ORAL ARGUMENT NOT YET SCHEDULED

Court of Appeals No. 14-5325

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH M. ARPAIO,
Plaintiff-Appellant,

v.

BARACK OBAMA, ET AL.,
Defendants-Appellees.

APPEAL FROM A FINAL ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
IN CIVIL CASE NO. 1:14-cv-01966-BAH

JOINT APPENDIX – Vol. I of II

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U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:14-cv-01966-BAH

ARPAIO v. OBAMA et al
Assigned to: Judge Beryl A. Howell
Case in other court: USCA, 14-05325
Cause: 05:551 Administrative Procedure Act

Date Filed: 11/20/2014
Date Terminated: 12/24/2014
Jury Demand: None
Nature of Suit: 899 Administrative Procedure Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

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Kathleen Roberta Hartnett
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Date Filed	#	Docket Text
11/20/2014	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0090-3912973) filed by JOSEPH M. ARPAIO. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Civil Cover Sheet, # 5 Summons, # 6 Summons, # 7 Summons, # 8 Summons)(Klayman, Larry) (Entered: 11/20/2014)
11/20/2014		Case Assigned to Judge Beryl A. Howell. (sth,) (Entered: 11/21/2014)
11/21/2014	2	SUMMONS (4) Issued Electronically as to ERIC HOLDER, JR., JEH CHARLES JOHNSON, BARACK OBAMA, LEON RODRIQUEZ. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons)(sth,) (Entered: 11/21/2014)
11/21/2014	3	STANDING ORDER. Signed by Judge Beryl A. Howell on November 21, 2014.

		(lcbah2) (Entered: 11/27/2014)
11/24/2014		MINUTE ORDER (paperless) DIRECTING the plaintiff to comply with Local Civil Rule 65.1, which requires applications for preliminary injunctions and temporary restraining orders to be made in a motion "separate from the complaint," if the plaintiff intends to seek such extraordinary relief. Signed by Judge Beryl A. Howell on November 24, 2014. (lcbah2) (Entered: 11/24/2014)
11/24/2014	4	REQUEST FOR SUMMONS TO ISSUE by JOSEPH M. ARPAIO re 1 Complaint, filed by JOSEPH M. ARPAIO. Related document: 1 Complaint, filed by JOSEPH M. ARPAIO. (Attachments: # 1 Summons)(Klayman, Larry) (Entered: 11/24/2014)
11/25/2014	5	SUMMONS (2) Issued Electronically as to ERIC HOLDER, JR., BARACK OBAMA, U.S. Attorney and U.S. Attorney General (jf,) (Entered: 11/25/2014)
12/04/2014	6	MOTION for Preliminary Injunction by JOSEPH M. ARPAIO (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L)(Klayman, Larry) (Entered: 12/04/2014)
12/04/2014	7	MOTION for Preliminary Injunction by JOSEPH M. ARPAIO (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L)(Klayman, Larry) (Entered: 12/04/2014)
12/04/2014	8	ORDER Controlling Preliminary Injunction Proceedings. The plaintiff shall, by 5:00 p.m. on December 9, 2014, submit (1) proof of service of the 1 Complaint and 6 Motion for Preliminary Injunction; and (2) a joint proposed schedule to govern the preliminary injunction proceedings. See Order for further details. Signed by Judge Beryl A. Howell on December 1, 2014. (lcbah2) (Entered: 12/04/2014)
12/04/2014		Set/Reset Deadlines: Response to Order of the Court due by 5:00 PM on 12/9/2014. (tg,) (Entered: 12/04/2014)
12/05/2014	9	NOTICE Praecipe by JOSEPH M. ARPAIO re 8 Order, (Attachments: # 1 Exhibit 1)(Klayman, Larry) (Entered: 12/05/2014)
12/06/2014	10	NOTICE of Appearance by Adam D. Kirschner on behalf of All Defendants (Kirschner, Adam) (Entered: 12/06/2014)
12/06/2014	11	RESPONSE re 9 Notice (Other) filed by ERIC HOLDER, JR., JEH CHARLES JOHNSON, BARACK OBAMA, LEON RODRIQUEZ. (Kirschner, Adam) (Entered: 12/06/2014)
12/09/2014	12	RESPONSE TO ORDER OF THE COURT re 8 Order, filed by JOSEPH M. ARPAIO. (Klayman, Larry) (Entered: 12/09/2014)
12/10/2014		MINUTE ORDER (paperless) ISSUING the following SCHEDULING ORDER to control the timing and consideration of the plaintiff's motion for a preliminary injunction. The plaintiff's 12 Statement on Briefing Scheduling of Motion for Preliminary Injunction indicates that the parties have been unable to agree to a joint briefing schedule and, consequently, under LCvR 65.1, "[t]he opposition shall be served and filed within seven days after service of the application for preliminary injunction." LCvR 65.1 does not provide for the submission of a reply brief. Accordingly, the defendants are directed to file their opposition, including any

		objections based on the significant jurisdictional issues raised by plaintiff's lawsuit," to the plaintiff's 6 Motion for Preliminary Injunction and Request for Oral Argument Thereon by December 15, 2014. The parties shall appear on December 22, 2014 at 9:30 AM, in Courtroom 15, for a hearing regarding the plaintiff's 6 Motion for Preliminary Injunction and Request for Oral Argument Thereon. Signed by Judge Beryl A. Howell on December 10, 2014. (lcbah2) (Entered: 12/10/2014)
12/10/2014		Set/Reset Deadlines/Hearings: Opposition to 6 Motion for Preliminary Injunction and Request for Oral Argument Thereon due by 12/15/2014. Hearing on the Motion for Preliminary Injuction scheduled for 12/22/2014 at 9:30 AM in Courtroom 15 before Judge Beryl A. Howell. (tg,) (Entered: 12/10/2014)
12/15/2014	13	Memorandum in opposition to re 7 MOTION for Preliminary Injunction , 6 MOTION for Preliminary Injunction filed by ERIC HOLDER, JR., JEH CHARLES JOHNSON, BARACK OBAMA, LEON RODRIQUEZ. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Text of Proposed Order) (Kirschner, Adam) (Entered: 12/15/2014)
12/16/2014		MINUTE ORDER (paperless) TO SHOW CAUSE why the defendants' 13 Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction ("Defs.' Opposition") should not be construed as a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The defendants shall file a notice with the Court by 12:00 PM on December 17, 2014 explaining whether their opposition should be construed as a motion to dismiss under Rule 12(b)(1). The plaintiff may file a reply in light of the issues raised by Defs.' Opposition by 5:00 PM on December 18, 2014. Signed by Judge Beryl A. Howell on December 16, 2014. (lcbah2) (Entered: 12/16/2014)
12/16/2014		Set/Reset Deadlines: Response to Show Cause due by 12:00 PM on 12/17/2014; Reply due by 5:00 PM on 12/18/2014. (tg,) (Entered: 12/16/2014)
12/16/2014	14	NOTICE OF SUPPLEMENTAL AUTHORITY by JOSEPH M. ARPAIO (Attachments: # 1 Exhibit 1)(Klayman, Larry) (Entered: 12/16/2014)
12/17/2014	15	NOTICE *re Minute Order* by ERIC HOLDER, JR., JEH CHARLES JOHNSON, BARACK OBAMA, LEON RODRIQUEZ re Order,, (Kirschner, Adam) (Entered: 12/17/2014)
12/17/2014	16	Unopposed MOTION for Extension of Time to File Reply by JOSEPH M. ARPAIO (Klayman, Larry) (Entered: 12/17/2014)
12/17/2014	17	NOTICE *of Filing of Request for Live Testimony* by JOSEPH M. ARPAIO re 7 MOTION for Preliminary Injunction (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Klayman, Larry) (Entered: 12/17/2014)
12/18/2014		MINUTE ORDER (paperless) GRANTING the plaintiff's 16 Unopposed Motion for Extension of Time to File Reply. The plaintiff shall have until 8:00 PM on December 18, 2014 to file his reply. The plaintiff's 17 Request for Live Testimony is DENIED as the testimony will result in the "needless presentation of cumulative evidence," see LCvR 65(1)(d), since, 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. Any evidence the plaintiff wished the Court to hear by live testimony may be presented instead in a sworn declaration supplementing the plaintiff's previous declaration. See Decl. of Sheriff Joe Arpaio, Ex. G, ECF No. 6 . Accordingly, the plaintiff has leave to file a supplemental declaration setting forth those facts the plaintiff would have otherwise presented during live testimony by 5:00 PM on December 19, 2014. Signed by Judge Beryl A. Howell on December 18, 2014. (lcbah2) (Entered: 12/18/2014)
12/18/2014		Set/Reset Deadlines: Plaintiff's Reply due by 8:00 PM on 12/18/2014. Plaintiff's Sworn Supplemental Declaration due by 5:00 PM on 12/19/2014. (tg,) (Entered: 12/18/2014)
12/18/2014	18	Unopposed MOTION to Increase Page Limit re Order,, by JOSEPH M. ARPAIO (Klayman, Larry) (Entered: 12/18/2014)
12/18/2014		MINUTE ORDER (paperless) GRANTING the plaintiff's 18 Unopposed Motion to Increase Page Limit. The plaintiff shall have an additional fifteen pages for his Reply. Signed by Judge Beryl A. Howell on December 18, 2014. (lcbah2) (Entered: 12/18/2014)
12/18/2014	19	REPLY to opposition to motion re 7 MOTION for Preliminary Injunction filed by JOSEPH M. ARPAIO. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Klayman, Larry) (Entered: 12/18/2014)
12/19/2014	20	NOTICE *of Filing of Supplemental Declaration of Sheriff Joe Arpaio, in Support of Plaintiffs Motion for Injunction* by JOSEPH M. ARPAIO re Order on Motion for Extension of Time to File,,,, (Attachments: # 1 Declaration of Sheriff Joe Arpaio, In Support of Plaintiff's Motion for Injunction)(Klayman, Larry) (Entered: 12/19/2014)
12/21/2014	21	NOTICE *of Filing of Document to be Included as Part of Exhibit 5* by JOSEPH M. ARPAIO re 20 Notice (Other), (Attachments: # 1 Exhibit)(Klayman, Larry) (Entered: 12/21/2014)
12/21/2014	22	NOTICE of Appearance by Kathleen Roberta Hartnett on behalf of All Defendants (Hartnett, Kathleen) (Entered: 12/21/2014)
12/22/2014		Minute Entry for proceedings held before Judge Beryl A. Howell: Hearing on a Motion for Preliminary Injunction held on 12/22/2014. (Court Reporter Barbara DeVico.) (tg,) (Entered: 12/22/2014)
12/23/2014	23	MEMORANDUM OPINION regarding the plaintiff's 6 , 7 Motion for Preliminary Injunction and the defendants' Motion to Dismiss for lack of subject matter jurisdiction. Signed by Judge Beryl A. Howell on December 23, 2014. (lcbah3) (Entered: 12/23/2014)
12/23/2014	24	ORDER GRANTING the defendants' Motion to Dismiss for lack of subject matter jurisdiction and DENYING the plaintiff's 6 , 7 Motion for Preliminary Injunction. The Clerk of the Court is directed to close the case. See Order for further details. Signed by Judge Beryl A. Howell on December 23, 2014. (lcbah3) (Entered: 12/23/2014)

12/23/2014	25	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 23 Memorandum & Opinion, 24 Order, by JOSEPH M. ARPAIO. Filing fee $ 505, receipt number 0090-3945815. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Klayman, Larry) (Entered: 12/23/2014)
12/24/2014	26	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 25 Notice of Appeal to DC Circuit Court. (rdj) (Entered: 12/24/2014)
12/29/2014		USCA Case Number 14-5325 for 25 Notice of Appeal to DC Circuit Court, filed by JOSEPH M. ARPAIO. (rd) (Entered: 12/29/2014)
12/29/2014	27	TRANSCRIPT OF PROCEEDINGS before Judge Beryl A. Howell held on 12-22-14; Page Numbers: 1-60. Date of Issuance:12-29-14. Court Reporter/Transcriber Barbara DeVico, Telephone number 202-354-3118, Court Reporter Email Address : Barbara_DeVico@dcd.uscourts.gov.<P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at ww.dcd.uscourts.gov.<P></P> Redaction Request due 1/19/2015. Redacted Transcript Deadline set for 1/29/2015. Release of Transcript Restriction set for 3/29/2015.(DeVico, Barbara) (Entered: 12/29/2014)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiff,

v.

The Honorable BARACK OBAMA, individually and in his professional capacity as President of the United States of America
1600 Pennsylvania Avenue
Washington, D.C. 20500

and

The Honorable JEH JOHNSON, individually and in his professional capacity as Secretary of the U.S. Department of Homeland Security
12th & C Street SW
Washington, D.C. 20024

and

The Honorable LEON RODRIQUEZ, individually and in his professional capacity as Director of U.S. Citizenship and Immigration Services
12th & C Street SW
Washington, D.C. 20024

and

The Honorable ERIC HOLDER, JR., individually and in his professional capacity as U.S. Attorney General
555 Fourth St. NW
Washington, D.C. 20530

Defendants.

CIVIL COMPLAINT

Civil Action No. _____

COMPLAINT

Plaintiff sues the Defendants in this civil action. The Defendants' Deferred Action for Childhood Arrivals (DACA) from June 15, 2012 and new November 20, 2014, Executive Order Amnesty (EOA) programs are unconstitutional abuses of the President's role in our nation's constitutional architecture and exceed the powers of the President within the U.S. Constitution. Even where Congress has granted authority to the executive branch, these programs are *ultra vires*, exceeding the bounds of delegated authority. While Defendant Obama hijacks the language of previous immigration regulation and law, Defendant Obama fundamentally transforms the definition of key terms to create a radically new and different regime of immigration law and regulation.

DACA and EOA are sweeping changes to immigration law and regulation, operate on a "wholesale" level upon broad categories rather than "retail" as an individualized adjudication of persons one at a time, operate in and modify areas already regulated differently by existing regulations, and are a dramatic departure from prior interpretation and application of existing law and regulations. Yet the Obama Administration purports to effect these dramatic changes by Executive Order announced by the President, implemented through his Cabinet Secretaries.

Even if the Court deems this constitutional, DACA and EOA are exercises of delegated law-making authority by the executive branch which must first go through rigid rule-making procedures under the Administrative Procedures Act. The President cannot simply announce sweeping new rules and implement them by giving a speech.

Alternatively, Plaintiff challenges these executive branch actions pursuant to 5 U.S.C. §§ 702 through 706 as unlawful and invalid as arbitrary, capricious, an abuse of discretion, unreasonable, and/or otherwise not in accordance with law.

Plaintiff seeks a Declaratory Judgment, and preliminary and permanent injunctions. Plaintiff also challenges the executive branch action under this Circuit's Nondelegation Doctrine. As grounds therefore, Plaintiff alleges as follows:

INTRODUCTION AND SUMMARY

Defendant Obama has announced and initiated actions under his purported inherent authority as President of the United States to grant amnesty by Executive Order, or more precisely by giving directions to Cabinet Secretaries. The President states that he is doing so because he does not like the legislative decisions of the Congress.

In fact, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article I, Section 1, of the U.S. Constitution. "The Congress shall have Power . . . To establish an uniform Rule of Naturalization," Article I, Section 8, of the U.S. Constitution. There is nothing in the U.S. Constitution which offers any authority or role of the executive branch with regard to immigration, admission of aliens to the country, or naturalization or citizenship other than the President's duty that he "shall take Care that the Laws be faithfully executed…." Article II, Section 3, of the U.S. Constitution.

Defendant Obama has already purported to give amnesty, the status of lawful presence in the United States, and even the right to work lawfully in the United States to 611, 953[1] illegal aliens classified as "Dreamers" who arrived illegally in the United States with their parents.

[1] U.S. Citizen and Immigration Services, Number cf I-821p (Mar. 2014) available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_daca_fy2014qtr2.pdf

The Department of Homeland Security admits that these initiatives are "unprecedented." Despite the attempt to use familiar terminology, these initiatives are a dramatic departure from past precedent, interpretation, and application of immigration law.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as involving questions and controversies arising under the U.S. Constitution and the federal laws and regulations arising thereunder.
2. Venue is proper for Defendants pursuant to 28 U.S.C. § 1391(b)(1) because the Defendants and the federal government are primarily located in the District of Columbia.

THE PARTIES

3. The Plaintiff Joe Arpaio is the elected Sheriff of Maricopa County, State of Arizona. He has held the office of Sheriff since 1993, and has 57 years of law enforcement experience. Previously, Plaintiff Arpaio served as Regional Director of the Drug Enforcement Administration ("DEA") of the U.S. Department of Justice, and served in Turkey, the Middle East, Mexico, and Central and South America and in cities around the United States. He later retried as head of the DEA for Arizona.
4. Defendant Obama currently holds the position of and serves as President of the United States.
5. Defendant Jeh Johnson currently holds the position of and serves as the Secretary of the Department of Homeland Security of the United States, appointed by the President and confirmed by the U.S. Senate.
6. Defendant Eric Holder holds the position of and serves as the Attorney General of the United States of America and head of the U.S. Department of Justice, appointed by the

President and confirmed by the Senate. Although Defendant Holder has tendered his resignation, he made his resignation to be effective upon the appointment and confirmation of his successor to replace him.

7. Defendant Leon Rodriquez is Director of the U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security. Rodriquez was previously the Director of the U.S. Department of Health and Human Services Office for Civil Rights and from 2007 through 2010 he was the County Attorney for Montgomery County, Maryland.

8. Each of the Defendants are being sued in their individual and official capacities.

FACTS COMMON TO ALL COUNTS

9. On November 20, 2014, Secretary of Homeland Security, Defendant Johnson, released a series of Memorandum orders – simultaneous with Defendant Obama's announcement speech – directing various parts of the U.S. Department of Homeland Security to implement Defendant Obama's "Executive Order Amnesty" program. Defendant Johnson's implementing orders are posted at: http://www.dhs.gov/immigration-action. Other agencies might issue similar orders. Defendant Obama's Executive Order Amnesty consists primarily of (1) expanding Obama's June 15, 2012 DACA program to include childhood arrivals who arrived after the earliest cut-off date, and (2) extending DACA to parents and other relatives of U.S. citizens or persons lawfully present.

10. The extension of DACA to persons who arrived illegally as adults waive their illegal status. Currently, a person is not "admissible" or eligible to apply for any immigration status if they are currently in violation of U.S. immigration laws. Defendant Obama is waiving the prohibition for those who are illegally in the United States. Otherwise, they

would have to return to their home country, wait between 3 to 10 years, and reapply from their home country.

11. The issue of being a relative is a distraction because that is not a change from current law. Waiving illegal status is the key point which must be reviewed and acted upon by this Court.

12. Defendant Obama, through Defendant Johnson, gave other orders to refocus resources to border enforcement but in ways that are vague and premised upon unknown success in freeing up resources within the interior of the country. Another order directs Homeland Security to study the expansion of "parole" status to allow high-tech workers to stay in the United States and to give broader "grace periods" when immigrant workers are between jobs or legal status positions. Parole status cannot be used in this way, however.

A. President Obama's Executive Order Amnesty is Unconstitutional

13. The Supreme Court applied a fundamental analysis of the constitutional architecture and structure of the U.S. Constitution in *INS v. Chadha*, 462 U.S. 919 (1983).

14. Here, this case presents the reverse, mirror image of *INS v. Chadha*, 462 U.S. 919 (1983).

15. Even though any provision within legislation would normally be routinely accepted as an exercise of congressional authority, the Supreme Court found in *Chadha* that a legislative veto of executive branch action violated the U.S. Constitution, because it did violence to the constitutional architecture and structure.

16. The U.S. Constitution's structure is for Congress to legislate and the executive branch to implement legislation.

17. Here, Defendant President Obama is seeking to legislate in place of Congress.

18. DACA and EOA are unconstitutional in the same manner as in *Chadha*, because instead of legislation first passing both houses of Congress and then being sent to the President under the "Presentment Clause" for signature and implementation or veto, the President originates legislation by himself and then dares the Congress to disagree.

19. The Supreme Court has also required the executive branch to implement the laws passed by Congress in the so-called Impoundment cases. Despite over 150 years of precedent allowing the President to use his discretion not to fully enforce a law or spend all the funds appropriated by Congress, the Supreme Court ordered the Nixon Administration that it must spend all the money appropriated by Congress.

20. The case of *Train v. City of New York*, 420 U.S. 35 (1975), held that "[t]he president cannot frustrate the will of Congress by killing a program through impoundment."

21. President Nixon had tried to control the budget deficit by not spending all of the funds appropriated by Congress where in the course of administration it found money could be saved, and "impounding" the unspent money to pay down the national debt.

22. Despite this process seeming to be a part of the core role of the executive branch to administer the funds appropriated, and consider actual circumstances, the Supreme Court ruled that the President had no discretion over how much of the funds to spend.

B. <u>President Admits His Actions Today are Illegal</u>

23. Defendant Obama has repeatedly admitted and acknowledged that the amnesty he now attempts to issue to illegal aliens is illegal and/or unconstitutional, and he knows it.

> "The problem is that, you know, I am the President of the United States. I am not the Emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic."

-- President Barack Obama, February 14, 2013, in an internet town hall with young voters called a "Google hangout." https://www.youtube.com/watch?v=FSV9n-v_0KI.

24. In an interview on the Telemundo television network with Jose Diaz-Balart on September 17, 2013,[2] Mr. Obama said he was proud of having protected the "Dreamers" — people who came to the United States illegally as young children — from deportation. But he also said that he could not apply that same action to other groups of people.

> "Here's the problem that I have, Jose. And I've said this consistently. My job in the Executive Branch is supposed to be to carry out the laws that are passed. Congress has said here is the law when it comes to those who are undocumented. And they've allocated a whole bunch of money for enforcement. And what I have been able to do is to make a legal argument that I think is absolutely right, which is that given the resources we have we can't do everything that Congress has asked us to do. What we can do is then carve out the Dream Act folks, saying young people who've basically grown up here are Americans we should welcome. We're not going to have them operate under a cloud, under a shadow."
>
> "But if we start broadening that, then essentially I'll be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option and I do get a little worried that advocates of immigration reform start losing heart and immediately thinking well, you know, somehow there's an out here. If Congress doesn't act, we'll just have the President sign something and that will take care of. We won't have to worry about it. What I've said is that there is a path to get this done and that's through Congress. And right now everybody should be focused on making sure that that bill that's already passed out of the Senate hits the floor of the House of Representatives."

C. Border States Under Invasion by Violent Criminals Acting Across Unsecured Border, Subject to Domestic Violence from Foreign Invasion

25. President Obama grounds his argument for granting amnesty by Executive Order to illegal aliens on the federal government having insufficient resources to prosecute and deport all of the illegal aliens that the executive branch has allowed into the country.

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[2] **NOTICIAS TELEMUNDO**, https://www.youtube.com/watch?v=wp68QI_9r1s

26. In fact, Defendant Obama's amnesty programs merely shift the burden to the States and local governments, creating severe burdens and a crime wave in States along the border.

27. 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, but has been severely affected by increases in the influx of illegal aliens motivated by Defendant Obama's policies of offering amnesty. In this regard, as detailed in Exhibits 1, 2 and 3 to this Complaint which is incorporated herein for reference, Plaintiff Arpaio has been severely affected and damaged by Defendant Obama's release of criminal aliens onto the streets of Maricopa County, Arizona. This prior damage will be severely increased by virtue of Defendant Obama's Executive Order of November 20, 2014, which is at issue.

28. Thus, the Office of the Sheriff has been directly harmed and impacted adversely by Obama's DACA program and will be similarly harmed by his new Executive Order effectively granting amnesty to illegal aliens.

29. Defendant Obama's past promises of amnesty and his DACA amnesty have directly burdened and interfered with the operations of the Sheriff's Office, and Defendant Obama's new amnesty program will greatly increase the burden and disruption of the Sheriff's duties.

30. First, experience has proven as an empirical fact that millions more illegal aliens will be attracted into the border states of the United States, regardless of the specific details.

31. Second, the 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.

32. 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.

D. Defendant Obama Orders Amnesty by Fiat

33. Defendant Obama has ordered new programs and initiatives to grant millions of illegal aliens amnesty, consisting of lawful status and the authorization to work in the United States, which he will announce Thursday.

34. Already, this announcement is doing irreparable harm, because it will stimulate a new flood of illegal aliens crossing the United States-Mexican border.

35. Many people will die in the desert attempting to reach United States soil as a result.

36. Moreover, illegal aliens are being victimized by smugglers charging them dearly.

37. Defendant Obama has openly, clearly, and explicitly declared dozens of times that he is acting because he doesn't like the legislative decisions of the Congress.

E. Executive Order Amnesty under Deferred Action for Childhood Arrivals

38. Previously, on June 15, 2012, Defendant Obama (through his Secretary of Homeland Security) created a new immigration status not existing anywhere in the law, called the "Deferred Action for Childhood Arrivals" (DACA) status, without legislative authority and over the objection of the U.S. Congress.

39. DACA status for a person lasts for only two years, although renewal may be requested.

40. Thus, no vested interest or vested right has been created beyond each two-year period.

41. The Department of Homeland Security (DHS) admits on its website that DACA is contrary to past construction and application of the law: "Over the past three years, this Administration has undertaken ***an unprecedented effort*** to transform the immigration enforcement system into one that focuses on public safety, border security and the integrity of the immigration system." *(Emphasis added)* Department of Homeland Security website page, "Deferred Action for Childhood Arrivals" [3]

F. Claim of Insufficient Resources

42. Defendant Obama contends that he is authorized to grant amnesty and work authorization to millions of trespassers on the grounds (in part) that Congress has provided insufficient resources for the executive branch to faithfully execute the laws concerning immigration and trespassers illegally present.

43. Therefore, Defendant Obama claims, he can and must prioritize his enforcement of the law.

44. The fatal defect with Defendant Obama's false excuse (pretext) is that the executive branch has not requested additional resources to secure the borders that Congress ever denied.

45. Each year, the executive branch under any Administration (Presidential leadership) is legally obligated to submit to Congress a request for the resources that the executive branch believes it will require in the coming Fiscal Year and to some extent future years, pursuant to the requirements of the Budget and Accounting Act of 1921 (as amended).

46. To the contrary, Defendants and the Obama Administration have very strongly, along with its predecessors to a less extreme extent, conducted a persistent, comprehensive, full

[3] http://www.dhs.gov/deferred-action-childhood-arrivals

scale legal and political war against every effort to control the borders of the United States.

CAUSES OF ACTION

47. For each of the Causes of Action set forth below, Plaintiff incorporates by reference, repeats and re-alleges each and every allegation of the foregoing paragraphs as if fully set forth in each of the Causes of Action stated below.

48. For each of the Causes of Action asking for Declaratory Judgment set forth below, the Plaintiff relies upon 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, and further asserts that under 28 U.S.C. § 2201, Declaratory Judgment under Federal law is available "whether or not further relief is or could be sought," and "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." Moreover, Plaintiff asks the Court to declare the rights and other legal relations any interested parties.

49. For each of the Causes of Action asking for Declaratory Judgment set forth below, the controversy is within the jurisdiction of this Court under the U.S. Constitution.

FIRST CAUSE OF ACTION
Declaratory Judgment Obama's Ultra Vires Under the U.S. Constitution

50. Plaintiff respectfully asks the Court to enter Declaratory Judgment that Defendant Obama's DACA program and Executive Order Amnesty are unconstitutional as violating the role of the President of the United States and exceeding the President's constitutional authority under the U.S. Constitution.

51. There is an actual controversy as to whether the President may convey lawful presence status upon illegal aliens present within the country, including conferring benefits and employment authorization to work within the United States.

52. Defendant Obama and the other Defendants have no authority under the U.S. Constitution to decide immigration policy or who may enter the United States or be granted lawful presence status and/or naturalized other than the authority granted to various executive branch officials or the President by Congress.

53. The President is obligated to enforce the laws as written:

> Article II - The Executive Branch
> * * *
> Section 3 - State of the Union, Convening Congress
> He shall … take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

54. The U.S. Constitution explicitly reserves to the Congress power to govern immigration:

> Article I - The Legislative Branch
> * * *
> Section 8 - Powers of Congress
> The Congress shall have Power * * * To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

55. There is no other provision in the U.S. Constitution sharing any such power concerning immigration with the President.

56. The Supreme Court undertook a fundamental analysis of the constitutional architecture of the U.S. Constitution in *INS v. Chadha*, 462 U.S. 919 (1983).

57. Where a provision in legislation would normally be routinely accepted, the Supreme Court found in *Chadha* that the legislative veto of executive branch action violated the U.S. Constitution because it did violence to the constitutional architecture and structure.

58. The U.S. Constitution's structure is for Congress to legislate and the executive branch to implement. The legislative veto violated that structure.

59. Here, DACA and EOA present the mirror image of *Chadha.*

60. Here it is Defendant Obama seeking to legislate in place of Congress.

61. DACA and EOA are unconstitutional in the same manner.

SECOND CAUSE OF ACTION
Violation of Rule-Making Requirements

62. Defendant Obama and the other Defendants are not engaging in individualized adjudication of illegal aliens one by one so as to involve prosecutorial discretion. These programs are wholesale legislating, not retail adjudication.

63. Clearly, Defendant Obama and the other Defendants are engaged in rule-making with regard to broad, sweeping categories, including exercising legislative power either delegated to the executive branch or usurped by the executive branch, establishing a new status of immigrant presence in the United States, and establishing a new regulatory scheme.

64. At a minimum, Defendant Obama and the other Defendants are changing the definition of key terms from what the definitions previously were under existing regulations.

65. Defendant Obama and the other Defendants are establishing broad regimes applying to millions of people by category, including grants of additional benefits – unnecessary to and outside of the purported purpose – as well as imposing intricate plans for requirements and eligibility.

66. Furthermore, DACA and Executive Order amnesty cover topics already covered by previously-promulgated regulations, but address those topics in radically different ways than existing regulations on the same topics (largely by altering the meaning of terms).

67. Therefore, these programs are a significant departure from existing regulations.

68. As a result, the Defendants must comply with the rule-making procedures imposed by the Administrative Procedures Act (APA).

THIRD CAUSE OF ACTION
Violation of Existing Regulatory Authority

69. Plaintiff challenges Defendant Obama and the other Defendant's DACA and Executive Order amnesty as illegal, unconstitutional, and invalid agency action pursuant to 5 U.S.C. §§ 702 through 5 U.S.C. §§ 706.

70. Specifically, Plaintiff moves the Court to enjoin the Attorney General, the Secretary of Homeland Security, and the Director of the Citizenship and Immigration Services (USCIS) from implementing DACA and Defendant Obama's new program to be implemented which Plaintiff refers to as "Executive Order Amnesty."

71. Plaintiff is aggrieved by the invalid, illegal, and unconstitutional agency actions as set forth in Section IV (C), above.

72. Defendant Obama and the other Defendant's programs 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.

73. That is, 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.

FOURTH CAUSE OF ACTION
Declaratory Judgment: Conveying Work Authorization Irrational

74. Plaintiff respectfully asks the Court to enter Declaratory Judgment that the executive branch granting authorization to work in the United States as part of DACA and Executive Order Amnesty are unconstitutional as failing the rational basis test for the exercise of delegated authority in administrative law.

75. There is an actual controversy as to whether there is any 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.

76. 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.

77. 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.

78. Even if there were legal or constitutional validity to Defendant Obama deferring deportation of illegal aliens, there is no rational basis to grant them work permits also.

FIFTH CAUSE OF ACTION
Declaratory Judgment: Prosecutorial Discretion is Individualized not Categorical

79. Plaintiff respectfully asks the Court to enter Declaratory Judgment that a President may not grant amnesty to illegal aliens on the grounds of prosecutorial discretion.

80. There is an actual controversy as to whether the President may grant amnesty to broad categories of illegal aliens as a purported exercise of prosecutorial discretion.

81. Prosecutorial discretion involves and requires an individualized weighing of the merits of a particular case, such as the availability of witnesses and evidence, the credibility of witnesses, the willingness of witnesses to testify, and the likelihood that an exercise of prosecutorial discretion will lead to rehabilitation and not recidivism.

82. By contrast, decisions made with regard to broad categories are legislative.

83. Prosecutorial discretion applies to adjudicatory decisions.

84. By contrast, Defendant Obama and the other Defendant's grant of amnesty to broad categories of illegal aliens is not an adjudicatory proceeding to which prosecutorial discretion applies.

SIXTH CAUSE OF ACTION
Violation of Non-Delegation Doctrine

85. The exercise of the executive branch's discretionary decision-making authority in creating DACA and the new EOA violates the nondelegation doctrine confirmed 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).

86. "The United States Constitution grants the legislative power exclusively to Congress, not to the President, courts, or governmental agencies. Nonetheless, the Supreme Court has

long recognized that Congress may delegate legislative power to governmental agencies, provided that the legislative act limits the delegated power and provides a standard to guide the agency's actions. Thus, agencies are not creating law, they are executing the law within specific parameters in accordance with legislative intent." [4]

87. However, an exercise of agency discretion within the statute must be based upon an "intelligible principle" grounded in the Congressional enactment, not merely the preference of the agency.

88. The sweeping power claimed by Defendant Obama and the other Defendants is an unlimited, unbridled power without the guidance of any intelligible principle guiding the exercise of the delegated power.

PRAYER FOR RELIEF

With regard to all counts, Plaintiff respectfully demands that the Court with regard to each and every Defendant: (1) Enter a preliminary restraining order until such time as the Court can hold a hearing to halt implementation of the Deferred Action for Childhood Arrivals (DACA) program and the President's new Executive Order Amnesty, because it will cause irreversible harm by encouraging more illegal aliens to enter the country unlawfully because of news of amnesty, inducing illegal aliens in the country to alter their circumstances in reliance on the amnesty programs, and creating new relationships and circumstances difficult to unravel if the amnesty programs are found to be unlawful, as it will result in the release of more criminal aliens onto the streets of Maricopa County and the United States as a whole; (2) Enter a preliminary injunction to halt implementation until the Court can hear all parties and enter a decision on a preliminary injunction; and (3) Enter a permanent injunction declaring the amnesty

[4] "Delegation and Discretion: Structuring Environmental Law to Protect the Environment," Michael N. Schmidt, *J. LAND USE & ENVTL. L. , 111, 112*

programs to be unlawful, as well award such other forms of equitable relief as may be appropriate, and such other relief the Court may deem just and proper.

This prayer for relief does not request legal authority for Plaintiff Arpaio to enforce the immigration laws of the United States, as current legal precedent has found that he and other similarly situated state law enforcement and other officials have no authority to do so.

Dated: November 20, 2014

Respectfully submitted,

/s/ Larry Klayman

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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.

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

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.

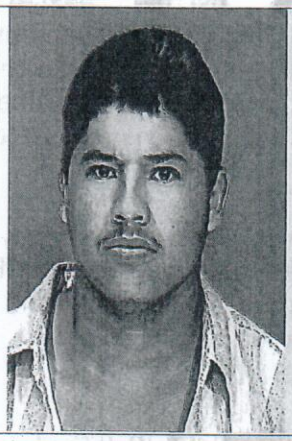
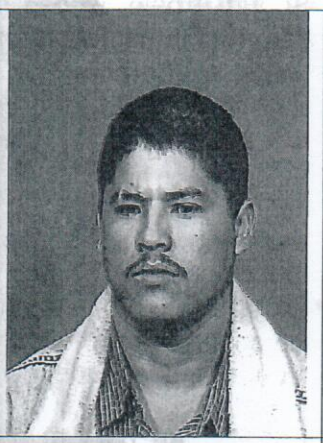
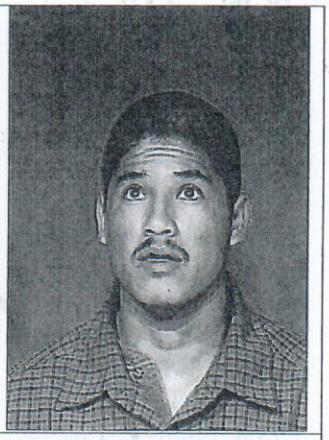
Marquez/Bracamonte was arrested yet again on May 4, 2001 for the sale of narcotic drugs and possession of marijuana for sale. He was released to ICE 3 days later.

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			
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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

550 West Jackson Street
Phoenix, AZ 85003

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

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.

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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
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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.

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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

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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.

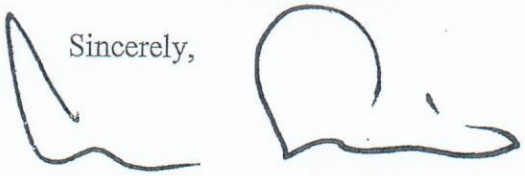
I am prepared to put the considerable resources of my organization to use in helping ICE identify, track and re-arrest those criminals released in our county. After serving as the regional director for the US Drug Enforcement Administration (DEA) in Mexico, Central and South America, as well as in Texas 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

Exhibit 3

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

June 30th, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20258
Fax (202) 282 8408

Dear Secretary Johnson,

I am aware through various published reports that you visited Arizona last week in response to the crisis over the thousands of children pouring over the U.S-Mexico border. Unfortunately, you did not take the opportunity to meet with me while you were visiting the southernmost area of the state for, as my previous letters to you have indicated, there is another calamity unfolding as a result of the federal government's unwillingness to secure the homeland.

As my preceding correspondence suggests, Immigration and Customs Enforcement (ICE) continues to release illegal immigrants who have been arrested by local law enforcement in Maricopa County, returning them to the streets of this community. Many of these illegal aliens, if not most, have been previously arrested on a broad range of serious criminal charges. In fact, this month saw that of 375 detainers placed on criminally charged illegal aliens, 141 had prior bookings with detainers. That means that the total for the past six months equals 2,775 ICE detainers placed on incoming criminal offenders, and of those, a stunning 1,010 were repeat offenders.

We know this because by my order, the Maricopa County Sheriff's Office has been compiling and analyzing the data on a continual basis. We have also sent the uncovered information to Homeland Security asking the department to review the facts and alter its strategy which, by the way, violates its own policies.

Of course, despite our monthly requests, complete with our data, for an investigation, we have received nothing other than one letter that could generously be described as perhaps a half-step above a form letter from – frankly – a relatively low-level official assuring us, in typical bureaucratic language, that ICE is "committed to sensible, effective immigration enforcement that focuses on public safety, national security threats, and individuals apprehended at the border while attempting to unlawfully enter the United States."

As actions still speak louder than words, this assertion is simply nonsensical, given ICE's flouting of its own stated priorities and responsibilities.

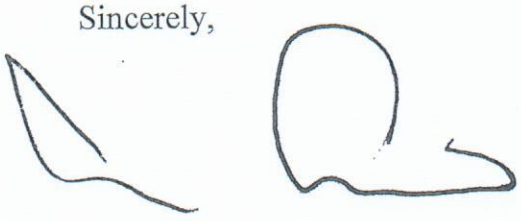
Regardless, we will continue to press ICE to investigate and conform to not only its policies, but to what is right and necessary for the people of Maricopa County who are placed in danger, every day, by the U.S. government's casual disregard for their safety. In addition, the Maricopa County Sheriff's Office is the fourth largest Office and jail system in the nation. Therefore, the actions by Homeland Security impact my Office on both ends: from the deputies who must confront these criminals without knowledge of their criminal history, to the Sheriff's detention officers who deal with them in this federally caused revolving door. Of course, the extra burden on my Office's resources cost considerable funds, an unfair penalty on taxpayers.

Given that our appeals for an inspection by Homeland Security have gone unheeded, I am now requesting a more direct approach, specifically, a meeting between you and me. I welcome the chance to explain to you the problem and to talk about solutions. Remember, that while you are still new on your job, I have extensive federal experience as the head of the U.S. Drug Enforcement Administration (DEA) in Mexico, Central and South America, and also in Texas and then in Arizona, with more than a dozen years on one side of the border or another. I have been Sheriff of Maricopa County, the fifth largest county in the nation (which incidentally extends to within 30 miles of the border) for 22 years. Between these experiences running sizeable operations for both local and federal government, you might find that I have something of value to impart to you as you become familiar with your new position.

Thus, in order to best serve the public interest, not to mention to improve local/federal cooperation, it is important for us to meet.

I await your response.

Sincerely,



Joseph M. Arpaio
Sheriff

MARICOPA COUNTY SHERIFF'S OFFICE

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

Facsimile Transmittal Cover Sheet

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

Facsimile Telephone: **(202) 282-8408**

From: **Desk of Sheriff Arpaio**

MCSO File Number: **none**

Left with Fax Operator

Date: **05/30/14** Time: **05:00 PM**

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If there was a problem with this transmission, please call: Amy Lake (602) 876-1829.

5000-458 R9-93 (MW97 v1.0 07/15/97)

Office of the Director
U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

MAY 0 2 2014

U.S. Immigration and Customs Enforcement

5-9-14

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

Dear Sheriff Arpaio:

Thank you for your April 1, 2014 letter to Secretary Johnson regarding individuals arrested by local law enforcement in Maricopa County and then subsequently transferred to U.S. Immigration and Customs Enforcement (ICE) custody. Your letter was referred to ICE for response.

While we continue to work with Congress to enact common sense immigration reform, ICE remains committed to sensible, effective immigration enforcement that focuses on public safety, national security threats, and individuals apprehended at the border while attempting to unlawfully enter the United States. Over the past several years, ICE has focused and prioritized its immigration enforcement efforts. In particular, ICE implemented civil enforcement priorities, refined the use of prosecutorial discretion, and implemented a sustained focus on the identification and removal of convicted criminals and other priority removable individuals.

ICE exercises discretion on a case-by-case basis to focus its resources on the agency's enforcement priorities. Such decisions are based on individualized assessments of the facts, including any criminal history, length of presence in the United States, ties to the community, and other relevant factors. ICE reviews every case to ensure that dangerous criminals and national security threats are detained and removed from the United States, with a particular emphasis on violent criminals, felons, and repeat offenders. ICE's partnerships with local law enforcement are a crucial part of advancing our agency's public safety mission, and we look forward to collaborative partnership with local law enforcement throughout the United States.

Again, thank you for your letter. Should you have any further questions or concerns, please do not hesitate to contact my office at (202) 732-3000.

Sincerely,

Thomas S. Winkowski
Principal Deputy Assistant Secretary

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: March 20, 2014 **CONTACT:** Joaquin Enriquez (480)318-4846

Arrest Data Suggests Disturbing Recidivism Rate Amongst Illegal Immigrants

Sheriff on Deportations: Are Feds Dishonest, Incompetent or Both?

(Phoenix, AZ) Maricopa County Sheriff Joe Arpaio says a review of arrest data by his Office revealed that one in three illegal aliens booked into jail over a recent three-month period were previously arrested by local law enforcement on various criminal charges, despite being turned over to the federal government for deportation proceedings.

This alarming rate of recidivism by illegal immigrants leads to an undeniable deduction: The federal policy of stopping illegal immigration through arrest and deportation is failing through an apparent combination of incompetence and intention.

"One of two things is happening," said Sheriff Arpaio, "either the federal government is quietly ushering illegal aliens out its back doors and back onto our streets, or our border is still so wide open that deportees continue to re-enter the country illegally with remarkable ease."

This situation leads to an unavoidable conclusion, Arpaio reasons, and one with far-ranging political consequences for law enforcement in general and for the entire nation as a whole.

Arpaio contends that the federal government authorities stopped the Sheriff from enforcing immigration laws in order to allow them to take over the task of immigration enforcement in Arizona.

Furthermore, as the data suggests, the federal government assumed the responsibility of controlling the arrest and disposition of illegal immigrants to ensure that no enforcement of the law would actually occur.

The government's intent, Arpaio says, was to quietly achieve its broader agenda: to stop Arpaio's enforcement of immigration laws and loudly discourage all other law enforcement agencies from doing the same.

Their refusal to do the job of enforcing immigration laws translates to a high level of frustration by local law enforcement which faces a large revolving population of criminal illegal aliens who appear to be violating laws with minimal fear of deportation or being held accountable for their crimes.

In fact recent congressional testimony points to a further shell game by the Obama administration which loudly claims record numbers of deportations. Congress heard just this week that the administration has been employing a misleading methodology to inflate deportation numbers.

This serious and disturbing state of affairs, says Sheriff Arpaio, has remained unaddressed by the federal government since the Maricopa County Sheriff's Office began enforcing immigration laws over eight years ago.

A three-month snapshot of jail records indicated that 31% of illegal alien criminal offenders booked into the Maricopa County Jail system were returning to jail shortly after being turned over to the federal government with immigration holds.

Of the 1348 illegal immigrants held by MCSO at the request of Immigration Customs and Enforcement in the examined three-month period, 419 (31%) were previously arrested despite being turned over to ICE for deportation proceedings. Many of the reoffending 31% had *several* previous bookings into the county jail – some more than twenty times. The recidivism data has Sheriff's officials concerned that local tax dollars are wasted by placing immigration holds and turning illegal alien offenders over to the federal government only to find that they are coming back as often as they are.

A cursory look at the records of some of those arrested again is revealing, both in regard to the quantity of arrests and the nature of those arrests.

Many illegals had 5 or 6 arrests, while others had far more. One man had 9 prior arrests; another numbered 15; and still another totaled an astonishing 19 previous arrests and bookings. Many of the cases examined had been charged with 'level one' crimes – the criteria by which the federal government says would mandate their deportation.

Then there are the actual charges, which span a wide range of major crimes, from kidnapping to sexual abuse to organized retail theft to molestation of minors to forgery to aggravated assault to DUI to weapon possession to resisting arrest to the

entire scope of drug-related offenses, from possession to sale to conspiracy, on and on.

These are not minor crimes, but dangerous and destructive to individuals and society. And the issue does not end there, as Sheriff Arpaio pointed out. Compounding the problem is the significant impact that the recidivism data has on taxpayers.

"Clearly, local tax dollars are being wasted," declared the Sheriff. "Law enforcement across the county arrests these offenders, officers place immigration holds to keep the offenders in jail, and then they are turned over to the federal government that brags about 'record deportations.' Yet our statistics paint a very different picture. These 'deportations' are either not happening or are exceptionally ineffective and that means Washington is failing the American people and hiding the truth."

Arpaio said Maricopa County taxpayers need to demand answers from responsible federal authorities.

"Every time we place a hold on criminal aliens at the request of Immigration and Customs Enforcement," said the Sheriff, "it translates into money and manpower. Why are we wasting our valuable resources in the jails and on the streets if there is no intention on the federal government's part to either deport these people or to increase security on the border?

"Let me make this clear," said Arpaio, "this might be politics for the President but for law enforcement this is a practical issue, because law enforcement cannot protect the community if critical facts are being withheld by the federal government. We want ICE to open its records and tell us who they are releasing onto our streets and why. Going forward, we need to establish rational reporting procedures. On our behalf, we are going to publish statistics showing how many illegal aliens are arrested and then released every month until this situation is resolved."

Arpaio concluded, "American citizens who commit crimes also re-offend at an alarming rate, so this problem is not unique to illegal aliens. However, the difference is while we can't absolutely stop US citizens from re-offending, we can with illegal aliens. Simply stated: they cannot commit crimes if they are no longer in the country. The solution is that simple."

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: April 1, 2014

CONTACT: Sheriff Joe Arpaio

SHERIFF JOE ARPAIO CALLS ON DHS SECRETARY TO INVESTIGATE WHY HIS DEPARTMENT VIOLATES OWN DEPORTATION POLICIES

THE SHERIFF DEMANDS EXPLANATION

(Phoenix, AZ) Sheriff Joe Arpaio today sent US Secretary of Homeland Security Jeh Johnson a letter demanding an explanation as to why Immigration and Customs Enforcement (ICE) is violating its own policies in releasing illegal immigrants booked into Maricopa County jails by local enforcement on a variety of criminal charges instead of processing them for deportation.

Accompanying the letter is a list of 419 criminally charged individuals, along with those charges, to assist in his investigation.

As previously noted by the Maricopa County Sheriff's Office, a review over a recent three-month period that one out of three illegal immigrants arrested by local law enforcement in Maricopa County and booked into jail had previously been arrested on a a wide range of serious criminal charges – most multiple times, many more than a dozen times - despite being turned over to ICE. The aforementioned 419 individuals constitute 31% of a total of 1,348 illegal aliens arrested and booked during the three-month period examined.

"ICE might want to ignore this situation, or dismiss it as unimportant," asserted Sheriff Arpaio, "but it is not unimportant to my deputies and other law enforcement officers who put their lives in danger confronting these criminals on the streets every day. Nor is it unimportant to the citizens of Maricopa County, who, with hundreds of people whose actions necessitate their incarceration or deportation but are instead walking our streets essentially free and clear, pay first in diminished public safety, and then financially, as this revolving door wastes taxpayer money. "

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

Furthermore, stated the Sheriff, "these 419 people are not only charged with breaking the law but have reached ICE's own criteria for deportation as Level 1 and 2 violators."

