recent response, received July 10, 2014, to my letter. While I appreciate the detailing of ICE's enforcement priorities, it would seem that the issues I have raised, and continue to raise, directly impact, to quote your letter "the promotion of national security, border security, public safety, and the integrity of the immigration system." Yet Homeland Security and ICE have consistently pursued policies that contravene those goals. I am speaking in particular of the fact that some one-third of the illegal immigrants arrested by law enforcement in Maricopa County and booked into my jails have already been arrested on a wide range of serious criminal charges – and many of them multiple times.

For the seventh month in a row, the facts show that of the 393 illegal immigrants arrested by local law enforcement in Maricopa County in July 2014, no fewer than 139, or 35.3% of the total, are repeat offenders. Their crimes include a full range of serious offenses – aggravated assault with a deadly weapon, armed robbery, kidnapping, molestation of a child, sexual abuse, dangerous drugs, conspiracy, and more – just as we have seen every month we have looked at the statistics.

Finally, adding the numbers from the past seven months together, 3,168 ICE detainers were placed in incoming criminal offenders, and of those, a stunning 1,149, or 36.3%, more than one-third, were repeat offenders.

Let us use one example alone to exemplify the horrific reality behind these statistics. Armando Rodriguez was arrested on February 13, 2014, and charged with theft and giving false information to a law enforcement officer. This was not Mr. Rodriguez's first arrest; indeed, he had been previously arrested on two separate occasions, beginning some thirteen years ago – a long time, not incidentally, to be living illegally in this country. In those instances, the charges included a variety of drug and burglary offenses. Thus, by the time of his February 13, 2014, arrest, Mr. Rodriguez, in addition to his current charges, had already compiled a record worthy of deportation under ICE guidelines. Nonetheless, he was released, for whatever reason, despite being given an ICE detainer. The result was that just five months later, on July 29, 2014, Mr. Rodriguez was arrested yet again and this time his charges were two counts of sexual conduct with a minor, three counts of attempted sexual conduct with a minor, kidnapping, aggravated assault, sexual abuse, molestation of a child, and furnishing obscene material to a child. It is hard to think of more terrible crimes, crimes that in

this instance, assuming the charges are proved true, could not have been committed if the federal government had done what it should have done - deported Armando Rodriguez.

That case, together with all the statistics, demonstrate what I have said over and over: That when local law enforcement arrests illegal immigrants on criminal charges and turns them over to the federal government, the federal government, in the form of Homeland Security and ICE, either quietly releases them back onto our streets or deports them, the result being they quickly and with obvious ease make their way back to our community.

Both actions are unacceptable. The first, releasing those with immigration detainers from jail without consequences, free to commit new crimes, is an outrage against the people of Maricopa County. The second, allowing those deported to so readily return to this country, is an insult to all Americans.

I am once again requesting a meeting with you to discuss this intolerable situation. I am ready to work with ICE on this matter. As you know, I have ICE officers in my jails, and ICE agents are cross-certified by me to function as deputy sheriffs in order to enforce the laws of Maricopa County.

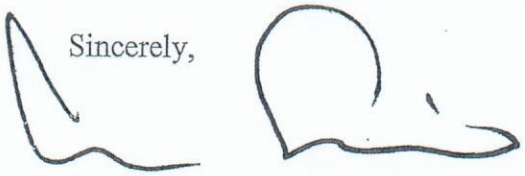
I am prepared to put the considerable resources of my organization to use in helping ICE identify, track and re-arrest those criminals released in our county. After serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas and Arizona, I understand very well both the difficulties in securing the border as well as dealing with the complex issue of illegal immigration, and am always ready to work to resolve these problems.

After ignoring the growing problem for so long, it is interesting to watch the Administration scramble to handle the thousands upon thousands of children crossing the border. As important as dealing with that issue is, it pales in comparison with the reality that the federal government, sworn to protect us, simply releases illegal immigrants charged with serious crimes to roam free on our streets.

It has been widely reported that President Obama intends to declare some form of summary amnesty for perhaps millions of illegal immigrants sometime after Labor Day. Can the federal government guarantee that many among that enormous number will not be criminals, charged and yet released by that government? Can the government guarantee that those given amnesty will not commit more crimes against American citizens?

All these questions demand answers, and the situation as it now stands cannot be allowed to continue. I am determined to see this through on behalf of the people of Maricopa County.

Sincerely,



Joseph M. Arpaio
Sheriff