Arpaio pledged to evaluate and release to the public the numbers of those illegal immigrants arrested and turned over to ICE every month until this matter is resolved.

"This entire issue puts a spotlight on the federal government's hiding its true intentions on immigration," stated the Sheriff. "And I will continue to press for answers until the people of Maricopa County can be satisfied that the Obama Administration is acting in their best interests, and not using immigration for cheap political gains."

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

550 West Jackson Street
Phoenix, AZ 85003

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

April 1, 2014

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

Dear Secretary Johnson:

As someone who spent years 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 am well aware of the difficulties in securing the border and contending with the complex issue of illegal immigration. Nonetheless, I am distressed to find that these difficulties and complexities are not being addressed in a manner that the law demands, but rather that the will of the both the people and the intent of the law is being circumvented by Immigration and Customs Enforcement (ICE), an agency under your command.

A review by my office over a recent three-month period revealed that one out of three illegal immigrants arrested by local law enforcement in Maricopa County and booked into my jails had previously been arrested on a wide range of serious criminal charges, despite being turned over to ICE. Four hundred nineteen out of 1,348 illegal aliens, fully 31%, who had been arrested and charged often multiple times – many more than a dozen times – in our county, who should have been deported as a minimal, automatic response to their arrests. This recidivism rate means one of two things: either ICE is choosing not to detain, let alone deport, these prisoners, and instead quietly releasing them back onto our streets, or the federal effort to control the border is a spectacular failure, with many of these illegal immigrants crossing and recrossing the border at will.

This flagrant disregard of the law, or incompetence in enforcing it, endangers both my deputies, other police officers, and the entire community when ICE releases dangerous individuals, a problem compounded when ICE doesn't bother to alert law enforcement beforehand. In addition, this is costing the taxpayers a fortune to pay for this charade of arresting, releasing, re-arresting, so on, causing law enforcement to spend its officers' time on this pointless carousel instead of stopping and investigating other crimes.

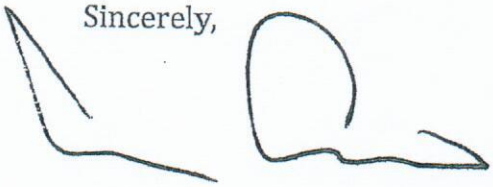
The federal government, and presumably your department, must address and fix these issues. A real policy must be put into place concerning illegal immigration, a policy that is aboveboard, consistent, and in compliance with the law. As a start, I request that you investigate and provide information that explains how and why ICE has acted as it has, and what it intends to do moving forward.

I am enclosing the names of those 419 illegal immigrants booked into our county jail, who had previously been criminally charged, and who have met ICE's own criteria for deportation as Level 1 and 2 offenders, only to appear in our custody again, for your investigation.

For my part, I will continue to evaluate the numbers of those arrested with illegal immigration charges placed on them, and see how many are neither deported nor detained, and simply let go back into Maricopa County without penalty. I will release these figures every month so we can all stay on top of this matter.

I look forward to hearing from you.

Sincerely,



Joseph M. Arpaio
Sheriff

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

MOTION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR ORAL ARGUMENT THEREON

I. INTRODUCTION

President Barack Obama announced on November 20, 2014, that he, on his own 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, Deferred Action for Childhood Arrivals (DACA) program. Under these two programs, some whom are eligible may not choose to apply and thus the programs collectively offer a form of amnesty to approximately 6 million illegal aliens.[1]

Simultaneously with making his November 20, 2014 announcement, and before and after, the President has offered to withdraw and cancel these programs if Congress passes the type of

[1] Defendants did not announce a name for the November 20, 2014, programs, but refer to them collective as "Executive Action." Plaintiff attempts to refer to them as "Executive Order Amnesty."

immigration legislation that he favors. Thus, the programs are not grounded in the specialized expertise of government agencies but in the political horse-trading of lobbying Congress.

The Executive Branch under the Administration of President Obama has changed the law of the United States with regard to immigration and the presence of aliens who are working in the country, by giving a speech followed by "guidance" Memoranda being issued by the Secretary of the Department of Homeland Security. It appears that no other department or agency has taken any action or issued any guidance on the subject, including the U.S. Department of Justice or U.S. Department of State; though they may in the future.

The parties are in agreement – or at least the Plaintiff and the Office of Legal Counsel at the U.S. Department of Justice agree – that Defendants' Executive Order Amnesty is unlawful and invalid unless it qualifies as valid prosecutorial discretion. Plaintiff argues it does not qualify and therefore it is legislation or regulation affecting broad categories of approximately 6 million illegal aliens. Defendants recite that they will consider applicants on a case-by-case basis. Plaintiff rejects this claim as phony and disingenuous because there is nothing remaining for a Departmental official to decide, and no standards or criteria to guide any further decision.

The Memoranda establish complex and detailed rules governing broad categories of persons and circumstances. The very nature of the programs is to create a standardized approach which produces exactly the same result in each and every case. There is only one possible outcome which is granted to all whom meet the general criteria. Replacing individual consideration with one sweeping, standardized result is Defendants' goal.

These abuses by the Executive Branch are not limited to the Administration of the current President. The current President justifies these programs largely on the claim that prior Presidents established a practice which the current Defendants now continue. Plaintiff contests

those practices regardless of which Presidential Administration originated them.

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." - Article I, Section 1, U.S. Constitution. "The executive Power shall be vested in a President of the United States of America." Article II, Section 1, U.S. Constitution.

As a result, legislation and national policy are enacted by Congress, not by the President. The President's executive responsibilities are to execute, that is implement, the laws enacted by Congress. In some limited cases, the Congress delegates quasi-legislative authority to the Executive Branch. However, the exercise of delegated authority requires compliance with a variety of restrictions and limitations.

II. REQUEST FOR ORAL ARGUMENT

Plaintiff, by counsel, respectfully requests oral argument upon the motion.

III. STATEMENT OF FACTS

A. Obama Administration's June 15, 2012, Deferred Action for Childhood Arrivals (DACA) Amnesty

By Memorandum dated June 15, 2012, Secretary of Homeland Security Janet Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,* a copy of which is attached as Exhibit A, addressed to U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). Key features include:

1. The core legal substance of the Memorandum is asserted to be *how* the Department of Homeland Security "should" "enforce" the Nation's immigration laws within the Department's prosecutorial discretion.
2. The Memorandum addresses enforcement against "certain" young people who

were brought to the country as children and "know only this country as home."

3. The Department admits by the Memorandum that the Nation's immigration laws must be enforced in a strong manner.

4. It asserts that "It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law."

5. The Deferred Action for Childhood Arrivals (DACA) program created by the Memorandum sets forth five (5) criteria on Page 1 plus one (1) further requirement for a background check on Page 2, which six (6) criteria define broad categories of persons estimated to total 1.5 million illegal aliens.

6. On Page 2, the Memorandum recites that "[R]equests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases."

7. The Memorandum asserts that the Nation's immigration laws are not designed to be blindly enforced without consideration given to the individual circumstances of each case.

Creating key disputes among the parties on the above, the Plaintiff contends that:

1. The reality is that the DACA Memorandum is regulatory rule-making, though in violation of the steps and requirements of the Administrative Procedures Act.
2. The Memorandum's recitation of case-by-case decisions is plainly a fiction.
3. There are no standards by which a subordinate Department official would ever deny a request for DACA relief, and no guiding principle to be followed by a line official of the Department applying the DACA program to any individual person.
4. Therefore, if it is true that a request for DACA relief will be decided on a case-by-

case basis, there is no standard or criteria to guide that exercise of a subordinate official's discretion other than his or her mere whim or personal opinion.

5. The Memorandum and Defendants' DACA program are self-contradictory and cynical. The DACA Memorandum simultaneously purports to set one consistent policy mandating a single approach to prosecutorial discretion throughout the Department. Yet Defendants pretend that decisions are made on a case-by-case basis. Is the prosecutorial discretion exercised by the Secretary or by the ICE or USCIS "line" official dealing with an individual case?
6. DACA is not a deferred action consistent with any past precedent but is a dramatic expansion of and departure from any past examples in both scale and type.
7. Plaintiff rejects the assumptions of the Memorandum that the Nation's immigration laws are "designed" to be modified by the Executive Branch according to the individual circumstances of each case. The Nation's immigration laws mean what they say. The DACA Memorandum assumes that it is the role of the Executive Branch to second-guess the wisdom of Congressional policy.

B. Obama Administration's November 20, 2014 Executive Action Amnesty

On November 20, 2014, President Obama announced significant further changes to the immigration laws, regulations, and practices by the Federal government implementing the nation's immigration laws and regulations. The President's new policies announced in an evening speech to the nation were implemented through a number of orders issued by the Secretary of the Department of Homeland Security issued at President Obama's directive.

A few hours before the President's evening speech, on November 20, 2014, the U.S. Department of Justice released publicly and posted on the Department's website for unrestricted

public viewing, a 33-page legal Memorandum titled *"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"* revealing the legal analysis and advice of the U.S. Department of Justice Office of Legal Counsel (OLC). The legal memorandum is dated November 19, 2014. A copy downloaded from the website is attached as Exhibit B.

The OLC legal memorandum was released by the Obama Administration for the purpose of adding to the public debate about the Defendants' executive action programs and convincing the public and officials of the legality of the program. In fact, the OLC legal memorandum attached as Exhibit B was made a part of the public record in a hearing in the Judiciary Committee of the U.S. House of Representatives on December 2, 2014, on "Executive Action on Immigration" by the Committee's Ranking Member Mr. John Conyers.

Page 3 presents a very useful summary of the overall processes and players involved.

C. MEMORANDUM: "Policies Supporting U.S. High-Skilled Businesses"

On November 20, 2014, Secretary Johnson issued a Memorandum Order titled *"Policies Supporting U.S. High-Skilled Businesses"* to USCIS and ICE, a copy of which downloaded from the Department's website is attached as Exhibit C. In this Memorandum, the Secretary admits that the changes directed require regulatory rule-making under the Administrative Procedures Act. For example, "Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers." Exhibit C at 2. And "More specifically, I direct that Immigration and Customs Enforcement (ICE) and USCIS develop regulations for notice and comment to expand the degree programs eligible for OPT and extend the time period and use of OPT for foreign STEM students and graduates, consistent with law." *Id. at* 3.

D. MEMORANDUM: "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"

In the main document at issue here, on November 20, 2014, Secretary Johnson issued a Memorandum Order titled *"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"* to the USCIS, ICE, Customs and Border Protection (CBP), and Acting Assistant Secretary for Policy Alan D. Bersin, a copy of which downloaded from the Department's website and is attached as Exhibit D. Key features include:

1. This Memorandum - *which is the primary document of the programs in dispute* - acknowledges that the intent and effect is to change current law, stating on Page 1:

   > This memorandum is intended to reflect new policies for the use of deferred action.

2. The Memorandum expands DACA by removing the previous age cap, adjusting the date of entry limit, and lengthening the renewal period to three years.

3. The Memorandum also extends DACA-like deferred action to new categories of persons who are illegal aliens (who arrived illegally or over-stayed as adults) but have a son or a daughter who is a U.S. citizen or lawful permanent resident and who also satisfy six (6) other criteria including passing a background check.

4. One of the factors is that the applicant must "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate."

5. The legal substance of the Memorandum is grounded on the assertion that:

   > Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law.

6. This key Memorandum further states:

> Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources-which must continue to be focused on those who represent threats to national security, public safety, and border security.

7. While defining and describing deferred action, the Memorandum admits that there is no lawful authority for the deferred action, but instead it is an "administrative mechanism" whose authority is that it has been engaged in (the Memorandum claims) by other Presidential Administrations in the past.

8. The Defendants admit by the Memorandum that

> As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion.

9. The Defendants admit by the Memorandum that

> Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.

10. In this key Memorandum, the Secretary of Homeland Security instructs that:

> By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

11. USCIS is to begin accepting applications within 180 days of the Memorandum.

12. A fee of $465 is required, which includes the application for work authorization.

Similar to the Plaintiff's dispute with the DACA Memorandum:

1. While one criteria is that an applicant "present no other factors that, in the exercise

of discretion, makes the grant of deferred action inappropriate" this does not provide any meaningful standard other than mere whim or personal preference of the line official. It is not credible that any applicant will ever actually be evaluated on a case-by-case basis or denied application. If a line official did actually deny deferred action status, there are no governing standards or criteria for the line official to follow.

2. Plaintiff contends that deferred action is an *ultra vires* violation of the limited authority delegated to the Executive Branch.

3. Plaintiff further contends that Defendants' programs exceed the boundaries of past uses of deferred action, and are a dramatic expansion of and departure from any past examples in both scale and type.

4. Moreover, the Obama Administration ignores the law's restrictions on the use of delegated authority within criteria established by Congress. The Administration believes that delegated authority is unlimited and is an invitation for the Executive Branch to question the wisdom of Congress' statutory enactments.

E. MEMORANDUM: "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"

In the second most important Memorandum Order for our purposes here, on November 20, 2014, Homeland Security Secretary Jeh Charles Johnson issued a Memorandum Order titled *"Expansion of the Provisional Waiver Program"* to USCIS, ICE and Customs and Border Protection, a copy of which downloaded from the Department's website is attached as Exhibit E. Key features include:

1. The Secretary admits that it is necessary for DHS to amend its 2013 regulation on

Page 2 – that is to engage in regulatory rule-making under the Administrative Procedures Act:

> Today, I direct DHS to amend its 2013 regulation to expand access to the provisional waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available.

2. The main issue is that relatives are ineligible (inadmissible) because they have violated immigration laws, which acts as a barrier to applying for lawful status. An "inadmissible" alien must return to their home country and wait 3 to 10 years.

3. The Memorandum expands the waiver of inadmissibility for family members of U.S. citizens and lawful permanent residents. In 2013, the DHS issued regulations through the rule-making process to relieve spouses and minor children of the requirement to return to their home country and apply there, as a result of being inadmissible to apply for immigration status. The Memorandum expands the waiver of inadmissibility to more categories of family members.

4. However, the Secretary of Homeland Security admits that the change requires regulatory rule-making under the Administrative Procedures Act to achieve, because they are legislative.

F. <u>MEMORANDUM: "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants."</u>

In a less important (for the purposes of this instant case), yet generally instructive, Memorandum, on November 20, 2014, Homeland Security Secretary Jeh Charles Johnson issued a Memorandum Order titled *"Policies for the Apprehension, Detention and Removal of Undocumented Immigrants"* to USCIS, ICE and Customs and Border Protection, a copy of which was downloaded from the Department's website and is attached as Exhibit F.

This Memorandum sets forth extensive details and discussion about the prioritization of

the Executive Branch's actions with regard to different categories of persons unlawfully present within the United States. The Memorandum extensively discusses the Executive Branch's view of its powers under prosecutorial discretion. The Memorandum is informative as to the overly-expansive concepts of prosecutorial discretion that the Defendants apply throughout this topic.

However, this Memorandum concerns internal prioritization of the Department's work, and does not grant affirmative benefits such as amnesty to certain illegal aliens, which is the essence of the current dispute. Plaintiff disagrees with much of the concepts asserted and the practices adopted by the Memorandum. Nevertheless, the Memorandum, does not directly award benefits to illegal aliens. Still, the Plaintiff's presentation would be incomplete and unfair to the Court if only some of the November 20, 2014 Memoranda were presented.

III. ARGUMENT

A. GOVERNING LAW / STANDARD OF REVIEW

To obtain injunctive relief, Plaintiff need only demonstrate (1) a substantial likelihood of success on the merits; (2) that they are likely to suffer "irreparable injury" if preliminary relief is not granted; (3) that an order would not substantially injure other interested parties; and (4) that the public interest would be furthered by granting the order. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, 35 (2d Cir. 2010). These four factors must be viewed as a continuum where greater strength in one factor compensates for less in the other: "If the arguments for one factor are particularly strong, in injunction may issue even if the arguments in other areas are rather weak." *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 739, 747 (D.C. Cir. 1995).

B. NO SUBSTANTIAL INJURY TO DEFENDANTS FROM ISSUANCE OF A PRELIMINARY INJUNCTION AND STATUS QUO OF CURRENT LAW

As a matter of law, Defendants cannot be said to be "burdened" by a requirement to continue to comply with existing law as enacted by Congress. The Defendants have announced that their program is explicitly intended to depart from governing law. However, the status quo is both a set of circumstances that have existed for many years and also the law of the land pursuant to existing statutory law enacted by Congress. There can be no burden recognized by the law from continuing to obey and apply the law as it currently exists. There can be no burden recognized by the law that political leaders desire to adopt new and different policies.

Furthermore, the main asserted purpose of the programs is a fiction, since the Executive Branch is not deporting illegal aliens in any significant numbers, even those convicted of non-immigration related crimes within the United States. The Defendants' programs purpose is to give illegal aliens a certificate that they will not be deported. Either way, with or without a certificate, those illegal aliens are very unlikely to be deported.

President Obama and others recite that the immigration system of the United States is broken. Of course, it is unmistakable that the only thing that is broken about the nation's immigration laws is that the Defendants are determined to break those laws themselves and also reward those nationals of foreign countries who break U.S. law. The Defendants both conspicuously fail to identify any other way in which the immigration laws are broken but also announce unambiguously their desire to reject the immigration laws of the U.S.

In contrast to the substantial irreparable harm facing Plaintiff and the nation, there can be no credible claim of harm to Defendants. The status quo is the existing law of the United States of America as enacted by the Congress and signed into law by various past Presidents. There is no harm to waiting until legal challenges are resolved.

C. THE BALANCE OF HARM AS WELL AS THE PUBLIC INTEREST SUPPORTS THE IMPLEMENTATION OF A PRELIMINARY INJUNCTION

An injunction is warranted because "there is an overriding public interest… in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. V. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). The public has a substantial interest in Defendants following the law. *See, e.g., In re Medicare Reimbursement Litigation*, 414 F.3d 7, 12 (D.C. Cir. 2005) (Additional administrative burden "[would] not outweigh the public's substantial interest in the Secretary's following the law.")

Given Defendants' fundamental refusal to comply with the law, the public interest will be served if this court preliminarily enjoins Defendants from implementing their illegal and unconstitutional actions. In light of the fact that Defendants' programs will dramatically change the status quo, a preliminary injunction to allow for the evaluation of such questions clearly serves the public interest. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 130 (D.D.C. 2012) (holding that "there is undoubtedly . . . a public interest in ensuring that the rights secured under the First Amendment . . . are protected"); *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (holding that "issuance of a preliminary injunction would serve the public's interest in maintaining a system of laws" free of constitutional violations). *See also Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002) (holding that the public interest is served by a court order that avoids "serious constitutional risks"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (noting "the general public interest served by agencies' compliance with the law"); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.,* 950 F. Supp. 357, 363 (D.D.C. 1996) (public interest served by enforcing constitutional requirements).

D. PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF PRELIMINARY RELIEF IS WITHHELD

Allowing the Executive Branch to immediately implement the President's DACA and Executive Amnesty programs will cause irreparable harm, including to those illegal aliens the programs seek to enroll, if the Federal courts later determine the programs to be unlawful.

Sheriff Joe Arpaio's office and deputies, as illustrated in the Exhibits attached to the Complaint, will suffer the loss of resources and funding diverted to handle the flood of increased illegal immigration, the danger to deputies enforcing the law, and an increase in crime in his County. As set forth in his Declaration, attached as Exhibit G, real-world experience has demonstrated this. Those who cross the border without resources, without a job, without a bank account, and without a home in the U.S., who are willing to break the law to achieve their purposes, and who are released from any social stigma in their home communities where they are known are correlated with an increase in crime in Maricopa County, Arizona. This includes when they cross through Arizona.

Citizens of other countries who are present in the United States unlawfully will be asked to pay fees of at least $465 each to the Department of Homeland Security and to change their circumstances in many ways in reliance upon the Defendants' executive action programs. To unravel the changed circumstances later would be an inexcusable unfairness to all concerned, including illegal aliens acting in reliance on and trusting in the Defendants' programs. Fees of $465 and up would have to be refunded to millions of individuals. The work and expenses incurred by the Executive Branch would be wasted by the Federal government on a mass scale.

Courts have consistently held that a colorable constitutional violation gives rise to a showing of irreparable harm. *See Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (a constitutional violation and loss of constitutional protections "'for even minimal periods

of time, unquestionably constitutes irreparable injury'") (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)); *see also Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 53 (D.D.C. 2002) (deprivation of constitutional protection "is an undeniably substantial and irreparable harm").

Furthermore, news of the Defendants' programs will serve as an invitation for millions of more trespassers to enter the country. Postponing the start of the Defendants' executive action programs may not entirely cancel that message, but it will reduce the encouragement for others to enter the country without first testing the legality of these programs.

As a result, Plaintiffs will suffer irreparable harm absent a preliminary injunction. Furthermore, without a preliminary injunction, Defendants would inherently have a significantly greater and substantially unfair advantage in this lawsuit, especially during the pendency of this action, thus depriving Plaintiffs of their right to a fair trial. The difficulty or near impossibility of unraveling the programs once started would mean that the Defendants have prevailed regardless of the decision of the Courts. In light of the above, Defendants should be enjoined until such time as the court can address the constitutional and legal issues raised.

E. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

There is a significant likelihood that the Plaintiff will succeed on the merits, at the very least on the grounds that the Defendants are clearly engaged in regulatory rule-making while flouting and ignoring the requirements of the Administrative Procedures Act. The following considerations are offered in support of the Plaintiff's allegations and causes of action:

1. Plaintiff Should be Granted Relief Prayed for in the Complaint

a) Plaintiff is entitled to declaratory relief under his First Cause of Action. The Defendants' 2012 DACA and 2014 Executive Action amnesty programs – including in their sheer scope and fundamentally different nature – usurp the role of Congress

within the architecture and basic design of the U.S. Constitution. *See infra*.

b) Under his Second Cause of Action, Plaintiff is entitled to relief from illegal, unconstitutional, and invalid agency action pursuant to 5 U.S.C. §§ 702 through 706 because the Executive Branch under the Defendants' authority and direction is issuing new regulations within the same scope as existing regulations without going through the detailed rule-making process of the Administrative Procedures Act.

c) Under his Third Cause of Action, Plaintiff is entitled to relief from illegal, unconstitutional, and invalid agency action pursuant to 5 U.S.C. §§ 702 through 706 because the Executive Branch under the Defendants' authority and direction is creating new regulations and/or interpretations and practices in conflict with existing laws and regulations. Plaintiff challenges Executive Branch departure from existing laws and regulations including those practices that begun under prior Presidential administrations. Even where today the Defendants engage in plausible interpretations and applications of the regulations and INA, that treatment is necessarily arbitrary, capricious, arbitrary, an abuse of discretion, unreasonable, and otherwise not in accordance with law because the Executive Branch in years past using its specialized expertise adopted different plausible interpretations and applications of the regulations and INA. Those inconsistent interpretations and applications cannot both be grounded in the agency's specialized expertise or in the facts and circumstances.

d) Under his Fourth Cause of Action, Plaintiff is entitled to declaratory judgment that there is no rational relationship between the stated goals of prioritizing the use of enforcement resources and granting benefits to illegal aliens so as to create a massive magnet attracting more illegal aliens to flood across our Nation's borders. Plaintiff

recognizes that it is very difficult for a government action to fail the legal test of rationality. And yet here the Executive Branch has created a magnet for further illegal immigration that is absolutely in contradiction to their stated goals of prioritizing the use of limited prosecutorial resources. Choosing to not deport all classes of persons unlawfully present with equal priority does not require granting some of them benefits and the right to work in the United States. Part of the difficulty is the Defendants' determination to grant law-breakers a certificate (loosely speaking) that they will not be prosecuted. If a police department chooses to focus on the most dangerous criminals, others do not receive a certificate authorizing them to continue breaking lesser laws. But here, the Defendants want to give a sort of certificate authorizing persons to continue breaking the law as long as they do not meet the highest priority for removal (deportation). *If the Defendants merely focused their efforts where most appropriate, but did not seek to affirmatively grant benefits to other illegal aliens*, there would be no magnet created for additional illegal immigration. The problem of limited resources will grow dramatically worse.

e) Plaintiff is entitled to declaratory relief under his Fifth Cause of Action that the Defendants' programs are not acts of prosecutorial discretion. As a result, Defendants are engaged in legislation and/or regulatory rule-making. This decision leads to the fact that the Defendants' actions are *ultra vires* and illegal.

f) Plaintiff is entitled to declaratory relief under his Sixth Cause of Action. The Defendants' 2012 DACA and 2014 Executive Action amnesty programs are invalid abuses of delegated authority. They violate the non-delegation doctrine (limitations upon when delegated authority is valid) recognized in this Circuit under *American*

Trucking Ass'ns, Inc. v. U.S. 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).

2. Defendants' Actions Modify Existing Regulations and are Legislating

President Obama's DACA and Executive Action Amnesty each modify existing regulations governing within the same scope of persons and circumstances. The fact that Defendants' actions operate within areas already subject to previously-promulgated regulations, underscores that Defendants are legislating and/or rule-making (issuing new regulations) by changing the treatment of these topics within existing regulations.

On Page 2, the OLC Memorandum states that "DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization." *(Emphasis added).*

Therefore, the Executive Branch admits that Congress has already extensively regulated and occupied the field with regard to immigration and naturalization.

Furthermore, the Executive Branch has officially promulgated extensive regulation pursuant to the Administrative Procedures Act, codified and published at Title 8 of the Code of Federal Regulations. These regulations cover every aspect of the enforcement of immigration enforcement. The Defendants do not claim now to be addressing any gaps in regulation. They admit that these matters are already regulated. But Defendants claim a lack of resources requires

them not to fully enforce the law as written.

3. <u>Defendants are Legislating in Conflict with Constitutional Requirements</u>

The U.S. Supreme Court has explained concerning the immigration laws:

> In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that ***<u>the formulation of these policies is entrusted exclusively to Congress</u>*** has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.

(Emphasis added). *Galvan v. Press*, 347 U.S. 522, 531 (1954) (internal citations omitted, citing *Kaoru Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950).

The U.S. Supreme Court has further explained about the relationship in another case of Executive Branch over-reach in the context of regulating carbon dioxide:

> Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers.

and:

> 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. But it does not include a power to revise clear statutory terms that turn out not to work in practice.

Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2446 (2014); *see also, Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 462 (2002) (Commissioner of Social Security did not have the authority "to develop new guidelines or to assign liability in a manner inconsistent with the statute.").

In *Utility Air Regulatory Group*, The U.S. Supreme Court struck down new EPA regulations regulating certain sources of emissions (primarily relating to greenhouse gases in that case) differently than how those same emission sources had been regulated in the past. The Supreme Court added that under "our system of government, Congress makes laws," while the

President executes them.

The U.S. Supreme Court undertook a fundamental analysis of the Constitutional architecture of the U.S. Constitution in *NRLB v. Noel Canning*, 134 S. Ct. 2550 (2014) (recess appointments invalid, reasoning from structure of the Constitution) and *INS v. Chadha*, 462 U.S. 919 (1983). The U.S. Supreme Court found in *Chadha* that a departure from the normal legislative process violated the U.S. Constitution because it offended the Constitutional architecture and structure of Congressional enactment and presentment to the President. *See also Kendall v. United States*, 37 U.S. 524 (1838).

Here, the roles are reversed between the Executive Branch and Legislative Branch from *Chadha*, but the Defendants openly admit that their efforts are to subvert the legislative process and the role of Congress, although effectively in a mirror image of *Chadha*. In *Chadha*, Congress sought to encroach on the executive role of the Executive Branch. Here, the Executive Branch seeks to legislate where Congress has chosen not to legislate.

Similarly, the U.S. Supreme Court held in *Train v. City of New York*, 420 U.S. 35 (1975) that "[t]he president cannot frustrate the will of Congress by killing a program through impoundment." That is, the President does not have authority by executive action to not enforce the laws enacted by Congress. In *Train*, the issue concerned the expenditure of funds in appropriated accounts; the motivation was the President disagreeing on policy grounds with Congress.

Similarly, the U.S. Supreme Court held in *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the President does not have inherent authority as executive action to take action outside of the laws enacted by Congress, where Congress refuses to act.

"Of course, an agency is not free simply to disregard statutory responsibilities: Congress

may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes. . . " *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). *See also* 18 Comp. Gen. 285, 292 (1938) ("[T]he question with the accounting officers is not the apparent general merit of a proposed expenditure, but whether the Congress, controlling the purse, has by law authorized the expenditure").

Plaintiff maintains that the rationale of these cases mandates that the President must go through the proper legislative process through Congress and "presentment" of a statute to the President for veto or signature and that the role of the President is to take care that the laws be faithfully executed, and not for the President to legislate on his own authority. President Obama's programs are a breath-taking case of chutzpah of first impression beyond what past Presidents would have ever attempted. Yet the rationale of those past cases clearly applies here.

An Executive Branch agency's duty is to comply with the law and the courts' duty is to make sure it does so. "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

> A President sometimes has policy reasons (as distinct from constitutional reasons, cf. infra note 3) for wanting to spend less than the full amount appropriated by Congress for a particular project or program. But in those circumstances, even the President does not have unilateral authority to refuse to spend the funds. Instead, the President must propose the rescission of funds, and Congress then may decide whether to approve a rescission bill. See2 U.S.C. § 683; see also *Train v. City of New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969), reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 279, 282 (1971) ("With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.").

In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013)

4. No Legal Authority to Grant Legal Status to Illegal Aliens

"The Congress shall have Power . . . To establish an uniform Rule of Naturalization," Article I, Section 8, of the U.S. Constitution.

There is nothing in the U.S. Constitution which offers any shared authority or role with the Executive Branch with regard to immigration, admission of aliens to the country, or naturalization or citizenship other than the President's duty that he "shall take Care that the Laws be faithfully executed. . . ." Article II, Section 3, of the U.S. Constitution.

Congress must provide some legal category under which an alien may be lawfully present within the United States of America or admitted into the country. The authority to waive inadmissibility does not qualify a national of another country for lawful presence, lawful admission, or benefits. Waiving inadmissibility merely allows an alien to apply for a lawful status – assuming he qualifies for it.

Inadmissibility means that even if they otherwise qualify for a category of lawful presence, a legal barrier has been created. A few simple examples include:

> 8 U.S. Code § 1182 - Inadmissible aliens
> (a)(9) Aliens previously removed
> (A) Certain aliens previously removed
> (i) Arriving aliens
> Any alien who has been ordered removed under section 1225 (b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

and:

> 8 U.S. Code § 1182 - Inadmissible aliens
> (a)(6) Illegal entrants and immigration violators
> * * *

> (C) Misrepresentation
> (i) In general
> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

If the Defendants were merely issuing internal guidance as to which illegal aliens to deport first, there would be no objection. Instead, it is the affirmative grant of benefits that is the objectionable aspect of the Defendants' actions. Defendants are granting amnesty and immunity from prosecution (deportation), authority, and written authorization to continue to break the law, Employment Authorization Cards for the right to work, the opportunity to use work authorization cards to get a State driver's license, the opportunity to use that driver's license to register to vote unlawfully, and the right to receive various other benefits including public assistance.

As a result, the Defendants' programs are legislation, conferring new benefits to broad categories of persons based upon standardized criteria defining broad classes of beneficiaries.

5. <u>Unless Subordinate Officials Can Say "No," No Case-by-Case Review Exists</u>

This Court is empowered to review the Defendants' claim to prosecutorial discretion in the civil enforcement of Congressional enactments. *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) *(en banc)*.

In issuing a (modified) injunction, this Circuit rejected claims that agency discretion not to fully enforce laws (in a civil context) was unreviewable by this Circuit:

> Appellants insist that the enforcement of Title VI is committed to agency discretion, and that review of such action is therefore not within the jurisdiction of the courts. But the agency discretion exception to the general rule that agency action is reviewable under the Administrative Procedure Act, 5 U.S.C. Secs. 701-02, is a narrow one, and is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S.Rep.No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). The terms

> of Title VI are not so broad as to preclude judicial review. A substantial and authoritative body of case law provides the criteria by which noncompliance can be determined, and the statute indicates with precision the measures available to enforce the Act.

Id. This Circuit distinguished discretion by the Attorney General or by U.S. Attorneys (prosecutors) presumably in a criminal context from enforcement by civil Departments:

> Appellants rely almost entirely on cases in which courts have declined to disturb the exercise of prosecutorial discretion by the Attorney General or by United States Attorneys. *Georgia v. Mitchell*, 146 U.S.App.D.C. 270, 450 F.2d 1317 (1971); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Powell v. Katzenbach*, 123 U.S.App.D.C. 250, 359 F.2d 234 (1965); *Moses v. Katzenbach*, 342 F.2d 931 (D.C.Cir.1965). Those cases do not support a claim to absolute discretion and are, in any event, distinguishable from the case at bar. Title VI not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures. The absence of similar specific legislation requiring particular action by the Attorney General was one factor upon which this court relied in *Powell v. Katzenbach*, 123 U.S.App.D.C. 250, 359 F.2d 234, 235 (1965), to uphold the exercise of discretion in that case.

Id. Moreover, this Circuit recognized that widespread *scope* of non-enforcement can be fundamentally different than small-scale exceptions, as (1) adopting a conscious policy in conflict with the Congressional enactment, and (2) an abdication of statutory duty, from case-by-case prosecutorial discretion. As here, the widespread refusal to enforce a law is a fundamentally different thing altogether from prosecutorial discretion:

> More significantly, this suit is not brought to challenge HEW's decisions with regard to a few school districts in the course of a generally effective enforcement program. To the contrary, appellants allege that HEW has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty. We are asked to interpret the statute and determine whether HEW has correctly construed its enforcement obligations.

Id. Moreover, this Circuit recognized the distinction between not enforcing violations as opposed to facilitating on-going violations of the law:

> It is one thing to say the Justice Department lacks the resources

> necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools. The anomaly of this latter assertion fully supports the conclusion that Congress's clear statement of an affirmative enforcement duty should not be discounted.

Id.

The OLC legal Memorandum (Exhibit B) strongly depends on the existence of a genuine, *bona fide*, case-by-case decision-making process to qualify as prosecutorial discretion.

As the Office of Legal Counsel has previously determined, the Executive Branch cannot refuse to enforce laws based on policy differences with Congress or policy "discretion" --

> "Finally, we emphasize that this conclusion *does not permit the President to determine as a matter of policy discretion which statutes to enforce*. The only conclusion here is that he may refuse to enforce a law which he believes is unconstitutional. Obviously, the argument that the President's obligation to defend the Constitution authorizes him to refuse to enforce an unconstitutional statute does not authorize the President to refuse to enforce a statute he opposes for policy reasons."

Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 1990 WL 488469, *11 (1990). *(Emphasis added)*.

Therefore, the claim that Department of Homeland Security "line" officials actually dealing with individual illegal aliens may simply disregard the laws passed by Congress on their own discretion requires something vastly higher than simply sprinkling throughout the Memoranda the phrase "case-by-case review" like garlic to repel judicial review. Thus the recitation claiming a case-by-case review is, as a legal term of art, a pretext.

Yet, here, Defendants' Memoranda issued to the DHS actually replace individual decision-making with mass standardization. Indeed, that is the point of the Defendants' programs: to assure 6 million illegal aliens that they will not be deported.

There is no possibility that any illegal alien will be denied the one and only deferred

action status offered on any individualized basis if the broad criteria of the regulatory scheme are satisfied. [2] The millions of persons who meet the regulatory criteria get only one possible result. Those who do not meet the regulatory criteria do not get that result, and receive no change from their current status. There is only one possible outcome for all those who qualify under the criteria, not a range of outcomes. There are no individually-tailored "plea deals."

The Defendants' Memoranda recite that there will be a case-by-case review, but do not provide any topic concerning what the case-by-case review might be *about*. There is no subject matter, no issues to be determined, no rationale for deferred action status to be granted to some and denied to others. Defendants have merely inserted empty buzz words into the Memoranda.

However, if there is a meaningful case-by-case review, then subordinate officials must be free to answer "no." Defendants claim that the reason for their programs is a lack of resources. Therefore, a case-by-case review would authorize subordinate Departmental officials to each make their own personal decisions as to whether they believe resources are adequate to deport any particular individual applicant or not. As a corollary, if the now Republican-controlled Congress increased funding for enforcement, including rapidly by a supplemental appropriation, Departmental officials would be obligated to deport everyone they can until funding is used up.

Contrast this with genuine prosecutorial discretion, where a prosecutor is evaluating whether or not he or she can prove the case against an accused in light of the quality, credibility, and availability of the witnesses and other evidence. *United States v. Armstrong*, 517 U.S. 456,

[2] The Chair of the Judiciary Committee of the U.S. House of Representatives reported in a hearing held on December 2, 2014, that the Department had told the Committee that if an applicant meets the published criteria, the applicant will always, without exception, receive the deferred action status. If that report is not accurate, the Defendants will hopefully clarify that question. *See* "Executive Action on Immigration," House Judiciary Committee, C-SPAN, December 2, 2014, http://www.c-span.org/video/?323021-1/house-judiciary-committee-hearing-executive-action-immigration

465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan") (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

Evaluating whether a case can be proven provides a meaningful set of standards for a prosecutor to follow, guided by her legal training, yet unique to each case. There is an actual reason for a case-by-case decision-making process when the chance of success is at issue.

Here, the topic being decided is that Defendants reject the wisdom and the policy of the laws Congress enacted. The Defendants having already decided on a national basis that they simply disagree with the policies of existing immigration law enacted by Congress, there is nothing further for any "line" (subordinate) Departmental official to decide case-by-case.

However, under the Defendants' programs, could a subordinate Departmental official decide that he or she actually likes the wisdom of current law and will choose to deny deferred action to applicants? We know the answer is no, because ten border patrol agents sued the Secretary to be allowed to do their jobs and enforce the laws in *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013). "Line" officials are not permitted to refuse amnesty.

6. <u>OLC Legal Memorandum Warns of Legal Limitations</u>

The OLC's legal Memorandum mostly assumes certain types of actions by the Defendants – which assumptions are not what the Defendants actually created – and then opines that the hypothesized actions would be legal.

On Page 4, the OLC Memorandum states that: "Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

579, 587–88 (1952). These limits, however, are not clearly defined."

Plaintiff asserts that President Obama and the other Defendants have fundamentally missed the message of *Youngstown Sheet & Tube Co., supra,* which held the contrary.

On Page 6, the OLC Memorandum states that:

> Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id*. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

On Page 7, the OLC Memorandum states that:

> Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law").

On Page 11, the OLC Memorandum states that: "And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any

circumstances." However, in fact, the Defendants' policy does grant approximately 6 million illegal aliens exemption from deportation. Indeed, that it is the purpose of the program, to give the promise and certainty to those illegal aliens that they will not be deported.

Concerning the Defendants June 15, 2012, DACA Program, on Page 18, the OLC Memorandum states in footnote 8 that:

> Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria.

On Page 24, the OLC Memorandum states that:

> Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77). Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it.

In general, the OLC Memorandum relies for the authority for deferred action on the fact that the Congress has not yet acted to stop the practice, despite being aware of deferred action.

7. Admissions By Party Opponent Obama – these Executive Actions are Illegal

Especially for the purposes of a preliminary injunction, the extensive admissions by the party-opponent Defendant Barack Obama (estimated to number at least 22 on separate occasions) that these actions violate Constitutional principles and legal requirements are strong grounds for issuing a preliminary injunction pending further proceedings in this Court:

As an admission against interest by a party-opponent, Defendant Barack Obama admits that he changed the law in this area. During a public, official speech[3] at Copernicus Community Center in Chicago, Illinois, as President, President Barack Obama was interrupted by screams from immigration protesters. Obama told the protesters it "doesn't make sense to yell at me right now," given his immigration action last week. "What you're not paying attention to is, I just took an action to change the law," he said as the crowd applauded.

President Obama has repeatedly admitted and acknowledged that the amnesty he now attempts to issue to illegal aliens is illegal and/or unconstitutional, and he knows it.

> The problem is that, you know, I am the President of the United States. I am not the Emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic.

- President Obama, February 14, 2013, in an internet town hall with young voters called a "Google hangout." Available at: https://www.youtube.com/watch?v=FSV9n-v_0KI

President Obama told the National Council of La Raza on July 25, 2011:

[3] "Obama to immigration hecklers: 'I just took an action to change the law,' Eric Bradner (CNN), Nov. 25, 2014 , KBMT, Channel 12, ABC News, Beaumont, Texas, http://www.12newsnow.com/story/27483218/obama-to-immigration-hecklers-i-just-took-an-action-to-change-the-law See, video, at https://www.youtube.com/watch?v=L8EoAYTRjw4

> 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 our system works. That's not how our democracy functions. That's not how our Constitution is written.

President Obama told a roundtable of Spanish-language news media reporters in September 2011:

> I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true," he said. "We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce.

President Obama answered a heckler during a speech in San Francisco at the Betty Ann Ong Recreation Center in 2013, by saying:

> If, in fact, I could solve all these problems without passing laws in Congress, then I would do so . . . but we're also a nation of laws. That's part of our tradition. So the easy way out is to try to yell and pretend like I can do something by violating our laws, and what I'm proposing is the harder path which is to use our democratic processes to achieve the same goal that you want to achieve.

In an interview on the Telemundo television network with Jose Diaz-Balart on September 17, 2013,[4] President Obama said he was proud of having protected the "Dreamers" — people who came to the United States illegally as young children — from deportation. But he also said that he could not apply that same action to other groups of people.

> Here's the problem that I have, Jose. And I've said this consistently. My job in the Executive Branch is supposed to be to carry out the laws that are passed. Congress has said here is the law when it comes to those who are undocumented. And they've allocated a whole bunch of money for enforcement. And what I have been able to do is to make a legal argument that I think is absolutely right, which is that given the resources we have we can't do everything that Congress has asked us to do. What we can do is then carve out the Dream Act folks, saying young people who've basically grown up here are Americans we should welcome. We're not going to have them operate under a cloud, under a shadow.

[4] NOTICIAS TELEMUNDO, https://www.youtube.com/watch?v=wp68QI_9r1s

> But if we start broadening that, then essentially I'll be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option and I do get a little worried that advocates of immigration reform start losing heart and immediately thinking well, you know, somehow there's an out here. If Congress doesn't act, we'll just have the President sign something and that will take care of. We won't have to worry about it. What I've said is that there is a path to get this done and that's through Congress. And right now everybody should be focused on making sure that that bill that's already passed out of the Senate hits the floor of the House of Representatives.

President Obama said the nation's laws were clear enough "that for me to simply, through executive order, ignore those congressional mandates would not conform with my appropriate role as president." Obama said this at a Town Hall in March of 2011,[5] months before issuing his Deferred Action for Children Arrivals (DACA) to keep children who arrived illegally with their non-citizen parents ("Dreamers") from being deported.

8. Agency Resources Not a Valid Consideration

If the Department does not have sufficient resources to fully enforce the Nation's laws, its remedy is to request those resources, not to create an entirely new and different regulatory scheme, while refusing to enforce that laws on the books.

The U.S. Congress appropriated about $814 million more for ICE than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

The U.S. Congress appropriated nearly $465 million more for USCIS than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

As a result, the Defendants cannot rewrite the immigration laws of the country claiming a lack of resources they never asked for. Clearly, considering that the Congress already

[5] "For Obama, Executive Order on Immigration Would Be a Turnabout", Michael D. Shear, The Washington Post, November 17, 2014, http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html?_r=0

appropriated more than asked for, if the Executive Branch asked for more resources to secure the border and enforce the laws, the Congress would appropriate the resources needed.

As discussed extensively in the OLC legal Memorandum, Exhibit B, and elsewhere, Defendants claim authority primarily on prosecutorial discretion resulting from a supposed lack of resources. However, this factor cannot be entertained as a justification for the Defendants' programs, because the Executive Branch never asked Congress for additional resources.

Yet as the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated. *See TVA v. Hill*, 437 U.S. 153, 190 (1978) (doctrine that repeals by implication are disfavored "applies with even greater force when the claimed repeal rests solely on an Appropriations Act"); *United States v. Langston*, 118 U.S. 389, 394 (1886) ("a statute fixing the annual salary of a public officer at a named sum. . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years"); cf. 1 GAO, Principles of Federal Appropriations Law at 2-49 (3d ed. 2004) ("a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation").

Federal courts have recognized that Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (when statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint").

Each Federal department and agency is required under the Budget and Accounting Act of

1921 (as amended)[6] to forward its projected needs for carrying out its mission to the Office for Management and Budget in the Executive Office of the President. OMB then submits a consolidated budget request for the entire Federal government to the U.S. Congress.

Moreover, the Executive Branch is authorized to impose fines upon employers who knowingly or flagrantly violate immigration law prohibitions on employing illegal aliens. 8 U.S.C. §1324a. Those fees, especially on large employers, would provide additional resources.

However, according to the Inspector General of the Department of Homeland Security, the Obama Administration routinely reduces fines owed by employers violating the law by an average of 40%.[7] ICE reduced the fine owed by one employer from $4.9 million to $1 million.

Budget information submitted to Congress by the U.S. Department of Homeland Security is posted at http://www.dhs.gov/dhs-budget . *See* Declaration, attached as Exhibit H.

As a result, the bases claimed by the Defendants is a disingenuous pretext.

9. Lack of Resources Not Credible Where Department Officials Restrained

Defendants base the legality of their actions almost entirely on the claim that the Executive Branch must prioritize the use of limited resources. However, for many years, the Executive Branch has forbidden border patrol agents and other immigration officials from fully doing their jobs. Border patrol agents actually sued the Secretary of Homeland Security for not allowing them to do their jobs of enforcing the Nation's immigration laws, that is causing the border patrol agents in their view to violate existing law by administrative directive that the agents not follow the law as written. This is a Federal lawsuit in the public records of the

[6] 31 U.S.C. 1101, et seq.; See also, OMB Circular No. A–11 (2014) Section 15: Basic Budget Laws, http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s15.pdf

[7] "Obama eases penalties for businesses hiring illegal immigrants," by Stephan Dinan, The Washington Times, February 25, 2015.

Federal courts of which this Court may take judicial notice.[8]

Where the public court records indicate that the Department has directed its existing personnel not to enforce the laws, to the extent that Departmental employees take the action risky to their careers of suing their bosses in Federal court to be allowed to enforce the immigration laws, the Defendants' mere recitation of a lack of resources to enforce the immigration laws of the United States is unpersuasive and cannot be credited.

It might be noted that the Defendants have merely recited without support their lack of resources, but have not substantiated that claim against overwhelming contrary evidence.

10. <u>Benefits to Parents of DACA Recipients are Not Lawful</u>

At a minimum, it is not lawful for the Defendants to extend deferred action status to parents of nationals of foreign countries who are illegally present but received deferred action themselves under the Deferred Action for Childhood Arrivals (DACA) program.

Defendants purport to expand DACA-like deferred action to illegal aliens who are parents of (a) U.S. citizens, (b) lawful permanent residents, or (c) DACA recipients.

The Office of Legal Counsel (OLC) on behalf of the Defendants makes clear that deferred action status cannot be extended to parents of deferred action status recipients, based on the deferred action status of the child alone.

On Page 2, the OLC Memorandum states that "We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion." Therefore, the Defendants admit that the

[8] *Crane v. Napolitano,* 920 F. Supp. 2d 724 (N.D. Tex. 2013). The case was dismissed by the trial court for lack of subject matter jurisdiction, on the theory that the Executive Branch was effectively suing itself. The dismissal is on appeal in the Fifth Circuit. That case raises some of the same challenges to DACA as presented here, but those challenges were not decided on the merits.

extension of deferred action to parents of DACA recipients is not lawful.

On Page 32, the OLC Memorandum states that:

> But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law.
>
> * * *
>
> Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.
>
> * * *
>
> The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.
>
> For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs.
>
> * * *
>
> But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

11. <u>Defendants' New Rules are Arbitrary, Capricious, and Unreasonable</u>

To the extent that the Defendants are changing the interpretation, application, and treatment of this subject matter under existing law and regulations, the departure from past practice renders the Defendants actions now necessarily arbitrary, capricious, and inherently

unreasonable. That is, where the agency's specialized expertise has in the past led to one result. But now the Defendants choose a contrary result, both results cannot be simultaneously justified by the same facts and circumstances as informed by the agency's experience and expertise.

While the Federal courts may defer to the agency's application of the law under certain specific conditions, a dramatic departure from past interpretation and application cannot be a product of the agency's experience and expertise.

What has changed to justify this dramatic departure from past practice? Not the facts, nor the circumstances or the agency's experience. What has changed is President Obama's overtly announced desire to force Congress to change the national policies on immigration and naturalization and to subvert Congress' refusal to do so.

As the U.S. Supreme Court recently illustrated with regard to regulation of greenhouse gases from certain types of sources, a Federal Department "must ground its reasons for action or inaction in the statute." Here, however, the Defendants clearly ground their reasons for acting in politics and lobbying Congress to pass the legislation they desire, not in the statute.

> In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore arbitrary, capricious, . . . or otherwise not in accordance with law. 42 U. S. C. §7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA.s actions in the event that it makes such a finding. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843-844 (1984). We hold only that EPA must ground its reasons for action or inaction in the statute.

Massachusetts v. Environmental Protection Agency, 549 U.S. 497(2007).

The U.S. Supreme Court reversed in part because the agency action "was therefore arbitrary, capricious, . . . or otherwise not in accordance with law." Here, for the Department to adopt a different approach than the previously justified under the law, the facts, circumstances,

and agency expertise – when there has been no change of circumstances other than a different President with a different set of policy goals – is by its very nature of a dramatic change in direction Its action "arbitrary, capricious, . . . or otherwise not in accordance with law."

12. <u>Defendants Admit their Goals are Political, Not Prosecutorial Discretion</u>

Another factor demonstrating that the Defendants are legislating by their executive action programs is that the Defendants openly admit their objective for the program is political, that is to make a dramatic change in the Nation's policies on immigration and naturalization. President Obama has made it unmistakably clear in dozens of public statements that he seeks to determine the national policy on immigration and naturalization while the U.S. Constitution explicitly reserves only to the Congress the power to set uniform rules on naturalization.

As demonstrated by the news reports attached collectively as Exhibit I, President Obama has made unmistakably clear in public statements intended to be official pronouncements of his position and policy that:

a) The objective of these programs is to establish a new national policy different from the policies enacted into law by Congress.

b) President Obama is ordering these actions explicitly to circumvent Congress.

c) President Obama is ordering these actions explicitly because Congress did not pass legislation that he favors. That is, Obama is aware that his actions are in conflict with the will of Congress and Obama is acting precisely because his actions are in conflict with the will of Congress.

d) President Obama is offering to withdraw these executive action programs if Congress passes the legislation that Obama wants, including with the content he wants. Thus the Defendants' programs are not grounded in facts, circumstances, or the expertise of the

government but in a desire to coerce the Congress. The fact that Obama offers to withdraw the programs indicate that they are not a sincere determination of appropriate considerations.

13. Divided Congress Unlikely to Act

Meanwhile, it appears that the Republican Party in Congress remains divided and unlikely to act to block or defund the Defendants' executive action programs. *See* "Obama Has Already Won the Immigration Fight," Dana Milbank, The Washington Post, December 2, 2014, attached as Exhibit J, and "The GOP's War on Obama's Executive Action Lasted About 5 Minutes," Sahil Kapur, The Talking Points Memo: DC, December 3, 2014, attached as Exhibit K.

IV. CONCLUSION

For the foregoing reasons, 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 action directed by the President. In addition and in so doing, this Court should declare Defendants' actions unconstitutional.

Dated: December 4, 2014

Respectfully submitted,

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Exhibit A

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

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the

above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano

Exhibit B

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

The Department of Homeland Security's proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS's enforcement discretion.

November 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United

States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment"); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of

DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal. *See* 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and

enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." *Id.* These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* at 831; *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration's refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency's decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may "provide[] guidelines for the agency to follow in exercising its enforcement powers," in the absence of such "legislative direction," an agency's non-enforcement determination is, much like a prosecutor's decision not to indict, a "special province of the Executive." *Id.* at 832–33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and

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

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, "[a]t each stage" of the removal process—"commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—immigration officials have "discretion to abandon the endeavor." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see*

Chaney, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, Congress "may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.[1]

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id*. Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.* at 832, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id*. at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id*. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting

[1] *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503–05 (2009) (describing Congress's response to its dissatisfaction with the Executive's use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g.*, *infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law").

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that "single-shot non-enforcement decisions" almost inevitably rest on "the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp.*, 37 F.3d at 676–77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute "general polic[ies] that [are] so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency's use of "reasonable presumptions and generic rules" is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses "special risks" that the agency has exceeded the bounds of its enforcement discretion. *Crowley Caribbean Transp.*, 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS's proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long

employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to "provide clearer and more effective guidance in the pursuit" of DHS's enforcement priorities; namely, "threats to national security, public safety and border security." Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3–5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id*. at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id*. at 3–4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they "qualify for asylum or another form of relief under our laws." *Id*. at 3–5.

The policy would instruct that resources should be directed to these priority categories in a manner "commensurate with the level of prioritization identified." *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy "requires DHS personnel to exercise discretion based on individual circumstances"). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority." *Id.* at 3. Similar discretionary provisions would apply to

aliens in the second and third priority categories.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] In addition, the policy would expressly state that its terms should not be construed "to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities," and would further provide that "[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority" if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id*. at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) ("Shahoulian E-mail"). The proposed policy explains that, because DHS "cannot respond to all immigration violations or remove all persons illegally in the United States," it seeks to "prioritize the use of enforcement personnel, detention space, and removal assets" to "ensure that use of its limited resources is devoted to the pursuit of" DHS's highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS's proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly "within [DHS's] expertise." *Chaney*, 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS's organic statute itself recognizes this inevitable fact, instructing the Secretary to establish "national

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[2] Under the proposed policy, aliens in the second tier could be deprioritized if, "in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority." Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, "in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority." *Id*. at 5.

[3] These factors include "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative." Johnson Prioritization Memorandum at 6.

immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And an agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors "peculiarly within [an agency's] expertise" are "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all").

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS's enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as "aggravated felonies" under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3–4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied "on factors which Congress had not intended it to consider." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a "single-shot non-enforcement decision," neither does it amount to an abdication of DHS's statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy's identification of categories of aliens who constitute removal

priorities is also consistent with the categorical nature of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id*. Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.[4]

II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred

[4] In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA "mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at *4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483–84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, *see, e.g.*, *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); *see* USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) ("USCIS SOP"); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.[5]

[5] Parole is available to aliens by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, *see id.* § 1255(a), and may eventually qualify them for Federal means-tested benefits, *see id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf.* 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary relief formulated administratively under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based 'extended voluntary departure,' and there no longer are aliens in the United States benefiting from such a designation," but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). *See generally* Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum,* Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5–10 (July 13, 2012) ("CRS Immigration Report").

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a "non-priority case" as "one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors"); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed "deferred action." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever "adverse action would be unconscionable because of the existence of appealing humanitarian factors").

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]" in 8 U.S.C. § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"). Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization 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) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action 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); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42

(May 6, 2009) ("USCIS Consolidation of Guidance") (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is "unlawfully present" if, among other things, he "is present in the United States after the expiration of the period of stay authorized by the Attorney General").[6]

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action." USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing "[a]n explanation as to why he or she is seeking deferred action" along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions—known as "Third Preference" visa petitions—relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979–80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20–23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12–14 (1980). And in 1990, INS implemented a "Family Fairness" program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). *See* Memorandum for Regional Commissioners,

[6] Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) ("Family Fairness Memorandum"); *see also* CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, "on a case-by-case basis, whether to place the alien in deferred action status" while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action." *Id.* But because "[i]n an unusual case, there may be factors present that would militate against deferred action," the agency instructed officers that requests for deferred action should still "receive individual scrutiny." *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. at 43 (July 20, 2000) ("H.R. 3083 Hearings").

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a "T visa" available to victims of human trafficking and their family members, and a "U visa" for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate "possible victims in the above categories," and to use "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal" to prevent those victims' removal "until they have had the opportunity to avail themselves of the provisions of the VTVPA." Memorandum

for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make "deferred action assessment[s]" for "all [T visa] applicants whose applications have been determined to be bona fide," Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants "determined to have submitted *prima facie* evidence of [their] eligibility," Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. *See* 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800–01 (Jan. 31, 2002)) (providing that any T visa applicant who presents "*prima facie* evidence" of his eligibility should have his removal "automatically stay[ed]" and that applicants placed on a waiting list for visas "shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)"); *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list" for visas.).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include "pursuit of a 'full course of study.'" USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), *available at* http//www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina." *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1–2 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf (last visited Nov. 19, 2014). USCIS explained that such

requests for deferred action would be "decided on a case-by-case basis" and that it could not "provide any assurance that all such requests will be granted." *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that "no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" and USCIS had not yet adjudicated a visa petition on the spouse's behalf. Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). "In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens," USCIS issued guidance permitting covered surviving spouses and "their qualifying children who are residing in the United States" to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, "serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons." *Id.* at 6.[7]

5. Deferred Action for Childhood Arrivals. Announced by DHS in 2012, DACA makes deferred action available to "certain young people who were brought to this country as children" and therefore "[a]s a general matter . . . lacked the intent to violate the law." Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("Napolitano Memorandum"). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety." *See id.* DHS evaluates applicants' eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 ("DACA Toolkit"). Successful DACA applicants receive deferred action for a

[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen "for at least 2 years at the time of the citizen's death" to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance "obsolete," USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and "confer[] no substantive right, immigration status or pathway to citizenship," Napolitano Memorandum at 3.[8]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.[9] On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that "[a]pproved [VAWA] self-petitioners are placed in deferred action status," such that "[n]o battered alien who has filed a[n approved] self petition . . . has been deported." H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be "eligible for deferred action and work authorization." Victims of Trafficking and

[8] Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

[9] Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS's authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class-wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).[10]

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238. Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at

[10] Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

49 U.S.C. § 30301 note), which makes a state-issued driver's license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card's recipient has "[e]vidence of [l]awful [s]tatus." Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or "approved deferred action status." *Id.* § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system—and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful

presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as "permissive" and largely "unfettered").[11] Although the INA

[11] Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080–81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an "unauthorized alien." As relevant here, Congress defined an "unauthorized alien" barred from employment in the United States as an alien who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that "the phrase 'authorized to be so employed by this Act or the Attorney General' does not recognize the Attorney General's authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act." *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the

requires the Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section 1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established

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regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15–18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.[12] Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of "lawful status" for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy "'rather than embarking on a frolic of its own.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139

[12] For example, since 1978, the Department of Justice's Antitrust Division has implemented a "leniency program" under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)*, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), *available at* http://www.irs.gov/uac/Revised-IRS-Voluntary-Disclosure-Practice (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information "may result in prosecution not being recommended"); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, *available at* http://www.usmarshals.gov/safesurrender/faqs.html (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the "Fugitive Safe Surrender" program are likely to receive "favorable consideration").

(1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137–39 (concluding that Congress acquiesced in an agency's assertion of regulatory authority by "refus[ing] . . . to overrule" the agency's view after it was specifically "brought to Congress'[s] attention," and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress "implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act of 1949, which "create[d] a procedure to implement" those very agreements).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6–7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* pp. 6–7 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it

will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.'" (quoting H.R. Rep. No. 85-1199, at 7 (1957)). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside

in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197–99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).[13] Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status

[13] The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155–56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009–10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21–22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years "have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways"); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who "have become well settled in this country" would be a "wasteful use of the Immigration and Naturalization Service's limited enforcement resources"); *see also Arizona*, 132 S. Ct. at 2499 (noting that "[t]he equities of an individual case" turn on factors "including whether the alien has . . . long ties to the community").

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has

abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status "takes time." *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period.[14] Immigration officials have on several

[14] DHS's proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197–99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS's proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the

occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval—and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 18–20.[15] In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status

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amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

[15] Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually "acquire lawful permanent resident status" and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14–15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that "the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id.* § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those

discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the

proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

KARL R. THOMPSON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Exhibit C

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

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies Supporting U.S. High-Skilled Businesses and Workers**

I hereby direct the new policies and regulations outlined below. These new policies and regulations will be good for both U.S. businesses and workers by continuing to grow our economy and create jobs. They will support our country's high-skilled businesses and workers by better enabling U.S. businesses to hire and retain highly skilled foreign-born workers while providing these workers with increased flexibility to make natural advancements with their current employers or seek similar opportunities elsewhere. This increased mobility will also ensure a more-level playing field for U.S. workers. Finally, these measures should increase agency efficiencies and save resources.

These new policies and regulations are in addition to efforts that the Department of Homeland Security is implementing to improve the employment-based immigration system. In May, for example, U.S. Citizenship and Immigration Services (USCIS) published a proposed rule to extend work authorization to the spouses of H-1B visa holders who have been approved to receive lawful permanent resident status based on employer-sponsorship. USCIS is about to publish the final rule, which will incentivize employer sponsorship of current temporary workers for lawful permanent residence so they can become Americans over time, while making the United States an even more competitive destination for highly skilled talent. Also, USCIS has been working on guidance to strengthen and improve various employment-based temporary visa programs. I expect that such guidance, consistent with the proposals contained in this memorandum, will be published in a timely manner.

A. Modernizing the Employment-Based Immigrant Visa System

As you know, our employment-based immigration system is afflicted with extremely long waits for immigrant visas, or "green cards," due to relatively low green card numerical limits established by Congress 24 years ago in 1990. The effect of these caps is further compounded by an immigration system that has often failed to issue all of the immigrant visas authorized by Congress for a fiscal year. Hundreds of thousands of such visas have gone unissued in the past despite heavy demand for them.

The resulting backlogs for green cards prevent U.S. employers from attracting and retaining highly skilled workers critical to their businesses. U.S. businesses have historically relied on temporary visas—such as H-1B,[1] L-1B,[2] or O-1[3] visas—to retain individuals with needed skills as they work their way through these backlogs. But as the backlogs for green cards grow longer, it is increasingly the case that temporary visas fail to fill the gap. As a result, the worker's temporary status expires and his or her departure is required. This makes little sense, particularly because the green card petition process for certain categories requires the employer to test the labor market and show the unavailability of other U.S. workers in that position.

To correct this problem, I hereby direct USCIS to take several steps to modernize and improve the immigrant visa process. *First*, USCIS should continue and enhance its work with the Department of State to ensure that all immigrant visas authorized by Congress are issued to eligible individuals when there is sufficient demand for such visas. *Second*, I ask that USCIS work with the Department of State to improve the system for determining when immigrant visas are available to applicants during the fiscal year. The Department of State has agreed to modify its visa bulletin system to more simply and reliably make such determinations, and I expect USCIS to revise its current regulations to reflect and complement these proposed modifications. *Third*, I direct that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers.

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[1] INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 101(a)(15)(H)(i)(b).

[2] INA § 101(a)(15)(L), 8 U.S.C. § 101(a)(15)(L).

[3] INA § 101(a)(15)(O)(i), 8 U.S.C. § 101(a)(15)(O)(i).

B. Reforming "Optional Practical Training" for Foreign Students and Graduates from U.S. Universities

Under long-standing regulations, foreign nationals studying in the United States on non-immigrant F-1 student visas[4] may request twelve additional months of F-1 visa status for "optional practical training" (OPT), which allows them to extend their time in the United States for temporary employment in the relevant field of study. OPT, which may occur before or after graduation, must be approved by the educational institution.

This program provides important benefits to foreign students and the U.S. economy. Foreign students are able to further their full course of study in the United States and gain additional, practical experience in their fields by training in those fields with employers in the United States. In turn, foreign students put into practice the skills and education they gain at U.S. universities to benefit the U.S. economy. By regulations adopted in 2007, students in science, technology, engineering, and mathematics (STEM) fields are eligible for an additional 17 months of OPT, for a total of 29 months. This extension has the added benefit of helping America keep many of its most talented STEM graduates from departing the country and taking their skills overseas.

The OPT program should be evaluated, strengthened, and improved to further enhance American innovation and competitiveness, consistent with current legal authority. More specifically, I direct that Immigration and Customs Enforcement (ICE) and USCIS develop regulations for notice and comment to expand the degree programs eligible for OPT and extend the time period and use of OPT for foreign STEM students and graduates, consistent with law. I am also directing ICE and USCIS to improve the OPT program by requiring stronger ties to degree-granting institutions, which would better ensure that a student's practical training furthers the student's full course of study in the United States. Finally, ICE and USCIS should take steps to ensure that OPT employment is consistent with U.S. labor market protections to safeguard the interests of U.S. workers in related fields.

C. Promoting Research and Development in the United States

To enhance opportunities for foreign inventors, researchers, and founders of start-up enterprises wishing to conduct research and development and create jobs in the United States, I hereby direct USCIS to implement two administrative improvements to our employment-based immigration system:

First, the "national interest waiver" provided in section 203(b)(2)(B) of the *Immigration and Nationality Act* (INA) permits certain non-citizens with advanced

[4] INA § 101(a)(15)(F)(i), 8 U.S.C. § 101(a)(15)(F)(i).

degrees or exceptional ability to seek green cards without employer sponsorship if their admission is in the national interest.[5] This waiver is underutilized and there is limited guidance with respect to its invocation. I hereby direct USCIS to issue guidance or regulations to clarify the standard by which a national interest waiver can be granted, with the aim of promoting its greater use for the benefit of the U.S economy.

Second, pursuant to the "significant public benefit" parole authority under section 212(d)(5) of the INA,[6] USCIS should propose a program that will permit DHS to grant parole status, on a case-by-case basis, to inventors, researchers, and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research. Parole in this type of circumstance would allow these individuals to temporarily pursue research and development of promising new ideas and businesses in the United States, rather than abroad. This regulation will include income and resource thresholds to ensure that individuals eligible for parole under this program will not be eligible for federal public benefits or premium tax credits under the Health Insurance Marketplace of the Affordable Care Act.

D. Bringing Greater Consistency to the L-1B Visa Program

The L-1B visa program for "intracompany transferees" is critically important to multinational companies. The program allows such companies to transfer employees who are managerial or executives, or who have "specialized knowledge" of the company's products or processes to the United States from foreign operations. It is thus an essential tool for managing a global workforce as companies choose where to establish new or expanded operations, research centers, or product lines, all of which stand to benefit the U.S. economy. To date, however, vague guidance and inconsistent interpretation of the term "specialized knowledge" in adjudicating L-1B visa petitions has created uncertainty for these companies.

To correct this problem, I hereby direct USCIS to issue a policy memorandum that provides clear, consolidated guidance on the meaning of "specialized knowledge." This memorandum will bring greater coherence and integrity to the L-1B program, improve consistency in adjudications, and enhance companies' confidence in the program.

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[5] INA § 203(b)(2)(B), 8 U.S.C. § 1153(b)(2)(B).

[6] INA § 205(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

E. Increasing Worker Portability

Currently, uncertainty within the employment-based visa system creates unnecessary hardships for many foreign workers who have filed for adjustment of status but are unable to become permanent residents due to a lack of immigrant visas. Current law allows such workers to change jobs without jeopardizing their ability to seek lawful permanent residence, but only if the new job is in a "same or a similar" occupational classification as their old job. Unfortunately, there is uncertainty surrounding what constitutes a "same or similar" job, thus preventing many workers from changing employers, seeking new job opportunities, or even accepting promotions for fear that such action might void their currently approved immigrant visa petitions.

To help eliminate this uncertainty, I hereby direct USCIS to issue a policy memorandum that provides additional agency guidance, bringing needed clarity to employees and their employers with respect to the types of job changes that constitute a "same or similar" job under current law. This guidance should make clear that a worker can, for example, accept a promotion to a supervisory position or otherwise transition to related jobs within his or her field of endeavor. By removing unnecessary restrictions to natural career progression, workers will have increased flexibility and stability, which would also ensure a more level playing field for U.S. workers.

Exhibit D

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

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **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**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated 1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization");* INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c) (d) Pub. L. 108-136 *(spouse, parent or child of certain U.S. citizen who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").*

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work

authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of

the Immigration and Nationality Act.[4] Deferred action granted pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.
- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the[Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).

Exhibit E

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

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Expansion of the Provisional Waiver Program**

By this memorandum, I hereby direct U.S. Citizenship and Immigration Services (USCIS) to issue new regulations and policies with respect to the use of the I-601A provisional waiver to all statutorily eligible applicants.

As you know, under current law certain undocumented individuals in this country who are the spouses and children of U.S. citizens and lawful permanent residents, and who are statutorily eligible for immigrant visas, must leave the country and be interviewed at U.S. consulates abroad to obtain those immigrant visas. If these qualifying individuals have been in the United States unlawfully for more than six months and later depart, they are, by virtue of their departure, barred by law from returning for 3 or 10 years.[1] Current law allows some of these individuals (*i.e.*, a spouse, son, or daughter of a U.S. citizen or permanent resident) to seek a waiver of these 3- and 10-year bars if they can demonstrate that absence from the United States as a result of the bar imposes an "extreme hardship" to a U.S. citizen or lawful permanent spouse or parent.[2] But, prior to 2013, the individual could not apply for the waiver until he or she had left the country for a consular interview.

In January 2013, the Department of Homeland Security (DHS) published a regulation establishing a process that allows a subset of statutorily eligible individuals to apply to USCIS for a waiver of the 3- and 10-year bars before departing abroad for consular interviews.[3] This "provisional" waiver provided eligible individuals with some

[1] Immigration and Nationality Act (INA) § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i).

[2] INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

[3] *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, Fed. Reg. 78-2, 551 (Jan. 3, 2013).

level of certainty that they would be able to return after a successful consular interview and would not be subject to lengthy overseas waits while the waiver application was adjudicated.[4] However, the 2013 regulation extended the provisional waiver process only to the spouses and children of U.S. citizens. In 2013 we did not initially extend the provisional waiver to other statutorily eligible individuals—*i.e.*, the spouses and children of lawful permanent residents and the adult children of U.S. citizens and lawful permanent residents—to assess the effectiveness and operational impact of the provisional waiver process. To date, approximately 60,000 individuals have applied for the provisional waiver, a number that, as I understand, is less than was expected.

Today, I direct DHS to amend its 2013 regulation to expand access to the provisional waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available. The purpose behind today's announcement remains the same as in 2013—family unity.

As a related matter, I hereby direct USCIS to provide additional guidance on the definition of "extreme hardship." As noted above, to be granted a provisional waiver, applicants must demonstrate that their absence from the United States would cause "extreme hardship" to a spouse or parent who is a U.S. citizen or lawful permanent resident. The statute does not define the term, and federal courts have not specifically defined it through case law.[5] It is my assessment that additional guidance about the meaning of the phrase "extreme hardship" would provide broader use of this legally permitted waiver program.

USCIS should clarify the factors that are considered by adjudicators in determining whether the "extreme hardship" standard has been met. Factors that should be considered for further explanation include, but are not limited to: family ties to the United States and the country of removal, conditions in the country of removal, the age of the U.S. citizen or permanent resident spouse or parent, the length of residence in the United States, relevant medical and mental health conditions, financial hardships, and educational hardships. I further direct USCIS to consider criteria by which a presumption of extreme hardship may be determined to exist.[6]

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[4] 8 C.F.R. 212.7 (e)(3).

[5] *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, Fed. Reg. 78-2, 551 (Jan. 3, 2013).

[6] Such a presumption was previously adopted by regulations implementing the 1997 Nicaraguan Adjustment and Central American Relief Act. Pub. L. No. 105–100. 8 C.F.R. 240.64(d).

Exhibit F

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

Homeland Security

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies for the Apprehension, Detention and Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: 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. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,* March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens*, June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases,* November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,* December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations*, December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;[1] sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who 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

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal[2] on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

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[1] In evaluating whether the offense is a significant misdemeanor involving ..domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. *See generally,* John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,* June 17, 2011.

[2] For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Exhibit G

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.

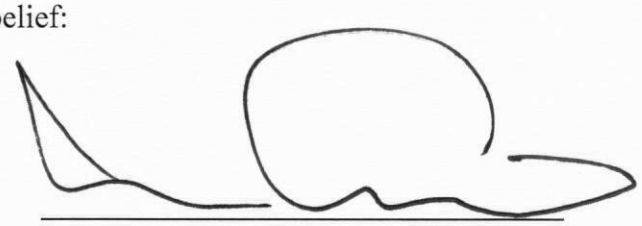
30) Therefore, the problem is not a lack of resources by the Department of Homeland Security, but a lack of desire by the Obama Administration to enforce the law.

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.

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

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.

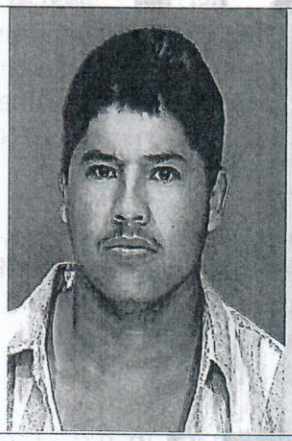
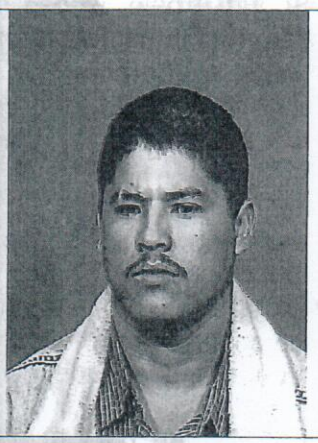
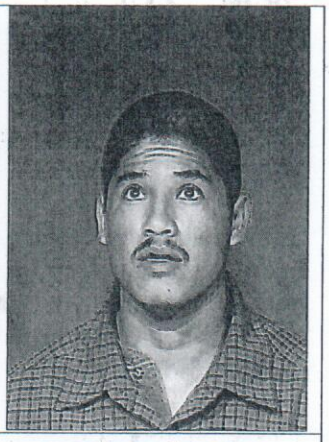
Marquez/Bracamonte was arrested yet again on May 4, 2001 for the sale of narcotic drugs and possession of marijuana for sale. He was released to ICE 3 days later.

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			
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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.

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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.

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

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.

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

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
www.mcso.org

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

Exhibit H

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 JONATHON MOSELEY, FREEDOM WATCH, IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION

Pursuant to 28 U.S.C. §1746, I, Jonathon Moseley, 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) I searched the publicly released budget information for the United States Immigration and Customs Enforcement (ICE) and United States Citizenship and Immigration Services (USCIS) components of the United States Department of Homeland Security, at the websites of the Office of Management and Budget and the Department of Homeland Security.

3) The published budgets and budget requests of the U.S. Department of Homeland Security, technically admissions by a party-opponent, report the following information which was submitted to Congress by the U.S. Department of Homeland Security and now posted on the Department's website at http://www.dhs.gov/dhs-budget.

4) Those segments of the President's budgetary request to Congress applying to ICE and to USCIS for each fiscal year recites the amount of funding requested by the Department for ICE and USCIS and the amount actually appropriated by Congress in the prior fiscal year.

5) The U.S. Congress appropriated about $814 million more for ICE than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

6) The U.S. Congress appropriated nearly $465 million more for USCIS than the U.S. Department of Homeland Security requested in and since fiscal year 2006.

Immigration and Customs Enforcement (ICE)

2006	Budget Request:	$4,364,270,000	Congress Appropriated	$3,879,443,000
2007	Budget Request:	$4,696,932,000	Congress Appropriated	$4,726,641,000
2008	Budget Request:	$5,014,500,000	Congress Appropriated	$5,576,080,000
2009	Budget Request:	$5,676,085,000	Congress Appropriated	$5,948,210,000
2010	Budget Request:	$5,762,800,000	Congress Appropriated	$5,741,752,000
2011	Budget Request:	$5,835,187,000	Congress Appropriated	$5,748,339,000
2012	Budget Request:	$5,822,576,000	Congress Appropriated	$5,862,453,000
2013	Budget Request:	$5,644,061,000	Congress Appropriated	$5,879,064,000
2014	Budget Request:	$5,341,722,000	Congress Appropriated	$5,610,663,000

U.S. Citizenship and Immigration Services (USCIS)

2006	Budget Request:	$1,854,000,000	Congress Appropriated	$1,887,850,000
2007	Budget Request:	$1,985,990,000	Congress Appropriated	$1,985,990,000
2008	Budget Request:	$2,568,872,000	Congress Appropriated	$2,619,173,000
2009	Budget Request:	$2,689,726,000	Congress Appropriated	$2,690,926,000
2010	Budget Request:	$2,867,232,000	Congress Appropriated	$2,859,997,000
2011	Budget Request:	$2,812,357,000	Congress Appropriated	$3,029,829,000
2012	Budget Request:	$2,906,865,000	Congress Appropriated	$3,078,465,000
2013	Budget Request:	$3,005,383,000	Congress Appropriated	$3,005,383.000
2014	Budget Request:	$3,219,466,000	Congress Appropriated	$3,217,236,000

7) I am engaged as an independent contractor performing occasional legal services part-time for the Plaintiff Freedom Watch, Inc.

8) I am familiar with the budgetary information and historical tables published by the Office of Management and Budget, a part of the Executive Office of the President, including as posted on the website of OMB.

9) I earned a Bachelors of Science in Business Administration with a major in Finance from the University of Florida in Gainesville, Florida.

10) I studied an additional year of post-graduate accounting at the University of Florida.

11) I worked from 1987 through 1992 as a management analyst in the United States Department of Education (USED).

12) While working at USED, I became directly familiar as part of my work with the budget of the United States and the budgeting process for the Federal Departments.

13) In fact, I was “hired” to work at OMB on the basis of being detailed from USED to

OMB while remaining on the USED payroll, but the use of a Full Time Equivalent (FTE) slot to detail me to OMB was not approved by the Office of Management.

14) While working in the Executive Office of the Office of Bilingual Education and Minority Languages Affairs (OBEMLA), I prepared the budget requests for OBEMLA to the United States Congress to be forwarded through OMB, including the briefing books to prepare the Director of OBEMLA, Alica Coro, to testify in support of the budget request in Congress, under the delegation and direction of the Executive Officer of OBEMLA.

15) I left the U.S. Department of Education in 1992 to attend George Mason University School of Law in Arlington, Virginia.

16) As a result, I am directly familiar from my professional work with the budgetary process for Federal Departments, the budget requests prepared and submitted to Congress, and the historical budgetary tables and reports of the U.S. Government.

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:

Jonathon Moseley, Esq.

Dated: December 1, 2014

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Exhibit I

The White House

Office of the Press Secretary

For Immediate Release June 30, 2014

Remarks by the President on Border Security and Immigration Reform

Rose Garden

3:04 P.M. EDT

THE PRESIDENT: Good afternoon, everybody. One year ago this month, senators of both parties — with support from the business, labor, law enforcement, faith communities — came together to pass a commonsense immigration bill.

Independent experts said that bill would strengthen our borders, grow our economy, shrink our deficits. As we speak, there are enough Republicans and Democrats in the House to pass an immigration bill today. I would sign it into law today, and Washington would solve a problem in a bipartisan way.

But for more than a year, Republicans in the House of Representatives have refused to allow an up-or-down vote on that Senate bill or any legislation to fix our broken immigration system. And I held off on pressuring them for a long time to give Speaker Boehner the space he needed to get his fellow Republicans on board.

Meanwhile, here's what a year of obstruction has meant. It has meant fewer resources to strengthen our borders. It's meant more businesses free to game the system by hiring undocumented workers, which punishes businesses that play by the rules, and drives down wages for hardworking Americans. It's meant lost talent when the best and brightest from around the world come to study here but are forced to leave and then compete against our businesses and our workers. It's meant no chance for 11 million immigrants to come out of the shadows and earn their citizenship if they pay a penalty and pass a background check, pay their fair share of taxes, learn English, and go to the back of the line. It's meant the heartbreak of separated families.

That's what this obstruction has meant over the past year. That's what the Senate bill would fix if the House allowed it to go to a vote.

Our country and our economy would be stronger today if House Republicans had allowed a simple yes-or-no vote on this bill or, for that matter, any bill. They'd be following the will of the majority of the American people who support reform. Instead, they've proven again and again that they're unwilling to stand up to the tea party in order to do what's best for the country. And the worst part about it is a bunch of them know better.

We now have an actual humanitarian crisis on the border that only underscores the need to drop the politics and fix our immigration system once and for all. In recent weeks, we've seen a surge of unaccompanied children arrive at the border, brought here and to other countries by smugglers and traffickers.

The journey is unbelievably dangerous for these kids. The children who are fortunate enough to survive it will be taken care of while they go through the legal process, but in most cases that process will lead to them being sent back home. I've sent a clear message to parents in these countries not to put their kids through this. I recently sent Vice President Biden to meet with Central American leaders and find ways to address the root causes of this crisis. Secretary Kerry will also be meeting with those leaders again tomorrow. With our international partners, we're taking new steps to go after the dangerous smugglers who are putting thousands of children's lives at risk.

Today, I sent a letter to congressional leaders asking that they work with me to address the urgent humanitarian challenge on the border, and support the immigration and Border Patrol agents who already apprehend and deport hundreds of thousands of undocumented immigrants every year. And understand, by the way, for the most part,

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Why Global Health Security Is an Emergency
In June 2012, the world missed a deadline, without fanfare and without public outcry: Eighty percent of countries failed to meet the global timeline to be prepared to battle biological threats like Ebola.

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President Obama speaks with Business Roundtable, a group of CEOs of some of the country's leading companies, at an event in Washington, D.C.

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this is not a situation where these children are slipping through. They're being apprehended. But the problem is, is that our system is so broken, so unclear that folks don't know what the rules are.

Now, understand –- there are a number of Republicans who have been willing to work with us to pass real, commonsense immigration reform, and I want to thank them for their efforts. There are a number of Republican leaders in the Senate who did excellent work and deserve our thanks. And less visibly, there have been folks in the House who have been trying to work to get this done. And quietly, because it doesn't always help me to praise them, I've expressed to them how much I appreciate the efforts that they've made.

I believe Speaker Boehner when he says he wants to pass an immigration bill. I think he genuinely wants to get something done. But last week, he informed me that Republicans will continue to block a vote on immigration reform at least for the remainder of this year. Some in the House Republican Caucus are using the situation with unaccompanied children as their newest excuse to do nothing. Now, I want everybody to think about that. Their argument seems to be that because the system is broken, we shouldn't make an effort to fix it. It makes no sense. It's not on the level. It's just politics, plain and simple.

Now, there are others in the Republican Caucus in the House who are arguing that they can't act because they're mad at me about using my executive authority too broadly. This also makes no sense. I don't prefer taking administrative action. I'd rather see permanent fixes to the issue we face. Certainly that's true on immigration. I've made that clear multiple times. I would love nothing more than bipartisan legislation to pass the House, the Senate, land on my desk so I can sign it. That's true about immigration, that's true about the minimum wage, it's true about equal pay. There are a whole bunch of things where I would greatly prefer Congress actually do something. I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. And in this situation, the failure of House Republicans to pass a darn bill is bad for our security, it's bad for our economy, and it's bad for our future.

So while I will continue to push House Republicans to drop the excuses and act –- and I hope their constituents will too — America cannot wait forever for them to act. And that's why, today, I'm beginning a new effort to fix as much of our immigration system as I can on my own, without Congress. As a first step, I'm directing the Secretary of Homeland Security and the Attorney General to move available and appropriate resources from our interior to the border. Protecting public safety and deporting dangerous criminals has been and will remain the top priority, but we are going to refocus our efforts where we can to make sure we do what it takes to keep our border secure.

I have also directed Secretary Johnson and Attorney General Holder to identify additional actions my administration can take on our own, within my existing legal authorities, to do what Congress refuses to do and fix as much of our immigration system as we can. If Congress will not do their job, at least we can do ours. I expect their recommendations before the end of summer and I intend to adopt those recommendations without further delay.

Of course, even with aggressive steps on my part, administrative action alone will not adequately address the problem. The reforms that will do the most to strengthen our businesses, our workers, and our entire economy will still require an act of Congress. And I repeat: These are reforms that already enjoy the wide support of the American people. It's very rare where you get labor, business, evangelicals, law enforcement all agreeing on what needs to be done. And at some point, that should be enough. Normally, that is enough. The point of public service is to solve public problems. And those of us who have the privilege to serve have a responsibility to do everything in our power to keep Americans safe and to keep the doors of opportunity open.

And if we do, then one year from now, not only would our economy and our security be stronger, but maybe the best and the brightest from around the world who come study here would stay and create jobs here. Maybe companies that play by the rules will no longer be undercut by companies that don't. Maybe more families who've been living here for years, whose children are often U.S. citizens, who are our neighbors and our friends, whose children are our kids' friends and go to school with them, and play on ball teams with them, maybe those families would get to stay together. But much of this only happens if Americans continue to push Congress to get this done.

So I've told Speaker Boehner that even as I take those steps that I can within my existing legal authorities to make the immigration system work better, I'm going to continue to reach out to House Republicans in the hope that they deliver a more permanent solution with a comprehensive bill. Maybe it will be after the midterms, when they're less worried about politics. Maybe it will be next year. Whenever it is, they will find me a willing partner. I have been consistent in saying that I am prepared to work with them even on a bill that I don't consider perfect. And the Senate bill was a good example of the capacity to compromise and get this done. The only thing I can't do is stand by and do nothing while waiting for them to get their act together.

And I want to repeat what I said earlier. If House Republicans are really concerned about me taking too many executive actions, the best solution to that is passing bills. Pass a bill; solve a problem. Don't just say no on something that everybody agrees needs to be done. Because if we pass a bill, that will supplant whatever I've done administratively. We'll have a structure there that works, and it will be permanent. And people can make plans and businesses can make plans based on the law. And there will be clarity both here inside this country and outside it.

Let me just close by saying Friday is the Fourth of July. It's the day we celebrate our independence and all the things that make this country so great. And each year, Michelle and I host a few hundred servicemembers and wounded warriors and their families right here on the lawn for a barbecue and fireworks on the Mall.

And some of the servicemembers coming this year are unique because they signed up to serve, to sacrifice, potentially to give their lives for the security of this country even though they weren't yet Americans. That's how

much they love this country. They were prepared to fight and die for an America they did not yet fully belong to. I think they've earned their stripes in more ways than one. And that's why on Friday morning we're going to naturalize them in a ceremony right here at the White House. This Independence Day will be their first day as American citizens.

One of the things we celebrate on Friday –- one of the things that make this country great –- is that we are a nation of immigrants. Our people come from every corner of the globe. That's what makes us special. That's what makes us unique. And throughout our history, we've come here in wave after wave from everywhere understanding that there was something about this place where the whole was greater than the sum of its parts; that all the different cultures and ideas and energy would come together and create something new.

We won this country's freedom together. We built this country together. We defended this country together. It makes us special. It makes us strong. It makes us Americans. That's worth celebrating. And that's what I want not just House Republicans but all of us as Americans to remember.

Thanks very much.

END
3:21 P.M. EDT

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WHERE YOUR OPINION COUNTS

DECEMBER 2, 2014

His Own Words: Obama Said He Doesn't Have Authority For Executive Amnesty 22 Times

Katie Pavlich

11/19/2014 12:00:00 PM - Katie Pavlich

According to a report in POLITICO, President Obama is expected to make good on his executive amnesty threat on Friday during an event in Las Vegas, despite saying repeatedly over the years that he does not have the authority to change immigration laws from the Oval Office.

House Speaker John Boehner, who warned the President shortly after the 2014 midterm elections that acting alone on immigration would "poison the well," has taken notice of Obama's past statements. After some research, his office found President Obama directly claimed 22 times he couldn't take executive action on immigration because he doesn't have the authority.

Over the weekend President Obama was questioned during an overseas trip about his change in position with executive action looming and tried to argue his position on the extent of his authority to change immigration law hasn't changed at all.

"Actually, my position hasn't changed. When I was talking to the advocates, their interest was in me, through executive action, duplicating the legislation that was stalled in Congress," Obama told reporters.

When Obama says he was speaking with "advocates," he's referring to radio interviews on programs with open-border hosts, at La Raza events and during a number of interviews conducted by Univision and Telemundo. Here are a few examples:

October 2010: Obama on Immigration Reform "I am Not a King"

> "My cabinet has been working very hard on trying to get it done, but ultimately, I think somebody said the other day, I am president, I am not king," Obama told Univision in October 2010, when asked why he had yet to achieve comprehensive immigration reform.

March 2011: Remarks by the President Univision Townhall

> "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."

> "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 our system works. That's not how our democracy functions. That's not how our Constitution is written."

January 2013: Pres. Obama Defends Deportation Record: 'I'm Not A King'

> "I'm not a king. My job as the head of the executive branch ultimately is to carry out the law," Obama told Telemundo. "When it comes to enforcement of our immigration laws, we've got some discretion. We can prioritize what we do. But we can't simply ignore the law."

February 2013: Obama: 'I Am Not a Dictator'

> "I can't do these things just by myself." He reiterated that sentiment in a February 2013 interview with Telemundo. "I'm not a king," he said.

FactCheck.org, The New York Times, and The Washington Post aren't buying Obama's argument and make it clear the President has in fact changed his position.

> This is a flagrant untruth: "In fact, most of the questions that were posed to the president over the past several years were about the very thing that he is expected to announce within a matter of days," reported The New York Times. "[T]he questions actually specifically addressed the sorts of actions that he is contemplating now," The Washington Post's Fact Checker agreed, awarding President Obama the rare "Upside-Down Pinocchio," which signifies "a major-league flip-flop." Even FactCheck.org piled on.

Obama's argument that his "position hasn't changed" and that "when I was talking to the advocates, their interest was in me, through executive action, duplicating the legislation that was stalled in Congress," falls far short of explaining away his statement about a lack of authority. Not to mention, regardless of whether legislation is stalled in Congress, the President still doesn't have the authority to rewrite or issue an executive order mirroring pending legislation.

Yesterday ABC's Jon Karl asked White House Press Secretary Josh Earnest if President Obama still doesn't view himself as the "emperor" of the United States as he refuses to work with Congress on illegal immigration reform. From MRC:

> "Does the President still stand by what he said last year when he said, 'I am not the emperor of the United States; my job is to execute laws that are passed.' Is that still operative?" asked Jonathan Karl, reporter for ABC, during Tuesday's White House press briefing.
>
> "Absolutely," replied White House Press Secretary Josh Earnest.
>
> "Not a king either?" asked Karl, to audience chuckles.
>
> "That's right," said Earnest flatly.

There are a few explanations for President Obama moving forward to change illegal immigration law despite his own statements and objections from Congress and even liberal attorneys like Jonathan Turley. The first is that the President is an ideologue with nothing to lose politically at this point. Obama isn't up for re-election, he only has two years left and Democrats just lost in huge numbers at every level of government across the country. There's no longer anything to save. Obama is interested in his legacy with the Left, not with the country as a whole. Second, the President is interested in fighting with Republicans, not working with them, and his latest move on illegal immigration proves it. The President is essentially daring Republicans to look at ways to address executive action and is hoping to get impeachment on the table in order to suck up all of the media oxygen and hysteria for the remainder of his term. Further, Obama knows if Republicans choose to address his executive action through the courts, he'll be out of office before the legal fight is over. Obama doesn't have much, if anything to lose and has made it clear he doesn't care much about the constitutionality of what he's about to do, despite claiming his coming action doesn't fall within his constitutional authority over the past six years.

Conn has your rundown on what Republicans will do after Obama goes through with executive action on Friday.

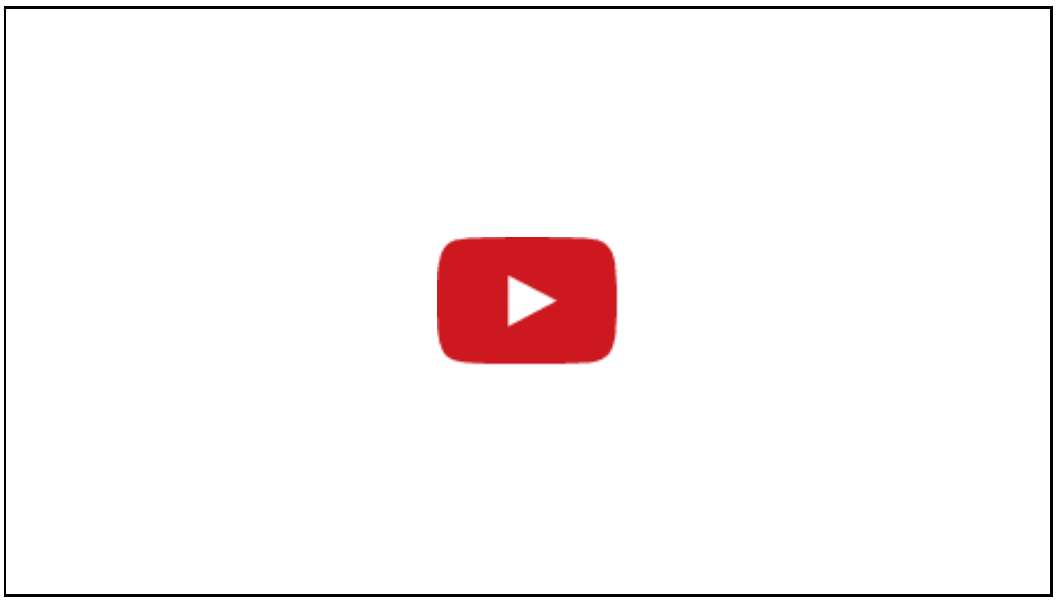
I'll leave you with this:

> Yikes RT @mmurraypolitics: Tease from our new NBC/WSJ poll: 48% oppose Obama taking executive action on immigration, while 38% support it
>
> — Noah Rothman (@NoahCRothman) November 19, 2014

BEN SHAPIRO'S TRUTH REVOLT

Obama Admits He 'Changed Law' With Executive Order

11.26.2014 | News (http://www.truthrevolt.org/news) | O'Connor (http://www.truthrevolt.org/author/larry-oconnor)



President Barack Obama was shouted at by hecklers Tuesday during a speech designed to rally support for his executive action granting amnesty for some individuals who entered and/or remained in the country illegally.

Obama turned and responded to the hecklers (who were advocating even more amnesty) by saying, "What you're not paying attention to is the fact that I just took an action to change the law."

This is an interesting, and potentially damning, admission against interest for the former law professor.

In his recent interviews defending his Executive Order Obama has insisted that he was merely advising departments responsible for enforcing immigration laws to utilize "prosecutorial discretion" when applying the law under certain

circumstances. But he has insisted (correctly) that only Congress can "change a law."

In fact, over the years President Obama has continually insisted that he can't change the law. Speaker (http://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law#sthash.RroR3chq.dpuf) John Boehner's office offers the detailed account of 22 instances when publicly said so:

1. “I take the Constitution very seriously. The biggest problems that we’re facing right now have to do with [the president] trying to bring more and more power into the executive branch and not go through Congress at all. And that’s what I intend to reverse when I’m President of the United States of America.” (3/31/08)
2. “We’ve got a government designed by the Founders so that there’d be checks and balances. You don’t want a president who’s too powerful or a Congress that’s too powerful or a court that’s too powerful. Everybody’s got their own role. Congress’s job is to pass legislation. The president can veto it or he can sign it. … I believe in the Constitution and I will obey the Constitution of the United States. We're not going to use signing statements as a way of doing an end-run around Congress.” (5/19/08)
3. “Comprehensive reform, that's how we're going to solve this problem. … Anybody who tells you it's going to be easy or that I can wave a magic wand and make it happen hasn't been paying attention to how this town works.” (5/5/10)
4. “[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.” (7/1/10)
5. “I do have an obligation to make sure that I am following some of the rules. I can't simply ignore laws that are out there. I've got to work to make sure that they are changed.” (10/14/10)
6. “I am president, I am not king. I can't do these things just by myself. We have a system of government that requires the Congress to work with the Executive Branch to make it happen. I'm committed to making it happen, but I've got to have some partners to do it. … The main thing we have to do to stop deportations is to change the laws. … [T]he most important thing that we can

do is to change the law because the way the system works – again, I just want to repeat, I'm president, I'm not king. If Congress has laws on the books that says that people who are here who are not documented have to be deported, then I can exercise some flexibility in terms of where we deploy our resources, to focus on people who are really causing problems as a opposed to families who are just trying to work and support themselves. But there's a limit to the discretion that I can show because I am obliged to execute the law. That's what the Executive Branch means. I can't just make the laws up by myself. So the most important thing that we can do is focus on changing the underlying laws." (10/25/10)

7. "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." (3/28/11)
8. "I can't solve this problem by myself. … [W]e're going to have to have bipartisan support in order to make it happen. … I can't do it by myself. We're going to have to change the laws in Congress, but I'm confident we can make it happen." (4/20/11)
9. "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one." (4/29/11)
10. "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." (5/10/11)
11. "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 our system works. That's not how our democracy functions. That's not how our Constitution is written." (7/25/11)
12. "So what we've tried to do is within the constraints of the laws on the books, we've tried to be as fair, humane, just as we can, recognizing, though, that the laws themselves need to be changed. … The most important thing for your

viewers and listeners and readers to understand is that in order to change our laws, we've got to get it through the House of Representatives, which is currently controlled by Republicans, and we've got to get 60 votes in the Senate. … Administratively, we can't ignore the law. … I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true. We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce. And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true. … We live in a democracy. You have to pass bills through the legislature, and then I can sign it. And if all the attention is focused away from the legislative process, then that is going to lead to a constant dead-end. We have to recognize how the system works, and then apply pressure to those places where votes can be gotten and, ultimately, we can get this thing solved." (9/28/11)

13. In June 2012, President Obama unilaterally granted deferred action for childhood arrivals (DACA), allowing "eligible individuals who do not present a risk to national security or public safety … to request temporary relief from deportation proceedings and apply for work authorization." He then argued that he had already done everything he could legally do on his own: "Now, what I've always said is, as the head of the executive branch, there's a limit to what I can do. Part of the reason that deportations went up was Congress put a whole lot of money into it, and when you have a lot of resources and a lot more agents involved, then there are going to be higher numbers. What we've said is, let's make sure that you're not misdirecting those resources. But we're still going to, ultimately, have to change the laws in order to avoid some of the heartbreaking stories that you see coming up occasionally. And that's why this continues to be a top priority of mine. … And we will continue to make sure that how we enforce is done as fairly and justly as possible. But until we have a law in place that provides a pathway for legalization and/or citizenship for the folks in question, we're going to continue to be bound by the law. … And so part of the challenge as President is constantly saying, 'what authorities do I have?'" (9/20/12)
14. "We are a nation of immigrants. … But we're also a nation of laws. So what I've said is, we need to fix a broken immigration system. And I've done everything that I can on my own[.]" (10/16/12)
15. "I'm not a king. I am the head of the executive branch of government. I'm required to follow the law. And that's what we've done. But what I've also said is, let's make sure that we're applying the law in a way that takes into account people's humanity. That's the reason that we moved forward on deferred action. Within the confines of the law we said, we have some discretion in terms of how we apply this law." (1/30/13)
16. "I'm not a king. You know, my job as the head of the executive branch

ultimately is to carry out the law. And, you know, when it comes to enforcement of our immigration laws, we've got some discretion. We can prioritize what we do. But we can't simply ignore the law. When it comes to the dreamers, we were able to identify that group and say, 'These folks are generally not a risk. They're not involved in crime. … And so let's prioritize our enforcement resources.' But to sort through all the possible cases of everybody who might have a sympathetic story to tell is very difficult to do. This is why we need comprehensive immigration reform. To make sure that once and for all, in a way that is, you know, ratified by Congress, we can say that there is a pathway to citizenship for people who are staying out of trouble, who are trying to do the right thing, who've put down roots here. … My job is to carry out the law. And so Congress gives us a whole bunch of resources. They give us an order that we've got to go out there and enforce the laws that are on the books. … If this was an issue that I could do unilaterally I would have done it a long time ago. … The way our system works is Congress has to pass legislation. I then get an opportunity to sign it and implement it." (1/30/13)

17. "This is something I've struggled with throughout my presidency. The problem is that I'm the president of the United States, I'm not the emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic. ... [W]e've kind of stretched our administrative flexibility as much as we can[.]" (2/14/13)
18. "I think that it is very important for us to recognize that the way to solve this problem has to be legislative. I can do some things and have done some things that make a difference in the lives of people by determining how our enforcement should focus. … And we've been able to provide help through deferred action for young people …. But this is a problem that needs to be fixed legislatively." (7/16/13)
19. "My job in the executive branch is supposed to be to carry out the laws that are passed. Congress has said 'here is the law' when it comes to those who are undocumented, and they've allocated a whole bunch of money for enforcement. And, what I have been able to do is to make a legal argument that I think is absolutely right, which is that given the resources that we have, we can't do everything that Congress has asked us to do. What we can do is then carve out the DREAM Act folks, saying young people who have basically grown up here are Americans that we should welcome. … But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option. … What I've said is there is a there's a path to get this done, and that's through Congress." (9/17/13)
20. "[I]f, in fact, I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use

our democratic processes to achieve the same goal that you want to achieve. … It is not simply a matter of us just saying we're going to violate the law. That's not our tradition. The great thing about this country is we have this wonderful process of democracy, and sometimes it is messy, and sometimes it is hard, but ultimately, justice and truth win out." (11/25/13)

21. "I am the Champion-in-Chief of comprehensive immigration reform. But what I've said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do. What I've done is to use my prosecutorial discretion, because you can't enforce the laws across the board for 11 or 12 million people, there aren't the resources there. What we've said is focus on folks who are engaged in criminal activity, focus on people who are engaged in gang activity. Do not focus on young people, who we're calling DREAMers …. That already stretched my administrative capacity very far. But I was confident that that was the right thing to do. But at a certain point the reason that these deportations are taking place is, Congress said, 'you have to enforce these laws.' They fund the hiring of officials at the department that's charged with enforcing. And I cannot ignore those laws any more than I could ignore, you know, any of the other laws that are on the books. That's why it's so important for us to get comprehensive immigration reform done this year." (3/6/14)
22. "I think that I never have a green light [to push the limits of executive power]. I'm bound by the Constitution; I'm bound by separation of powers. There are some things we can't do. Congress has the power of the purse, for example. … Congress has to pass a budget and authorize spending. So I don't have a green light. … My preference in all these instances is to work with Congress, because not only can Congress do more, but it's going to be longer-lasting." (8/6/14)

Issues Illegal Immigration (http://www.truthrevolt.org/issues/illegal-immigration)
Immigration (http://www.truthrevolt.org/issues/immigration)

People Barack Obama (http://www.truthrevolt.org/people/barack-obama)

the weekly Standard
www.weeklystandard.com

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Obama Admits: 'I Just Took an Action to Change the Law'

Calls it a "fact."

Daniel Halper

November 25, 2014 7:42 PM

The White House has argued that President Obama's executive amnesty order last week was made well within the existing law. But in remarks in Chicago tonight, President Obama went off script and admitted that in fact he unilaterally made changes to the law.

President Obama made the admission after getting heckled for several minutes by immigration protesters.

Watch here:

"All right, OK. OK. I understand," Obama told the protesters after letting them go on for some time. "Listen. Hold on, hold on, hold on. Young lady, young lady, don't just -- don't just start -- don't just start yelling, young ladies. Sir, why don't you sit down, too?

"Listen, you know -- here. Can I just say this, all right? I've listened to you. I heard you. I heard you. I heard you. All

right? Now, have been respectful, I let you -- I'll -- All right? So let me just -- nobody is removing you. I have heard you, but you have got to listen to me, too. All right? And I understand you may disagree, I understand you may disagree. But we have got to be able to talk honestly about these issues, all right?

"Now, you're absolutely right that there have been significant numbers of deportations. That's true. But what you are not paying attention to is the fact that I just took an action to change the law."

The United States Constitution says the legislative power is held by Congress, not by the president.

Source URL: http://www.weeklystandard.com/blogs/obama-admits-i-just-took-action-change-law_820167.html

Exhibit J

Thursday, December 4 2014

Opinions

Obama has already won the immigration fight

Republicans from the House of Representatives spoke out Tuesday ahead of a vote this week to go on record as disapproving President Obama's executive actions on illegal immigration. (AP)

By Dana Milbank Opinion writer December 2

Follow @Milbank

Among the many ways Republican members of Congress are contemplating to punish President Obama for his executive actions on immigration is a proposal of elegant

simplicity: They would refuse to invite him to the Capitol to give his State of the Union address.

Yes, that should do the job. And if this doesn't force Obama to back down from his executive orders, Republican lawmakers can escalate by unfriending him on Facebook and unfollowing him on Twitter. If even this fails, they can take the extreme step of having their Christmas cards from the Obamas returned to sender. Surely, the president then would have no choice but to relent.

Dana Milbank writes about political theater in the nation's capital. He joined the Post as a political reporter in 2000.
View Archive

The State of the Union dis-invitation, in other words, would be precisely as effective as all the other ideas Republicans are contemplating, which is to say entirely ineffective. There will be more spluttering and stomping and shouting about Obama's illegal and unconstitutional activities, but pay no attention. In the immigration stare-down, Republicans have already blinked. Unwilling to squander their new majority and public support by risking a government shutdown, they are quickly falling in line behind symbolic protests.

My Post colleague Robert Costa has heard Republican lawmakers floating no fewer than nine possible responses, from the frivolous (the State of the Union snub) to the outrageous (impeachment). But all signs indicate Republicans have abandoned attempts to defund Obama's executive actions under the threat of a shutdown — at least for now. Instead, they plan to keep the government running through Sept. 30, probably allowing immigration-

related spending to lapse earlier next year. This would be paired with a symbolic vote blocking Obama's executive actions.

Even the author of that token bill, Rep. Ted Yoho (R-Fla.), admits it would be useless unless the still-Democratic Senate passes it and Obama signs it. Why would either do that?

"Well, you brought up a great point," Yoho acknowledged as he emerged from a meeting with Republican colleagues in the Capitol basement Tuesday. "It can be a symbolic message . . . I'm relying on you to get this message out to the American people so that it is not a lame-duck message."

Message delivered, congressman. But it won't help.

Rep. Steve King (R-Iowa), perhaps the most outspoken immigration hard-liner in the House, left the meeting criticizing his colleagues for going soft. "We need to shut off the funding to this president's lawless act, nothing else, but I don't know if there's enough will in that room to defend the Constitution yet," he said.

And how many share this view? “I think that there’s a majority that agree with me but there’s not yet a majority that are ready to fight.”

If the will to fight is not there now, when Republicans’ anger about immigration is fresh, it’s not clear why they think they’d have better luck threatening a shutdown next year. That may be why Heritage Action, a powerful conservative group, issued a statement while House Republicans met Tuesday declaring: “The fight is now, not next year. Americans expect real action, not a show vote.”

John Boehner was unpersuaded. After his caucus meeting, which ran a half-hour over schedule, the House speaker acknowledged to reporters that his members “understand that it’s going to be difficult to take meaningful action as long as we’ve got Democratic control of the Senate.”

ABC News’s Jeff Zeleny asked him if he was, as Heritage claimed, holding a “show vote.”

“Frankly, we have limited options and limited abilities to deal with it directly,” Boehner conceded.

“Is a shutdown off the table?” NBC’s Luke Russert called after Boehner as he left. The speaker didn’t reply — but the answer was obvious, as rank-and-file Republicans, even faithful conservatives, left the meeting almost uniformly disavowing interest in a shutdown.

That leaves symbolic protest.

Michael McCaul (R-Tex.), chairman of the House Homeland Security Committee, hauled in Homeland Security Secretary Jeh Johnson Tuesday for a tongue-lashing about the executive orders. "Unprecedented executive power-grab," McCaul fumed. "The president has deliberately and willfully broken the trust that is needed between our branches of government." The chairman demanded that Johnson reconcile the actions with Obama's previous statements indicating such orders would be illegal.

Johnson was calm and mild in his response. "I do not believe that what we have done is inconsistent," he said. "We spent a lot of time with lawyers."

Republican members of the panel continued to rail against the policy (Utah's Jason Chaffetz played a gotcha video of Obama, to which the secretary replied, "very nice") but Johnson declined to be drawn into an argument. He didn't have to: Obama had already won.

Twitter: @Milbank

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Read more about this topic:

The Post's View: On immigration, the GOP should make the next move

Dana Milbank: Obama's big immigration mistake

Charles Krauthammer: Republicans must seize the day

Exhibit K

In it, but not of it. TPM DC

The GOP's War On Obama's Executive Action Lasted About 5 Minutes

AP Photo / Susan Walsh

By Sahil Kapur Published December 3, 2014, 6:00 AM EST 85870 views

Five months ago, conservative were so livid over President Barack Obama's upcoming "executive amnesty" that incoming House Majority Whip Steve Scalise (R-LA) couldn't bring himself to rule out impeaching the president as punishment.

Now, even firebrand Rep. Steve King (R-IA) and Sen. Jeff Sessions (R-AL), Obama's chief immigration foes, have ruled that out. GOP leaders were never seriously considering the idea, but they've successfully tamped down any talk of it.

What's more, Republicans may be on the brink of avoiding a government shutdown fight, at least until March, and effectively permitting the executive actions by "Emperor Obama," as Speaker John Boehner's (R-OH) office has dubbed him, with no pushback other than a symbolic vote of disapproval.

Republicans don't have the votes for this watered down plan yet, and it could still collapse. But it has significant GOP support, a sign that the fury has calmed quite a bit.

How did things change so much?

Many Republicans gradually realized that they have no realistic chance of stopping Obama, at least while they control only one chamber of Congress before January, and have heeded calls from leadership to put off the fight until they take over the Senate and expand their House majority in January.

"You need to utilize every political means that you can in the environment that you're in. We have limited capabilities now politically, with one house of government," freshman Rep. Robert Pittenger (R-NC) said.

"We're not going to take that bait," Rep. Dennis Ross (R-FL) said of a potential shutdown. "We learned from what happened last time. We also learned that no matter what we do until we get a dance partner in the Senate ... we've got to be realistic. And shutting down the government is not a realistic alternative at this juncture."

And for all their fighting words, many Republican members never had much of an appetite for another government shutdown in less than two years.

"Almost no members want to get back into what happened last year," Rep. Devin Nunes (R-CA), a vocal GOP critic of the 2013 shutdown, told TPM. "If you find some, let me know. They're an endangered species."

Even if Congress manages to pass the "CRonmibus" bill to keep the government running while funding the Department of Homeland Security only through March, Boehner is raising expectations for a major fight early next year that could spin out of his control, much as the 2013 battle over Obamacare did. The conservatives who were talked out of a fight this time may feel the need to wage one early next year when they have a larger presence in Congress.

"This is a serious breach of our Constitution, it's a serious threat to our system of governing," Boehner told reporters. "And frankly, we have limited options, limited ability to deal with it directly."

The chief advocates demanding that Republicans act to thwart Obama now, not later, at the risk of a shutdown are King, Sessions, the tea party group Heritage Action (which called the Boehner plan "a blank check for amnesty") and RedState editor Erick Erickson (who called on Boehner to "[p]ut up or shut up").

"Symbolic protest votes are a move that lacks the testicular fortitude of real conviction," Erickson wrote.

Republican leaders also privately worry that an all-out brawl against an immigration policy that Hispanic voters strongly support could damage their party's hopes in the 2016 presidential election.

With House Minority Leader Nancy Pelosi (D-CA) staunchly opposed to the CRomnibus, Boehner may not be able to rely on many Democratic votes to help pass the proposal. If it passes the House, Senate Majority Leader Harry Reid (D-NV) signaled that the upper chamber will take it up. (But he said he won't allow a vote on the House measure to disapprove of Obama's moves.)

The deadline to fund the government is Dec. 11. Boehner's plan is not yet a done deal, but if he pulls it off it will be a sign of restraint by a party whose third-ranking House leader, Scalise, just weeks ago called Obama a "go-it-alone president hell-bent on forcing his radical agenda via subterfuge."

About The Author

Sahil Kapur Follow @sahilkapur

Sahil Kapur is TPM's senior congressional reporter and Supreme Court correspondent. His articles have been published in the Huffington Post, The Guardian and The New Republic. Email him at sahil@talkingpointsmemo.com and follow him on Twitter at @sahilkapur.



Exhibit L

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 JONATHON MOSELEY, FREEDOM WATCH, IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION AUTHENTICATION OF DEFENDANTS' DOCUMENTS

Pursuant to 28 U.S.C. §1746, I, Jonathon Moseley, 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) On November 20, 2014, starting at 8 PM Eastern Standard Time, I watched over the television news networks as President Barack Obama announced his new "Executive Action" program of granting deferred action status (essentially amnesty to a limited extent) to illegal aliens in the United States.

3) Simultaneously with President Obama's speech, the U.S. Department of Homeland Security (DHS) posted an announcement page to correspond with the President's speech on the Department of Homeland Security's public internet website. This page was and is aimed at the general public, news media, and others, and publicly viewable without restriction.

4) The announcement page is http://www.dhs.gov/immigration-action titled "Fixing Our Broken Immigration System Through Executive Action - Key Facts"

5) At that DHS announcement page, DHS has posted publicly, for public viewing without restriction, links for the general public to download and view the key documents relating to the Defendants' new "Executive Action" programs on immigration.

6) From the Department of Homeland Security website, I downloaded the documents which are attached to the Plaintiff's Motion for Preliminary Injunction as Exhibit A and Exhibits C through F.

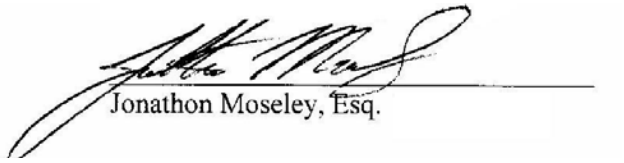
7) Also on November 20, 2014, the U.S. Department of Justice, Office of Legal Counsel, posted the legal memorandum, publicly and without restriction for public viewing, a copy of which is attached as Exhibit B. I downloaded from the U.S. Department of Justice website the document that is attached as Exhibit B to this Motion for Preliminary Injunction.

8) On December 2, 2014, the same Office of Legal Counsel (OLC) legal memorandum was introduced into the record as evidence in a hearing in the Judiciary Committee of the U.S. House of Representatives by Ranking Member Congressman John Conyers. *See* "Executive Action on Immigration," House Judiciary Committee, C-SPAN, December 2, 2014, http://www.c-span.org/video/?323021-1/house-judiciary-committee-hearing-

executive-action-immigration

9) The OLC memorandum attached as Exhibit B was made available to the public intentionally and knowingly, as presented on the DoJ's website, as legal justification in support of the Defendants' "Executive Action" programs to grant deferred action status (amnesty) to millions of illegal aliens in the country.

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 4, 2014

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH ARPAIO	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 14-cv-1966 (BAH)
	)	
BARACK OBAMA, *et al*.	)	
	)	
Defendants.	)	
_____	)	

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

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INTRODUCTION

The policies at issue in this case are part of a comprehensive effort by the Secretary of Homeland Security, at the request of the President, to more effectively administer and enforce our nation's immigration laws. The effort reflects the multiple, converging enforcement challenges that the Department of Homeland Security ("DHS") has faced in recent years. These challenges include: insufficient resources to address the number of immigration violations confronted by the Department; recent demographic shifts at the border that significantly increase the costs of managing and deterring unauthorized border crossings; the increasing complexity of removing aliens from the interior; congressional directives to prioritize recent border crossers and aliens convicted of serious crimes; the humanitarian and social consequences of separating the nuclear families of U.S. citizens and lawful permanent residents ("LPRs"); and renewed urgency to harmonize the work of DHS's component immigration agencies.

On November 20, 2014, the Secretary issued a series of directives pursuant to his authority under the Immigration and Nationality Act ("INA") to address these challenges. Central to this initiative is the establishment of DHS-wide enforcement priorities that further emphasize national security, border security, and public safety. These priorities reflect statutory obligations and congressional priorities embodied in the INA, as well as humanitarian factors recognized by our immigration laws. They also reflect DHS's need to prioritize and better coordinate its enforcement efforts in light of its limited resources. Integral to this initiative is a DHS memorandum calling for the case-by-case exercise of deferred action—a long-established form of prosecutorial discretion—for certain low-priority aliens: aliens present in the United States since before 2010 and who either entered as children or are the parents of U.S. citizens or LPRs. Designation of such aliens as potentially eligible for deferred action serves two purposes: (1) to enhance DHS's capacity to focus limited resources on threats to national security, border

security, and public safety, and (2) to recognize family ties and other humanitarian concerns under the INA.

Hours after the President's announcement of the Secretary's new initiative, Plaintiff filed the instant lawsuit, challenging parts of the DHS initiative, as well as DHS deferred action guidance that has been in effect since 2012. Plaintiff is a county sheriff, challenging a national policy in a domain that the Supreme Court has made clear is an area of federal authority, and that does not impose any constraint or obligation on his office. Plaintiff's claimed harm is that deferred action serves as a magnet for more illegal entries by aliens who will then commit crimes within his county and thus burden his law enforcement resources. This theory is speculative and unsubstantiated; indeed, it is contradicted by the very guidance he challenges, which aims to provide federal authorities increased resources to remove criminal aliens and recent border crossers—precisely the individuals whom Plaintiff argues should be removed. Plaintiff has thus failed to show he will suffer any Article III injury at all—irreparable or otherwise—let alone an injury traceable to the guidance at issue or redressable by any relief that this Court could order.

Nor can Plaintiff demonstrate the requisite likelihood of success on the merits. First, his lack of standing, in addition to being a reason for dismissal, is fatal to his success on the merits. Second, even if he had standing, Plaintiff's challenge to the prosecutorial discretion embodied in the DHS guidance is meritless. Indeed, the Supreme Court has made clear that the federal government's discretion regarding immigration enforcement includes decisions whether to even pursue removal. *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). The DHS policy guidance at issue here, concerning its prioritization of immigration enforcement efforts, is inherently a matter committed to agency discretion by law, which this Court lacks authority to review. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

Plaintiff's repeated false labeling of deferred action as "amnesty" merely belies the weakness of his arguments. The deferred action guidance does not grant legal status to any alien. Rather, it authorizes a temporary exercise of prosecutorial discretion on a case-by-case basis for certain individuals who have been in the United States since 2010 and have deep ties to the community, while making work authorization available under existing statutory authority. This guidance is part of a long tradition of the exercise of prosecutorial discretion, and in particular , the use of deferred action, to advance federal immigration priorities. Indeed, Congress itself recognizes that the Executive must prioritize its resources in this area, and has instructed DHS to prioritize the removal of criminals and recent border crossers, as it is doing here. This specific direction, against the historical backdrop of broad discretion afforded the Secretary of Homeland Security, makes clear that Plaintiff's substantive challenge is meritless.

Finally, the balance of harms and public interest weigh heavily against granting a preliminary injunction to prohibit the existing and future use of deferred action for certain childhood arrivals and certain parents of U.S. citizens or LPRs who have been in the country since 2010. Among other things, the requested preliminary injunction would subvert the government's judgment about how best to protect border security, national security, and public safety, including by focusing on the removal of priority aliens. An injunction would also interfere with the Secretary's established authority to take into account humanitarian consequences in exercising his power to consider deferred action. Furthermore, an injunction would do nothing to advance the claimed interests of Plaintiff, which, if anything, are advanced by the very guidance he seeks to challenge.

For all of these reasons, Plaintiff's motion should be denied, and this case should be dismissed for lack of jurisdiction.

BACKGROUND

I. Statutory and Regulatory Background.

A. The Executive Branch's Discretion Over Immigration Enforcement.

Congress has charged the Secretary of Homeland Security with the administration and enforcement of the immigration laws. 8 U.S.C. § 1103(a)(1). In doing so, it has vested the Secretary with considerable discretion over immigration matters, authorizing the Secretary to "establish such regulations; . . . issue such instructions; and perform such other acts *as he deems necessary* for carrying out his authority" under the statute. *Id.* § 1103(a)(3) (emphasis added). Such broad authority and discretion over immigration matters is consistent with the Executive Branch's inherent power over the admissibility and exclusion of aliens. *See Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950). This power is at its apex when the removal of aliens is at issue. "The broad discretion exercised by immigration officials" is a "principal feature of the removal system," which includes the power to decide "whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499.

Recognizing the Executive Branch's inherent power and need for flexibility in light of limited resources for immigration enforcement, Congress has directed the Secretary to establish "national immigration enforcement policies and priorities." Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)). Indeed, although there "are approximately 11.3 million undocumented aliens in the country," Congress has only "appropriated sufficient resources for [DHS] to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country." Karl Thompson, Memorandum Opinion for the Sec'y of Homeland Security and the Counsel to the President: *DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 9

(Nov. 19, 2014) ("OLC Op.").[1] These significant constraints require DHS to "ensure that [its] limited resources [are] devoted to the pursuit of" its highest priorities. *Id*. (quoting draft of Memorandum from Jeh Charles Johnson, Secretary, DHS, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, *et al.*, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) ("Prioritization Guidance") (attached as Exhibit 2).

This prioritization is reflected in the immigration laws. The INA, for example, prioritizes the detention and removal of recent border crossers, criminal aliens, and threats to national security. *See*, *e.g.*, 8 U.S.C. § 1225(establishing a special "expedited removal" process for aliens apprehended at the border); *id.* § 1226(c) (providing mandatory detention for aliens convicted of certain crimes); *id.* § 1226a (providing mandatory detention of suspected terrorists). Congress has also directed DHS to prioritize "the identification and removal of aliens convicted of a crime," Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. F., Tit. II, 128 Stat. 5, 251 (2014), and to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer," H.R. Rep. No. 111-157, at 8 (2009) (DHS Appropriations Act 2010, Pub. L. No. 111-83, 123 Stat. 2142 (2009) (enacted as amended)).

B. The Executive Branch's Longstanding Exercise Of Its Immigration Enforcement Discretion Through "Deferred Action."

The Executive Branch has long exercised prosecutorial discretion in the immigration context, including through "deferred action" with respect to certain classes of aliens, in order to focus the agency's scarce resources on higher priority aliens. Deferred action also can further

[1] The OLC Opinion is attached as Exhibit 1. It is also publicly available at: http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

other public interests, such as offering humanitarian relief, advancing foreign policy objectives, fostering economic development, and promoting administrative efficiency. Deferred action is revocable at any time and *does not* confer legal status on aliens whose removal is deferred. *See, e.g.*, U.S. Citizenship and Immigration Services ("USCIS"), *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 16 (2014) ("DACA Toolkit") (attached as Exhibit 3). Longstanding regulations, based on authority granted to the Secretary and previously to the Attorney General, *see* 8 U.S.C. § 1324a(h)(3), provide that an alien subject to deferred action may be eligible for employment authorization. 8 C.F.R. § 274a.12(c)(14).

For decades, the Executive Branch has implemented deferred action and other forms of prosecutorial discretion both for individual aliens and for various classes of aliens. For example, from 1956 to 1990, discretionary mechanisms similar to deferred action were used to defer enforcement against aliens who were beneficiaries of approved visa petitions,[2] nurses who were eligible for H-1 visas,[3] nationals of designated foreign states,[4] and the ineligible spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986.[5] *See* OLC Op. at 14. Since 1990, deferred action has been applied for additional

[2] *See United States ex. rel. Parco v. Morris*, 426 F. Supp. 976, 979-80 (E.D. Pa. 1977).
[3] *See* Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978).
[4] *See* Andorra Bruno *et al.*, Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 20-23 (July 13, 2012) (attached as Exhibit 4); Moore, Charlotte J., Cong. Research Serv., *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12-14 (1980) (excerpt attached as Exhibit 5).
[5] Memorandum from Gene McNary, Commissioner, INS, to Regional Commissioners, INS, *Family Fairness: Guidelines for Voluntary Departure under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) (attached as Exhibit 6).

classes of aliens, such as battered aliens under the Violence Against Women Act ("VAWA"),[6] T and U Visa applicants,[7] foreign students affected by Hurricane Katrina,[8] widows and widowers of U.S. citizens,[9] and childhood arrivals.[10] *See id*. at 15-17.[11]

The Supreme Court has specifically acknowledged the Executive Branch's authority to exercise prosecutorial discretion in the immigration context, including through deferred action. *See Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471, 483-84 (1999) ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor,

[6] Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, INS, to Regional Directors *et al.*, INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997) (attached as Exhibit 7).

[7] Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, INS, to Michael A. Pearson, Executive Associate Commissioner, INS, *Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 –"T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001) (attached as Exhibit 8).

[8] USCIS, Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ) at 1 (Nov. 25, 2005) (attached as Exhibit 9).

[9] Memorandum, from Donald Neufeld, Acting Associate Director, USCIS, to Field Leadership, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009) (attached as Exhibit 10).

[10] Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Commissioner, CBP, *et al.*, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("2012 DACA Memo") (attached as Exhibit 11).

[11] *See also* Sam Bernsen, Immigration and Naturalization Serv. (INS) General Counsel, Legal Op. Regarding Service Exercise of Prosecutorial Discretion 2 (July 15, 1976) (attached as Exhibit 12) (noting the Executive Branch's "inherent authority" to exercise prosecutorial discretion); Memorandum from Doris Meissner, INS Comm'r, to Regional Directors, *Exercising Prosecutorial Discretion* at 2 (Nov. 17, 2000) (attached as Exhibit 13) (directing, following the enactment of IIRIRA, that prosecutorial discretion "applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions," such as "granting deferred action or staying a final order"); Memorandum from William J. Howard, Principal Legal Advisor, DHS, to OPLA Chief Council, DHS, *Prosecutorial Discretion* at 2 (Oct. 24, 2005) (attached as Exhibit 14) (recognizing, after the formation of DHS that the "universe of opportunities to exercise prosecutorial discretion is large," including "in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs"); Memorandum from Julie L. Myers, Assistant Sec'y, DHS, to Field Office Directors, DHS, *Prosecutorial and Custody Discretion* (Nov. 7, 2007) (attached as Exhibit 15) (recommending the exercise of prosecutorial discretion for nursing mothers).

and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience."). Moreover, the Court has recognized that 8 U.S.C. § 1252(g) renders the Executive's exercise of discretion over the initiation and prosecution of removal proceedings unreviewable. *Id.* at 483-84, 486-87. The Supreme Court recently reaffirmed the Executive Branch's authority to defer the initiation of removal proceedings. *See Arizona*, 132 S. Ct. at 2499 ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.").

Congress also has approved the practice of deferred action. For example, Congress expanded the Executive's VAWA deferred action program in 2000 by making eligible for "deferred action and work authorization" children who could no longer self-petition under VAWA because they were over the age of 21. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)). Similarly, in 2008, as part of legislation authorizing DHS to grant "an administrative stay of a final order of removal" to any individual who could make a *prima facie* showing of eligibility for a T or U visa, Congress stated that "[t]he denial of a request for an administrative stay of removal . . . shall not preclude the alien from applying for . . . deferred action." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(2)). In addition, in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302, Congress specified that "approved deferred action status" constituted evidence of lawful status as it relates to making state-issued driver's licenses or identification cards acceptable for federal purposes. Congress also has specified classes of aliens who should be made eligible for deferred action,

such as certain family members of LPRs who were killed on September 11, 2001, *see* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain family members of certain U.S. citizens killed in combat, *see* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694.

II. Procedural Background.

A. DHS Guidance Challenged by Plaintiff.

i. 2012 Deferred Action For Childhood Arrivals.

On June 15, 2012, DHS announced guidance referred to as Deferred Action for Childhood Arrivals ("DACA"). Under DACA, aliens brought to the United States as children who meet certain guidelines, including continuous residence in the United States since June 15, 2007, are able to request deferred action.[12] *See* Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Commissioner, CBP, *et al.*, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("2012 DACA Memo") (attached as Exhibit 11). The 2012 DACA Memo explained that deferred action would be offered "in the exercise of [DHS's] prosecutorial discretion" because these children "lacked the intent to violate the law" and "additional measures [were] necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." *Id.*

[12] The DACA guidelines are: (1) being under the age of 31 when the guidance was issued; (2) being under the age of 16 at the time of arrival in the United States; (3) having continuously resided in the United States for at least five years immediately preceding June 15, 2012; (4) having been physically present in the United States on June 15, 2012; (5) being in school, having graduated from high school, having obtained a general education development certificate, or having been honorably discharged from the Coast Guard or the Armed Forces of the United States; (6) and not having been convicted of felonies or other serious offenses, or otherwise posing a threat to the national security or public safety. 2012 DACA Memo at 1.

DHS officials consider approval for DACA "on an individual basis," and contingent on meeting the eligibility guidelines, passing a background check, and otherwise meriting an exercise of discretion. *Id*. at 2. The 2012 DACA Memo made clear that DHS could not "provide any assurance that relief w[ould] be granted in all cases," *id*., and that deferred action "confer[red] no substantive right, immigration status or pathway to citizenship." *Id.* at 3. Successful DACA requestors received deferred action for two years, subject to renewal. DACA Toolkit at 11. Those who receive DACA are also eligible for work authorization during the period of deferred action. *See* 2012 DACA Memo at 3. A grant of deferred action under DACA can be terminated at any time in the agency's discretion. DACA Toolkit at 16.

ii. 2014 DACA Modification.

On November 20, 2014, the Secretary issued various memoranda as part of a comprehensive initiative to establish Department-wide enforcement priorities that further focus DHS resources on national security, border security, and public safety. One of those memoranda addressed deferred action guidelines for low-priority aliens and included revisions to three aspects of DACA. *See* Memorandum from Jeh Charles Johnson, Secretary, DHS, to León Rodriguez, Director, USCIS, *et al.*, *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* (Nov. 20, 2014) ("2014 Deferred Action Guidance") (attached as Exhibit 16). First, it removed the age cap of 31 so that individuals could request DACA regardless of their current age, as long as they entered the United States before the age of 16. *Id*. at 3. Second, it extended the period of DACA from two to three years. *Id*. Third, it adjusted the relevant date by which an individual must have been in the United States from June 15, 2007 to January 1, 2010. *Id*. at 4. USCIS was instructed to

begin accepting requests under the revised DACA guidelines no later than 90 days after the guidance was issued, *id.*, which is February 18, 2015.

iii. 2014 Deferred Action For Parents of U.S. Citizens and LPRs.

The November 2014 Deferred Action Guidance also established separate guidelines under which certain parents of U.S. citizens or LPRs will be able to request deferred action ("DAPA"). To be considered for deferred action under DAPA, an individual must meet the following guidelines: (1) have, on November 20, 2014, a son or daughter who is a U.S. citizen or LPR; (2) have continuously resided in the United States since before January 1, 2010; (3) have been physically present in the United States on November 20, 2014, and at the time of making a request for deferred action with USCIS; (4) have had no lawful status on November 20, 2014; (5) not fall within one of the categories of enforcement priorities set forth in another memorandum issued that same day; and (6) present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate. 2014 Deferred Action Guidance at 4. In addition, individuals are required to submit personal identifying information, such as fingerprints, to USCIS for a background check. *Id*. USCIS was instructed to begin accepting requests from individuals under the DAPA guidelines no later than 180 days after the policy's announcement, *id*. at 5, which is May 19, 2015.

As with DACA, DAPA requests will be assessed individually by immigration officers, who will determine whether to exercise prosecutorial discretion "on a case-by-case basis" considering all relevant factors. *Id*. at 4. Also, as with DACA, deferred action under DAPA does not confer any "substantive right, immigration status or pathway to citizenship," *id*. at 5, and it may be revoked at any time in the agency's discretion, *id*. at 2. Individuals who request deferred action under DAPA may also be eligible for work authorization for the period of

deferred action (3 years) pursuant to applicable regulations. *Id*. at 4-5; 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).[13]

B. Plaintiff's Claims.

On November 20, 2014, the same day that the 2014 Deferred Action Guidance and other immigration guidance memoranda were issued, Plaintiff Joseph Arpaio, the Sheriff of Maricopa County in Arizona, filed a Complaint against Defendants seeking declaratory and injunctive relief (Compl.) (ECF. No. 1). Plaintiff challenges DHS's authority concerning the ongoing implementation of DACA, which has been taking place since 2012, as well as DHS's authority to issue some of the DHS guidance announced on November 20, 2014, although he fails to differentiate clearly among the several DHS memoranda issued that day. Plaintiff's Complaint includes six causes of action, of which four (the first, third, fourth, and fifth) all concern one issue: whether DHS has the authority to implement DACA and the 2014 Deferred Action Guidance.[14] Plaintiff appears to argue that DACA and other 2014 DHS guidance: (1) exceeded the Executive Branch's constitutional and statutory authority (first, third, fourth, and fifth causes of action); (2) were subject to, and violated, the Administrative Procedure Act's ("APA") notice-

[13] In his Motion, Plaintiff references three other memoranda issued by DHS on November 20, 2014. *See* Prioritization Guidance (attached as Exhibit 2); Memorandum from Jeh Charles Johnson, Secretary, DHS, to León Rodriguez, Director, USCIS,*et al.*, *Expansion of the Provisional Waiver Program* (Nov. 20, 2014) ("Provisional Waiver Guidance") (attached as Exhibit 17); Memorandum from Jeh Charles Johnson, Secretary, DHS, to León Rodriguez, Director, USCIS, *et al.*, *Policies Supporting U.S. High Skilled Businesses and Workers* (Nov. 20, 2014) ("High-Skilled Businesses & Workers Guidance") (attached as Exhibit 18).

[14] Plaintiff alleges that DACA, and some of DHS's 2014 guidance memoranda, exceed the President's authority under the Constitution (first cause of action), Compl. ¶ 50, are "invalid agency action" under the APA (third cause of action), *id*. ¶ 69, fail the "rational basis test for exercise of delegated authority in administrative law" because they "grant employment authorization to . . . illegal aliens" (fourth cause of action), *id*. ¶¶ 74-75, and do not constitute a lawful exercise of prosecutorial discretion (fifth cause of action), *id*. ¶¶ 79-84.

and-comment requirements (second cause of action); and (3) violated the "nondelegation doctrine" (sixth cause of action). Compl. ¶¶ 50-88.

On December 4, 2014, Plaintiff Arpaio filed a Motion for a Preliminary Injunction (Pl.'s Mot.) (ECF No. 6). Plaintiff's motion states that the 2014 Deferred Action Guidance "is the primary document of the programs in dispute." Pl.'s Mot. at 7.[15] He argues the Court should grant a preliminary injunction because he allegedly would suffer irreparable injury absent an injunction by having to divert resources "to handle the flood of increased illegal immigration" and purported increase in crime that DACA and the 2014 Deferred Action Guidance will cause. Pl.'s Mot. at 14. In his December 9, 2014 Statement of Briefing Scheduling (ECF No. 12), Plaintiff conceded that "the legal criteria for a preliminary injunction apply more weakly to those who are already holding deferred action and work authorization under DACA." *Id.* at 10.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy," which "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20; *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014). "A movant's failure to show any irreparable harm is . . . grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

[15] In addition, Plaintiff indicates that he is not challenging the 2014 Prioritization Guidance, calling it "less important (for the purposes of the instant case)," and stating that it "concerns internal prioritization of [DHS's] work, and does not grant affirmative benefits . . . to certain illegal aliens, which is the essence of the current dispute." Pl.'s Mot. at 10-11.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFF'S MOTION AND DISMISS THIS ACTION FOR LACK OF SUBJECT-MATTER JURISDICTION BECAUSE PLAINTIFF LACKS STANDING.

Before addressing the merits of Plaintiff's motion for a preliminary injunction, this Court must determine whether it has subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Aamer v. Obama*, 742 F.3d 1023, 1028 (D.C. Cir. 2014); *Zukerberg v. D.C. Bd. of Elections & Ethics*, 999 F. Supp. 2d 79, 82 (D.D.C. 2013). Plaintiff plainly lacks standing to challenge the guidance at issue in this case, and the Court therefore lacks jurisdiction to entertain Plaintiff's claims. Accordingly, the Court should deny Plaintiff's motion and dismiss the entire case. *See Steel Co.*, 523 U.S. at 94; *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915 (D.C. Cir. 2003); *see also Munaf v. Geren*, 553 U.S. 674, 692 (2008) (finding it appropriate to "terminate the litigation" at the preliminary injunction stage if the "Government is entitled to judgment as a matter of law").

A. Plaintiff Lacks Article III Standing to Challenge the Deferred Action Guidance At Issue In This Case.

Federal courts sit to decide cases and controversies, not to resolve disagreements about policy or politics. Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation and internal quotation omitted). Article III standing "is an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must demonstrate (1) a "concrete and particularized" injury-in-fact that is "actual or imminent," (2) a causal connection between the injury and defendants'

challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Id.* (internal quotation marks omitted).

Plaintiff has failed to discharge this burden. At its core, Plaintiff's lawsuit is a generalized disagreement with the federal government's immigration policy, which cannot support Article III standing.

i. Plaintiff Has Failed to Demonstrate Any Injury-In-Fact Traceable to the Specific Guidance He Challenges In This Litigation.

Plaintiff has failed to allege any concrete injury whatsoever to the Maricopa County Sheriff's Office, let alone one traceable to the DHS policies challenged in this case. That failure is fatal to Plaintiff's Article III standing. To be sure, Plaintiff's motion and declaration are replete with conclusory and speculative allegations about the harm that the Sheriff's Office allegedly incurs as a result of illegal immigration—from the depletion of resources to increases in crime and danger to deputies, ostensibly supported by press releases issued by Plaintiff himself. *See* Pl's Mot. at 14-15. But self-serving, conclusory allegations cannot give rise to standing, and in any event, Plaintiff fails entirely to connect these alleged harms to the DHS policies challenged in this litigation. Moreover, Plaintiff's contention that he is harmed by DHS's alleged non-enforcement of immigration laws runs up against 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).

As an initial matter, the challenged DHS policies neither direct Plaintiff to take any action nor restrain him in the performance of any of his duties. Accordingly, this case is readily distinguishable from cases in which law enforcement officials have been found to have standing to sue a federal agency due to direct regulation of their official conduct. *See, e.g.*, *Fraternal*

*Order of the Police v. United State*s, 152 F.3d 998, 1001-1002 (D.C. Cir. 1998); *Lamont v. O'Neill*, 285 F.3d 9, 12-14 (D.C. Cir. 2002). Because Plaintiff's conduct is not regulated by the policies at issue in this case, standing is "substantially more difficult to establish" here. *Lujan*, 504 U.S. at 562 (internal quotation marks omitted); *see also Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1269 (D.C. Cir. 2007).

Because the challenged DHS guidance does not directly impact him, Plaintiff is left to make speculative and unfounded assertions about the alleged consequences of future increases in illegal immigration that he implausibly claims will be caused by that guidance. *See* Decl. of Sheriff Joe Arpaio ¶¶ 7, 11-14 ("Arpaio Decl.") (ECF No. 6-7) (hypothesizing that "more illegal aliens will be attracted into the border states," causing more "criminal aliens" to be "back onto the streets of Maricopa County"). These allegations of future harm are far too conclusory, generalized, and speculative to demonstrate the kind of concrete and particularized injury required by Article III. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996); *see also Sadowski v. Bush*, 293 F. Supp. 2d 15, 18-19 (D.D.C. 2003) (concluding that allegations of "general harms caused by the Administration's immigration policies" fall short of demonstrating a particularized injury to plaintiff); *People of Colo. ex rel. Suthers v. Gonzales*, 558 F. Supp. 2d 1158, 1165 (D. Colo. 2007) (holding that Colorado lacked standing to challenge alleged non-enforcement of immigration laws based on allegations that such non-enforcement could lead to a terrorist threat). Indeed, a court addressing similar speculative allegations of injury concerning DHS's 2012 DACA Guidance found them insufficient to establish standing. *See Crane v. Napolitano*, 920 F. Supp. 2d 724, 745-46 (N.D. Tex. 2013), *appeal docketed*, No. 14-10049 (5th Cir. Jan. 14, 2014) ("[T]he Court finds that Mississippi's asserted fiscal injury is purely speculative because there is no concrete evidence that the costs associated with the

presence of illegal aliens in the state of Mississippi have increased or will increase as a result of the [DACA] Directive or the Morton Memorandum.").

Although the speculative and generalized nature of Plaintiff's purported injuries is by itself sufficient to deny standing, Plaintiff's alleged injuries are also wholly disconnected from the challenged DACA and DAPA guidance.[16] Indeed, Plaintiff provides no support whatsoever for the claim that DACA or DAPA have resulted or will result in a future increase in illegal immigration or the release of criminal aliens from custody. To begin with, any decision to cross the border is made by the individual alien, not the federal government. *See Texas v. United States*, No. B-94-228 (S.D. Tex. Aug. 7, 1995) (attached as Exhibit 19) (explaining that Texas's alleged expenditures as a result of illegal immigration were attributable to "conscious actions of aliens to enter Texas illegally"), *aff'd on other grounds by* 106 F.3d 661 (5th Cir. 1997); *see also Lujan*, 504 U.S. at 560-61.

Moreover, Plaintiff's conjecture that the deferred action guidance memoranda will cause a new wave of illegal immigration is directly contrary to the terms of those policies, which *do not apply* to recent arrivals. Indeed, recent border crossers and those apprehended at the border are DHS enforcement priorities. Aliens cannot be considered for DACA or DAPA unless they have "continuously resided in the United States since before January 1, 2010." *See* 2014 Deferred Action Guidance at 4. Plaintiff likewise provides no support for his speculation that the June 2012 DHS DACA memorandum—which applied only to certain individuals who resided in the United States since 2007—resulted in "an increased flood of illegal aliens into Arizona in 2014." Arpaio Decl. ¶ 10. In reality, the causes of increased illegal immigration in recent years

[16] Plaintiff makes no attempt to demonstrate that he suffers harms traceable to any aspect of the Provisional Waiver Guidance, the High-Skilled Businesses & Workers Guidance, or the grant of work authorization to recipients of deferred action pursuant to regulation.

are extremely complex and heavily influenced by factors wholly outside the United States' control, including social, economic, and political strife in other countries. *See, e.g.*, Dangerous Passage: Central America in Crisis and the Exodus of Unaccompanied Minors: Hearing Before the S. Foreign Relations Comm. at 1-3 (July 17, 2014) (Testimony of Ambassador Thomas A. Shannon, Counselor of the Department of State) (attached as Exhibit 20). Furthermore, the Government continues its aggressive and substantial efforts specifically aimed at dispelling any misperceptions about immigration benefits in the United States (the sufficiency of which are not subject to challenge in this litigation).[17] *See, e.g.*, Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs at 4-5 (July 9, 2014) (statement of Craig Fugate, Administrator, Federal Emergency Management Agency, *et al.*) ("Craig Fugate statement") (attached as Exhibit 21).

Not only does Plaintiff incorrectly speculate about the alleged effects of DACA and DAPA, but he ignores the reality that these initiatives *promote* border security and *prevent* crime. Specifically, by deferring the removal of individuals with significant community ties and no significant criminal records, DACA and DAPA free up limited enforcement resources to focus on "threats to national security, border security, and public safety," Prioritization Guidance at 3—the very types of aliens the Plaintiff claims the federal government *should* be pursuing.

Plaintiff has failed to plausibly allege that the crime rate in Maricopa County is traceable to the 2012 DACA Memo or the 2014 Deferred Action Guidance. Indeed, Plaintiff's speculation

[17] Any misperceptions that aliens hold about immigration benefits—whether perpetuated by individuals such as Plaintiff, or by third parties not before the Court, such as smugglers seeking to induce individuals to cross the border—would not be traceable to the Defendants. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013) (plaintiff has burden to demonstrate "that the defendant's *actual* action has caused" the alleged harm) (emphasis added).

about the crime rate appears to rest solely on an unfounded implication that aliens who fall within the DACA or DAPA guidelines are associated with an increased risk of criminal activity. *See* Pl.'s Mot. at 14. This assumption is baseless and affirmatively belied by the terms of DACA and DAPA, which provide that individuals should be considered for deferred action only where they are determined not to pose national security or public safety risks based on appropriate background and criminal record checks.

As shown by Plaintiff's own declaration, his real complaint is with what he asserts to be a "lack of desire by the Obama Administration to enforce the law" relating to the removal of repeat criminal offenders. Arpaio Decl. ¶ 30. Indeed, as the September 3, 2014, letter from Plaintiff to the Inspector General for the Department of Homeland Security reveals, Plaintiff believes that "the problem and the awareness of the problem is not a recent matter, *but a long-term issue*." *Id*. Ex. 1 to Arpaio Decl. (emphasis added). And even with respect to this more general complaint, Plaintiff himself concedes that he is not sure whether the harm he alleges is traceable to *any* actions by Defendants or rather to the acts of third-party aliens. *See id.* ¶ 20 (indicating that he is not sure whether previously-arrested aliens were "not deported" by ICE, or instead "were deported and kept returning to the United States"). In short, any attempt to connect Plaintiff's claimed injury to DACA and DAPA depends on multiple layers of speculation that are unsupported even by Plaintiff's own statements. Indeed, the very purpose of DACA and DAPA is to facilitate DHS's aggressive efforts to focus its enforcement resources on priority removals. Accordingly, Plaintiff lacks standing to challenge the policies at issue here.

Plaintiff's case is ultimately a policy disagreement with Defendants and their determination about how best to prioritize federal immigration resources, *see* Arpaio Decl. ¶ 2, a matter committed by the Constitution and the INA to the federal government. A policy dispute

such as this cannot satisfy the requirements for Article III standing. The Supreme Court has consistently admonished that "'a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in [the] proper application of the Constitution and laws, and seeking relief that no more directly [or] tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Lujan*, 504 U.S. at 560-61).

ii. Plaintiff's Purported Injury Is Not Redressable By The Relief Sought Or Any Relief Plaintiff Could Plausibly Secure In This Litigation.

Even if Plaintiff had plausibly alleged an injury-in-fact traceable to the deferred action guidance at issue, he would still lack Article III standing because such harms—continued presence of complained-of aliens—would not be redressed by the injunction he seeks.

Enjoining DACA and DAPA, as Plaintiff seeks to do, would not compel the ultimate removal of any alien. Plaintiff does not and cannot challenge the Secretary of Homeland Security's general authority to exercise prosecutorial discretion; nor does Plaintiff contend that this Court has authority to compel DHS to remove an individual over DHS's objection. *See Arizona*, 132 S. Ct. at 2499 ("A principal feature of the removal system is the broad discretion exercised by immigration officials."). Moreover, because DHS has limited resources, DHS still will have to prioritize removals. *Cf.* Pl.'s Mot. at 12 (conceding that regardless of DACA or DAPA, the affected aliens "are very unlikely to be deported").

B. Prudential Considerations Further Undermine This Court's Authority To Review This Challenge.

Prudential considerations about the "the proper—and properly limited—role of the courts in a democratic society" further undermine this Court's authority to review Plaintiff's challenge to the Secretary's enforcement of the INA. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Among other things, such considerations

restrain courts from "adjudicating abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (internal citations omitted). Courts will also decline review where a plaintiff's grievance does not "arguably fall within the zone of interests protected or regulated by the statutory provision" in question.[18] *See Bennett*, 520 U.S. at 162.

Prudential considerations counsel against adjudication of Plaintiff's generalized grievance about immigration policy, which would improperly inject this Court into matters that are committed to the plenary authority of the federal political branches. *See Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.").

Plaintiff also does not fall within the zone of interests protected by the INA. *See Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d 897, 900 (D.C. Cir. 1996) (holding that individuals living in immigration-impacted areas lacked prudential standing to claim that "a rush of immigrants adversely affects the welfare of the Federation's members by generating unemployment and wage reductions and burdening public services"). Plaintiff is not personally

[18] In *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Supreme Court recently suggested that the restriction on entertaining generalized grievances, though commonly couched in terms of prudential standing, may actually be a limit on Article III standing. *Id.* at 1387 n.3. At the same time, the Court held that in some circumstances the "zone of interests" test is better understood as an inquiry into whether Congress intended to provide a particular type of plaintiff a cause of action, rather than a prudential limitation on standing. *Lexmark*, however, addresses causes of action under a specific statute rather than the general cause of action established by the Administrative Procedure Act. And, in any event, it makes clear that the "zone of interests" test remains focused on whether the statute is intended to protect the class of persons encompassing the plaintiff from the harm that has occurred as a result of the alleged statutory violation. *Id*. at 1388-89 & n.5.

subject to the INA's provisions, but instead complains of alleged indirect harm from the exercise of prosecutorial discretion by federal officials under the INA. *See* Pl.'s Mot. at 18-19, 22-23. There is also no indication that Congress enacted the INA—and in particular, the provisions of the INA dealing with removal authority—to confer a particular benefit on local law enforcement officials. And there is no reason to believe that Congress intended to permit such officials to police the federal government's enforcement efforts in this uniquely federal area of law. *See Arizona*, 132 S. Ct. at 2499; *see also* Compl. at 19 (acknowledging that "as current legal precedent has found[,] he and other similarly situated state law enforcement and other officials have no authority to [enforce immigration laws]"). The Court therefore lacks authority to review Plaintiff's claims.

II. PLAINTIFF WILL NOT SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

Because Plaintiff has failed to establish Article III standing, he has necessarily failed to meet the higher standard required for the extraordinary relief of a preliminary injunction: proof of injury that is irreparable. The D.C. Circuit "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. The injury to the movant "must be both certain and great," as well as "actual and not theoretical." *Wis. Gas Co. v. FERC.*, 758 F.2d 669, 674 (D.C. Cir. 1985). The movant must also "substantiate" its "claim that irreparable injury is 'likely' to occur" with appropriate factual evidence. *Id.* Failure to meet this "high standard" renders a plaintiff ineligible for preliminary injunctive relief, regardless of the remaining factors. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

Here, for the same reasons he lacks an injury-in-fact, and even more so in light of the heightened standard for irreparable harm, Plaintiff falls well short of demonstrating the harm required for preliminary injunctive relief. Plaintiff's claim of irreparable harm rests on his

speculation that the challenged policies will cause a "flood of increased illegal immigration," and will lead to increased crime, danger to the Sheriff's deputies, and a drain on office resources. Pl's. Mot. at 14. Plaintiff simply offers no basis to conclude that this outcome is "'likely' to occur" as a "direct[] result" of the DHS policies he seeks to enjoin. *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

In addition, part of Plaintiff's challenge is to DACA guidance that has been in effect since 2012, and Plaintiff has acknowledged that "the legal criteria for a preliminary injunction apply more weakly to those who are already holding deferred action and work authorization under DACA." ECF No. 12 at 10. Plaintiff's two-year delay in seeking to enjoin the 2012 guidance "implies a lack of urgency and irreparable harm" and supports the denial of emergency relief. *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005); *see also, e.g., Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975); *Brown v. Dist. of Columbia*, 888 F. Supp. 2d 28, 33 (D.D.C. 2012).

Having failed to demonstrate that he stands to suffer any actual and certain harm in the absence of an injunction, Plaintiff posits that "a colorable constitutional violation" is sufficient to "give[] rise to a showing of irreparable harm." Pl.'s Mot. at 14 (citing *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009)). As an initial matter, Plaintiff has failed to allege a colorable constitutional violation. His vague reference to the "architecture and basic design of the U.S. Constitution," *see* Pls.' Mot. at 16, is insufficient to convert his claims, which are statutory in nature, into colorable constitutional ones. Moreover, it is not the existence of a constitutional violation in the abstract that may give rise to irreparable harm, but rather a plaintiff's "loss of constitutional freedoms." *Mills*, 571 F.3d at 1312. Thus, even if Plaintiff's general incantation of structural constitutional concerns were sufficient to state a colorable

constitutional violation, he has failed to show how the guidance he challenges infringes any freedoms that the Constitution secures *to him*. *See Sweis v. U.S. Foreign Claims Settlement Comm'n*, 950 F. Supp. 2d 44, 48 (D.D.C. 2013).

Because Plaintiff has entirely failed to demonstrate that he will suffer irreparable harm in the absence of emergency relief, his motion can be denied on this basis alone.

III. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS.[19]

A. Deferred Action Is An Unreviewable Exercise of Enforcement Discretion Under *Heckler v. Chaney*.

Plaintiff's claim that the Secretary of Homeland Security exceeded his authority in providing for prosecutorial discretion through DACA and DAPA fails because it is a matter not subject to judicial review. *Heckler v. Chaney*, 470 U.S. 821 (1985), is directly on point here. In that case, the Supreme Court held that an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is "presumed" to be "immune from judicial review under § 701(a)(2)" of the APA. *Id.* at 832; *Balt. Gas & Elec. Co. v. F.E.R.C.*, 252 F.3d 456, 459 (D.C. Cir. 2001). The D.C. Circuit has recognized that the principles animating *Chaney* and its progeny "may well be a requirement of the separation of powers commanded by our Constitution." *Balt. Gas & Elec. Co.*, 252 F.3d at 459; *see also Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157 (2006) (noting that "the traditional nonreviewability" of prosecutorial discretion applies to administrative enforcement); *Town of Castle Rock v.*

[19] Although "it remains an open question" in this Circuit "whether the 'likelihood of success' factor is 'an independent, free-standing requirement,' or whether, in cases where the other three factors strongly favor issuing an injunction, a plaintiff need only raise a 'serious legal question' on the merits," *Aamer*, 742 F.3d at 1043 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 393, 398 (D.C. Cir. 2011)), it makes no difference here. Plaintiff has not shown that the other three preliminary-injunction factors "strongly favor" entry of an injunction. Thus, Plaintiff must show a "likelihood of success" on the merits. *Id.* He can show neither that nor even a serious merits question.

Gonzales, 545 U.S. 748, 761 (2005) (noting the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands").[20]

The rationale for non-reviewability in the enforcement context is that an "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Chaney*, 470 U.S. at 831. The *Chaney* Court noted at least three reasons why agency enforcement decisions generally are not reviewable. First, an agency's enforcement strategy "often involves a complicated balancing of a number of factors which are peculiarly within its expertise," and the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32. Second, an agency's decision not to exercise its enforcement authority "generally does not involve [the] exercise [of] *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Third, an agency's exercise of enforcement discretion "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. Const., art. II, § 3).

The Court of Appeals for this Circuit has held that this presumption of nonreviewability may be overcome only in three circumstances: (1) where "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"; (2) where the agency

[20] Regardless of whether Plaintiff's claim is styled as a statutory claim or some imprecise claim emanating from the structure of the Constitution, the result is the same: the Executive has broad authority to exercise discretion in enforcing the nation's immigration laws and the challenge to that enforcement is not a matter subject to judicial review. But, as explained below, even if it were subject to judicial review, Defendants have acted within and consistent with the broad authority provided by the INA in a manner recognized by the Supreme Court.

refuses "to institute proceedings based solely on the belief that it lacks jurisdiction"; and (3) where the agency "has conspicuously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Balt. Gas & Elec. Co.*, 252 F.3d at 460 (internal citations omitted). None of these exceptions applies here.

i. Congress Has Not Limited DHS's Exercise of Discretion Through Deferred Action.

Deferred action is a longstanding form of prosecutorial discretion used by federal immigration authorities. *See*, *e.g.*, *AADC*, 525 U.S. at 483-84. Contrary to Plaintiff's claims, *see* Pl.'s Mot. at 22-23, individuals who receive deferred action do not receive legal status. *See* 2014 Deferred Action Guidance at 2 ("Deferred action does not confer a legal status in this country."). Nor does deferred action provide citizenship, or even a path to citizenship. *Id.* Rather, deferred action represents a time-limited decision to de-prioritize the removal of certain individuals, upon a case-by-case assessment. *Id*. Further making clear that deferred action is not legal status or "amnesty," it can be revoked at any time in the agency's discretion. *See id*.

The Supreme Court has repeatedly and explicitly recognized that the INA grants broad discretion to the Executive Branch, including the decision whether to initiate removal proceedings or grant deferred action: "A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *See Arizona*, 132 S. Ct. at 2499; *see also AADC*, 525 U.S. at 483-84 ("At each stage" of the removal process, "the Executive has discretion to abandon the endeavor"); *id.* (explaining that, as of 1996, "the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience"); *id*. at 485

(challenged INA provision "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations").

No provision of the INA restricts the exercise of prosecutorial discretion through the use of deferred action.[21] Indeed, the INA undoubtedly makes discretion available for immigration enforcement policies such as those challenged here. *See* 8 U.S.C. § 1103(a); 8 C.F.R. § 2.1.[22] Through the INA, Congress has authorized the Secretary to "establish such regulations; . . . issue such instructions; and perform such other acts *as he deems necessary* for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3) (emphasis added). The Supreme Court has found that similar language commits action to agency discretion by law. *See Webster v. Doe*, 486 U.S. 592, 600 (1988); *see also Claybrook v. Slater*, 111 F.3d 904, 909 (D.C. Cir. 1997).

Not only has Congress not limited the Executive's use of deferred action, but DACA and DAPA are consistent with the substantive priorities established by Congress. *Cf. Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011). The INA clearly prioritizes the detention and removal of threats to border security, national security, and public safety. *See, e.g.*, 8 U.S.C. § 1225 (establishing "expedited removal" for aliens apprehended at the border); *id.* § 1226(c) (providing mandatory detention for certain criminal aliens); *id.* § 1226a (providing mandatory detention of suspected terrorists); *see also* Consolidated Appropriations Act, 2014, Pub. L. No.

[21] Plaintiff cites to 8 U.S.C. § 1182 for examples of who is considered an inadmissible alien, *see* Pl.'s Mot. at 22-23, but that misses the point. DHS is not conferring lawful status on individuals who receive deferred action. DHS is temporarily deferring enforcement action against them, thereby freeing up DHS's limited enforcement resources to remove higher priority aliens.

[22] 8 C.F.R. § 2.1, the regulation implementing 8 U.S.C. § 1103, states that "[a]ll authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security," and the Secretary may "in his [or her] discretion" delegate her authority and through "regulation, directive, memorandum or other means deemed appropriate," announce principles "in the exercise of the Secretary's discretion."

113-76, Div. F., Tit. II, 128 Stat. 5, 251 (2014) (requiring DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime").

At the same time, numerous provisions of the INA reflect a concern for ensuring family unity among U.S. citizens and their undocumented families. *See INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of the United States citizens and immigrants united.'") (quoting H.R. Rep. No. 85-1199, at 7 (1957)). And deep-rooted principles of fairness, including as reflected in the INA, support the exercise of leniency toward individuals who lack culpability for their violations of the law. *See, e.g.*, 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (alien not inadmissible for falsely claiming citizenship if "the alien permanently resided in the United States prior to attaining the age of 16, and alien reasonably believed at the time of making such representation that he or she was a citizen").

DACA and DAPA directly advance the interests articulated by Congress: prioritizing the removal of serious criminals, national security threats, and recent border crossers, and deprioritizing the removal of certain aliens who lack culpability for unlawfully entering the country or who have immediate family members lawfully present. Concurrent with the Secretary's determination to further dedicate CBP's and ICE's limited enforcement resources to high-priority targets, *see* Prioritization Guidance at 1, DACA and DAPA help prevent the unwise expenditure of removal resources on the lowest priority aliens by having a different agency—USCIS—implement DACA and DAPA through fees paid by the deferred action requestors.

Although requestors under DACA and DAPA are, as a general matter, low-priority aliens with strong ties to the United States, to ensure that grants of deferred action are consistent with the agency's enforcement priorities, the Secretary reaffirmed that the revised DACA and DAPA

policies would continue the case-by-case, individualized consideration that has characterized DACA since its inception in 2012, to ensure that each requestor is not an enforcement priority and does not possess a characteristic that would make deferred action inappropriate. *See* 2014 Deferred Action Guidance at 2, 4-5; *see also* DACA Memo at 2 (noting individualized consideration).[23]

Exercising prosecutorial discretion through deferred action for individuals who came to the United States as children and for parents of U.S. citizens or LPRs also serves other recognized interests. The Supreme Court has explicitly recognized humanitarian and other interests in the Executive's enforcement of immigration laws:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations.

Arizona, 132 S. Ct. at 2499; *see also AAADC*, 525 U.S. at 483-84 (describing long-recognized humanitarian rationale as well as administrative convenience for deferred action). Both DACA and DAPA appropriately reflect these concerns. *See, e.g.*, 2014 Deferred Action Guidance at 3

[23] Plaintiff baselessly dismisses this individualized determination as a "fiction." *See, e.g.*, Pl.'s Mot. at 4. But, as of December 5, 2014, of the 719,746 individuals who made initial requests for deferred action under DACA, 42,632 applications were rejected, 630,032 were approved, and 36,860 were denied. *See* DHS, Current Statistics: Deferred Action for Childhood Arrivals: Pending, Receipts, Rejected, Approvals, and Denials (2014) (attached as Exhibit 22). Further, those who request DACA likely are a self-selecting group. In any event, agencies may establish frameworks for the exercise of prosecutorial discretion. *See, e.g.*, *Chaney*, 470 U.S. at 824 (challenge to a general enforcement policy regarding the use of drugs in executions); *Ass'n of Irritated Residents v. E.P.A.*, 494 F.3d 1027 (D.C. Cir. 2007) (holding non-reviewable a broad agreement between the agency and an entire industry, which deferred agency enforcement for several years); *United States v. 9/1 Kg. Containers*, 854 F.2d 173, 178 (7th Cir. 1988) (endorsing FDA "non-enforcement policy"). Moreover, the deferred action guidance at issue here directs that each request for deferred action be assessed on a discretionary, case-by-case basis.

(recognizing that most individuals considered for DACA and DAPA "are hard-working people who have become integrated members of American society").

In sum, the Executive's exercise of prosecutorial discretion pursuant to the guidance challenged by Plaintiff corresponds to the substantive priorities established by Congress and upheld by the Supreme Court. The presumption of non-reviewability therefore stands.

ii. DHS Has Not Stated A "Belief That It Lacks Jurisdiction."

The presumption of non-reviewability also applies here because DHS has not suggested, in providing guidance for the exercise of deferred action, that the agency believes it lacked jurisdiction to make enforcement decisions; nor was any such belief a basis for issuing the guidance. *See Balt. Gas & Elec. Co.*, 252 F.3d at 460. Plaintiff cannot demonstrate otherwise.

iii. DHS's Tailored Deferred Action Guidance Does Not Constitute "An Abdication of" DHS's "Statutory Responsibilities."

Finally, any suggestion by Plaintiff that the Secretary's exercise of prosecutorial discretion through DACA and DAPA "is so extreme as to amount to an abdication of [DHS's] statutory responsibilities," *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc), is meritless. "Congress has not given [DHS] an inflexible mandate to bring enforcement actions against all violators of the [immigration laws]." *Cutler v. Hayes*, 818 F.2d 879, 893 (D.C. Cir. 1987) (distinguishing *Adams*, 480 F.2d at 1161). To the contrary, Congress has expressly recognized that DHS must set priorities to do its work effectively and consistent with the public interest, and both Congress and the Supreme Court have recognized deferred action as one such mechanism for exercising prosecutorial discretion. DACA and DAPA allow for deferral of the removal of certain low-priority aliens, so that removal resources can be directed at higher priority aliens. Because no alien is automatically entitled to relief under DACA and DAPA—and because even those who do receive deferred action may have it revoked at any

time—these policies do not negate any past violations of immigration laws Congress enacted. This type of administrative postponement or deferment of enforcement is not a basis for judicial intervention. *Id.* at 894.

DHS's effort to prioritize the removal of those who present a risk to public safety, national security, and border security over those who have long ties to this country is fully consistent with the priorities Congress has set. Indeed, DHS's allocation of enforcement priorities stands in stark contrast to *Adams*, a case relied upon by Plaintiff. *See Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 344 (D.C. Cir. 2002) (describing *Adams* as a case in which "the Secretary of Health, Education, and Welfare declined to enforce an entire statutory scheme, Title VI of the Civil Rights Act of 1964"); *see also Adams*, 480 F.2d at 1162 (distinguishing case from an exercise of prosecutorial discretion based on the fact that the Department of Health, Education, and Welfare was "actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress"). And, in any event, "[r]eal or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty." *Texas v. United States*, 106 F.3d at 661.

Congress's funding choices further reinforce the point. DHS's limited resources will always constrain how many aliens can be removed every year. DHS has estimated that "Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country." *See* OLC Op. at 9. Even if all 400,000 such removals could be dedicated to the interior,[24] that would represent less than 4% of the 11.3 million

[24] Due to recent demographic changes among aliens apprehended at the border (*see* section IV.A.), more than half of ICE's removals in recent years have involved aliens apprehended at the border rather than in the interior. *See* U.S. Immigration and Customs Enforcement, ERO Annual

undocumented aliens in the country. *See id*. This limitation follows in part from the fact that Congress's appropriations require DHS to maintain a level of approximately 34,000 detention beds. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. F., Tit. II, 128 Stat. 5, 251 (2014) ("funding made available under this heading shall maintain a level of not less than 34,000 detention beds through September 30, 2014"). Based largely on these resource constraints, DHS has been instructed to not "simply round[] up as many illegal immigrants as possible, which is sometimes achieved by targeting the easiest and least threatening among the undocumented population," but to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer." *See* H.R. Rep. 111-157, at 8. That is precisely the object of DACA and DAPA. Even setting aside persons granted deferred action under DACA and DAPA, the number of removable aliens exceeds the resources that DHS has to remove them.

Further, DACA and DAPA build on the Executive's long history of exercising prosecutorial discretion through the identification of certain discrete groups of aliens who may be eligible for an exercise of discretion. *See* OLC Op. at 14-18 (providing examples). This approach dates back to the 1950s. *See id*. at 14. More recently, under the "Family Fairness" program in 1990, the Executive granted "indefinite voluntary departure" and provided work authorization for certain aliens who were ineligible for legal status under the Immigration Reform and Control Act of 1986 but who were the spouses and children of aliens who qualified for legal status under the Act. *See id*. at 14-15. Since the 1990s, the Executive also has used deferred action for battered aliens who were waiting for visas to become available under VAWA,

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Report: FY 2013 ICE Immigration Removals at 1 (noting that 235,093 removals out of the 368,644 total removals that ICE conducted in FY 2013 were of individuals apprehended along the border), available at http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf.

applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000, foreign students affected by Hurricane Katrina, and widows and widowers of U.S. citizens. *See id*. at 15-18.

In short, DACA and DAPA are an entirely appropriate part of a long tradition of enforcement prioritization and discretion by the Executive, grounded in its statutory and constitutional authority to determine how best to use the limited resources available to enforce the nation's immigration laws. *See Arizona*, 132 S. Ct. at 2499. They are therefore not reviewable under *Chaney*.

B. Plaintiff's APA Claims Lack Merit.

Even if Plaintiff's challenge to DACA and DAPA was justiciable notwithstanding *Chaney*—which it is—Plaintiff's claims of a violation of the APA are meritless. The APA permits judicial review of "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704; *Bennett*, 520 U.S. at 154. Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), in excess of statutory . . . authority, 5 U.S.C. § 706(2)(C), or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). DACA and DAPA are consistent with the APA, both procedurally and substantively.

i. As a Procedural Matter, The Deferred Action Guidance Is Explicitly Exempt From the Notice-And-Comment Requirement Of The APA.

The DACA and DAPA guidance challenged by Plaintiff comports with the procedural requirements of the APA. This guidance reflects a general statement of policy by the agency, a type of agency action that the APA explicitly exempts from the notice-and-comment requirements. *See* 5 U.S.C. § 553(b)(3)(A); *see also Lincoln v. Vigil*, 508 U.S. 182, 197 (1993)

(holding that the APA exempts from notice-and-comment "general statements of policy," which the Supreme Court has described as "'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'") (citations omitted). Accordingly, Plaintiff's Second Cause of Action, in which he argues that DHS's deferred action guidance contravenes the APA's notice-and-comment requirements, *see* Compl. at ¶¶ 62-68, must fail.

Plaintiff does not recognize, let alone address, that DHS's deferred action guidance is a general statement of policy, and thus exempt from notice-and-comment. Rather, he claims, without citation to fact or law, that the agency is "issuing new regulations . . . without going through the detailed rule-making process." *See* Pl.'s Mem. at 16 (referring to Second Cause of Action in Compl. ¶¶ 62-68). However, even assuming that the DACA and DAPA guidance "would qualify as a 'rule,' within the meaning of the APA, [they] would be exempt from notice-and-comment requirements" as general statements of policy. *Lincoln v. Vigil*, 508 U.S. at 197 (finding the announcement that the agency will discontinue a discretionary allocation of funds to be a general statement of policy). The Supreme Court, in differentiating statements of policy from rules, has described a "general statement of policy" as an issuance that does "not have the force and effect of law." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n. 31 (1979). The challenged DHS guidance concerning deferred action states that it "confers no substantive right, immigration status or pathway to citizenship," 2014 Deferred Action Guidance at 5; the guidance instead provides for an individualized decision concerning the exercise of prosecutorial discretion. *See id.*; DACA Toolkit at 25-26. Indeed, the guidance makes clear that deferred action may be denied notwithstanding the requestor's ability to meet the relevant guidelines. *Id.*; *cf. Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987) (concluding that a legacy INS

operating instruction on deferred action was a general statement of policy, because, *inter alia*, "[t]he Instruction [left] the district director free to consider the individual facts in each case" (internal quotation marks and citation omitted)); *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (recognizing that an agency "vested with discretionary power" may determine, in a manner consistent with the APA, that it will or will not use that power "in favor of a particular class on a case-by-case basis"). The challenged guidance therefore constitutes a general statement of policy exempt from APA notice-and-comment, *see* 5 U.S.C. § 553(b)(3)(A).

ii. The Deferred Action Guidance Fully Complies With The APA.

Any substantive challenge to DHS's DACA and DAPA guidance under the APA must fail, because the DHS guidance was issued in accordance with Congress's broad and explicit vesting of authority in the Secretary, charging him with "the administration and enforcement of [the INA and all other laws] relating to the immigration and naturalization of aliens," *see* 8 U.S.C. § 1103, and the responsibility for "[e]stablishing national immigration enforcement policies and priorities."[25] 6 U.S.C. § 202(5). With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499.

In light of the Secretary's significant discretion in enforcing the INA, Plaintiff cannot support his unsubstantiated claim that DACA and DAPA exceed the Secretary's statutory authority or are otherwise arbitrary and capricious. Regarding the former, Plaintiff cites to no

[25] As noted above, Plaintiff's attempt to frame his claim that Defendants have acted outside of their statutory authority as a constitutional deficiency is an attempt to constitutionalize his statutory claims. Plaintiff's first cause of action, like the third, fourth, and fifth causes of action, can and should be considered, collectively, as statutory authority challenges under the APA. *See INS v. Chadha*, 462 U.S. 919, 954 n.16 (1983) (holding that delegated "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review").

statutory provision of the INA that conflicts with or is exceeded by the implementation of the guidance memoranda, except for a vague reference to INA statutory bars to admissibility that are unrelated to the exercise of prosecutorial discretion through deferred action, *see* Pl.'s Mot. at 10. As explained further above, DACA and DAPA are entirely consistent with congressional directives and Supreme Court precedent. As to Plaintiff's latter claim, "[t]he 'arbitrary and capricious' standard deems the agency action presumptively valid provided the action meets a minimum rationality standard." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1233 (D.C. Cir. 2014). Here, the challenged guidance easily meets this highly deferential standard of review; as the Secretary explained in his memorandum, "[c]ase-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests." 2014 Deferred Action Guidance at 3.

Plaintiff's further claim that the deferred action guidance fails rational basis review because it "grant[s] employment authorization . . . to illegal aliens" is based on the flawed premise that the challenged guidance is what grants employment authorization to individuals who request deferred action. Compl. ¶¶ 74-75. As discussed above, it is the INA and longstanding regulations promulgated under its authority—not DACA or DAPA—that authorize the Secretary to grant work authorization to particular classes of aliens. *See* 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048-50 (5th Cir. 1990) ("employment authorization . . . [is] purely [a] creature[] of regulation."). Although the INA requires the Secretary to grant work authorization to some classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization generally, and expressly contemplates that the Secretary

may grant work authorization to aliens lacking lawful immigration status, s*ee, e.g.*, 8 U.S.C. § 1226(a)(3) (permitting Secretary to grant work authorization to certain aliens who have been arrested and detained pending a decision whether to initiate removal proceedings). Conversely, no law abrogates the Secretary's authority to consider granting work authorization to DACA and DAPA requestors. And the Secretary's articulated basis for issuing guidance related to work authorizations—to "encourage these people to come out of the shadows," 2014 Deferred Action Guidance at 3—is clearly rational.

Moreover, Plaintiff's contention that DHS's enforcement guidance is invalid agency action under Section 706(1) of the APA, Pl.'s Mot. at 16, is meritless because of the discretion afforded to DHS to enact immigration policy priorities. "[A] claim under § 706(1) [of the APA] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("SUWA") (emphasis in original). Section 706(1) only "empowers a court to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act." *Id.* (citing Att'y Gen.'s Manual on the Admin. Procedure Act 108 (1947)) (emphasis in original). The APA does not contemplate "pervasive oversight by federal courts over the manner and pace of agency compliance with [broad] congressional directives[.]" *Id.* at 67. Here, Plaintiff seeks exactly the kind of judicial entanglement in discretionary policy decisions that the APA precludes.

iii. DHS's Guidance Memoranda Discussing Proposed Regulations Do Not Constitute Final Agency Action.

Finally, Plaintiff has failed to demonstrate that the other memoranda that he half-heartedly challenges—the High-Skilled Businesses and Workers Guidance, Exhibit 18, and the Provisional Waiver Guidance, Exhibit 17—represent final agency action under the APA. *See* 5

U.S.C. § 704 (actions reviewable under the APA must be made either reviewable by statute or be considered final agency action). Neither of these memoranda constitutes final agency action, and they therefore cannot be challenged under the APA. In order for an agency action to be "final," it must be something more than a "merely tentative or interlocutory decision;" it must be one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78.[26]

These two guidance memoranda are merely tentative decisions that do not create any legal consequences. Here, the tentative nature of the High-Skilled Businesses and Workers Guidance is illustrated, for example, by the fact that USCIS has been tasked with issuing guidance and regulations to "clarify" how to interpret certain provisions of the INA and "propose a program." High-Skilled Businesses and Workers Guidance at 3-4. Likewise, the Provisional Waiver Guidance directs USCIS to "amend its 2013 regulation" to "expand access to the provisional waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available"; the Provisional Waiver Guidance also directs USCIS to "provide additional guidance" on a term used in a pre-existing regulation and to "clarify the factors" considered by adjudicators on whether the extreme hardship standard has been met in adjudicating applications for provisional waivers. *See* Provisional Waiver Guidance at 2.

These guidance memoranda thus do not serve as the basis for granting or denying any of the enumerated employment-based visas or provisional waivers for "extreme hardship." Nor do they impose a regulatory requirement that applicants must now meet. These two memoranda "neither mark the consummation of the agency's decision-making process," nor do they

[26] The deferred action memoranda likewise are not final agency action: they do not grant deferred action, and by their terms, they "confer[] no substantive right, immigration status, or pathway to citizenship." 2014 Deferred Action Guidance at 5; *see* 2012 DACA Memo at 3.

determine "plaintiff's legal rights or obligations." *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996).

C. Plaintiff's Non-Delegation Claim Also Lacks Merit.

Plaintiff, relying on *Am. Trucking Ass'ns, Inc., v. U.S. Envtl. Prot. Agency*, 175 F.3d 1027 (D.C. Cir 1999) —a D.C. Circuit case that was later reversed by the Supreme Court on the issue of nondelegation, *see Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)—claims that the deferred action guidance violates the "nondelegation doctrine." *See* Compl.¶¶ 85-88, Pl.'s Mot. at 17-18. Under this doctrine, the "constitutional question is whether the statute has delegated legislative power to the agency." *Whitman*, 531 U.S. at 472. The Supreme Court has long recognized that "absent an ability to delegate power under broad general directives," Congress "simply cannot do its job." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Here, the INA authorizes the Secretary to establish regulations, issue instructions, and "perform such other acts *as he deems necessary* for carrying out his authority under the statute." 8 U.S.C. § 1103(a)(3) (emphasis added); *see also* 8 U.S.C. § 1324a(h)(3) (defining the term "unauthorized alien" as meaning that the alien is not at that time "authorized to be so employed by this chapter or by the Attorney General."). The "scope of discretion" delineated by Section 1103 is "well within the outer limits of [the Supreme Court's] nondelegation precedents." *Whitman*, 531 U.S. at 474.

IV. GRANTING A PRELIMINARY INJUNCTION WOULD HARM DEFENDANTS AND THE PUBLIC INTEREST.

Finally, Plaintiff has failed to demonstrate—as he must—that "the threatened irreparable injury outweighs the threatened harm that the injunction would cause Defendants and third parties" and that "granting the preliminary injunction would be in the public interest." *Whitaker*

v. Thompson, 248 F. Supp. 2d 1, 7-8 (D.D.C. 2002) (citing *Mova. Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Here, the balance of the equities and the public interest weigh overwhelmingly against Plaintiff and his request for a preliminary injunction. As established above, Plaintiff's alleged harms are entirely speculative and disconnected from the agency guidance he seeks to challenge. In contrast, enjoining the ongoing and successful implementation of DACA (which has been in place since 2012), and preventing DHS from implementing the 2014 Deferred Action Guidance, would cause serious harm and disruption nationwide, and would undermine DHS's comprehensive efforts to organize its resources to focus on its top enforcement priorities: national security, border security, and public safety.

A. The Challenged Deferred Action Policies Promote Congressionally-Mandated Public Safety And National Security Objectives.

Congress has directed DHS, an agency with limited resources, to prioritize the removal of aliens who pose a threat to national security, border security, and public safety. *See supra* at 4-5. As explained above, that is precisely what DACA and DAPA help DHS to accomplish. 2014 Deferred Action Guidance at 3-5. Individuals participating and those who may participate include high school graduates and parents of U.S. citizens or LPRs, all of whom have lived in the United States for at least five years and were determined on a case-by-case basis not to pose a threat to national security or public safety, or otherwise to present a factor that makes deferred action inappropriate. DACA Memo at 1; 2014 Deferred Action Guidance at 4. By creating a mechanism to identify efficiently these aliens who are a low priority for removal, DACA and DAPA help the government to focus its removal efforts on criminals and more recent border crossers. Documents provided through grants of deferred action, for instance, allow immigration officials conducting enforcement actions to quickly distinguish recent arrivals and other

priorities—who may be removed more quickly under existing statutory authority—from lower-priority aliens whose cases may impose additional burdens on already backlogged immigration courts.

The need for DACA and DAPA is especially acute given recent developments affecting the removal of persons from the United States. At the border, for example, recent and sizable demographic shifts have necessitated a radical realignment in the Department's approach to border enforcement. For example, the U.S. Border Patrol is apprehending an increasing number of nationals from Central American countries at the border (paired with a decrease in the apprehension of Mexican nationals). *See* U.S. Customs and Border Protection, *USBP Nationwide Apprehensions by Requested Citizenship FY 2010 – FY 2014* (2014) (attached as Exhibit 23). This shift requires both: (1) a significant transfer of ICE resources to assist with the removal of aliens apprehended by the Border Patrol who are not immediately removable to a contiguous country, and (2) the expenditure of increased overall resources, as the removal of persons to non-contiguous countries is far more resource-intensive. *See* U.S. Immigration and Customs Enforcement, ERO Annual Report: FY 2013 ICE Immigration Removals at 3 (noting increase in CBP apprehension of non-Mexican nationals and corresponding increase in ICE removals of non-Mexican nationals apprehended by CBP), available at http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf;. DHS Office of Inspector General, Detention and Removal of Illegal Aliens, No. OIG-66-33, 8 (Apr. 2006) (discussing increased ICE workload resulting from border apprehensions of non-Mexican nationals), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_06-33_Apr06.pdf.

The Government continues to undertake substantial and successful efforts to stem illegal immigration across the Mexican border. This summer, for example, DHS shifted significant

resources across the Department to the border. *See, e.g.*, Open Borders: The Impact of Presidential Amnesty on Border Security: Hearing Before the House Comm. on Homeland Security, 113th Cong. 3-4 (Dec. 2, 2014) (statement of Jeh C. Johnson, Secretary, U.S. Dep't of Homeland Security) (attached as Exhibit 24). And in recent months the U.S. Government has held high-level discussions with Mexico and Central American countries, provided millions of dollars in aid to those countries, and initiated a large-scale public affairs campaign to inform people in these countries of the dangers of making the long journey to the United States and dissuade them from attempting the journey. *See, e.g.*, Craig Fugate statement at 4-5 (attached as Exhibit 21).

Due to these and other challenges in removing high-priority aliens, consistent with congressional mandates, DHS has had to realign its resources away from non-priority aliens where possible. DACA and DAPA are two such efficiencies. By actively inducing individuals who are not removal priorities to come forward, submit to background checks, and seek deferred action from USCIS, DHS is better able to identify priority aliens and concentrate CBP's and ICE's enforcement resources on such aliens.

B. The Challenged Deferred Action Guidance Advances Other Immigration Policy Objectives.

The public interest is also advanced by other equities from the discretion entailed in DACA and DAPA. As the Court in *Arizona* acknowledged, "[d]iscretion in the enforcement of immigration law embraces immediate human concerns." 132 S. Ct. at 2499. Such discretion may properly recognize the difference between "unauthorized workers trying to support their families" on the one hand and "alien smugglers" or those "who commit a serious crime" on the other hand. *Id.* DACA and DAPA appropriately reflect such human concerns. The injunction Plaintiff seeks would harm the public by halting policies that promote not only public safety and

national security, but also humanitarian concerns and family unification. Moreover, Plaintiff's requested injunction would disrupt the effective enforcement of the law, interfere with the orderly implementation of the mechanisms for considering some non-priority cases for deferred action under DACA and DAPA, and impede the harmonization of enforcement priorities among DHS's component immigration agencies.

The Supreme Court has specifically suggested that family unity is an appropriate factor for DHS to consider in exercising its enforcement discretion. *See Arizona*, 132 S. Ct. at 2499 ("The equities of an individual case may turn on many factors, including whether the alien has children born in the United States[.]"). Deferred action impacts the lives of many people. For example, as of December 5, 2014, approximately 630,032 individuals have been granted deferred action under DACA. *See* DHS, Current Statistics: Deferred Action for Childhood Arrivals: Pending, Receipts, Rejected, Approvals, and Denials (2014) (attached as Exhibit 22).

C. Enjoining the Challenged Deferred Action Guidance Would Significantly Undermine The Public Interest.

DHS officials have been instructed to implement the DACA modifications within 90 days and DAPA within 180 days. 2014 Deferred Action Guidance at 4-5. A preliminary injunction would prevent DHS from the timely implementation of this guidance. It is not in the public interest to delay policies, such as DACA and DAPA, that promote public safety, national security, administrative efficiency, and humanitarian concerns. *See, e.g.*, *Nat'l Res. Def. Council, Inc. v. Pena*, 972 F. Supp. 9, 20 (D.D.C. 1997); *Hodges v. Abraham*, 253 F. Supp. 2d 846, 873 (D.S.C. 2002); *Gulf Oil Corp. v. FEA*, 391 F. Supp. 856, 864 (W.D. Pa. 1975). As explained further above, DACA and DAPA are integral to DHS's efforts to more effectively administer and enforce our nation's immigration laws, including by allowing enforcement resources to be focused on high-priority aliens, thereby promoting national security and public

safety, while at the same time addressing the human concerns properly the subject of immigration enforcement efforts.

D. The Challenged Deferred Action Guidance and Exercises of Discretion Can Be Modified At Any Time.

Plaintiff contends that a preliminary injunction is justified because of the "near impossibility of unraveling the programs once started[.]" Pl.'s Mot. at 15. Plaintiff is simply wrong: deferred action confers "no substantive right, immigration status or pathway to citizenship." DACA Memo at 3; 2014 Deferred Action Guidance at 5. And deferred action can be revoked at any time. DACA Toolkit at 16.

CONCLUSION

This Court should deny Plaintiff's motion for preliminary injunction and, indeed, dismiss Plaintiff's complaint for lack of subject matter jurisdiction.

Dated: December 15, 2014

Respectfully submitted,

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EXHIBIT 1

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

The Department of Homeland Security's proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS's enforcement discretion.

November 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United

States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment"); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of

DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal. *See* 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and

enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." *Id.* These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* at 831; *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration's refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency's decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may "provide[] guidelines for the agency to follow in exercising its enforcement powers," in the absence of such "legislative direction," an agency's non-enforcement determination is, much like a prosecutor's decision not to indict, a "special province of the Executive." *Id.* at 832–33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and

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

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, "[a]t each stage" of the removal process—"commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—immigration officials have "discretion to abandon the endeavor." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see*

Chaney, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, Congress "may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.[1]

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id*. Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.* at 832, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id*. at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id*. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting

[1] *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503–05 (2009) (describing Congress's response to its dissatisfaction with the Executive's use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g.*, *infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law").

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that "single-shot non-enforcement decisions" almost inevitably rest on "the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp.*, 37 F.3d at 676–77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute "general polic[ies] that [are] so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency's use of "reasonable presumptions and generic rules" is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses "special risks" that the agency has exceeded the bounds of its enforcement discretion. *Crowley Caribbean Transp.*, 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS's proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long

employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to "provide clearer and more effective guidance in the pursuit" of DHS's enforcement priorities; namely, "threats to national security, public safety and border security." Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3–5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id*. at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id*. at 3–4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they "qualify for asylum or another form of relief under our laws." *Id*. at 3–5.

The policy would instruct that resources should be directed to these priority categories in a manner "commensurate with the level of prioritization identified." *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy "requires DHS personnel to exercise discretion based on individual circumstances"). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority." *Id.* at 3. Similar discretionary provisions would apply to

aliens in the second and third priority categories.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] In addition, the policy would expressly state that its terms should not be construed "to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities," and would further provide that "[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority" if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id*. at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) ("Shahoulian E-mail"). The proposed policy explains that, because DHS "cannot respond to all immigration violations or remove all persons illegally in the United States," it seeks to "prioritize the use of enforcement personnel, detention space, and removal assets" to "ensure that use of its limited resources is devoted to the pursuit of" DHS's highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS's proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly "within [DHS's] expertise." *Chaney*, 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS's organic statute itself recognizes this inevitable fact, instructing the Secretary to establish "national

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[2] Under the proposed policy, aliens in the second tier could be deprioritized if, "in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority." Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, "in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority." *Id*. at 5.

[3] These factors include "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative." Johnson Prioritization Memorandum at 6.

immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And an agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors "peculiarly within [an agency's] expertise" are "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all").

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS's enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as "aggravated felonies" under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3–4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied "on factors which Congress had not intended it to consider." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a "single-shot non-enforcement decision," neither does it amount to an abdication of DHS's statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy's identification of categories of aliens who constitute removal

priorities is also consistent with the categorical nature of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id*. Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.[4]

II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred

[4] In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA "mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at *4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483–84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, *see, e.g.*, *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); *see* USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) ("USCIS SOP"); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.[5]

[5] Parole is available to aliens by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, *see id.* § 1255(a), and may eventually qualify them for Federal means-tested benefits, *see id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf.* 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary relief formulated administratively under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based 'extended voluntary departure,' and there no longer are aliens in the United States benefiting from such a designation," but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). *See generally* Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum,* Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5–10 (July 13, 2012) ("CRS Immigration Report").

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a "non-priority case" as "one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors"); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed "deferred action." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever "adverse action would be unconscionable because of the existence of appealing humanitarian factors").

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]" in 8 U.S.C. § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"). Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization 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) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action 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); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42

(May 6, 2009) ("USCIS Consolidation of Guidance") (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is "unlawfully present" if, among other things, he "is present in the United States after the expiration of the period of stay authorized by the Attorney General").[6]

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action." USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing "[a]n explanation as to why he or she is seeking deferred action" along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions—known as "Third Preference" visa petitions—relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979–80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20–23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12–14 (1980). And in 1990, INS implemented a "Family Fairness" program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). *See* Memorandum for Regional Commissioners,

[6] Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) ("Family Fairness Memorandum"); *see also* CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, "on a case-by-case basis, whether to place the alien in deferred action status" while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action." *Id.* But because "[i]n an unusual case, there may be factors present that would militate against deferred action," the agency instructed officers that requests for deferred action should still "receive individual scrutiny." *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. at 43 (July 20, 2000) ("H.R. 3083 Hearings").

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a "T visa" available to victims of human trafficking and their family members, and a "U visa" for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate "possible victims in the above categories," and to use "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal" to prevent those victims' removal "until they have had the opportunity to avail themselves of the provisions of the VTVPA." Memorandum

for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make "deferred action assessment[s]" for "all [T visa] applicants whose applications have been determined to be bona fide," Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants "determined to have submitted *prima facie* evidence of [their] eligibility," Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. *See* 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800–01 (Jan. 31, 2002)) (providing that any T visa applicant who presents "*prima facie* evidence" of his eligibility should have his removal "automatically stay[ed]" and that applicants placed on a waiting list for visas "shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)"); *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list" for visas.).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include "pursuit of a 'full course of study.'" USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), *available at* http//www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina." *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1–2 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf (last visited Nov. 19, 2014). USCIS explained that such

requests for deferred action would be "decided on a case-by-case basis" and that it could not "provide any assurance that all such requests will be granted." *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that "no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" and USCIS had not yet adjudicated a visa petition on the spouse's behalf. Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). "In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens," USCIS issued guidance permitting covered surviving spouses and "their qualifying children who are residing in the United States" to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, "serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons." *Id.* at 6.[7]

5. Deferred Action for Childhood Arrivals. Announced by DHS in 2012, DACA makes deferred action available to "certain young people who were brought to this country as children" and therefore "[a]s a general matter . . . lacked the intent to violate the law." Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("Napolitano Memorandum"). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety." *See id.* DHS evaluates applicants' eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 ("DACA Toolkit"). Successful DACA applicants receive deferred action for a

[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen "for at least 2 years at the time of the citizen's death" to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance "obsolete," USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and "confer[] no substantive right, immigration status or pathway to citizenship," Napolitano Memorandum at 3.[8]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.[9] On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that "[a]pproved [VAWA] self-petitioners are placed in deferred action status," such that "[n]o battered alien who has filed a[n approved] self petition . . . has been deported." H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be "eligible for deferred action and work authorization." Victims of Trafficking and

[8] Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

[9] Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS's authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class-wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).[10]

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238. Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at

[10] Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

49 U.S.C. § 30301 note), which makes a state-issued driver's license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card's recipient has "[e]vidence of [l]awful [s]tatus." Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or "approved deferred action status." *Id.* § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system—and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful

presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as "permissive" and largely "unfettered").[11] Although the INA

[11] Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080–81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an "unauthorized alien." As relevant here, Congress defined an "unauthorized alien" barred from employment in the United States as an alien who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that "the phrase 'authorized to be so employed by this Act or the Attorney General' does not recognize the Attorney General's authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act." *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the

requires the Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section 1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established

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regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15–18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.[12] Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of "lawful status" for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy "'rather than embarking on a frolic of its own.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139

[12] For example, since 1978, the Department of Justice's Antitrust Division has implemented a "leniency program" under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)*, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), *available at* http://www.irs.gov/uac/Revised-IRS-Voluntary-Disclosure-Practice (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information "may result in prosecution not being recommended"); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, *available at* http://www.usmarshals.gov/safesurrender/faqs.html (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the "Fugitive Safe Surrender" program are likely to receive "favorable consideration").

(1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137–39 (concluding that Congress acquiesced in an agency's assertion of regulatory authority by "refus[ing] . . . to overrule" the agency's view after it was specifically "brought to Congress'[s] attention," and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress "implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act of 1949, which "create[d] a procedure to implement" those very agreements).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6–7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* pp. 6–7 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it

will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.'" (quoting H.R. Rep. No. 85-1199, at 7 (1957)). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside

in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197–99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).[13] Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status

[13] The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155–56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009–10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21–22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years "have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways"); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who "have become well settled in this country" would be a "wasteful use of the Immigration and Naturalization Service's limited enforcement resources"); *see also Arizona*, 132 S. Ct. at 2499 (noting that "[t]he equities of an individual case" turn on factors "including whether the alien has . . . long ties to the community").

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has

abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status "takes time." *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period.[14] Immigration officials have on several

[14] DHS's proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197–99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS's proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the

occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval—and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 18–20.[15] In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status

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amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

[15] Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually "acquire lawful permanent resident status" and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14–15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that "the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id.* § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those

discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the

proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

KARL R. THOMPSON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

EXHIBIT 2

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

Homeland Security

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies for the Apprehension, Detention and Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: 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. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,* March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens*, June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases,* November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,* December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations*, December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;[1] sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who 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

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal[2] on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

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[1] In evaluating whether the offense is a significant misdemeanor involving ..domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. *See generally,* John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,* June 17, 2011.

[2] For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

EXHIBIT 3

U.S. Citizenship and Immigration Services

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) TOOLKIT:

Resources for Community Partners

In addition to the resources in this toolkit, USCIS has created a power point presentation on DACA to be used in stakeholder outreach events. To request a copy of the presentation, please contact the USCIS Public Engagement Division at **Public.Engagement@uscis.dhs.gov**.

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PROGRAM OVERVIEW

Background

- USCIS began accepting requests under the Deferred Action for Childhood Arrivals (DACA) program on August 15, 2012. The DACA process was created by the Secretary of Homeland Security to offer relief from removal (in 2-year increments) for undocumented immigrants who came to the United States as children and who met several key criteria. DACA is an exercise of prosecutorial discretion and does not provide lawful status.
- The first USCIS-approved DACA grants were issued in September 2012. The initial 2-year duration will begin to expire for certain individuals in September 2014. Those individuals will be able to request consideration for renewal of DACA for a 2-year period.
- Some individuals were granted DACA by U.S. Immigration and Customs Enforcement (ICE) between June 15, 2012, and August 15, 2012. In February 2014, USCIS provided guidance to these individuals on the process they should follow to request DACA renewals.
- USCIS has updated Form I-821D [dated 6/4/14] to allow individuals to request a 2-year renewal of DACA. Previous versions of the form will not be accepted after June 5, 2014. There will be no grace period for individuals to submit a previous version of Form I-821D to request a renewal of their deferred action.
- Individuals who have not yet requested consideration for DACA must also use the new Form I-821D.
- In addition to the new Form I-821D, all individuals must also submit a Form I-795, Application for Employment Authorization (along with the accompanying fees for that form), and a Form I-765WS, Worksheet, when requesting either initial DACA or renewal of DACA.
- Individuals who allow their initial 2-year period of DACA to expire and do not seek renewal will no longer be considered to be lawfully present for inadmissibility purposes and will no longer be authorized to work legally in the United States. To ensure that their deferred action does not lapse, USCIS recommends that current DACA recipients submit Forms I-821D, I-765, and I-765 Worksheet approximately 120 days (4 months) before their 2-year period of deferred action expires. However, USCIS may reject DACA requests received earlier than 150 days (5 months) before an individual's 2-year period of deferred action expires.
- For more information on requesting DACA, please visit our Web site at **www.uscis.gov/childhoodarrivals** or call our National Customer Service Center at (800) 375-5283.

Renewal DACA Requests

- An individual may be considered for renewal of DACA if he or she met the guidelines for initial DACA and he or she:
  - Did not depart the United States on or after June 15, 2007, without advance parole;
  - Has continuously resided in the United States since he or she submitted his or her most recent DACA request that was approved up until the present time; and
  - Has not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and does not otherwise pose a threat to national security or public safety.
- Requests for renewal should be submitted to USCIS no less than 120 days, and no more than 150 days prior to the expiration of the current period of deferred action.

Initial DACA Requests

- USCIS will also continue to accept initial requests for DACA. An individual may be considered for initial DACA if he or she:
  - Was under the age of 31 as of June 15, 2012;
  - Came to the United States before reaching his or her 16th birthday;
  - Has continuously resided in the United States since June 15, 2007, up to the present time;
  - Was physically present in the United States on June 15, 2012, and at the time of making his or her request for consideration of deferred action with USCIS;
  - Had no lawful status on June 15, 2012.

    NOTE:

    No lawful status on June 15, 2012, means that:

    - You never had a lawful immigration status on or before June 15, 2012; or
    - Any lawful immigration status or parole that you obtained prior to June 15, 2012, had expired as of June 15, 2012.
  - Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a General Education Development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or U.S. Armed Forces; and
  - Has not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety;

- Individuals who were younger than 15 when DACA was first announced and are not in removal proceedings or have a final order may request DACA from USCIS any time after they have reached their 15th birthday. Individuals who are in removal proceedings or who have a final order may request DACA from USCIS even if they are younger than 15 at the time of filing.

Consideration of DACA

- USCIS has updated Form I-821D [dated 6/4/14] to allow individuals to request renewal of DACA for an additional 2-year period. Previous versions of the form will not be accepted after June 5, 2014.
- There will be no grace period for individuals to submit a previous version of Form I-821D to request a renewal of their deferred action.
- There is no fee for Form I-821D. The fee for Form I-765 and the required biometrics is $465.

Avoiding Immigration Scams

- Please be aware of immigration scams. Unauthorized practitioners of immigration law may try to take advantage of individuals by charging them money to obtain or submit forms related to DACA or communicate with USCIS on their behalf. Visit **www.uscis.gov/avoidscams** or **www.uscis.gov/eviteestafas** for tips on how to find authorized legal assistance and how to recognize and avoid immigration services scams.
- Protect yourself from immigration scams. Official U.S. Government Web sites should be your main source of information on DACA and immigration services. Go to **www.uscis.gov** to learn more.
- If you need legal immigration advice, be sure to use an authorized professional. This means an attorney in good standing or a Board of Immigration Appeals (BIA) accredited representative. Check the BIA Web site for a list of attorneys who provide immigration services for low to no cost and for a list of disciplined attorneys. You can also check the American Bar Association or your State bar association for legal services in your State.
- If you are a victim of an immigration scam, report it to the Federal Trade Commission at **www.ftc.gov/complaint** or **www.ftc.gov/queja** or by calling (877) FTC-HELP ((877) 372-4357).

General information F5

How do I request consideration of deferred action for childhood arrivals (DACA)?

U.S. Citizenship and Immigration Services

On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of 2 years, subject to renewal. Those granted deferred action are also eligible for work authorization.

Only individuals who can prove through verifiable documentation that they meet these guidelines will be considered for deferred action. Determinations will be made on a case-by-case basis under the guidelines in the Secretary's memorandum.

How do I know if I may request consideration of deferred action for childhood arrivals?

You may request consideration if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request with USCIS;
5. Had no lawful status on June 15, 2012, which means that:
   - –You never had a lawful immigration status on or before June 15, 2012; or
   - –Any lawful status or parole that you obtained prior to June 15, 2012, had expired as of June 15, 2012.
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or U.S. Armed Forces; and
7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

How do I request consideration of deferred action for childhood arrivals?

You must submit **Form I-821D**, Consideration of Deferred Action for Childhood Arrivals. This form must be completed, properly signed, and accompanied by a **Form I-765**, Application for Employment Authorization, and a **Form I-765WS**, Form I-765 Worksheet. Failure to submit a completed Form I-765, accompanied by the correct fees, will disqualify you from consideration for deferred action. While there is no filing fee for Form I-821D, you must submit the $380 filing fee and $85 biometric services fee for Form I-765, for a total fee of $465. Please read the form instructions to ensure that you submit all the required documentation to support your request. See **www.uscis.gov/I-821D** and **www.uscis.gov/I-765** for complete filing instructions. See **www.uscis.gov/childhoodarrivals** for additional information on the deferred action for childhood arrivals process.

Please Note: Once you receive a receipt confirming that your request is properly filed, you will be sent an appointment notice to visit an Application Support Center for biometric services (photograph and fingerprints). Please make sure you read and follow the directions in the notice. Failure to attend your biometrics appointment may delay processing or result in a denial of your request.

Where do I file my request for consideration of deferred action for childhood arrivals?

Requests for consideration of deferred action for childhood arrivals will be filed by mail to the USCIS Lockbox. Please visit **www.uscis.gov/I-821D** or contact the USCIS National Customer Service Center at **(800) 375-5283** for the most current information and instructions on where to mail your request.

What evidence should I submit with my initial request for consideration of deferred action for childhood arrivals?

For initial requests, the evidence should show that you meet the guidelines outlined above in "How do I know if I may request consideration of deferred action for childhood arrivals?" This includes evidence that you:

1. Were born after June 15, 1981;
2. Arrived in the United States before the age of 16;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were present in the United States on June 15, 2012;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or received a certificate of completion from high school, obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or U.S. Armed Forces; and
7. Are at least 15 years of age at the time of filing if you have never been in removal proceedings or if your case was terminated before you submit your request for consideration of deferred action for childhood arrivals.

For information about specific documents that may satisfy these guidelines, please read the instructions to Form I-821D at **www.uscis.gov/I-821D** and the frequently asked questions at **www.uscis.gov/childhoodarrivals**.

Does this process apply to me if I am currently in removal proceedings, have a final removal order, or have a voluntary departure order?

Yes. This process is open to any individuals who can demonstrate that they meet the guidelines, including those who have never been in removal proceedings as well as those in removal proceedings, with a final order, or with a voluntary departure order (as long as they are not in immigration detention). If you are not in immigration detention and want to affirmatively request consideration of deferred action, you must submit your request to USCIS. You do not need to be 15 years of age or older at the time of filing if you are in removal proceedings, have a final removal order, or have a voluntary departure order. All cases will be considered on an individual basis.

Submit a copy of the removal order or any document issued by the immigration judge or the final decision from the Board of Immigration Appeals, if available. This requirement applies only to people who have been in removal proceedings.

Do brief departures affect my ability to satisfy the continuous residence in the United States since June 15, 2007, guideline?

A brief, casual, and innocent absence from the United States will not interrupt your continuous residence. Any absence will be considered brief, casual, and innocent if it occurred before August 15, 2012, and was:

1. Short and reasonably calculated to accomplish the purpose for the absence;
2. Not because of an order of exclusion, deportation, or removal;
3. Not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation, or removal proceedings; and
4. The purpose of the absence and/or your actions while outside the United States were not contrary to law.

Any unauthorized travel outside of the United States on or after August 15, 2012, will interrupt your period of continuous residence and you will not be considered for deferred action under this process.

For information about specific documents that may show your absence was brief, casual, and innocent, please read the instructions at **www.uscis.gov/I-821D** and the frequently asked questions at **www.uscis.gov/childhoodarrivals**.

Will USCIS conduct a background check when reviewing my request for consideration of deferred action for childhood arrivals?

Yes. You must undergo background checks before USCIS will exercise prosecutorial discretion. You will not be considered for deferred action for childhood arrivals, unless there are exceptional circumstances, if you have been convicted of:

- Any felony;
- A significant misdemeanor offense;
- Three or more misdemeanor offenses (not occurring on the same date and not arising out of the same act, omission or scheme of misconduct); or
- You otherwise pose a threat to national security or public safety.

What happens after I submit my request for consideration of deferred action for childhood arrivals?

After receiving your Form I-821D, Form I-765, and Form I-765WS, USCIS will review them for completeness, including the required fees, initial evidence, and signatures. If the request is complete, USCIS will send you a receipt notice. USCIS will then send you a notice scheduling you to visit an Application Support Center for fingerprinting and photographing. You may choose to receive an email and/or text message notifying you that your form has been accepted by completing a **Form G-1145**, E-Notification of Application/Petition Acceptance. Please see **www.uscis.gov/G-1145** for instructions.

Each request for consideration of deferred action for childhood arrivals will be reviewed on an individual, case-by-case basis. You will be notified of USCIS' determination in writing. USCIS may request more information or evidence, or may request that you appear at a USCIS office. There is no appeal or motion to reopen/reconsider the denial of a request for consideration of deferred action for childhood arrivals.

Can I renew the period for which removal action will be deferred in my case?

Yes. You may request consideration of renewal of your deferred action for childhood arrivals. Your request for a renewal will be considered on a case-by-case basis. If USCIS renews its exercise of discretion under deferred action for childhood arrivals for your case, you will receive deferred action for another 2 years, and if you demonstrate an economic necessity for employment you may receive employment authorization throughout that period.

How do I know if I may request a renewal of my deferred action for childhood arrivals?

You may request consideration of renewal of deferred action for childhood arrivals if you met the guidelines for initial deferred action for childhood arrivals (see above) and you:

1. Did not depart the United States on or after August 15, 2012, without advance parole;
2. Have continuously resided in the United States since you submitted your most recent deferred action for childhood arrivals request that was approved up to the present time;

3. Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

Requests for renewal should be submitted to USCIS around 120 days (but no more than 150 days) before the expiration of the current period of deferred action. To request renewal of your deferred action for childhood arrivals, submit Form I-821D, Form I-765, and Form I-765WS along with the $380 filing fee for the Form I-765 and a $85 biometric services fee, for a total of $465.

You do not need to provide any additional documents at the time you request renewal of deferred action for childhood arrivals unless you have **new** documents related to removal proceedings or criminal history that you did not submit to USCIS in a previously approved deferred action for childhood arrivals request.

If USCIS does not exercise deferred action in my case, will I be placed in removal proceedings?

If your request for consideration of deferred action for childhood arrivals is denied, USCIS will apply its policy guidance governing the referral of cases to U.S. Immigration and Customs Enforcement (ICE) and the issuance of Notices to Appear (NTA). If your case does not involve a criminal offense, fraud, or a threat to national security or public safety, your case will not be referred to ICE for removal proceedings except in exceptional circumstances. For more detailed information, visit **www.uscis.gov/nta**.

Does this process result in lawful status for people who receive deferred action for childhood arrivals?

No. Deferred action under this process is only a discretionary determination to defer removal action. It is an act of prosecutorial discretion and does not provide you with a lawful status.

What protections are in place to protect the information I share in my request from being used for immigration enforcement purposes?

The information you provide in your request is protected from disclosure to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings unless you meet the criteria for the issuance of a Notice to Appear or a referral to ICE under the criteria explained in USCIS' Notice to Appear guidance at **www.uscis.gov/nta**. Individuals whose cases are deferred under the consideration of deferred action for childhood arrivals process will not be referred to ICE.

The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal. These other purposes could include: for assistance in the consideration of deferred action for childhood arrivals, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. This information-sharing clause covers family members and guardians, in addition to the person requesting deferred action.

This policy may be modified, superseded, or rescinded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Key Information

Key USCIS forms referenced in this guide	Form #
Consideration of Deferred Action for Childhood Arrivals	I-821D
Application for Employment Authorization	I-765
I-765 Worksheet	I-765WS
E-Notification of Application/Petition Acceptance	G-1145

Key USCIS Web sites referenced in this guide	Web site link
Information about Deferred Action for Childhood Arrivals process and frequently asked questions	www.uscis.gov/childhoodarrivals
Consideration of Deferred Action for Childhood Arrivals Form	www.uscis.gov/I-821D
Application for Employment Authorization	www.uscis.gov/I-765
E-Notification of Application/Petition Acceptance Form	www.uscis.gov/G-1145
USCIS Notice to Appear Policy	www.uscis.gov/NTA

Other U.S. Government Services-Click or Call	
General Information	www.usa.gov
New Immigrants	www.welcometoUSA.gov
U.S. Immigration & Customs Enforcement	www.ice.gov

For more copies of this guide, or information about other customer guides, please visit **www.uscis.gov/howdoi**.

You can also visit **www.uscis.gov** to download forms, e-file some applications, check the status of an application, and more. It's a great place to start!

If you don't have Internet access at home or work, try your local library.

If you cannot find what you need, please call

Customer Service at: (800) 375-5283
TDD for hearing-impaired: (800) 767-1833.

Disclaimer: *This guide provides basic information to help you become generally familiar with our rules and procedures. For more information, or the law and regulations, please visit our Web site. Immigration law can be complex, and it is impossible to describe every aspect of every process. You may wish to be represented by a licensed attorney or by a nonprofit agency recognized by the Board of Immigration Appeals.*

Deferred Action for Childhood Arrivals (DACA) Tip Sheet

At a Glance: Initial vs. Renewal DACA Process

	Initial DACA	Renewal DACA
Guidelines	You may request consideration of initial DACA if you: • Were under the age of 31 as of June 15, 2012; • Came to the United States before reaching your 16th birthday; • Have continuously resided in the United States since June 15, 2007, up to the present time; • Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS; • Had no lawful immigration status on June 15, 2012; • Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate (or other State-authorized exam in the United States), or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and • Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.	You may request consideration of renewal DACA if you met the guidelines for initial DACA and you: • Did not depart the United States on or after August Aw15, 2012, without advance parole; • Have continuously resided in the United States since you submitted your most recent request for DACA that was approved up to the present time; and • Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.
How to Request	• Complete and sign: ❑ Form I-821D, Consideration of Deferred Action for Childhood Arrivals; ❑ Form I-765, Application for Employment Authorization; and ❑ Form I-765W, Worksheet. • Submit all three forms, the $465 filing and biometrics fee and any required documentation to USCIS following the instructions on the forms.	• Complete and sign: ❑ Form I-821D, Consideration of Deferred Action for Childhood Arrivals; ❑ Form I-765, Application for Employment Authorization; and ❑ Form I-765W, Worksheet. ❑ Submit all three forms and the $465 filing and biometrics fee and any required documentation to USCIS following the instructions on the forms. ❑ Do not provide any additional documents at the time you request renewal of DACA unless you have new documents pertaining to removal proceedings or criminal history that you have not already submitted to USCIS in a previously approved DACA request.
When to File	You can file a request for initial DACA at any time.	USCIS encourages you to submit your request for renewal approximately 120 days (or four months) prior to the expiration of your current period of deferred action. However, if you file your renewal request more than 150 days (or 5 months) prior to the expiration of your current period of deferred action, USCIS may reject your submission and return it to you with instructions to resubmit your request closer to the expiration date.

FREQUENTLY ASKED QUESTIONS

WHAT IS DEFERRED ACTION FOR CHILDHOOD ARRIVALS?

Over the past several years, this Administration has undertaken an unprecedented effort to transform the immigration enforcement system into one that focuses on national security, public safety, border security, and the integrity of the immigration system. As the Department of Homeland Security (DHS) continues to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety, DHS will exercise prosecutorial discretion as appropriate to ensure that enforcement resources are not expended on low priority cases, such as individuals who came to the United States as children and meet other key guidelines. Individuals who demonstrate that they meet the guidelines below may request consideration of deferred action for childhood arrivals (DACA) for a period of 2 years, subject to renewal for a period of 2 years, and may be eligible for employment authorization.

You may request consideration of DACA if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012, meaning that:
   - You never had a lawful immigration status on or before June 15, 2012, or
   - Any lawful immigration status or parole that you obtained prior to June 15, 2012, had expired as of June 15, 2012.
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Individuals can call U.S. Citizenship and Immigration Services (USCIS) at 1-800-375-5283 with questions or to request more information on DACA. Those with pending requests can also use a number of **online self-help tools** which include the ability to check case status and processing times, change your address, and send an inquiry about a case pending longer than posted processing times or non-delivery of a card or document.

What is Deferred Action?

Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon **unlawful presence**, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer **lawful status** upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

Under existing regulations, an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." DHS can terminate or renew deferred action at any time, at the agency's discretion.

What is DACA?

On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of 2 years, subject to renewal, and would then be eligible for work authorization.

Individuals who can demonstrate through verifiable documentation that they meet these guidelines will be considered for deferred action. Determinations will be made on a case-by-case basis under the DACA guidelines.

Is there any difference between "deferred action" and DACA under this process?

DACA is one form of deferred action. The relief an individual receives under DACA is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion.

If my removal is deferred under the consideration of DACA, am I eligible for employment authorization?

YES. Under existing regulations, if your case is deferred, you may obtain employment authorization from USCIS provided you can demonstrate an economic necessity for employment.

If my case is deferred, am I in lawful status for the period of deferral?

NO. Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful status.

The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. However, although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time. **Individuals granted deferred action are not precluded by Federal law from establishing domicile in the United States.**

Apart from the immigration laws, "lawful presence," "lawful status," and similar terms are used in various other Federal and State laws. For information on how those laws affect individuals who receive a favorable exercise of prosecutorial discretion under DACA, please contact the appropriate Federal, State, or local authorities.

Can I renew my period of deferred action and employment authorization under DACA?

YES. You may request consideration for a renewal of your DACA. Your request for a renewal will be considered on a case-by-case basis. If USCIS renews its exercise of discretion under DACA for your case, you will receive deferred action for another 2 years, and if you demonstrate an economic necessity for employment, you may receive employment authorization throughout that period.

DACA PROCESS

How do I request consideration of DACA?

To request consideration of DACA (either as an initial request or to request a renewal), you must submit **Form I-821D, Consideration of Deferred Action for Childhood Arrivals,** to USCIS. Please visit **www.uscis.gov/i-821d** before you begin the process to make sure you are using the most current version of the form available. This form must be completed, properly signed, and accompanied by a **Form I-765, Application for Employment Authorization**, and a **Form I-765WS, Worksheet**, establishing your economic need for employment. If you fail to submit a completed Form I-765 (along with the accompanying filing fees for that form, totaling $465), USCIS will not consider your request for deferred action. Please read the form instructions to ensure that you answer the appropriate questions (determined by whether you are submitting an initial or renewal request) and that you submit all the required documentation to support your initial request.

You must file your request for consideration of DACA at the USCIS Lockbox. You can find the mailing address and instructions at **www.uscis.gov/i-821d**. As of June 5, 2014, requestors must use the new version of the

form. After your Form I-821D, Form I-765, and Form I-765 Worksheet have been received, USCIS will review them for completeness, including submission of the required fee, initial evidence and supporting documents (for initial filings).

If it is determined that the request is complete, USCIS will send you a receipt notice. USCIS will then send you an appointment notice to visit an Application Support Center (ASC) for biometric services, if an appointment is required. Please make sure you read and follow the directions in the notice. Failure to attend your biometrics appointment may delay processing of your request for consideration of deferred action, or may result in a denial of your request. You may also choose to receive an email and/or text message notifying you that your form has been accepted by completing a **Form G-1145, E-Notification of Application/Petition Acceptance**.

Each request for consideration of DACA will be reviewed on an individual, case-by-case basis. USCIS may request more information or evidence from you, or request that you appear at a USCIS office. USCIS will notify you of its determination in writing.

Note: All individuals who believe they meet the guidelines, including those in removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA from USCIS through this process. Individuals who are currently in immigration detention and believe they meet the guidelines may not request consideration of deferred action from USCIS but may identify themselves to their deportation officer or Jail Liaison. You may also contact the ICE Field Office Director. For more information visit ICE's Web site at **www.ice.gov/daca**.

Can I obtain a fee waiver or fee exemption for this process?

There are no fee waivers available for employment authorization applications connected to DACA. There are very limited fee exemptions available. Requests for fee exemptions must be filed and favorably adjudicated before an individual files his or her request for consideration of DACA without a fee. In order to be considered for a fee exemption, you must submit a letter and supporting documentation to USCIS demonstrating that you meet one of the following conditions:

- You are under 18 years of age, have an income that is less than 150 percent of the U.S. poverty level, and are in foster care or otherwise lacking any parental or other familial support; or
- You are under 18 years of age and homeless; or
- You cannot care for yourself because you suffer from a serious, chronic disability and your income is less than 150 percent of the U.S. poverty level; or
- You have, at the time of the request, accumulated **$10,000** or more in debt in the past 12 months as a result of unreimbursed medical expenses for yourself or an immediate family member, and your income is less than 150 percent of the U.S. poverty level.

You can find additional information on our **Fee Exemption Guidance** Web page. Your request must be submitted and decided before you submit a request for consideration of DACA without a fee. In order to be considered for a fee exemption, you must provide documentary evidence to demonstrate that you meet any of the above conditions at the time that you make the request. For evidence, USCIS will:

- Accept affidavits from community-based or religious organizations to establish a requestor's homelessness or lack of parental or other familial financial support;
- Accept copies of tax returns, bank Statements, pay stubs, or other reliable evidence of income level. Evidence can also include an affidavit from the applicant or a responsible third party attesting that the applicant does not file tax returns, has no bank accounts, and/or has no income to prove income level;
- Accept copies of medical records, insurance records, bank Statements, or other reliable evidence of unreimbursed medical expenses of at least **$10,000**;
- Address factual questions through Requests for Evidence (RFEs).

If individuals meet the guidelines for consideration of DACA and are encountered by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), will they be placed into removal proceedings?

DACA is intended, in part, to allow CBP and ICE to focus on priority cases. Under the direction of the Secretary of Homeland Security, if an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed. If individuals believe that, in light of this policy, they should not have been apprehended or placed into removal proceedings, contact the Law Enforcement Support Center's hotline at (855) 448-6903 (staffed 24 hours a day, 7 days a week).

Does this process apply to me if I am currently in removal proceedings, have a final removal order, or have a voluntary departure order?

This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those who have never been in removal proceedings as well as those in removal proceedings, with a final order, or with a voluntary departure order (as long as they are not in immigration detention).

If I am not in removal proceedings but believe I meet the guidelines for consideration of DACA, should I seek to place myself into removal proceedings through encounters with CBP or ICE?

NO. If you are not in removal proceedings but believe that you meet the guidelines, you should submit your DACA request to USCIS under the process outlined below.

Can I request consideration of DACA from USCIS if I am in immigration detention under the custody of ICE?

NO. If you are currently in immigration detention, you may not request consideration of DACA from USCIS. If you think you may meet the guidelines of this process, you should identify yourself to your deportation officer or Jail Liaison. You may also contact the ICE Field Office Director. For more information, visit ICE's Web site at **www.ice.gov/daca**.

If I am about to be removed by ICE and believe that I meet the guidelines for consideration of DACA, what steps should I take to seek review of my case before removal?

If you believe you can demonstrate that you meet the guidelines and are about to be removed, you should immediately contact the Law Enforcement Support Center's hotline at (855) 448-6903 (staffed 24 hours a day, 7 days a week).

What should I do if I meet the guidelines of this process and have been issued an ICE detainer following an arrest by a State or local law enforcement officer?

If you meet the guidelines and have been served a detainer, you should immediately contact the Law Enforcement Support Center's hotline at (855) 448-6903 (staffed 24 hours a day, 7 days a week).

If I accepted an offer of administrative closure under the case-by-case review process or my case was terminated as part of the case-by-case review process, can I be considered for deferred action under this process?

YES. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you have accepted an offer of administrative closure or termination under the case-by-case review process.

If I declined an offer of administrative closure under the case-by-case review process, can I be considered for deferred action under this process?

YES. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you declined an offer of administrative closure under the case-by-case review process.

If my case was reviewed as part of the case-by-case review process but I was not offered administrative closure, can I be considered for deferred action under this process?

YES. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA

even if you were not offered administrative closure following review of your case as part of the case-by-case review process.

Can I request consideration of DACA under this process if I am currently in a nonimmigrant status (e.g., F-1, E-2, H-4) or have Temporary Protected Status (TPS)?

NO. You can only request consideration of DACA under this process if you currently have no immigration status and were not in any lawful status on June 15, 2012.

Will the information I share in my request for consideration of DACA be used for immigration enforcement purposes?

Information provided in this request is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice to Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance **(www.uscis.gov/NTA)**. Individuals whose cases are deferred pursuant to DACA will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor. This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

If my case is referred to ICE for immigration enforcement purposes or if I receive an NTA, will information related to my family members and guardians also be referred to ICE for immigration enforcement purposes?

If your case is referred to ICE for purposes of immigration enforcement or you receive an NTA, information related to your family members or guardians that is contained in your request will not be referred to ICE for purposes of immigration enforcement against family members or guardians. However, that information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.

This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Will USCIS verify documents or Statements that I provide in support of a request for DACA?

USCIS has the authority to verify documents, facts, and Statements that are provided in support of requests for DACA. USCIS may contact education institutions, other government agencies, employers, or other entities in order to verify information.

BACKGROUND CHECKS

Will USCIS conduct a background check when reviewing my request for consideration of DACA?

YES. You must undergo biographic and biometric background checks before USCIS will consider your DACA request.

What do background checks involve?

Background checks involve checking biographic and biometric information provided by the individuals against a variety of databases maintained by DHS and other Federal Government agencies.

What steps will USCIS and ICE take if I engage in fraud through the new process?

If you knowingly make a misrepresentation or knowingly fail to disclose facts, in an effort to obtain DACA or work authorization through this process, you will

be treated as an immigration enforcement priority to the fullest extent permitted by law and be subject to criminal prosecution and/or removal from the United States.

AFTER USCIS MAKES A DECISION

Can I appeal USCIS' determination?

NO. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of DACA.

You may request a review of your I-821D denial by contacting USCIS' Call Centers at (800) 375-5283 to have a Service Request created if you believe that you actually did meet all of the DACA guidelines and you believe that your request was denied due to one of the following errors:

- Denied the request based on abandonment, when you actually responded to an RFE or NOID within the prescribed time;
- Mailed the RFE or NOID to the wrong address although you had submitted a Form AR-11, Change of Address, or changed your address online at www.uscis.gov before USCIS issued the RFE or NOID;
- Denied the request on the grounds that you did not come to the United States prior to your 16th birthday, but the evidence submitted **at the time of filing** shows that you did arrive before reaching that age;
- Denied the request on the grounds that you were under age 15 **at the time of filing** but not in removal proceedings, while the evidence submitted **at the time of filing** show that you indeed were in removal proceedings when the request was filed;
- Denied the request on the grounds that you were 31 or older as of June 15, 2012, but the evidence submitted **at the time of filing** shows that you were **not yet** 31 years old as of that date;
- Denied the request on the grounds that you had lawful status on June 15, 2012, but the evidence submitted **at the time of filing** shows that you indeed were in an unlawful immigration status on that date;
- Denied the request on the grounds that you were not physically present in the United States on June 15, 2012, and up through the date of filing, but the evidence submitted **at the time of filing** shows that you were, in fact, present;
- Denied the request due to your failure to appear at a USCIS ASC to have your biometrics collected, when you in fact either did appear at a USCIS ASC to have this done or requested prior to the scheduled date of your biometrics appointment to have the appointment rescheduled; or
- Denied the request because you did not pay the filing fees for Form I-765, Application for Employment Authorization, when you actually did pay these fees.

If you believe your request was denied due to any of these administrative errors, you may contact our National Customer Service Center at (800) 375-5283 or (800) 767-1833 (TDD for the hearing impaired). Customer service officers are available Monday – Friday, 8 a.m. – 6 p.m, in each U.S. time zone.

If USCIS does not exercise deferred action in my case, will I be placed in removal proceedings?

If you have submitted a request for consideration of DACA and USCIS decides not to defer action in your case, USCIS will apply its policy guidance governing the referral of cases to ICE and the issuance of a Notice to Appear (NTA). If your case does not involve a criminal offense, fraud, or a threat to national security or public safety, your case will not be referred to ICE for purposes of removal proceedings except where DHS determines there are exceptional circumstances. For more detailed information on the applicable NTA policy, visit **www.uscis.gov/NTA**. If after a review of the totality of circumstances USCIS determines to defer action in your case, USCIS will likewise exercise its discretion and will not issue you an NTA.

Can my deferred action under the DACA process be terminated before it expires?

YES. DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion.

INITIAL REQUESTS FOR DACA

What guidelines must I meet to be considered for deferred action for childhood arrivals (DACA)?

Under the Secretary of Homeland Security's June 15, 2012 memorandum, in order to be considered for DACA, you must submit evidence, including supporting documents, showing that you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA. U.S. Citizenship and Immigration Services (USCIS) retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

How old must I be in order to be considered for deferred action under this process?

- If you have never been in removal proceedings, or your proceedings have been terminated before your request for consideration of DACA, you must be at least 15 years of age or older at the time of filing and meet the other guidelines.
- If you are in removal proceedings, have a final removal order, or have a voluntary departure order, and are not in immigration detention, you can request consideration of DACA even if you are under the age of 15 at the time of filing and meet the other guidelines.
- In all instances, you cannot be the age of 31 or older as of June 15, 2012, to be considered for DACA.

I first came to the United States before I turned 16 years old and have been continuously residing in the United States since at least June 15, 2007. Before I turned 16 years old, however, I left the United States for some period of time before returning and beginning my current period of continuous residence. May I be considered for deferred action under this process?

YES, but only if you established residence in the United States during the period before you turned 16 years old, as evidenced, for example, by records showing you attended school or worked in the United States during that time, or that you lived in the United States for multiple years during that time. In addition to establishing that you initially resided in the United States before you turned 16 years old, you must also have maintained continuous residence in the United States from June 15, 2007, until the present time to be considered for deferred action under this process.

To prove my continuous residence in the United States since June 15, 2007, must I provide evidence documenting my presence for every day, or every month, of that period?

To meet the continuous residence guideline, you must submit documentation that shows you have been living

in the United States from June 15, 2007, up until the time of your request. You should provide documentation to account for as much of the period as reasonably possible, but there is no requirement that every day or month of that period be specifically accounted for through direct evidence.

It is helpful to USCIS if you can submit evidence of your residence during at least each year of the period. USCIS will review the documentation in its totality to determine whether it is more likely than not that you were continuously residing in the United States for the period since June 15, 2007. Gaps in the documentation as to certain periods may raise doubts as to your continued residence if, for example, the gaps are lengthy or the record otherwise indicates that you may have been outside the United States for a period of time that was not brief, casual, or innocent.

If gaps in your documentation raise questions, USCIS may issue a Request for Evidence to allow you to submit additional documentation that supports your claimed continuous residence.

Affidavits may be submitted to explain a gap in the documentation demonstrating that you meet the five-year continuous residence requirement. If you submit affidavits related to the continuous residence requirement, you must submit two or more affidavits, sworn to or affirmed by people other than yourself who have direct personal knowledge of the events and circumstances during the period as to which there is a gap in the documentation. Affidavits may only be used to explain gaps in your continuous residence; they cannot be used as evidence that you meet the entire 5-year continuous residence requirement.

Does "currently in school" refer to the date on which the request for consideration of deferred action is filed?

To be considered "currently in school" under the guidelines, you must be enrolled in school on the date you submit a request for consideration of deferred action under this process.

Who is considered to be "currently in school" under the guidelines?

To be considered "currently in school" under the guidelines, you must be enrolled in:

- A public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or home-school program meeting State requirements;
- An education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; or
- An education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under State law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other State-authorized exam (e.g., HiSet or TASC) in the United States.

These education, literacy, career training programs (including vocational training), or education programs assisting students in obtaining a regular high school diploma or its recognized equivalent under State law, or in passing a GED exam or other State-authorized exam in the United States include but are not limited to programs funded, in whole or in part, by Federal, State, county or municipal grants or administered by nonprofit organizations. Programs funded by other sources may qualify if they are administered by providers of demonstrated effectiveness, such as institutions of higher education, including community colleges and certain community-based organizations.

In assessing whether such programs not funded in whole or in part by Federal, State, county, or municipal grants or administered by nonprofit organizations are of demonstrated effectiveness, USCIS will consider the duration of the program's existence; the program's track record in assisting students in obtaining a regular high school diploma or its recognized equivalent, in passing a GED or other State-authorized exam (e.g., HiSet or

TASC), or in placing students in postsecondary education, job training, or employment; and other indicators of the program's overall quality. For individuals seeking to demonstrate that they are "currently in school" through enrollment in such a program, the burden is on the requestor to show the program's demonstrated effectiveness.

How do I establish that I am currently in school?

Documentation sufficient for you to demonstrate that you are currently in school may include but is not limited to:

- Evidence that you are enrolled in a public, private, or charter elementary school, junior high or middle school, high school or secondary school; alternative program, or homeschool program meeting State requirements; or
- Evidence that you are enrolled in an education, literacy, or career training program (including vocational training) that:
  - Has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; and
  - The program is funded in whole or in part by Federal or State grants or is of demonstrated effectiveness; or evidence that you are enrolled in an education program assisting students in obtaining a high school equivalency diploma or certificate recognized under State law (such as by passing a GED exam or other such State-authorized exam (for example, HiSet or TASC), and that the program is funded in whole or in part by Federal, State, county or municipal grants or are administered by nonprofit organizations or, if funded by other sources is of demonstrated effectiveness.

Such evidence of enrollment may include: acceptance letters, school registration cards, letters from a school or program, transcripts, report cards, or progress reports which may show the name of the school or program, date of enrollment, and current educational or grade level, if relevant.

What documentation may be sufficient to demonstrate that I have graduated from high school?

Documentation sufficient for you to demonstrate that you have graduated from high school may include but is not limited to: a high school diploma from a public or private high school or secondary school, certificate of completion, certificate of attendance, or alternate award from a public or private high school or secondary school, or a recognized equivalent of a high school diploma under State law, or a GED certificate or certificate from passing another such State-authorized exam (e.g., HiSet or TASC) in the United States.

What documentation may be sufficient to demonstrate that I have obtained a GED certificate or certificate from passing another such State-authorized exam (e.g., HiSet or TASC)?

Documentation may include but is not limited to, evidence that you have passed a GED exam or other State-authorized exam (e.g., HiSet or TASC), and, as a result, have received the recognized equivalent of a regular high school diploma under State law.

If I am enrolled in a literacy or career training program, can I meet the guidelines?

YES, in certain circumstances. You may meet the guidelines if you are enrolled in an education, literacy, or career training program that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement. Such programs include but are not limited to programs funded, in whole or in part by Federal, State, county or municipal grants, or are administered by nonprofit organizations, or, if funded by other sources, programs of demonstrated effectiveness.

If I am enrolled in an English as a Second Language (ESL) program, can I meet the guidelines?

YES, in certain circumstances. Enrollment in an ESL program may be used to meet the guidelines if the ESL program is funded in whole or in part by Federal, State, county or municipal grants, or administered by

nonprofit organizations, or, if funded by other sources, is a program of demonstrated effectiveness. You must submit direct documentary evidence that the program is funded in whole or part by Federal, State, county, or municipal grants, administered by a nonprofit organization, or of demonstrated effectiveness.

Will USCIS consider evidence other than that listed in Chart #1 to show that I have met the education guidelines?

NO. Evidence not listed in Chart #1 on the following page will not be accepted to establish that you are currently in school, have graduated or obtained a certificate of completion from high school, or have obtained a GED or passed another State-authorized exam (e.g., HiSet or TASC). You must submit any of the documentary evidence listed in Chart #1 to show that you meet the education guidelines.

Will USCIS consider evidence other than that listed in Chart #1 to show that I have met certain initial guidelines?

Evidence other than those documents listed in Chart #1 may be used to establish the following guidelines and factual showings if available documentary evidence is insufficient or lacking and shows that:

- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;
- You satisfy the continuous residence requirement, as long as you present direct evidence of your continued residence in the United States for a portion of the required period and the circumstantial evidence is used only to fill in gaps in the length of continuous residence demonstrated by the direct evidence; and
- Any travel outside the United States during the period of required continuous presence was brief, casual, and innocent.

However, USCIS will not accept evidence other than the documents listed in Chart #1 as proof of any of the following guidelines to demonstrate that you:

- Were under the age of 31 on June 15, 2012; and
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.

For example, even if you do not have documentary proof of your presence in the United States on June 15, 2012, you may still be able to satisfy the guidelines. You may do so by submitting credible documentary evidence that you were present in the United States shortly before and shortly after June 15, 2012, which, under the facts presented, may give rise to an inference of your presence on June 15, 2012 as well. However, evidence other than that listed in Chart #1 will not be accepted to establish that you have graduated high school. You must submit the designated documentary evidence to satisfy that you meet this guideline.

CHART #1: on the next page, provides examples of documentation you may submit to demonstrate you meet the initial guidelines for consideration of deferred action under this process. Please see the instructions of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, for additional details of acceptable documentation.

CHART #1: EXAMPLES OF DOCUMENTS TO SUBMIT TO DEMONSTRATE YOU MEET THE GUIDELINES

Proof of identity	• Passport or national identity document from your country of origin • Birth certificate with photo identification • School or military ID with photo • Any U.S. Government immigration or other document bearing your name and photo
Proof you came to U.S. before your 16th birthday	• Passport with admission stamp • Form I-94/I-95/I-94W • School records from the U.S. schools you have attended • Any Immigration and Naturalization Service or DHS document stating your date of entry (Form I-862, Notice to Appear) • Travel records • Hospital or medical records • Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc.) • Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Birth certificates of children born in the U.S. • Dated bank transactions • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof of immigration status	• Form I-94/I-95/I-94W with authorized stay expiration date • Final order of exclusion, deportation, or removal issued as of June 15, 2012 • A charging document placing you into removal proceedings
Proof of presence in U.S. on June 15, 2012	• Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc.) • School records (letters, report cards, etc.) • Military records (Form DD-214 or NGB Form 22)
Proof you continuously resided in U.S. since June 15, 2007	• Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Passport entries • Birth certificates of children born in the United States • Dated bank transactions • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof of your education status at the time of requesting consideration of DACA	• School records (transcripts, report cards, etc.) from the school that you are currently attending in the United States showing the name(s) of the school(s) and periods of school attendance and the current of requesting consideration of DACA educational or grade level • U.S. high school diploma, certificate of completion, or other alternate award • High school equivalency diploma or certificate recognized under State law • Evidence that you passed a State-authorized exam, including the GED or other State-authorized exam (for example, HiSet or TASC) in the United States
Proof you are an honorably discharged veteran of the U.S. Armed Forces or the U.S. Coast Guard	• Form DD-214, Certificate of Release or Discharge from Active Duty • NGB Form 22, National Guard Report of Separation and Record of Service • Military personnel records • Military health records

May I file affidavits as proof that I meet the initial guidelines for consideration of DACA?

Affidavits generally will not be sufficient on their own to demonstrate that you meet the guidelines for USCIS to consider you for DACA. However, affidavits may be used to support meeting the following guidelines only if the documentary evidence available to you is insufficient or lacking:

- Demonstrating that you meet the 5-year continuous residence requirement; and
- Establishing that departures during the required period of continuous residence were brief, casual, and innocent.

If you submit affidavits related to the above criteria, you must submit two or more affidavits, sworn to or affirmed by people other than yourself, who have direct personal knowledge of the events and circumstances. Should USCIS determine that the affidavits are insufficient to overcome the unavailability or the lack of documentary evidence with respect to either of these guidelines, it will issue a Request for Evidence indicating that further evidence must be submitted to demonstrate that you meet these guidelines.

USCIS will not accept affidavits as proof of satisfying the following guidelines:

- You are currently in school, have graduated or obtained a certificate of completion or other alternate award from high school, have obtained a high school equivalency diploma or certificate (such as by passing the GED exam or other State-authorized exam [for example, HiSet or TASC]), or are an honorably discharged veteran from the Coast Guard or Armed Forces of the United States;
- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;
- You were under the age of 31 on June 15, 2012; and
- Your criminal history, if applicable.

If the only evidence you submit to demonstrate you meet any of the above guidelines is an affidavit, USCIS will issue a Request for Evidence indicating that you have not demonstrated that you meet these guidelines and that you must do so in order to demonstrate that you meet that guideline.

Will I be considered to be in unlawful status if I had an application for asylum or cancellation of removal pending before either USCIS or the Executive Office for Immigration Review (EOIR) on June 15, 2012?

YES. If you had an application for asylum or cancellation of removal, or similar relief, pending before either USCIS or EOIR as of June 15, 2012, but had no lawful status, you may request consideration of DACA.

I was admitted for "duration of status" or for a period of time that extended past June 14, 2012, but violated my immigration status (e.g., by engaging in unauthorized employment, failing to report to my employer, or failing to pursue a full course of study) before June 15, 2012. May I be considered for deferred action under this process?

NO, unless the Executive Office for Immigration Review terminated your status by issuing a final order of removal against you before June 15, 2012.

I was admitted for "duration of status" or for a period of time that extended past June 14, 2012, but "aged out" of my dependent nonimmigrant status as of June 15, 2012. May I be considered for deferred action under this process?

YES. For purposes of satisfying the "had no lawful status on June 15, 2012," guideline alone, if you were admitted for "duration of status" or for a period of time that extended past June 14, 2012, but "aged out" of your dependent nonimmigrant status on or before June 15, 2012 (meaning you turned 21 years old on or before June 15, 2012), you may be considered for deferred action under this process.

I was admitted for "duration of status" but my status in SEVIS is listed as terminated on or before June 15, 2012. May I be considered for deferred action under this process?

YES. For the purposes of satisfying the "had no lawful status on June 15, 2012," guideline alone, if your status as of June 15, 2012, is listed as "terminated" in SEVIS, you may be considered for deferred action under this process.

I am a Canadian citizen who was inspected by CBP but was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

In general, a Canadian citizen who was admitted as a visitor for business or pleasure and not issued an I-94, Arrival/Departure Record, (also known as a "non-controlled" Canadian nonimmigrant) is lawfully admitted for a period of 6 months. For that reason, unless there is evidence, including verifiable evidence provided by the individual, that he or she was specifically advised that his or her admission would be for a different length of time, the Department of Homeland Security (DHS) will consider, for DACA purposes only, that the alien was lawfully admitted for a period of 6 months. Therefore, if DHS is able to verify from its records that your last non-controlled entry occurred on or before Dec. 14, 2011, DHS will consider your nonimmigrant visitor status to have expired as of June 15, 2012, and you may be considered for deferred action under this process.

I used my Border Crossing Card (BCC) to obtain admission to the United States and was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

Because the limitations on entry for a BCC holder vary based on location of admission and travel, DHS will assume that the BCC holder who was not provided an I-94 was admitted for the longest period legally possible—30 days—unless the individual can demonstrate, through verifiable evidence, that he or she was specifically advised that his or her admission would be for a different length of time. Accordingly, if DHS is able to verify from its records that your last admission was using a BCC, you were not issued an I-94 at the time of admission, and it occurred on or before May 14, 2012, DHS will consider your nonimmigrant visitor status to have expired as of June 15, 2012, and you may be considered for deferred action under this process.

Do I accrue unlawful presence if I have a pending initial request for consideration of DACA?

You will continue to accrue unlawful presence while the request for consideration of DACA is pending unless you are under 18 years of age at the time of the request. If you are under 18 years of age at the time you submit your request, you will not accrue unlawful presence while the request is pending, even if you turn 18 while your request is pending with USCIS. If action on your case is deferred, you will not accrue unlawful presence during the period of deferred action. However, having action deferred on your case will not excuse previously accrued unlawful presence.

RENEWAL OF DACA

When should I file my renewal request with U.S. Citizenship and Immigration Services (USCIS)?

USCIS encourages you to submit your request for renewal approximately 120 days (or 4 months) before your current period of deferred action under the Deferred Action for Childhood Arrivals (DACA) process expires. If you have filed approximately 120 days before your deferred action and Employment Authorization Document (EAD) expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS may provide deferred action and employment authorization for a short period of time until your renewal is adjudicated. However, if you file your renewal request more than 150 days prior to the expiration of your current period of deferred action, USCIS may reject your submission and return it to you with instructions to resubmit your request closer to the expiration date.

How will USCIS evaluate my request for renewal of DACA?

You may be considered for renewal of DACA if you met the guidelines for consideration of Initial DACA (see above) AND you:

1. Did not depart the United States on or after Aug. 15, 2012, without advance parole;
2. Have continuously resided in the United States since you submitted your most recent request for DACA that was approved up to the present time; and
3. Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA renewal. USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

Do I accrue unlawful presence if I am seeking renewal and my previous period of DACA expires before I receive a renewal of deferred action under DACA? Similarly, what would happen to my work authorization?

YES, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request.

Similarly, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will not be authorized to work in the United States regardless of your age at time of filing until and unless you receive a new employment authorization document from USCIS.

However, if you have filed your renewal request with USCIS approximately 120 days before your deferred action and EAD expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS may provide deferred action and employment authorization for a short period of time.

Do I need to provide additional documents when I request renewal of deferred action under DACA?

NO, unless you have new documents pertaining to removal proceedings or criminal history that you have not already submitted to USCIS in a previously approved DACA request. USCIS, however, reserves the authority to request at its discretion additional documents, information, or Statements relating to a DACA renewal request determination.

CAUTION: If you knowingly and willfully provide materially false information on Form I-821D, you will be committing a Federal felony punishable by a fine, or imprisonment up to 5 years, or both, under 18 U.S.C. Section 1001. In addition, individuals may be placed into removal proceedings, face severe penalties provided by law, and be subject to criminal prosecution.

TRAVEL

May I travel outside of the United States before I submit an initial Deferred Action for Childhood Arrivals (DACA) request or while my initial DACA request remains pending with the Department of Homeland Security (DHS)?

Any unauthorized travel outside of the United States on or after Aug. 15, 2012, will interrupt your continuous residence and you will not be considered for deferred action under this process. Any travel outside of the United States that occurred on or after June 15, 2007, but before Aug. 15, 2012, will be assessed by U.S. Citizenship and Immigration Services (USCIS) to determine whether the travel qualifies as brief, casual, and innocent. (**See Chart #2 on the following page.**)

CAUTION: You should be aware that if you have been ordered deported or removed, and you then leave the United States, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.

If my case is deferred under DACA, will I be able to travel outside of the United States?

Not automatically. If USCIS has decided to defer action in your case and you want to travel outside the United States, you must apply for advance parole by filing a **Form I-131, Application for Travel Document** and paying the applicable fee ($360). USCIS will determine whether your purpose for international travel is justifiable based on the circumstances you describe in your request. Generally, USCIS will only grant advance parole

Travel Dates	Type of Travel	Does It Affect Continuous Residence
On or after June 15, 2007, but before Aug. 15, 2012	Brief, casual, and innocent For an extended time Because of an order of exclusion, deportation, voluntary departure, or removal To participate in criminal activity	No Yes
On or after Aug. 15, 2012, and after you have requested deferred action	Any	In addition, if you have previously been ordered deported and removed and you depart the United States without taking additional steps to address your removal proceedings, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.

if your travel abroad will be in furtherance of:

- Humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative;
- Educational purposes, such as semester-abroad programs and academic research; or
- Employment purposes such as overseas assignments, interviews, conferences, training, or meetings with clients overseas.

Travel for vacation is not a valid basis for advance parole.

You may not apply for advance parole unless and until USCIS defers action in your case under the consideration of DACA. You cannot apply for advance parole at the same time as you submit your request for consideration of DACA. All advance parole requests will be considered on a case-by-case basis.

If USCIS has deferred action in your case under the DACA process after you have been ordered deported or removed, you may still request advance parole if you meet the guidelines for advance parole described above.

CAUTION: However, for those individuals who have been ordered deported or removed, before you actually leave the United States, you should seek to reopen your case before the Executive Office for Immigration Review (EOIR) and obtain administrative closure or termination of your removal proceeding. Even after you have asked EOIR to reopen your case, you should not leave the United States until after EOIR has granted your request. If you depart after being ordered deported or removed, and your removal proceeding has not been reopened and administratively closed or terminated, your departure may result in your being considered deported or removed, with potentially serious future immigration consequences. If you have any questions about this process, you may contact U.S. Immigration and Customs Enforcement (ICE) through the local ICE Office of the Chief Counsel with jurisdiction over your case.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.

Do brief departures from the United States interrupt the continuous residence requirement?

A brief, casual, and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States, your absence will be considered brief, casual, and innocent if it was on or after June 15, 2007, and before Aug. 15, 2012, and:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;
2. The absence was not because of an order of exclusion, deportation, or removal;
3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation, or removal proceedings; and
4. The purpose of the absence and/or your actions while outside the United States were not contrary to law.

Once USCIS has approved your request for DACA, you may file **Form I-131**, Application for Travel Document, to request advance parole to travel outside of the United States.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.

May I file a request for advance parole concurrently with my DACA package?

Concurrent filing of advance parole is not an option at this time. DHS is, however, reviewing its policy on concurrent filing of advance parole with a DACA request. In addition, DHS is also reviewing eligibility criteria for advance parole. If any changes to this policy are made, USCIS will update this FAQ and inform the public accordingly.

CRIMINAL CONVICTIONS

If I have a conviction for a felony offense, a significant misdemeanor offense, or multiple misdemeanors, can I receive an exercise of prosecutorial discretion under this new process?

NO. If you have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, you will not be considered for Deferred Action for Childhood Arrivals (DACA) except where the Department of Homeland Security (DHS) determines there are exceptional circumstances.

What offenses qualify as a felony?

A felony is a Federal, State, or local criminal offense punishable by imprisonment for a term exceeding 1 year.

What offenses constitute a significant misdemeanor?

For the purposes of this process, a significant misdemeanor is a misdemeanor as defined by Federal law (specifically, one for which the maximum term of imprisonment authorized is 1 year or less but greater than 5 days) and that meets the following criteria:

1. Regardless of the sentence imposed, is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence; or
2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

The time in custody does not include any time served beyond the sentence for the criminal offense based on a State or local law enforcement agency honoring a detainer issued by U.S. Immigration and Customs Enforcement (ICE). Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking

into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion. DHS retains the discretion to determine that an individual does not warrant deferred action on the basis of a single criminal offense for which the individual was sentenced to time in custody of 90 days or less.

What offenses constitute a non-significant misdemeanor?

For purposes of this process, a non-significant misdemeanor is any misdemeanor as defined by Federal law (specifically, one for which the maximum term of imprisonment authorized is 1 year or less but greater than 5 days) and that meets the following criteria:

1. Is not an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence; and
2. Is one for which the individual was sentenced to time in custody of 90 days or less. The time in custody does not include any time served beyond the sentence for the criminal offense based on a State or local law enforcement agency honoring a detainer issued by ICE.

Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion.

If I have a minor traffic offense, such as driving without a license, will it be considered a non-significant misdemeanor that counts towards the "three or more non-significant misdemeanors" making me unable to receive consideration for an exercise of prosecutorial discretion under this new process?

A minor traffic offense will not be considered a misdemeanor for purposes of this process. However, your entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, you warrant an exercise of prosecutorial discretion.

It is important to emphasize that driving under the influence is a significant misdemeanor regardless of the sentence imposed.

What qualifies as a national security or public safety threat?

If the background check or other information uncovered during the review of your request for deferred action indicates that your presence in the United States threatens public safety or national security, you will not be able to receive consideration for an exercise of prosecutorial discretion except where DHS determines there are exceptional circumstances. Indicators that you pose such a threat include, but are not limited to: gang membership, participation in criminal activities, or participation in activities that threaten the United States.

Will offenses criminalized as felonies or misdemeanors by State immigration laws be considered felonies or misdemeanors for purpose of this process?

NO. Immigration-related offenses characterized as felonies or misdemeanors by State immigration laws will not be treated as disqualifying felonies or misdemeanors for the purpose of considering a request for consideration of deferred action under this process.

Will DHS consider my expunged or juvenile conviction as an offense making me unable to receive an exercise of prosecutorial discretion?

Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. If you were a juvenile, but tried and convicted as an adult, you will be treated as an adult for purposes of the DACA process.

MISCELLANEOUS

Does this Administration remain committed to comprehensive immigration reform?

YES. The Administration has consistently pressed for passage of comprehensive immigration reform, including the DREAM Act, because the President believes these steps are critical to building a 21st century immigration system that meets our Nation's economic and security needs.

Is passage of the DREAM Act still necessary in light of the new process?

YES. The Secretary of Homeland Security's June 15, 2012, memorandum allowing certain people to request consideration for deferred action is one in a series of steps that DHS has taken to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety. Deferred Action for Childhood Arrivals (DACA) is an exercise of prosecutorial discretion and does not provide lawful status or a pathway to citizenship. As the President has Stated, individuals who would qualify for the DREAM Act deserve certainty about their status. Only the Congress, acting through its legislative authority, can confer the certainty that comes with a pathway to permanent lawful status.

Does deferred action provide me with a path to permanent resident status or citizenship?

NO. Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.

Can I be considered for deferred action even if I do not meet the guidelines to be considered for DACA?

This process is only for individuals who meet the specific guidelines for DACA. Other individuals may, on a case-by-case basis, request deferred action from U.S. Citizenship and Immigration Services (USCIS) or U.S. Immigration and Customs Enforcement (ICE) in certain circumstances, consistent with longstanding practice.

How will ICE and USCIS handle cases involving individuals who do not satisfy the guidelines of this process but believe they may warrant an exercise of prosecutorial discretion under the June 2011 Prosecutorial Discretion Memoranda?

If USCIS determines that you do not satisfy the guidelines or otherwise determines you do not warrant an exercise of prosecutorial discretion, then it will decline to defer action in your case. If you are currently in removal proceedings, have a final order, or have a voluntary departure order, you may then request ICE consider whether to exercise prosecutorial discretion.

How should I fill out question 9 on Form I-765, Application for Employment Authorization?

When you are filing a Form I-765 as part of a DACA request, question 9 is asking you to list those Social Security numbers that were officially issued to you by the Social Security Administration.

Will there be supervisory review of decisions by USCIS under this process?

YES. USCIS has implemented a successful supervisory review process to ensure a consistent process for considering requests for DACA.

Will USCIS personnel responsible for reviewing requests for DACA receive special training?

YES. USCIS personnel responsible for considering requests for consideration of DACA have received special training.

Must attorneys and accredited representatives who provide pro bono services to deferred action requestors at group assistance events file a Form G-28 with USCIS?

Under 8 C.F.R. §§ 292.3 and 1003.102, practitioners are required to file a Notice of Entry of Appearance as Attorney or Accredited Representative when they engage in practice in immigration matters before DHS, either in person or through the preparation or filing of any brief, application, petition, or other document. Under these rules, a practitioner who consistently violates the requirement to file a Form G-28 may be subject to

disciplinary sanctions; however on Feb. 28, 2011, USCIS issued a Statement indicating that it does not intend to initiate disciplinary proceedings against practitioners (attorneys and accredited representatives) based solely on the failure to submit a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) in relation to pro bono services provided at group assistance events. DHS is in the process of issuing a final rule at which time this matter will be reevaluated.

When must an individual sign a Form I-821D as a preparer?

Anytime someone other than the requestor prepares or helps fill out the Form I-821D, that individual must complete Part 5 of the form.

If I provide my employee with information regarding his or her employment to support a request for consideration of DACA, will that information be used for immigration enforcement purposes against me and/or my company?

You may, as you determine appropriate, provide individuals requesting DACA with documentation which verifies their employment. This information will not be shared with ICE for civil immigration enforcement purposes under section 274A of the Immigration and Nationality Act (relating to unlawful employment) unless there is evidence of egregious violations of criminal statutes or widespread abuses.

Can I request consideration for deferred action under this process if I live in the Commonwealth of the Northern Mariana Islands (CNMI)?

YES, in certain circumstances. The CNMI is part of the United States for immigration purposes and is not excluded from this process. However, because of the specific guidelines for consideration of DACA, individuals who have been residents of the CNMI are in most cases unlikely to qualify for the program. You must, among other things, have come to the United States before your 16th birthday and have resided continuously in the United States since June 15, 2007.

Under the Consolidated Natural Resources Act of 2008, the CNMI became part of the United States for purposes of immigration law only on Nov. 28, 2009. Therefore entry into, or residence in, the CNMI before that date is not entry into, or residence in, the United States for purposes of the DACA process.

USCIS has used parole authority in a variety of situations in the CNMI to address particular humanitarian needs on a case-by-case basis since Nov. 28, 2009. If you live in the CNMI and believe that you meet the guidelines for consideration of deferred action under this process, except that your entry and/or residence to the CNMI took place entirely or in part before Nov. 28, 2009, USCIS is willing to consider your situation on a case-by-case basis for a grant of parole. If this situation applies to you, you should make an appointment through INFOPASS with the USCIS ASC in Saipan to discuss your case with an immigration officer.

Someone told me if I pay them a fee, they can expedite my DACA request. Is this true?

NO. There is no expedited processing for deferred action. Dishonest practitioners may promise to provide you with faster services if you pay them a fee. These people are trying to scam you and take your money. Visit our **Avoid Scams** page to learn how you can protect yourself from immigration scams.

Make sure you seek information about requests for consideration of DACA from official government sources such as USCIS or the DHS. If you are seeking legal advice, visit our Find **Legal Services** page to learn how to choose a licensed attorney or accredited representative.

Am I required to register with the Selective Service?

Most male persons residing in the United States, who are ages 18 through 25, are required to register with Selective Service. Please see link for more information. [**Selective Service, www.sss.gov**].

Consideration of Deferred Action for Childhood Arrivals

Deferred action for childhood arrivals (DACA) allows certain individuals, who meet specific guidelines, to request consideration of deferred action from USCIS. Individuals who receive deferred action will not be placed into removal proceedings or removed from the United States for a specified period of time unless terminated. If you receive deferred action, you may be eligible for employment authorization. You may request deferred action for childhood arrivals if you meet the following guidelines:

Can I be considered?

Review Guidelines

- You came to the United States before reaching your 16th birthday
- You have continuously resided in the United States since June 15, 2007, up to the present time
- You were under the age of 31 as of June 15, 2012
- You never had a lawful immigration status on or before June 15, 2012, or any lawful immigration status or parole that you obtained had expired as of June 15, 2012
- You are currently in school, have graduated or obtained your certificate of completion from high school, have obtained your General Educational Development certification, or you are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States
- You have not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety
- You were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS

How do I file?

1. Collect documents as evidence you meet the guidelines
2. Complete USCIS Form I-821D, I-765 and I-765 Worksheet
3. Mail USCIS forms and fees (total $465)
4. Visit your local USCIS Application Support Center for a scheduled biometric services appointment
5. Check the status of your request online at USCIS.gov

Renew your DACA

Find your DACA expiration date

- On your Form I-797, Notice of Action
- OR
- Form I-766 - The date your Employment Authorization Document (EAD) expires

SUBMIT renewal request

4 months or 120 days before your current period of DACA expires.

Ensure you meet the following

- You met the initial DACA requirements
- You did not depart the United States on or after August 15, 2012, without advance parole
- You have continuously resided in the United States since you submitted your most recent DACA request that was approved
- You have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety

Complete and mail forms to USCIS

1. Form I-821D, Consideration of Deferred Action for Childhood Arrivals
2. Form I-765, Application for Employment Authorization
3. Form I-765W, Worksheet

REMEMBER: Read instructions carefully • Sign the forms • Pay $465 fee

U.S. Citizenship and Immigration Services

If you have questions about your request, please call USCIS Customer Service at 1-800-375-5283 or 1-800-767-1833 (TDD).
www.uscis.gov/childhoodarrivals

U.S. Citizenship and Immigration Services

Learn how to protect yourself from immigration scams at
www.uscis.gov/avoidscams

THE WRONG HELP CAN HURT

BEWARE OF IMMIGRATION SCAMS

DOWNLOAD
free forms and instructions

LEARN
about filing fees

VERIFY
only BIA-accredited representatives or eligible attorneys provide you legal services

REPORT
scams to the Federal Trade Commission (FTC) or your state attorney general
www.ftc.gov/complaint
1-877-FTC-HELP

About Us

USCIS is your **official** source of information about immigration benefits and services. Contact us for more information on USCIS and its programs.

Contact Us

www.uscis.gov
1-800-375-5283

DACA RESOURCES

DEPARTMENT OF HOMELAND SECURITY

U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS)

DACA resource page

www.uscis.gov/childhoodarrivals
www.uscis.gov/acciondiferida

These English and Spanish Web pages contain important DACA information.

Avoid Immigration Scams resource center

www.uscis.gov/avoidscams
www.uscis.gov/eviteestafas

These English and Spanish Web pages contain information related to immigration scams, including resources for applicants, community groups, and legal service providers.

"How Do I" guides

www.uscis.gov/howdoi

This online repository for all USCIS "How Do I" guides includes "How Do I Request Consideration of Deferred Action for Childhood Arrivals (DACA)?"

Public Engagement Division Outreach page

www.uscis.gov/outreach

This page lists upcoming national engagements, including multilingual engagements, and local outreach events.

Multilingual resource center

www.uscis.gov/multilingual

This online resource has links to documents in 22 languages, including multilingual DACA resources.

Online customer service tools

www.uscis.gov/tools

USCIS offers customers a variety of online customer service tools, including the ability to change address, check processing times and case status information, and submit inquiries.

Systematic Alien Verification for Entitlements (SAVE)

www.uscis.gov/save

The SAVE program is an intergovernmental information service initiative which verifies the immigration status of benefit applicants.

E-Verify

www.uscis.gov/e-verify

E-Verify is an electronic system that enables employers to verify employment eligibility. The E-Verify program has a variety of resources for employees on worker rights.

OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES (CRCL)

Overview of CRCL resources

www.dhs.gov/topic/civil-rights-and-civil-liberties

The mission of CRCL is to advance and safeguard the civil rights and civil liberties of individuals and communities with respect to the Department's immigration-related policies and activities.

OFFICE OF THE CIS OMBUDSMAN

Overview of Office of the CIS Ombudsman resources

www.dhs.gov/topic/cis-ombudsman

The Office of the CIS Ombudsman provides individual immigration case assistance and makes recommendations to improve the administration of immigration benefits.

DEPARTMENT OF EDUCATION

DEPARTMENT OF EDUCATION

Free Application for Federal Student Aid (FAFSA)

www.studentaid.ed.gov/fafsa

This Web page provides an overview of the FAFSA requirements and process.

Resources for DACA and immigrant students

www2.ed.gov/about/overview/focus/immigration-resources.html

This resource page includes Q&As on Federal student aid and education records for DACA students and a financial aid guide.

Migrant Education Program

www2.ed.gov/programs/mep/index.html

The Migrant Education Program supports the development and funding of education and support services for migratory children.

DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)

List of Board of Immigration Appeals (BIA) recognized organizations and accredited representatives

www.justice.gov/eoir/ra/raroster.htm

BIA accredited representatives working for BIA-recognized organizations are non-attorneys who are authorized to provide immigration legal services.

List of low cost and free immigration legal service providers

www.justice.gov/eoir/probono/states.htm

EOIR provides a list of free and low-cost immigration attorneys by State as a resource for applicants and petitioners.

ACCESS TO JUSTICE

Overview of Access to Justice resources

www.justice.gov/atj

Access to Justice works with Federal agencies, State, and local governments and State Access to Justice commissions to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.

DACA resource guide

www.justice.gov/atj/daca-resourceguide-atj-feb-27-3013.pdf

This resource guide provides information on the DACA process and links to DACA-related resources.

OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION-RELATED UNFAIR EMPLOYMENT PRACTICES

DACA flyer

www.justice.gov/crt/about/osc/pdf/publications/DACA_English2.pdf

The Office of Special Counsel enforces the anti-discrimination provisions of the Immigration and Nationality Act. This flyer provides DACA recipients with information about their right to work in the United States

DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

We Can Help website

www.dol.gov/wecanhelp

This Web site provides useful information for workers to understand their rights in the workplace and how to file a complaint, regardless of their immigration status.

YouthRules! Web site

www.youthrules.dol.gov

This Web site provides critical information on the jobs and hours a minor is allowed to work.

EXHIBIT 4

Congressional Research Service

MEMORANDUM July 13, 2012

To: Prepared for Distribution to Multiple Congressional Requesters

From: Andorra Bruno, Specialist in Immigration Policy, 7-7865
Todd Garvey, Legislative Attorney, 7-0174
Kate Manuel, Legislative Attorney, 7-4477
Ruth Ellen Wasem, Specialist in Immigration Policy, 7-7342

Subject: **Analysis of June 15, 2012 DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children***

This Congressional Research Service (CRS) memorandum provides background and analysis related to the memorandum issued by the Department of Homeland Security (DHS) on June 15, 2012, entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. Under the DHS directive, certain individuals who were brought to the United States as children and meet other criteria will be considered for relief from removal. Intended to respond to a variety of congressional requests on the policy set forth in the DHS memorandum, this CRS memorandum discusses the content of the June 15, 2012 memorandum, as well as the unauthorized alien student issue and related DREAM Act legislation, past administrative exercises of prosecutorial discretion to provide relief from removal, the legal authority for the actions contemplated in the DHS memorandum, and other related issues. For further information, please contact Andorra Bruno (unauthorized students and the DREAM Act), Todd Garvey (constitutional authority), Kate Manuel (other legal issues), or Ruth Wasem (antecedents of deferred departure and access to federal benefits).

Overview of Unauthorized Alien Students

The unauthorized alien (noncitizen) population includes minors and young adults who were brought, as children, to live in the United States by their parents or other adults. These individuals are sometimes referred to as "unauthorized alien students," or, more colloquially, as "DREAM Act kids" or "DREAMers."

While living in the United States, unauthorized alien children are able to receive free public education through high school.[1] Many unauthorized immigrants who graduate from high school and want to attend

[1] The legal authority for disallowing state discrimination against unauthorized aliens in elementary and secondary education is the 1982 Supreme Court decision in Plyler v. Doe. See also CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

college, however, find it difficult to do so. One reason for this is that they are ineligible for federal student financial aid.[2] Another reason relates to a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[3] that discourages states and localities from granting unauthorized aliens certain "postsecondary education benefits" (referred to here as the "1996 provision").[4] More broadly, as unauthorized aliens, they are typically unable to work legally and are subject to removal from the United States.[5]

According to DHS estimates, there were 1.4 million unauthorized alien children under age 18 living in the United States in January 2011. In addition, there were 1.6 million unauthorized individuals aged 18 to 24, and 3.7 million unauthorized individuals aged 25 to 34.[6] These data represent totals and include all individuals in the specified age groups regardless of length of presence in the United States, age at time of initial entry into the United States, or educational status. Numerical estimates of potential beneficiaries of the policy set forth in DHS's June 15, 2012 memorandum are provided below.

Legislation

Multiple bills have been introduced in recent Congresses to provide relief to unauthorized alien students. These bills have often been entitled the Development, Relief, and Education for Alien Minors Act, or the DREAM Act. A common element in these bills is that they would enable certain unauthorized alien students to obtain legal status through an immigration procedure known as *cancellation of removal*[7] and at some point in the process, to obtain legal permanent resident (LPR) status, provided they meet all the applicable requirements. Multiple DREAM Act bills have been introduced in the 112th Congress but none have seen any legislative action.[8]

Traditional DREAM Act bills

Since the 109th Congress, "standard" DREAM Act bills have included language to repeal the 1996 provision mentioned above and to enable certain unauthorized alien students to adjust status (that is, to obtain LPR status in the United States). These bills have proposed to grant LPR status on a conditional basis to an alien who, among other requirements, could demonstrate that he or she:

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[2] Higher Education Act (HEA) of 1965 (P.L. 89-329), as amended, November 8, 1965, 20 U.S.C. §1001 *et seq*.

[3] IIRIRA is Division C of P.L. 104-208, September 30, 1996.

[4] This provision, section 505, nominally bars states from conferring postsecondary education benefits (e.g., in-state tuition) to unauthorized aliens residing within their jurisdictions if similar benefits are not conferred to out-of-state U.S. citizens. Nevertheless, about a dozen states effectively do grant in-state tuition to resident unauthorized aliens without granting similar benefits to out-of-state citizens, and courts that have considered these provisions have upheld them.

[5] For additional information, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

[6] U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker.

[7] Cancellation of removal is a discretionary form of relief that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien's status is adjusted to that of a legal permanent resident.

[8] For additional analysis of DREAM Act legislation, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation.*

- was continuously physically present in the United States for at least five years preceding the date of enactment;
- was age 15 or younger at the time of initial entry;
- had been a person of good moral character since the time of initial entry;
- was at or below a specified age (age has varied by bill) on the date of enactment; and
- had been admitted to an institution of higher education in the United States or had earned a high school diploma or the equivalent in the United States.

The bills also include special requirements concerning inadmissibility,[9] and some would disqualify any alien convicted of certain state or federal crimes. After six years in conditional LPR status, an alien could have the condition on his or her status removed and become a full-fledged LPR if he or she meets additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the uniformed services[10] for at least two years. Two similar bills with these elements (S. 952, H.R. 1842)—both entitled the DREAM Act of 2011—have been introduced in the 112th Congress.

Other Versions of the DREAM Act

Revised versions of the DREAM Act have also been introduced in Congress in recent years. In the 111th Congress, the House approved one of these DREAM Act measures as part of an unrelated bill, the Removal Clarification Act of 2010 (H.R. 5281).[11] Unlike earlier DREAM Act bills, this measure[12] did not include a repeal of the 1996 provision and proposed to grant eligible individuals an interim legal status prior to enabling them to adjust to LPR status. Under this measure, an alien meeting an initial set of requirements like those included in traditional DREAM Act bills (enumerated in the previous section) would have been granted conditional *nonimmigrant*[13] status for five years. This status could have been extended for another five years if the alien met additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the Armed Forces for at least two years. The applications to obtain conditional status initially and to extend this status would have been subject to surcharges. At the end of the second conditional period, the conditional nonimmigrant could have applied to adjust to LPR status.

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[9] The Immigration and Nationality Act (INA) enumerates classes of inadmissible aliens. Under the INA, except as otherwise provided, aliens who are inadmissible under specified grounds, such as health-related grounds or criminal grounds, are ineligible to receive visas from the Department of State or to be admitted to the United States by the Department of Homeland Security.

[10] As defined in Section 101(a) of Title 10 of the U.S. Code, *uniformed services* means the Armed Forces (Army, Navy, Air Force, Marine Corps, and Coast Guard); the commissioned corps of the National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service.

[11] The Senate failed, on a 55-41 vote, to invoke cloture on a motion to agree to the House-passed DREAM Act amendment, and H.R. 5281 died at the end of the Congress.

[12] The language is the same as that in H.R. 6497 in the 111th Congress.

[13] Nonimmigrants are legal temporary residents of the United States.

Two bills in the 112th Congress—the Adjusted Residency for Military Service Act, or ARMS Act (H.R. 3823) and the Studying Towards Adjusted Residency Status Act, or STARS Act (H.R. 5869)—follow the general outline of the House-approved measure described above, but include some different, more stringent requirements. These bills would provide separate pathways for unauthorized students to obtain LPR status through military service (ARMS Act) or higher education (STARS Act). Neither bill would repeal the 1996 provision and, thus, would not eliminate the statutory restriction on state provision of postsecondary educational benefits to unauthorized aliens.

The initial requirements for conditional nonimmigrant status under the ARMS Act are like those in the traditional DREAM Act bills discussed above. The STARS Act includes most of these requirements, as well as others that are not found in other DREAM Act bills introduced in the 112th Congress. Two new STARS Act requirements for initial conditional status are: (1) admission to an accredited four-year college, and (2) submission of the application for relief before age 19 or, in some cases, before age 21.

Under both the ARMS Act and the STARS Act, the conditional nonimmigrant status would be initially valid for five years and could be extended for an additional five years if applicants meet a set of requirements. In the case of the ARMS Act, these requirements would include service in the Armed Forces on active duty for at least two years or service in a reserve component of the Armed Forces in active status for at least four years. In the case of the STARS Act, the requirements for an extension of status would include graduation from an accredited four-year institution of higher education in the United States. After obtaining an extension of status, an alien could apply to adjust to LPR status, as specified in each bill.

DHS Memorandum of June 15, 2012

On June 15, 2012, the Obama Administration announced that certain individuals who were brought to the United States as children and meet other criteria would be considered for relief from removal. Under the memorandum, issued by Secretary of Homeland Security Janet Napolitano, these individuals would be eligible for deferred action[14] for two years, subject to renewal, and could apply for employment authorization.[15] The eligibility criteria for deferred action under the June 15, 2012 memorandum are:

- under age 16 at time of entry into the United States;
- continuous residence in the United States for at least five years preceding the date of the memorandum;

[14] Deferred action is "a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion." U.S. Department of Homeland Security, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities," http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-low-enforcement-priorities.shtm.

[15] U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

- in school, graduated from high school or obtained general education development certificate, or honorably discharged from the Armed Forces;
- not convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and not otherwise a threat to national security or public safety; and
- age 30 or below.

These eligibility criteria are similar to those included in DREAM Act bills discussed above. The deferred action process set forth in the June 15, 2012 memorandum, however, would not grant eligible individuals a legal immigration status.[16]

Based on these eligibility criteria, the Pew Hispanic Center has estimated that the policy set forth in the June 15, 2012 memorandum could benefit up to 1.4 million unauthorized aliens in the United States. This potential beneficiary population total includes 0.7 million individuals under age 18 and 0.7 million individuals aged 18 to 30.[17]

Antecedents of the Policy

The Attorney General and, more recently, the Secretary of Homeland Security have had prosecutorial discretion in exercising the power to remove foreign nationals. In 1959, a major textbook of immigration law stated, "Congress traditionally has entrusted the enforcement of its deportation policies to executive officers and this arrangement has been approved by the courts."[18] Specific guidance on how prosecutorial discretion was applied in individual cases was elusive in the early years.[19] Generally, prosecutorial discretion is the authority that an enforcement agency has in deciding whether to enforce or not enforce the law against someone. In the immigration context, prosecutorial discretion exists across a range of decisions that include: prioritizing certain types of investigations; deciding whom to stop, question and arrest; deciding to detain an alien; issuing a notice to appear (NTA); granting deferred action; agreeing to let the alien depart voluntarily; and executing a removal order. (The legal authority to exercise prosecutorial discretion is discussed separately below.)

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[16] The DHS memorandum states: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law." Ibid., p. 3.

[17] Pew Hispanic Center, "Up to 1.4 Million Unauthorized Immigrants Could Benefit from New Deportation Policy," June 15, 2012, http://www.pewhispanic.org/2012/06/15/up-to-1-4-million-unauthorized-immigrants-could-benefit-from-new-deportation-policy/.

[18] Charles Gordon and Harry N. Rosenfield, *Immigration Law and Procedure*, Albany, New York: Banks and Company, 1959, p. 406.

[19] For example, in 1961, an official with the former Immigration and Naturalization Service (INS) offered his insights on circumstances in which discretionary relief from removal might be provided. The first factor he cited was age: "I have always felt that young people should be treated in our proceedings as are juveniles in the Courts who have violated criminal law.... My personal opinion is that certainly someone under eighteen is entitled to extra consideration." He added that persons over 60 or 65 years of age should be given special consideration. He also emphasized length of residence in the United States as a factor, noting that "five years is a significant mark in immigration law." Other factors he raised included good moral character, family ties in the United States, and exceptional and unusual hardship to the alien as well as family members. Aaron I. Maltin, Special Inquiry Officer, "Relief from Deportation," *Interpreter Releases*, vol. 38, no. 21 (June 9, 1961), pp. 150-155. He also discussed refugee and asylum cases.

Over the next few decades, an official guidance on discretionary relief from removal began to take shape. A 1985 Congressional Research Service "white paper" on discretionary relief from deportation described the policies of Immigration and Naturalization Service (INS)[20] at that time.

> Currently, three such discretionary procedures are relatively routinely used by INS to provide relief from deportation. One of the procedures – stay of deportation – is defined under INS regulations; another—deferred departure or deferred action – is described in INS operating instructions; and the third – extended voluntary departure—has not been formally defined and appears to be evolving.

The CRS "white paper" further noted that the executive branch uses these three forms of prosecutorial discretion "to provide relief the Administration feels is appropriate but which would not be available under the statute."[21]

In an October 24, 2005, memorandum, William Howard, then-Principal Legal Advisor of DHS's Immigration and Customs Enforcement (ICE), cited several policy factors relevant to the need to exercise prosecutorial discretion. One factor he identified was institutional change. He wrote:

> "Gone are the days when INS district counsels... could simply walk down the hall to an INS district director, immigrant agent, adjudicator, or border patrol officer to obtain the client's permission to proceed ... Now the NTA-issuing clients might be in different agencies, in different buildings, and in different cities from our own."

Another issue Howard raised was resources. He pointed out that the Office of Principal Legal Advisor (OPLA) was "handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board) and 12,000 motions to re-open each year." He further stated:

> "Since 2001, federal immigration court cases have tripled. That year there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000."[22]

Howard offered examples of the types of cases to consider for prosecutorial discretion, such as someone who had a clearly approvable petition to adjust to legal permanent resident status, someone who was an immediate relative of military personnel, or someone for whom sympathetic humanitarian circumstances "cry for an exercise of prosecutorial discretion."[23]

In November 2007, then-DHS Assistant Secretary for ICE Julie L. Myers issued a memorandum in which she clarified that the replacement of the "catch and release" procedure with the "catch and return" policy for apprehended aliens (i.e., a zero-tolerance policy for all aliens apprehended at the border) did not "diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to

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[20] Most of the immigration-related functions of the former INS were transferred to the U.S. Department of Homeland Security when it was created in 2002 by the Homeland Security Act (P.L. 107-296). Three agencies in DHS have important immigration functions in which prosecutorial discretion may come into play: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).

[21] Sharon Stephan, *Extended Voluntary Departure and Other Blanket Forms of Relief from Deportation*, Congressional Research Service, 85-599 EPW, February 23, 1985.

[22] William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all OPLA Chief Counsel, October 24, 2005.

[23] *Ibid.*

meritorious health-related cases and caregiver issues."[24] Assistant Secretary Myers referenced and attached a November 7, 2000, memorandum entitled "Exercising Prosecutorial Discretion," which was written by former INS Commissioner Doris Meissner. The 2000 memorandum stated, in part:

> "Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals."[25]

Meissner further stated that prosecutorial discretion should not become "an invitation to violate or ignore the law."[26]

The Meissner, Howard, and Myers memoranda provide historical context for the March 2011 memorandum on prosecutorial discretion written by ICE Director John Morton.[27] Morton published agency guidelines that define a three-tiered priority scheme that applies to all ICE programs and enforcement activities related to civil immigration enforcement.[28] Under these guidelines, ICE's top three civil immigration enforcement priorities are to: (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,[29] and (3) apprehend aliens who are fugitives or otherwise obstruct immigration controls.[30]

In a June 17, 2011 memorandum, Morton spells out 18 factors that are among those that should be considered in weighing prosecutorial discretion. The factors include those that might halt removal

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[24] Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion*, memorandum, November 7, 2007. CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel. (Hereafter CRS R42057, *Interior Immigration Enforcement.*)

[25] Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, memorandum to regional directors, district directors, chief patrol agents, and the regional and district counsels, November 7, 2000.

[26] *Ibid.*

[27] John Morton, Director, Immigration and Customs Enforcement, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens*, memorandum, March 2, 2011.

[28] ICE's mission includes the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration; see ICE, "ICE Overview: Mission," http://www.ice.gov/about/overview/. Laws governing the detention and removal of unauthorized aliens generally fall under ICE's civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE's criminal enforcement authority. Also see Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line," *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

[29] The memorandum does not define "recent illegal entrants." DHS regulations permit immigration officers to summarily exclude an alien present in the United States for less than two years unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture; and DHS policy is to pursue expedited removal proceedings against aliens who are determined to be inadmissible because they lack proper documents, are present in the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, are encountered by an immigration officer within 100 miles of the U.S. border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States for over 14 days. See CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[30] CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

proceedings, such as whether the person's immediate relative is serving in the military, whether the person is a caretaker of a person with physical or mental disabilities, or whether the person has strong ties to the community. The factors Morton lists also include those that might prioritize a removal proceeding, such as whether the person has a criminal history, whether the person poses a national security or public safety risk, whether the person recently arrived in the United States, and how the person entered. At the same time, the memorandum states:

> "This list is not exhaustive and no one factor is determinative. ICE officers, agents and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities."

The Morton memorandum would halt removal proceedings on those foreign nationals that are not prioritized for removal. The foreign nationals whose removals are halted in keeping with the Morton memorandum might be given deferred action or some other relief from removal. [31]

Deferred Action

In 1975, INS issued guidance on a specific form of prosecutorial discretion known as deferred action, which cited "appealing humanitarian factors." The INS Operating Instructions said that consideration should be given to advanced or tender age, lengthy presence in the United States, physical or mental conditions requiring care or treatment in the United States, and the effect of deportation on the family members in the United States. On the other hand, those INS Operating Instructions made clear that criminal, immoral or subversive conduct or affiliations should also be weighed in denying deferred action.[32] Today within DHS, all three of the immigration-related agencies—ICE, U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP)—possess authority to grant deferred action. A foreign national might be considered for deferred action at any stage of the administrative process.[33]

Because of where the foreign national may be in the process, ICE issuances of deferred action are more likely to be aliens who are detained or in removal proceedings. It is especially important to note, as mentioned above, that not all prosecutorial discretion decisions to halt removal proceedings result in a grant of deferred action to the foreign national. Voluntary departure, for example, might be an alternative outcome of prosecutorial discretion.[34]

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[31] John Morton, Director of Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Detention and Removal of Aliens*, memorandum to field office directors, special agents in charge, and chief counsels, June 17, 2011.

[32] Shoba Sivaprasad Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal*, Spring 2010.

[33] Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure*. Newark: LexisNexis, vol. 6, §72.03.

[34] Voluntary departure typically means that the alien concedes removability and departs the United States on his or her own recognizance, rather than with a final order of removal.

Other Forms of Deferred Departure

In addition to deferred action, which is granted on a case-by-case basis, the Administration may use prosecutorial discretion, under certain conditions, to provide relief from deportation that is applied as blanket relief.[35] The statutory authority cited by the agency for these discretionary procedures is generally that portion of the INA that confers on the Attorney General the broad authority for general enforcement and the section of the law covering the authority for voluntary departure.[36]

The two most common uses of prosecutorial discretion to provide blanket relief from deportation have been deferred departure or deferred enforced departure (DED) and extended voluntary departure (EVD).[37] The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate. Foreign nationals who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.

The executive branch has provided blanket or categorical deferrals of deportation numerous times over the years. CRS has compiled a list of these administrative actions since 1976 in **Appendix A**.[38] As the table indicates, most of these discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters. In many of these instances, Congress was considering legislative remedies for the affected groups, but had not yet enacted immigration relief for them. The immigration status of those who benefited from these deferrals of deportation often—but not always—was resolved by legislation adjusting their status (**Appendix A**).

Two Illustrative Examples

Several of the categorical deferrals of deportation that were **not** country-specific bear some similarities to the June 15, 2012 policy directive. Two examples listed in **Appendix A** are summarized below: the "Silva letterholders" class and the "family fairness" relatives. Both of these groups receiving discretionary relief from deportation were unique in their circumstances. While each group included many foreign nationals who would otherwise be eligible for LPR visas, they were supposed to wait in numerically-limited visa categories. These wait times totaled decades for many of them. Congress had considered but not enacted legislation addressing their situations. Ultimately, their cases were resolved by provisions folded into comprehensive immigration legislation.[39]

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[35] In addition to relief offered through prosecutorial discretion, the INA provides for Temporary Protected Status (TPS). TPS may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests. CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[36] §240 of INA, 8 U.S.C. §1229a; §240B, 8 U.S.C. §1229c.

[37] As TPS is spelled out in statute, it is not considered a use of prosecutorial discretion, but it does provide blanket relief from removal temporarily.

[38] **Appendix A** only includes those administrative actions that could be confirmed by copies of official government guidance or multiple published accounts. For example, reports of deferred action after Hurricane Katrina or the September 11, 2001, terrorist attacks could not be verified, though it seems likely that the Administration did provide some type of temporary reprieve.

[39] These policies and legal provisions pre-date the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (referenced above), which added substantial new penalties and bars for illegal presence in the United States.

The "Silva letterholders" were foreign nationals from throughout the Western Hemisphere who were in the United States without legal authorization. In 1976, the Attorney General opined that the State Department had been incorrectly charging the visas for Cuban refugees against the Western Hemisphere numerical limits from 1966 to 1976. A class action case named for Mr. Refugio Silva was filed to recapture the 145,000 LPR visas given to Cubans for foreign nationals with approved petitions from other Western Hemisphere nations. Apparently many of the aliens involved in the case were already in the country, out-of-status, even though they had LPR petitions pending. In other words, they had jumped the line. In 1977, the Attorney General temporarily suspended the expulsion while the class action case moved forward. Class members were allowed to apply for work authorization. Meanwhile, Congress passed amendments to the INA in 1978 that put the Western Hemisphere nations under the per-country cap, which further complicated their situation, by making visa availability more difficult for some but not all of the Western Hemisphere countries. The courts ruled for the Silva class, but the 145,000 recaptured visas were inadequate to cover the estimated 250,000 people who had received letters staying their deportation and permitting them to work. When the dependents of the Silva letterholders were included, the estimated number grew to almost half a million. Most of those in the Silva class who did not get one of the recaptured visas were ultimately eligible to legalize through P.L. 99-603, the Immigration Reform and Control Act (IRCA) of 1986.

Another example are the unauthorized spouses and children of aliens who legalized through IRCA. As Congress was debating IRCA, it weighed and opted not to provide a legalization pathway for the immediate relatives of aliens who met the requirements of IRCA unless they too met those requirements. As IRCA's legalization programs were being implemented, the cases of unauthorized spouses and children who were not eligible to adjust with their family came to the fore. In 1987, Attorney General Edward Meese authorized the INS district directors to defer deportation proceedings where "compelling or humanitarian factors existed." Legislation addressing this population was introduced throughout the 1980s, but not enacted. In 1990, INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA, dropping the where "compelling or humanitarian factors existed" requirement. At the time, McNary stated that an estimated 1.5 million unauthorized aliens would benefit from the policy. The new policy also allowed the unauthorized spouses and children to apply for employment authorizations. Ultimately, the Immigration Act of 1990 (P.L. 101-649) provided relief from deportation and employment authorization to them so they could remain in the United States until a family-based immigration visa became available. P.L. 101-649 also provided additional visas for the family-based LPR preference category in which they were waiting.

Legal Authority Underlying the June 15, 2012 Memorandum

The Secretary of Homeland Security would appear to have the authority to grant both deferred action and work authorization, as contemplated by the June 15 memorandum, although the basis for such authority is different in the case of deferred action than in the case of work authorization. The determination as to whether to grant deferred action has traditionally been recognized as within the prosecutorial discretion of immigration officers[40] and, thus, has been considered an inherent power of the executive branch, to which

[40] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (characterizing a grant of deferred action as within the prosecutorial discretion of immigration officers); Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, Nov. 7, 2000, at 2 (listing "granting deferred action or staying a final order of removal" among the determinations in which immigration officers may exercise prosecutorial discretion).

the Constitution entrusts decisions about whether to enforce particular cases.[41] While it could perhaps be argued that decisions to refrain from fully enforcing a law might, in some instances, run afoul of particular statutes that set substantive priorities for or otherwise circumscribe an agency's power to discriminate among the cases it will pursue, or run afoul of the President's constitutional obligation to "take care" that the law is faithfully executed, such claims may not lend themselves to judicial resolution.[42] In contrast, when it enacted the Immigration Reform and Control Act of 1986, Congress delegated to the Attorney General (currently, the Secretary of Homeland Security) the authority to grant work authorization to aliens who are unlawfully present.[43]

Authority to Exercise Prosecutorial Discretion

The established doctrine of "prosecutorial discretion" provides the federal government with "broad" latitude in determining when, whom, and whether to prosecute particular violations of federal law.[44] The decision to prosecute is one that lies "exclusively" with the prosecutor.[45] This doctrine, which is derived from the Constitution's requirement that the President "shall take Care that the Laws be faithfully executed,"[46] has traditionally been considered to be grounded in the constitutional separation of powers.[47] Indeed, both federal and state courts have ruled that the exercise of prosecutorial discretion is an executive function necessary to the proper administration of justice. Thus, prosecutorial discretion may be appropriately characterized as a constitutionally-based doctrine.

Prosecutorial Discretion Generally

In granting discretion to enforcement officials, courts have recognized that the "decision to prosecute is particularly ill-suited to judicial review," as it involves the consideration of factors—such as the strength of evidence, deterrence value, and existing enforcement priorities—"not readily susceptible to the kind of analysis the courts are competent to undertake."[48] Moreover, the Executive Branch has asserted that "because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress."[49]

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[41] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that the Attorney General and the United States Attorneys have wide latitude in enforcing federal criminal law because "they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'").

[42] *See infra* notes 66-85 and accompanying text.

[43] P.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b).

[44] United States v. Goodwin, 457 U.S. 368, 380 (1982). *See also* Exercising Prosecutorial Discretion, *supra* note 40, at 2 (defining prosecutorial discretion as "the authority of an agency charged with enforcing a law to decide whether to enforce, or not enforce, the law against someone").

[45] *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the *Confiscation Cases*, 7 Wall. 454 (1869) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case…")).

[46] U.S. Const. art. II, §3 ("[H]e shall take Care that the Laws be faithfully executed…").

[47] *See, e.g.*, *Armstrong*, 517 U.S. at 464.

[48] Wayte v. United States, 470 U.S. 598, 607 (1985).

[49] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 114 (1984). This traditional conception, however, may have been qualified in some respects following the Supreme Court's decision in *Morrison v. Olson*, in which the Court upheld a congressional delegation of prosecutorial power to an "independent counsel" under the Ethics in Government Act [49] In sustaining the validity of the statute's (continued...)

An agency decision to initiate an enforcement action in the *administrative* context "shares to some extent the characteristics of the decision of a prosecutor in the executive branch" to initiate a prosecution in the *criminal* context.[50] Thus, just as courts are hesitant to question a prosecutor's decisions with respect to whether to bring a criminal prosecution, so to are courts cautious in reviewing an agency's decision not to bring an enforcement action. In the seminal case of *Heckler v. Cheney*, the Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[51] The Court noted that agency enforcement decisions, like prosecution decisions, involve a "complicated balancing" of agency interests and resources—a balancing that the agency is "better equipped" to evaluate than the courts.[52] The *Heckler* opinion proceeded to establish the standard for the reviewability of agency non-enforcement decisions, holding that an "agency's decision not to take enforcement action should be presumed immune from judicial review."[53] That presumption however, may be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," [54] as is discussed below.

Prosecutorial Discretion in the Immigration Context

In *Reno v. American-Arab Anti-Discrimination Committee*, a majority of the Supreme Court found that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context,"[55] which entails civil (rather than criminal) proceedings. While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government's decision *not* to exercise prosecutorial discretion in their favor,[56] the Court's language is broad and arguably can be construed to

(...continued)

appointment and removal conditions, the Court suggested that although the independent counsel's prosecutorial powers—including the "no small amount of discretion and judgment [exercised by the counsel] in deciding how to carry out his or her duties under the Act"—were executive in that they had "typically" been performed by Executive Branch officials, the court did not consider such an exercise of prosecutorial power to be "so central to the functioning of the Executive Branch" as to require Presidential control over the independent counsel. 487 U.S. 654 (1988). While the ultimate reach of *Morrison* may be narrow in that the independent counsel was granted only limited jurisdiction and was still subject to the supervision of the Attorney General, it does appear that Congress may vest certain prosecutorial powers, including the exercise of prosecutorial discretion, in an executive branch official who is independent of traditional presidential controls.

[50] Heckler v. Cheney, 470 U.S. 821, 832 (1985).

[51] *Id*. at 831. Accordingly, such decisions are generally precluded from judicial review under the Administrative Procedure Act (APA). 5 U.S.C. §701 (establishing an exception to the APA's presumption of reviewability where "agency action is committed to agency discretion by law.").

[52] *Heckler*, 470 U.S. at 831.

[53] *Id*. at 832.

[54] *Id*. at 833.

[55] 525 U.S. 471, 490 (1999). *See also* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (noting that immigration is a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program").

[56] Specifically, the Court noted that any delays in criminal proceedings caused by judicial review of exercises of prosecutorial discretion would "merely … postpone the criminal's receipt of his just desserts," while delays in removal proceedings would "permit and prolong a continuing violation of United States law," and could potentially permit the alien to acquire a basis for changing his or her status. *Reno*, 525 U.S. at 490. The Court further noted that immigration proceedings are unique in that they can implicate foreign policy objectives and foreign-intelligence techniques that are generally not implicated in criminal (continued...)

encompass decisions to favorably exercise such discretion. More recently, in its decision in *Arizona v. United States*, a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that "[a] principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."[57] According to the majority, such exercises of prosecutorial discretion may reflect "immediate human concerns" and the "equities of … individual case[s]," such as whether the alien has children born in the United States or ties to the community, as well as "policy choices that bear on … international relations."[58]

In addition to such general affirmations of the executive branch's prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion afforded first to INS and, later, the immigration components of DHS. These decisions include:

- whether to parole an alien into the United States;[59]
- whether to commence removal proceedings and what charges to lodge against the respondent;[60]
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests in an immigration judge;[61]
- whether to grant deferred action or extended voluntary departure;[62]
- whether to appeal an immigration judge's decision or order, and whether to file a motion to reopen;[63] and
- whether to impose a fine for particular offenses.[64]

The recognition of immigration officers' prosecutorial discretion in granting deferred action is arguably particularly significant here, because the June 15 memorandum contemplates the grant of deferred action to aliens who meet certain criteria (e.g., came to the United States under the age of sixteen).

(...continued)

proceedings. *Id*. at 491. It also found that the interest in avoiding selective or otherwise improper prosecution in immigration proceedings, discussed below, is "less compelling" than in criminal proceedings because deportation is not a punishment and may be "necessary to bring to an end *an ongoing violation* of United States law." *Id*. (emphasis in original).

[57] No. 11-182, Opinion of the Court, slip op. at 4-5 (June 25, 2011). Justice Scalia's dissenting opinion, in contrast, specifically cited the June 15 memorandum when asserting that "there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift." Opinion of Scalia, J., slip op., at 19 (June 25, 2011).

[58] No. 11-182, Opinion of the Court, slip op. at 4-5.

[59] *See, e.g.*, Matter of Artigas, 23 I. & N. Dec. 99 (2001).

[60] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012).

[61] *See, e.g.*, Matter of G-N-C, 22 I. & N. Dec. 281 (1998).

[62] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (deferred action); Hotel & Rest. Employees Union Local 25 v. Smith, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988), *aff'g*, 563 F. Supp. 157 (D.D.C. 1983) (extended voluntary departure).

[63] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012); Matter of York, 22 I. & N. Dec. 660 (1999).

[64] *See, e.g.*, Matter of M/V Saru Meru, 20 I. & N. Dec. 592 (1992).

Limitations on the Exercise of Prosecutorial Discretion

While the executive branch's prosecutorial discretion is broad, it is not "unfettered,"[65] and has traditionally been exercised pursuant to individualized determinations. Thus, an argument could potentially be made that the permissible scope of prosecutorial or enforcement discretion is exceeded where an agency utilizes its discretion to adopt a broad policy of non-enforcement as to particular populations in an effort to prioritize goals and maximize limited resources. It would appear, especially with respect to agency enforcement actions, that the invocation of prosecutorial discretion does not create an absolute shelter from judicial review, but rather is subject to both statutory and constitutional limitations.[66] As noted by the U.S. Court of Appeals for the District of Columbia Circuit: "the decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness."[67] While it is apparent, then, that the exercise of prosecutorial discretion is subject to certain restrictions, the precise boundaries beyond which the executive may not cross remain unclear. Moreover, even if existing statutory or constitutional restrictions were conceivably applicable to the June 15 memorandum, standing principles would likely prevent judicial resolution of any challenge to the memorandum on these grounds.[68]

Potential Statutory Limitations on the Exercise of Prosecutorial Discretion

With respect to statutory considerations, the presumption following the Supreme Court's decision in *Heckler v. Cheney* has been that agency decisions not to initiate an enforcement action are unreviewable. However, *Heckler* expressly held that this presumption against the reviewability of discretionary enforcement decisions can be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[69] Consistent with *Heckler*, a court may be willing to review a broad agency non-enforcement policy where there is evidence that Congress intended to limit enforcement discretion by "setting substantive priorities, or by otherwise circumscribing the agency's power to discriminate among issues or cases it will pursue."[70] The *Heckler* opinion also suggested that scenarios in which an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" may be subject to a different standard of review.[71]

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[65] United States v. Batchelder, 442 U.S. 114, 125 (1979).

[66] Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) ("It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.")

[67] *Id.* at 679 (citing *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970)).

[68] In order to satisfy constitutional standing requirements, a prospective plaintiff must have suffered a personal and particularized injury that is "fairly traceable" to the defendant's conduct and is likely to be redressed by the relief requested from the court. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984). It is difficult to envision a potential plaintiff who has been adequately injured by the issuance of the June 15 memorandum such that the individual could satisfy the Court's standing requirements. Standing is a threshold justiciability requirement. Thus, unless a plaintiff can attain standing to challenge the DHS directive, it would not appear that a court would have the opportunity to evaluate the directive's validity.

[69] 470 U.S. 821, 833 (1985).

[70] *Id.*

[71] *Id.* at 833 n.4 ("Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable (continued...)

Reviewability of the policy underlying the June 15 memorandum might, however, be limited even under a broad reading of *Heckler*, in part, because the INA does not generally address deferred action,[72] much less provide guidelines for immigration officers to follow in exercising it. Some commentators have recently asserted that amendments made to Section 235 of the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 removed immigration officers' discretion as to whether to bring removal proceedings against aliens who unlawfully entered the Untied States.[73] Specifically, this argument holds that, pursuant to Section 235, as amended:

1) any alien present in the United States who has not been admitted (i.e., aliens who entered unlawfully) "shall be deemed … an applicant for admission;"

2) all aliens who are applicants for or otherwise seeking admission "shall be inspected by immigration officers;" and

3) in the case of an alien who is an applicant for admission, if the examining immigration officer determines that the alien is not clearly and beyond a doubt entitled to be admitted, the alien "shall be detained" for removal proceedings.[74]

It appears, however, that this argument may have been effectively foreclosed by the majority opinion in *Arizona*, where the Supreme Court expressly noted the "broad discretion exercised by immigration officials" in the removal process.[75] Moreover, the argument apparently relies upon a construction of the word "shall" that has generally been rejected in the context of prosecutions and immigration enforcement actions.[76] Rather than viewing "shall" as indicating mandatory agency actions, courts and the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration law in removal cases, have instead generally found that prosecutors and enforcement officers

(...continued)

under §701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'").

[72] The INA uses the phrase "deferred action" only three times, in very specific contexts, none of which correspond to the proposed grant of deferred action contemplated by the June 15 memorandum. *See* 8 U.S.C. §1151 note (addressing the extension of posthumous benefits to certain surviving spouses, children, and parents); 8 U.S.C. §1154(a)(1)(D)(i)(IV) ("Any [victim of domestic violence] described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."); 8 U.S.C. §1227(d)(2) (providing that the denial of a request for an administrative stay of removal does not preclude the alien from applying for deferred action, among other things). However, INS and, later, DHS policies have long addressed the use of deferred action in other contexts on humanitarian grounds and as a means of prioritizing cases. *See, e.g.*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 821 (2004) (discussing a 1970's INA Operations Instruction on deferred action). This Instruction was rescinded in 1997, but the policy remained in place. *See, e.g.*, Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 6-72 IMMIGR. L. & PROC. §72.03 (2012).

[73] *See, e.g.*, Kris W. Kobach, *The "DREAM" Order Isn't Legal*, NEW YORK POST, June 21, 2012, http://www nypost.com/p/news/opinion/opedcolumnists/the_dream_order_isn_legal_4WAYaqJueaEK6MS0onMJCO.

[74] Arizona v. United States, No. 11-182, *Amicus Curiae* Brief of Secure States Initiative in Support of Petitioners, at 8-9 (quoting 8 U.S.C. §1225(a)(1), (a)(3), and (b)(2)(A)).

[75] No. 11-182, Opinion of the Court, slip op. at 4-5.

[76] *Cf.* Exercising Prosecutorial Discretion, *supra* note 40, at 3 ("[A] statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion.").

retain discretion to take particular actions even when a statute uses "shall" or "must" when discussing these actions.[77]

It is also unclear that the actions contemplated by the June 15 memorandum conflict with any substantive priorities set by Congress, or are "so extreme as to amount to an abdication" of DHS's responsibilities under the INA. For example, it appears that an argument could potentially be made to the contrary that the policy comports with the increased emphasis that Congress has placed upon the removal of "criminal aliens" with amendments made to the INA by IRCA, IIRIRA, and other statutes.[78] The June 15 memorandum expressly excludes from eligibility for deferred action persons who have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors,[79] thereby potentially allowing immigration officers to focus their enforcement activities upon the "criminal aliens" who were identified as higher priorities for removal in earlier Obama Administration guidance on prosecutorial discretion.[80] In addition, Congress has funded immigration enforcement activities at a level that immigration officials have indicated is insufficient for the removal of all persons who are present in the United States without authorization. This level of funding figures prominently in the Obama Administration's rationale for designating certain aliens as lower priorities for removal,[81] and could potentially be said to counter any assertion that the Obama Administration's policy amounts to an "abdication" of its statutory responsibilities.

Potential Constitutional Limitations on the Exercise of Prosecutorial Discretion

With respect to constitutional considerations, it is clear that executive branch officials may not exercise prosecutorial discretion in a manner that is inconsistent with established constitutional protections or other constitutional provisions. Selective prosecution cases commonly illustrate such an abuse of prosecutorial discretion. These cases typically arise where certain enforcement determinations, such as whether to prosecute a specific individual, are made based upon impermissible factors, such as race or religion.[82] A separate constitutional argument may be forwarded, however, in situations where the

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[77] *See, e.g.*, Matter of E-R-M & L-R-M, 25 I. & N. Dec. 520, 523 (2011) (finding that determinations as to whether to pursue expedited removal proceedings (as opposed to removal proceedings under Section 240 of the INA) are within ICE's discretion, even though the INA uses "shall" in describing who is subject to expedited removal). The Board here specifically noted that, "in the Federal criminal code, Congress has defined most crimes by providing that whoever engages in certain conduct 'shall' be imprisoned or otherwise punished. But this has never been construed to require a Federal prosecutor to bring charges against every person believed to have violated the statute." *Id*. at 522.

[78] *See, e.g.*, IRCA, P.L. 99-603, §701, 100 Stat. 3445 (codified, as amended, at 8 U.S.C. §1229(d)(1)) (making the deportation of aliens who have been convicted of certain crimes an enforcement priority by requiring immigration officers to "begin any deportation proceeding as expeditiously as possible after the date of … conviction"); IIRIRA, P.L. 104-208, div. C, 110 Stat. 3009-546 to 3009-724 (expanding the definition of "aggravated felony," convictions for which can constitute grounds for removal, and creating additional criminal grounds for removal).

[79] Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[80] *See, e.g.*, John Morton, Director, U.S. ICE, Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, at 1-2, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[81] *Id*., at 1 (estimating that ICE has resources to remove annually less than four percent of the noncitizens who are in the United States without authorization).

[82] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (holding that a decision may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). *But see Reno*, 525 U.S. at 488 *(*"[A]s a general matter … an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his (continued...)

executive branch has, in effect, broadly refused to enforce a duly enacted statute by implementing a blanket ban on enforcement such that the agency has "expressly adopted a general policy which is in effect an abdication of its statutory duty."[83] By refusing to fully enforce certain aspects of a statutory provision, such an action may exceed the permissible scope of prosecutorial discretion and violate the President's duty that the "laws be faithfully executed."[84] However, CRS was unable to find a single case in which a court invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care clause. Moreover, it is unclear whether the June 15 memorandum would constitute an absolute non-enforcement policy so as to amount to an "abdication" of a statutory obligation, as discussed previously. Though establishing a department-wide policy regarding a group of individuals who meet certain criteria, the directive suggests that the listed criteria should be "considered" in each individual case. Thus, the directive could be interpreted as setting forth criteria for consideration in each individual exercise of prosecutorial discretion, rather than implementing a ban on deportation actions for qualified individuals.[85]

Authority to Grant Work Authorization

The INA grants the Secretary of Homeland Security arguably wide latitude to issue work authorization, including to aliens who are unlawfully present. Since the enactment of IRCA in 1986, federal law has generally prohibited the hiring or employment of "unauthorized aliens."[86] However, the definition of "unauthorized alien" established by IRCA effectively authorizes the Secretary to grant work authorization to aliens who are unlawfully present by defining an "unauthorized alien" as one who:

> with respect to the employment of an alien at a particular time, … is not either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General [currently, Secretary of Homeland Security].[87]

Regulations promulgated by INS and DHS further provide that aliens who have been granted deferred action and can establish an "economic necessity for employment" may apply for work authorization.[88]

When first promulgated in 1987,[89] these regulations were challenged through the administrative process on the grounds that they exceeded INS's statutory authority.[90] Specifically, the challengers asserted that

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(...continued)

deportation.").

[83] *See* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

[84] U.S. Const. art. II, §3.

[85] As is discussed elsewhere in this memorandum, there have been other instances where deferred action or extended voluntary departure was granted to individuals who were part of a more broadly defined group (e.g., persons from Nicaragua, surviving spouses and children of deceased U.S. citizens, victims and witnesses of crimes).

[86] *See* 8 U.S.C. §§1324a-1324b.

[87] 8 U.S.C. §1324a(h)(3).

[88] 8 C.F.R. §274a.12(c)(14). Under these regulations, the "basic criteria" for establishing economic necessity are the federal poverty guidelines. *See* 8 C.F.R. §274a.12(e).

[89] *See* INS, Control of Employment of Aliens: Final Rule, 52 Fed. Reg. 16216 (May 1, 1987).

[90] INS, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (Dec. 4, 1987) (denying a petition for rulemaking submitted by the Federation for American Immigration Reform, which sought the rescission of certain regulations pertaining to employment authorization for aliens in the United States).

the statutory language referring to aliens "authorized to be … employed by this chapter or by the Attorney General" did not give the Attorney General authority to grant work authorization "except to those aliens who have already been granted specific authorization by the Act."[91] Had this argument prevailed, the authority of INS and, later, DHS to grant work authorization to persons granted deferred action would have been in doubt, because the INA does not expressly authorize the grant of employment documents to such persons. However, INS rejected this argument on the grounds that the:

> only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.[92]

Subsequent case law has generally affirmed that immigration officials have broad discretion in determining whether to deny or revoke work authorizations to persons granted deferred action, or in other circumstances.[93] These cases would appear to suggest that, by extension, immigration officials have similarly broad discretion to grant work authorization provided any requisite regulatory criteria (e.g., economic necessity) are met.

Corollary Policy Implications: Access to Federal Benefits

Many observers characterize foreign nationals with relief from removal who obtain temporary work authorizations as "quasi-legal" unauthorized migrants.[94] They may be considered "lawfully present" for some very narrow purposes under the INA (such as whether the time in deferred status counts as illegal presence under the grounds of inadmissibility) but are otherwise unlawfully present. Foreign nationals to whom the government has issued temporary employment authorization documents (EADs) may legally obtain social security numbers (SSNs).[95] Possession of a valid EAD or SSN issued for temporary employment, however, does not trigger eligibility for federal programs and services. In other words, foreign nationals who are granted deferred action may be able to work but are not entitled to federally-funded public assistance, except for specified emergency services.[96]

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[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Perales v. Casillas, 903 F.2d 1043, 1045 (5th Cir. 1990) ("[T]he agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law."); Chan v. Lothridge, No. 94-16936, 1996 U.S. App. LEXIS 8491 (9th Cir. 1996) (finding that INS did not abuse its discretion in denying interim work authorization to the petitioner while his application for asylum was pending); Kaddoura v. Gonzales, No. C06-1402RSL, 2007 U.S. Dist. LEXIS 37211 (W.D. Wash. 2007) (finding that the court lacked jurisdiction to hear a suit seeking to compel U.S. Citizenship and Immigration Services to grant work authorization because such actions are discretionary acts).

[94] The "quasi-legal" unauthorized aliens fall in several categories. The government has given them temporary humanitarian relief from removal, such as Temporary Protected Status (TPS). They have sought asylum in the United States and their cases have been pending for at least 180 days. They are immediate family or fiancées of LPRs who are waiting in the United States for their legal permanent residency cases to be processed. Or, they have overstayed their nonimmigrant visas and have petitions pending to adjust status as employment-based LPRs. These are circumstances in which DHS issues temporary employment authorization documents (EADs) to aliens who are not otherwise considered authorized to reside in the United States.

[95] For further background, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[96] CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem.

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) established comprehensive restrictions on the eligibility of all noncitizens for means-tested public assistance, with exceptions for LPRs with a substantial U.S. work history or military connection. Regarding unauthorized aliens, Section 401 of PRWORA barred them from any federal public benefit except the emergency services and programs expressly listed in Section 401(b) of PRWORA. This overarching bar to unauthorized aliens hinges on how broadly the phrase "federal public benefit" is implemented. The law defines this phrase to be

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[97]

So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation.

Thus, beneficiaries of the June 15, 2012 policy directive will be among those "quasi-legal" unauthorized migrants who have EADs and SSNs—but who are not otherwise authorized to reside in the United States.

[97] §401(c) of PRWORA, 8 U.S.C. §1611.

Appendix. Past Administrative Directives on Blanket or Categorical Deferrals of Deportation

Selected Major Directives, 1976-2011

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1976	Extended voluntary departure (EVD) for Lebanese on a case-by-case basis	Otherwise deportable Lebanese in the United States.	NA	Lebanese received TPS from 1991 to 1993.
1977	EVD for Ethiopians	Otherwise deportable Ethiopians in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by the Immigration Reform and Control Act (IRCA) of 1986 to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ethiopians.
1977	The Attorney General temporarily suspended the expulsion of certain natives of Western Hemisphere countries, known as the "Silva Letterholders." They were granted stays and permitted to apply for employment authorization.	A group of aliens with approved petitions filed a class action lawsuit to recapture about 145,000 visas assigned to Cubans.	250,000	Many of these cases were not resolved until the passage of IRCA.
1978	EVD for Ugandans	Otherwise deportable Ugandans in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ugandans.
1979	EVD for Nicaraguans	Otherwise deportable Nicaraguans in the United States.	NA	EVD ended in September 1980.
1979	EVD for Iranians	Otherwise deportable Iranians in the United States.	NA	EVD ended in December 1979, and they were encouraged to apply for asylum.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1980	EVD for Afghans	Otherwise deportable Afghans in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Afghans.
1984	EVD for Poles	Otherwise deportable Poles in the United States.	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Poles.
1987	Memorandum from Attorney General Edward Meese directing the Immigration and Naturalization Service (INS) not to deport any Nicaraguans and to grant them work authorizations.	Nicaraguans who demonstrated a "well-founded fear of persecution," who had been denied asylum, or had been denied withholding of deportation.	150,000 to 200,000	Legislation to grant stays of deportation to Nicaraguans as well as Salvadorans had received action by committees in both chambers during the 1980s. Congress ultimately enacted legislation legalizing the Nicaraguans, the Nicaraguan Adjustment and Central American Relief Act (P.L. 105-100).
1987	Attorney General Edward Meese authorized INS district directors to defer deportation proceedings of certain family members of aliens legalized through IRCA.	This policy directive applied where "compelling or humanitarian factors existed" in the cases of families that included spouses and children ineligible to legalize under IRCA.	NA	Legislation to enable the immediate family of aliens legalized through IRCA to also adjust status had been introduced. (See 1990 "Family Fairness" directive below.)
1989	Attorney General Richard Thornburgh instructed INS to defer the enforced departure of any Chinese national in the United States through June 6, 1990.	Chinese nationals whose nonimmigrant visas expired during this time were to report to INS to benefit from this deferral and to apply, if they wished, for work authorizations.	80,000	Legislation that included provisions to establish Temporary Protected Status (TPS) was moving through Congress at that time.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1990	Executive Order 12711 of April 11, 1990, provided temporary protection for certain nationals of the People's Republic of China (PRC) and their dependents. It permitted temporary deferral of enforcement of the departure from the United States and conferred eligibility for certain other benefits through January 1, 1994.	Chinese nationals and dependents who were in the U.S. on or after June 5, 1989, up to and including the date of Executive Order 12711.	80,000	The Chinese Student Protection Act of 1992 (CSPA) (P.L. 102-404) enabled Chinese with deferred enforced departure to become lawful permanent residents.
1990	INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA. The policy dropped the where "compelling or humanitarian factors existed" requirement and allowed the family members to apply for employment authorizations.	Unauthorized spouses and children of aliens legalized under IRCA.	1.5 million	P.L. 101-649 provided relief from deportation and employment authorization to an eligible alien who was the spouse or unmarried child of a legalized alien holding temporary or permanent residence pursuant to IRCA.
1991	Presidential directive to Attorney General instructing him to grant deferred enforced departure to Persian Gulf evacuees who were airlifted to the United States after the invasion of Kuwait in 1990	Aliens who had U.S. citizen relatives or who harbored U.S. citizens during the invasion, largely persons originally from Palestine, India, and the Philippines.	2,227	It is not clear how these cases were handled.
1992	President George H.W. Bush instructed the Attorney General to grant deferred enforced departure (DED) to Salvadorans	Unauthorized Salvadorans who had fled the civil war in the 1980s.	190,000	Congress had passed a law in 1990 giving Salvadorans TPS for 18 months.
1997	President William J. Clinton instructed the Attorney General to grant DED to Haitians for one year.	Haitians who were paroled into the United States or who applied for asylum before December 1, 1995.	40,000	Haitians had been provided TPS from 1993-1997. Legislation enabling Haitians to adjust their status passed at the close of the 105th Congress (P.L. 105-277) in 1998.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1997	INS General Counsel Paul Virtue issues guidelines for deferred action for certain foreign nationals who might gain relief through the Violence Against Women Act.	Battered aliens with approved LPR self-petitions, and their derivative children listed on the self-petition.	NA	Regulations to implement the U visa portions of P.L. 106-386 were promulgated in 2007.
1998	Attorney General Janet Reno temporarily suspended the deportation of aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	Unauthorized aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	NA	This relief was provided in response to Hurricane Mitch. Guatemalans and Salvadorans had their stays of removal extended until March 8, 1999. TPS was given to Hondurans and Nicaraguans.
1999	President William J. Clinton instructed the Attorney General to grant DED to Liberians for one year.	Liberian nationals with TPS who were living in the United States.	10,000	Liberians had been provided TPS from 1991 through 1999; they were given TPS again in 2002.
2007	President George W. Bush directed that DED be provided to Liberians whose TPS expired.	Liberian nationals who had lived in the United States since October 1, 2002, and who had TPS on September 30, 2007.	3,600	
2011	President Barack Obama extended Liberian DED through March 2013.			

Source: CRS review of published accounts, archived CRS materials, and government policy documents.

Notes: Excludes aliens with criminal records or who "pose a danger to national security." *Estimated Number* refers to estimated number of beneficiaries at time of issuance of directive. *NA* means "not available." Other countries whose nationals had some form of deferred deportation prior to 1976 include Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam.

EXHIBIT 5

DOCUMENT RESUME

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ABSTRACT

This government report reviews U.S. refugee resettlement programs and policies. Part I of the book provides an overview of U.S. refugee admissions programs and discusses refugee admissions policies for two time frames: 1945 to 1965, and 1965 to the present. In Part II an analysis of Federal assistance programs for domestic resettlement of refugees is found. This section describes assistance offered to refugees resettling in the U.S. and the legislation and programs authorizing such assistance. The Refugee Act of 1980 is covered in Part III. Major issues of the act are outlined along with its legislative history. The section concludes with a section-by-section summary of the Act. Appendices contain the complete text of the 1980 Refugee Act, a conference report and analysis of the Act, and a report on refugee resettlement in the U.S. by the TransCentury Foundation. The TransCentury report presents information regarding the Cuban, Hungarian, Indochinese, Chilean, Kurdish, and Soviet resettlement efforts, resettlement organizations, the needs of refugees, and resettlement models of other western nations. Recommendations are offered and suggestions are made for refocusing efforts in some areas. (APM)

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REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES

A REPORT

PREPARED AT THE REQUEST OF

Senator EDWARD M. KENNEDY, *Chairman*

COMMITTEE ON THE JUDICIARY
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(II)

FOREWORD

America has been a haven for the world's homeless since the first colonists reached these shores four centuries ago. Since then, the American people have a record of accomplishment in offering a helping hand to refugees that is unsurpassed by any other nation.

We can be proud of this record. Over many years we have responded generously and compassionately to the needs of the homeless, and our national policy of welcome has served our country and our traditions well.

But for too long our policy toward refugee assistance and resettlement lacked effective programing and planning. We admitted refugees in fits and starts because our immigration law was inadequate and out of date. Once refugees arrived, our resettlement programs and policies were inconsistent and out of touch with today's needs.

To bring some long overdue reform to our country's refugee policies and programs, Congress has enacted "The Refugee Act of 1980." As stated in the first title of the act, the objectives of the act were "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."

The new law accomplishes six basic objectives:

1. It repeals the previous law's discriminatory treatment of refugees by providing a new definition of a refugee—moving us away from only accepting refugees "from communism" or certain areas of the Middle East—to all who meet the test of the U.N. Convention and Protocol on the Status of Refugees.

2. It raises the annual limitation on regular refugee admissions from 17,400 to 50,000 each fiscal year.

3. It provides for an orderly but flexible procedure to deal with emergency refugee situations if the resettlement needs of refugees of "special humanitarian concern" to the United States cannot be met within the regular ceiling established prior to the beginning of the fiscal year.

4. It replaces the former use of the "parole authority" contained in section 212(d)(5) of the Immigration and Nationality Act—which has been governed only by custom and practice—with new statutory language asserting congressional control (i.e., formal "consultations") over the entire process of admitting refugees.

5. It establishes an explicit asylum provision in our immigration law for the first time.

6. It provides for a full range of Federal programs to assist in the resettlement process, and statutorily creates the Office of Refugee Resettlement to monitor, coordinate, and implement refugee resettlement programs.

Together, these provisions will enable the United States to meet any refugee situation, anywhere, and to deal with it more effectively and efficiently. The new law ends years of ad hoc programs and differing policies toward different refugees, and puts our refugee programs on a firmer footing.

To give some perspective to this new law, I asked the Library of Congress to update an earlier study on U.S. refugee resettlement programs, and to review for the committee the evolution of U.S. refugee law and policy. A revised edition of that study has now been submitted to the committee by the Congressional Research Service and is printed in this volume, along with other background material on refugee programs and policies.

The committee hopes this report will contribute to a better public understanding of U.S. refugee programs.

EDWARD M. KENNEDY.
Chairman, Committee on the Judiciary.

LETTER OF SUBMITTAL

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
August 8, 1980.

Senator EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to submit a report on U.S. refugee resettlement law and policy which was prepared at your request by the Congressional Research Service.

The report was written by Charlotte J. Moore, analyst in social legislation, of our Education and Public Welfare Division. It is a revised and updated version of a 1979 CRS paper of the same title by Catherine McHugh. Since that time, major legislation, the Refugee Act of 1980, was enacted by Congress. Ms. Moore's update focuses on the development of the Refugee Act in the context of past U.S. refugee admission and resettlement programs and policies.

We hope that this report will serve the needs of the Committee on the Judiciary, as well as the needs of other committees and Members of Congress concerned with U.S. refugee policy.

Sincerely,

GILBERT GUDE,
Director.

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INTRODUCTION

The Refugee Act,[1] enacted March 17, 1980, is the first comprehensive Federal statute affecting the admission and resettlement of refugees. The legislation amends the Immigration and Nationality Act to set forth new procedures for the regular and emergency admission of refugees into the United States, and provides a uniform authorization for Federal resettlement assistance. The major impetus for the legislation was the need to end an ad hoc approach that had characterized U.S. refugee policy since World War II.

Refugees, as distinct from immigrants, are aliens who flee their country of nationality generally because of persecution or fear of persecution. Immigrants, in contrast, leave their country of nationality voluntarily to seek family reunification, economic, or other benefits through reestablishing permanent residence in some other country of their choice.

From the beginning of our Nation's history, the United States has been a haven for oppressed peoples. Until the 20th century, there were few restrictions on immigration, and this country was equally open to those seeking freedom and those seeking their fortune. However, significant limitations on immigration were enacted by Congress which changed this. For example, the Immigration Act of 1917[2] set forth qualitative grounds for exclusion of aliens; the Immigration Act of 1924[3] established numerical quotas, primarily based on national origin, limiting immigration. With a few exceptions, refugees were indistinct from immigrants under these immigration laws.

Millions of people were uprooted during or following World War II, which required extraordinary measures to reduce the human suffering and disruption it brought about. During the postwar years, the United States adopted a series of special refugee admissions programs outside the regular immigration law under which thousands of refugees and other persons displaced by the war become permanently resettled here.

The United States continued a largely ad hoc approach to refugee admissions into the 1970's. Although some refugees entered the United States under normal immigration procedures, the bulk of refugee admissions were authorized outside the normal immigration channels by special programs. This was true for the Hungarians in the 1950's, the Cubans in the 1960's, and the Indochinese in the 1970's. The immigration law was not sufficiently flexible to bring in large groups of refugees in emergency situations. Instead, the Attorney General's discretionary authority to parole aliens into the country temporarily became the initial vehicle for admission, and special legislation was then generally required to adjust their status to permanent resident.

[1] Public Law 96-212, Act of Mar. 17, 1980, 94 Stat. 102.
[2] Act of Feb. 5, 1917, 39 Stat. 874.
[3] Act of May 26 1924, 43 Stat. 153.

Voluntary agencies and organizations were primarily responsible for refugee resettlement for a number of years. As the admission of large groups of refugees became more frequent, the Federal Government became increasingly responsible for providing assistance and services to aid in refugee resettlement and assimilation into our society. The special assistance programs that were enacted by the Federal Government for refugees were, like the admissions programs, designed to meet immediate needs rather than to establish a fundamental policy.

The Refugee Act of 1980 was drafted by Congress in cooperation with the Carter administration to establish by statute a permanent U.S. refugee policy. To a great extent the act reflects the experiences of the United States in recent years in coping with massive refugee migrations. It also affirms that this Nation has a fundamental commitment to providing sanctuary to refugees as part of its immigration policy.

PART I. OVERVIEW OF U.S. REFUGEE ADMISSIONS PROGRAMS

The United States has traditionally been regarded as a place of asylum for persons fleeing religious or political persecution. It was not until World War II, however, that immigration programs were established which specifically provided for the admission of refugees. Prior to that time, refugees were subject to the same restrictions that were imposed on immigrants generally, except that persons fleeing religious or political persecution were exempted from the literacy test requirement of the law. Otherwise, admissions were limited by national origin quotas; by mental, moral and physical requirements; and by the prohibition against aliens' becoming public charges.

Immigration to the United States was relatively unrestricted until the 1880's when the first Chinese exclusion and contract labor laws were enacted. Immigration was restricted by quotas based on national origin which were established temporarily in 1921 and permanently in 1924. Although immigration law was subsequently amended, national origin quotas remained a fundamental component of the law until the enactment of the Immigration and Nationality Act Amendments of 1965.

The 1965 amendments to the Immigration and Nationality Act represented a fundamental revision of U.S. immigration policy, rejecting nationality and ethnic background as determinants of admission and substituting a system of priorities based primarily on reunification of families and on the alien's skills.[4] Built into this preference system was a permanent statutory basis for the admission of refugees, the so-called conditional entry provision of the Immigration and Nationality Act.[5]

Between World War II and 1965 there had been a series of specific programs under which refugees were admitted outside the regular immigration law. Under the 1965 amendments, with the new preference category for the conditional entry of refugees, it was the intent of Congress that such specific admissions programs would cease.

Since 1965 however, the vast majority of refugees admitted to the United States continued to do so outside the regular procedure prescribed by the Immigration and Nationality Act. There was considerable disparity in the treatment of refugees who entered the United States at different periods of time, who had come from different parts of the world, or who were fleeing from different kinds of political regimes under the irregular procedure that has governed their admission. This uneven means of admitting refugees was the major factor leading to the development of the admissions provisions of the Refugee Act.

The following section summarizes U.S. refugee admissions activities since World War II. Particular attention is devoted to the legislation

[4] U.S. Congress. Senate. Committee on the Judiciary. U.S. Immigration Law and Policy: 1952–1979. Committee Print, 96th Cong., 1st sess. Washington, U.S. Government Printing Office, 1979. p. 51.
[5] 8 U.S.C. 1153(a)(7).

and admissions procedures since 1965 which formed the backdrop for the evolution of the Refugee Act.

As an overview, table I indicates that 1,324,699 refugees were admitted to the United States for permanent residence between fiscal years 1946 and 1978 under special refugee legislation and under the conditional entry provision. Refugees whose status was not adjusted to that of permanent resident alien as of September 30, 1978, and those who were admitted under other provisions of immigration law are not included in the table. If these latter numbers are taken into account, the total number of refugees accepted by the United States for permanent resettlement since 1945 is about 2 million.

TABLE I.—REFUGEES ADMITTED BY COUNTRY OR REGION OF BIRTH YEARS ENDED JUNE 30, 1946–76 JULY SEPTEMBER 1976 AND YEARS ENDED SEPT. 30, 1977–78

Country or region of birth	Number admitted	President's directive of Dec. 22, 1945	Displaced Persons Act of 1948: Displaced persons admitted	Displaced Persons Act of 1948: Displaced persons adjusting under sec. 4	Displaced Persons Act of 1948: German ethnics	Refugee Relief Act of 1953 [1]	Act of July 29, 1953 (orphans)	Act of Sept 11 1957 (secs 4 and 15)	Act of July 25 1958 (Hungarian parolees)	Act of Sept. 2 1958 (Azores and Netherlands refugees)	Act of Sept. 22 1959 (sec. 6) (refugee relatives)	Act of July 14, 1960 (refugee-escapees)	Act of Oct. 3, 1965 (conditional entries by refugees) [2]	Act of Nov. 2, 1966 (Cuban refugees)	Act of Oct. 30 1977, (Indochinese refugees), [3]
All countries	1,324,699	40,324	352,260	3,670	53,766	189,021	466	29,462	30,751	22,213	1,820	19,783	116,397	370,620	94,146
Europe	778,688	39,802	349,751	1,794	53,689	171,689	140	16,833	30,712	9,896	1,376	15,893	79,499	7,551	63
Austria	16,684	2,015	6,426	2	2,529	4,658	75	532	102	2	----	74	259	10	1
Belgium	1,694	147	947	1	3	451	---	8	8	3	----	94	28	4	----
Bulgaria	4,124	22	567	10	12	478	----	197	5	----	----	515	2,315	3	----
Czechoslovakia	27,580	3,386	9,522	277	2,839	2,916	----	53	180	----	----	82	8,321	3	1
Denmark	115	11	55	----	7	29	----	8	1	----	----	1	1	2	----
Estonia	11,262	145	9,943	221	263	657	----	18	----	----	----	12	2	1	----
Finland	163	12	93	1	1	18	----	36	----	1	----	----	1	----	----
France	2,404	157	791	----	8	660	1	198	10	5	5	212	279	41	37
Germany	100,295	16,071	52,049	5	10,069	20,922	54	598	29	5	----	256	204	29	4
Greece	29,602	7	10,272	3	2	16,922	4	1,504	12	7	397	80	367	25	----
Hungary	69,684	885	12,826	297	3,504	9,659	----	5,172	29,905	5	1	1,605	5,811	13	1
Ireland	65	7	31	2	----	18	----	1	----	----	----	2	----	1	3
Italy	57,827	154	2,217	12	19	57,026	4	1,685	2	2	953	168	476	88	----
Latvia	38,263	538	35,150	211	645	1,567	----	85	----	----	3	47	9	----	----
Lithuania	27,352	790	23,202	18	1,478	1,681	----	94	----	1	----	21	28	38	1
Netherlands	17,608	116	53	2	9	11,337	----	1,031	----	5,633	----	2	8	17	----
Norway	77	5	25	----	5	20	----	3	----	1	----	3	5	10	----
Poland	167,077	11,660	128,569	341	6,592	11,912	----	1,139	14	2	2	776	5,806	464	----
Portugal	5,040	8	14	1	7	34	----	125	----	4,811	4	1	13	21	1
Romania	28,421	535	5,129	136	5,353	4,369	----	482	274	3	9	4,438	7,647	46	----
Spain	9,420	----	31	1	5	123	----	173	----	3	----	21	2,602	6,460	1
Sweden	450	10	347	----	----	79	----	3	----	4	----	----	2	3	2
Switzerland	331	66	131	1	3	38	----	59	1	3	----	6	9	8	6
U.S.S.R	64,266	1,982	31,373	51	4,323	5,827	----	186	9	----	----	251	20,159	105	----
United Kingdom	2,834	183	1,819	4	7	679	----	25	2	3	----	21	75	11	5
Yugoslavia	84,110	736	17,238	193	15,936	17,425	----	3,002	154	----	1	6,443	22,973	9	----
Other Europe	6,940	154	904	4	270	2,184	2	415	4	2	1	762	2,099	139	----

See footnotes at end of table

TABLE I.—REFUGEES ADMITTED BY COUNTRY OR REGION OF BIRTH YEARS ENDED JUNE 30, 1946–76, JULY SEPTEMBER 1976, AND YEARS ENDED SEPT. 30, 1977–78—Continued

Country or region of birth	Number admitted	Displaced Persons Act of 1948: President's directive of Dec. 22, 1945	Displaced Persons Act of 1948: Displaced persons admitted	Displaced Persons Act of 1948: Displaced persons adjusting under sec 4	Displaced Persons Act of 1948: German ethnics	Refugee Relief Act of 1953	Act of July 29 1953 (orphans)	Act of Sept. 11 1957 (sec. 4 and 15)	Act of July 25, 1958 (Hungarian parolees)	Act of Sept. 2, 1958 (Azores and Netherlands refugees)	Act of Sept. 22, 1959 (sec. 6) (refugee relatives)	Act of July 14, 1960 (refugee-escapees)	Act of Oct. 3, 1965 (conditional entries by refugees)	Act of Nov. 2, 1966 (Cuban refugees)	Act of Oct. 30, 1977 (Indochinese refugees)
Asia:	172,586	416	2,157	1,848	11	16,333	324	20,869	4	12,262	431	795	32,078	1,041	94,017
China and Taiwan	28,692	284	909	1,729	2	6,903	3	2,820			115	23	15,047	620	223
India	140	4	7	1	1	46	2	21		7		3	36	9	3
Indonesia	15,995		2		4	3,148		612		12,133	1		92	1	2
Israel	870		16	8		521		210	1		2	2	96	14	
Japan	4,384	3	9	2	2	2,268	287	1,505		3	269	1	13	11	11
Korea	4,482					630	4	3,793		1		2	9	6	37
Palestine	1,098	40	77	46		607		170			3	30	106	10	1
Philippines	472	3	19	3		121	15	187		4	2		7	26	85
Other Asia	116,453	82	1,118	59	2	2,089	18	1,551	3	100	39	726	16,672	344	93,655
North America	363,081	50	228	3	57	486		191	35	22	11	2	836	361,128	32
Canada	134	3	17		8	15		7	1		4		1	72	6
Mexico	317		3	1		5		1					2	315	10
West Indies	361,399	5	1	1	1	50		164		18	4	1	825	360,318	11
Cuba	360,772												818	359,953	1
Other West Indies	627	5	1	1	1	50		164		18	4	1	7	365	10
Central America	327	4	3		1	7		3			1		3	302	3
Other North America	884	38	204	1	47	409		16	34	4	2	1	5	121	2
South America	998	24	15		4	43		22		9	2	1	14	855	9
Africa	9,126	15	78	25	4	405	1	1,492		1		3 091	3,960	40	14
Other countries	220	17	31		1	65	1	55		23		1	10	5	11

[1] Includes 6,130 Hungarian refugees.
[2] Includes 102,217 aliens who conditionally entered the United States and 14,180 refugees whose status was adjusted to permanent residents after 2 yr continuous physical presence in the United States. The 102,217 conditional entrants include those who have been accorded lawful permanent resident status.
[3] Includes 3,566 for Cambodia, 4,205 for Laos and 85,651 for Vietnam.

Source: U.S. Department of Justice, Immigration and Naturalization Service.

I. Legislative and Administrative Actions Affecting Refugee Admissions: 1945–65

A. Presidential Directive of December 22, 1945

In 1945, President Truman announced new administrative procedures would be instituted to facilitate the immigration of displaced persons under existing immigration quotas, with emphasis on reestablishing European consular operations disrupted by World War II. This program was carried out through June 10, 1948, when the Displaced Persons Act went into effect.

B. Displaced Persons Act of 1948

In his state of the Union message to Congress in January 1947, President Truman referred to the inadequacy of the attempt to admit displaced persons within the existing immigration quotas. He proposed emergency legislation which was eventually enacted in the Displaced Persons Act of 1948, the first significant refugee legislation in U.S. history.

The Displaced Persons Act of 1948 as amended [6] provided for the admission of over 400,000 displaced persons through December 31, 1951. This was accomplished by charging the admissions of displaced persons to the national immigration quotas of their country of origin and, if oversubscribed, the admission was charged to the future annual quotas of the country in question, or "mortgaged."

The Displaced Persons Act originally provided for the admission of 100,000 persons uprooted during or following World War II, 3,000 orphans, and 2,000 Czechs who fled the 1948 Communist coup, through June 30, 1950; and provided for the adjustment to permanent resident status of 15,000 displaced persons already in the United States. In 1950, the categories of eligible aliens were expanded, possible admissions under the Displaced Persons Act were increased to 415,000, and the act was extended through June 30, 1951, except for certain provisions concerning orphans and persons of German ethnic origin which were effective through June 30, 1952. In 1951, the Displaced Persons Act was extended again, through December 31, 1951

In order to be admitted under the Displaced Persons Act, an alien had to provide assurances that he would be able to obtain employment and housing without displacing an American, and that he would not become a public charge. Regular immigration requirements were imposed, as well as other eligibility requirements designed to keep out politically undesirable aliens, such as Communists. The assurances needed by aliens seeking admission to the United States were generally provided by private nonprofit voluntary agencies. The admission of refugees under the sponsorship of voluntary agencies has remained one of the principal features of U.S. refugee programs.

C. Immigration and Nationality Act of 1952

One of the primary purposes of the Immigration and Nationality Act of 1952 [7] was to consolidate previous immigration laws into one statute. Although the Immigration and Nationality Act has been amended substantially since 1952, it remains the basic law governing immigration to the United States.

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[6] Act of June 25, 1948, 62 Stat 1009; as amended by act of June 16, 1950, 64 Stat 219; and act June 28, 1951, 65 Stat 96

[7] Act of June 27, 1952, 66 Stat. 163.

As originally enacted, the Immigration and Nationality Act did not specifically provide for the admission of refugees. Three of its provisions which remain in effect today and relate to the admission of refugees are discussed below.

1. Defector provision.—Section 212(a)(28)(I)(ii) of the Immigration and Nationality Act permits the immigration of former Communist Party members or other persons affiliated with proscribed organizations if they can demonstrate that their membership was involuntary and was terminated at least 5 years prior to application for a visa. Without this provision, certain persons fleeing communism would be unable to enter the United States.

2. Parole provision.—The parole provision of the Immigration and Nationality Act, section 212(d)(5), incorporated into statutory law a provision authorizing the temporary parole of aliens into the United States, which had been an administrative practice of long standing. This provision authorizes the Attorney General in his discretion to parole any alien into the United States temporarily, under such conditions as the Attorney General may prescribe, in emergencies or for reasons deemed strictly in the public interest. Parole is not regarded as admission to the United States. When the purposes of parole have been served, the alien returns to the status from which he was paroled and is dealt with in the same manner as any other applicant for admission to the United States. Congress originally intended that parole would be used on a case-by-case basis on behalf of individual aliens. Parole has since been used as the primary basis for entry of large numbers of refugees. Section 212(d)(5) was amended by the Refugee Act to limit its use for the admission of refugees.

3. Withholding deportation because of anticipated persecution.—The Internal Security Act of 1950[8] authorized withholding the deportation of an alien to any country where the Attorney General finds the alien would be subject to physical persecution. This provision was incorporated into the Immigration and Nationality Act as section 243(h).

Section 243(h) was subsequently amended,[9] most recently by the Refugee Act of 1980, expanding the grounds for relief from deportation.

D. Act of July 29, 1953

The act of July 29, 1953,[10] permitted the entry of 500 orphans adopted, or coming to be adopted, by certain U.S. citizens.

E. The Refugee Relief Act of 1953

At the height of the Cold War and after the expiration of the Displaced Persons Act, Congress enacted the Refugee Relief Act of 1953 primarily to expedite the admission into the United States of refugees escaping Iron Curtain countries.

The act, as amended,[11] authorized the admission of 214,000 refugees and was inforce between August 7, 1953 and December 31, 1956. In contrast to the Displaced Persons Act, the admissions were authorized

[8] Act of Sept. 23, 1950, 64 Stat. 987.
[9] Section 243(h) was amended by the 1965 amendments to the Immigration and Nationality Act (Act of Oct. 3, 1965, 79 Stat. 913) in part to conform with the language of the conditional entry provision adopted at that time.
[10] 67 Stat. 229.
[11] Act of Aug. 7, 1953, 67 Stat. 400, as amended by the act of Aug. 31, 1954, 68 Stat. 1044.

outside the existing immigration quotas. Visas were made available by categories of refugees, for example, 4,000 to war orphans; 55,000 to German expellees; 15,000 to Italian refugees; 15,000 to Greek and Dutch refugees, et cetera. As a departure from the immigration policy that had existed practically excluding Asians, there was provision for the admission of refugees from the Far East. The Refugee Relief Act also permitted the adjustment of status of up to 5,000 aliens already in the United States.

The Refugee Relief Act incorporated safeguards to prevent the immigration of undesirable aliens. In addition, aliens were required to have assurances of employment and housing.

Some 6,500 unused Refugee Relief Act visas were made available at the direction of President Eisenhower for Hungarian refugees before the Refugee Relief Act program expired. A total of 189,000 persons were admitted or adjusted their status under the act.

A related measure, the act of September 22, 1959,[12] was designed in part to facilitate family reunification by enabling the spouses and children of certain aliens admitted under the Refugee Relief Act to be issued visas outside existing immigration quotas.

F. Hungarian refugee program

In late 1956, President Eisenhower announced that the United States would accept 21,500 refugees who had fled Hungary following the revolution of October 1956. About 6,500 refugees were to be admitted using visas available under the Refugee Relief Act, and the President directed the Attorney General to permit the entry of 15,000 Hungarian refugees under the parole provision of the Immigration and Nationality Act. This was the first use of the parole provision on behalf of a group of refugees. By 1958, 38,000 Hungarian refugees had entered the United States, 32,000 of them under the parole provision. At that time, an alien paroled into the United States was not eligible to adjust his status to that of a permanent resident.

The act of July 25, 1958,[13] provided for the adjustment of status of Hungarian refugees who had been in the United States for at least 2 years. These refugees were exempted from the documentary requirements for immigration; and the date of admission for permanent residence was recorded as of the date of the alien's arrival in the United States.

G. Refugee Escapee Act

The act of September 11, 1957,[14] is sometimes referred to as the Refugee Escapee Act.

Section 15 of this act authorized 18,656 special nonquota immigrant visas that had been made available under the Refugee Relief Act but remained unused at the expiration of that act, to be made available to "refugee-escapees" defined as victims of racial, religious, or political persecution fleeing Communist or Communist-occupied or dominated countries or a country in the area of the Middle East. This was the origin of the eligibility standard for conditional entrants adopted in the 1965 amendments to the Immigration and Nationality Act.

[12] 73 Stat. 644
[13] 72 Stat. 419
[14] 71 Stat. 639

Section 4 of the Refugee-Escapee Act provided for the admission outside immigration quotas through June 30, 1959, of certain orphans adopted, or to be adopted by U.S. citizens. The legislation also removed the mortgages on immigration quotas imposed as a result of the Displaced Persons Act.

II. Act of September 2, 1958

The act of September 2, 1958,[15] made visas available outside existing immigration quotas for nationals of the Netherlands displaced from Indonesia because of political events, and Portuguese nationals who were unable to return to their homes in the Azores because of earthquakes and volcanic eruptions, and the spouses and children of such aliens. The termination of this program was extended from June 30, 1960, to June 30, 1962, by the Refugee Fair Share Law, which also increased the number of admissible refugees.

I. Refugee Fair Share Law

By 1960 a large number of refugees and displaced persons from World War II remained in camps in Europe under the mandate of the United Nations High Commissioner for Refugees. The so-called Refugee Fair Share Law, enacted July 14, 1960, was passed to provide a temporary program for the admission into the United States of a portion of the refugees in the camps.

The Fair Share Law gave the Attorney General a specific mandate to use his parole authority under section 212(d)(5) of the Immigration and Nationality Act to admit eligible "refugee-escapees" (the same definition as used in the Refugee-Escapee Act described above) until July 1, 1962, in a number not to exceed 25 percent of the total number of refugee-escapees under the mandate of the U.N. High Commissioner who had been resettled in other countries since July 1, 1959. It is noteworthy that this was congressional sanctioning of the use of the parole authority to admit groups of aliens.

Under this program, the Attorney General was authorized to parole up to 500 "difficult to resettle" refugees, with the assurance of a voluntary agency that any such refugee could become self-supporting, or would be supported by his family.

An alien paroled into the United States under this legislation could adjust his status to that of an alien admitted for permanent residence after 2 years in the United States. Refugees adjusting their status under this legislation were exempted from the documentary requirements of immigration law. This Fair Share Law provision was the forerunner of the conditional entry procedure.

The Immigration and Nationality Act's permanent adjustment of status provision under section 245(c)[16] was amended by this enactment to extend eligibility for adjustment of status to aliens paroled into the United States.

The Refugee Fair Share Law was more comprehensive than previous refugee admission programs; it was not designed to assist refugee of a particular nationality or to meet a particular emergency, but to provide an ongoing mechanism for the admission of refugees, although for a statutorily limited period of time. In 1962 the Refugee

[15] 72 Stat. 1712.
[16] 8 U.S.C. 1255(c)

Fair Share Law was extended indefinitely by a provision of the Migration and Refugee Assistance Act.[17]

The Immigration and Nationality Act Amendments of 1965 established a permanent statutory provision for the admission of refugees, and terminated the refugee parole program authorized by the Refugee Fair Share Law.

II. Refugee Admissions Legislation and Procedure After 1965

A. *Conditional entry*

The 1965 amendments to the Immigration and Nationality Act included a permanent statutory authority for the admission of refugees, the so-called conditional entry provision.[18] This authority remained in force until its repeal by the Refugee Act.

The conditional entry provision, section 203(a)(7) of the Immigration and Nationality Act, was established as part of the new immigrant visa preference system for the Eastern Hemisphere created by the 1965 amendments to the act. A numerical ceiling of 170,000 persons per year was imposed on immigration from the Eastern Hemisphere, with a 20,000 per country limit. Seven immigrant visa preference categories were established, each allocated a portion of the annual ceiling. The seventh preference category was for the conditional entry of refugees and was allocated 6 percent of the ceiling, one-half of which could be used for aliens in the United States 2 years who were adjusting their status. In 1976 the preference system was amended and extended to the Western Hemisphere, under a separate numerical ceiling on Western Hempshire immigration. In 1978 the Eastern Hemisphere and Western Hemisphere numerical ceilings were combined into a single worldwide ceiling on immigration, making 17,400 conditional entry numbers available to refugees each year.

In order to be eligible for entry under section 203(a)(7) aliens had to be examined by an Immigration and Naturalization Service (INS) officer in a non-Communist country, and meet the criteria of the section which were the same as the definition of refugee-escapee in the 1957 Refugee-Escapee Act (see page CRS-12). These criteria were as follows:

> that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode.

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[17] Act of June 28, 1962, 76 Stat. 121.
[18] Act of Oct. 3, 1965, 79 Stat. 913, as amended by the act of Oct. 20, 1976, 90 Stat. 2705, and the act of Oct. 5, 1978, 92 Stat. 907.

As of 1979, the Immigration and Naturalization Service conducted conditional entry examinations in Frankfurt, Hong Kong, Rome, Vienna and Athens. Conditional entry was never used to admit victims of natural disasters.

Conditional entry, as the name implies, was not admission for permanent residence. A permanent provision for the adjustment of status of conditional entrants to that of permanent resident alien was included as sections 203 (g) and (h) of the Immigration and Nationality Act. The language of these adjustment of status sections was similar to that contained in the Refugee Fair Share Law. To obtain permanent resident status, the alien had to be admissible as an immigrant, except for documentary requirements, and he must have been in the United States for 2 years. Adjustment of status was effective retroactively to the date of the alien's arrival in the United States.

Table II indicates the number of conditional entries of refugees since 1965. The Refugee Act repealed the conditional entry provision.

TABLE II *Conditional entries of refugees under sec. 203(a)(7)*

1965–66	3,191
1967–68	13,267
1969–70	30,339
1971–72	20,894
1973–74	10,099
1975–76	17,778
1977–78	20,720
Total	126,288
Average per year	9,020

SOURCE.—U.S. Congress Senate, Committee on the Judiciary The Refugee Act of 1979. Report to accompany S 643, Senate Report No 96 256, 96th Cong., 1st sess Washington, U S. Government Printing Office, 1979, p. 6

B. Parole

The parole provision, section 212(d)(5) of the Immigration and Nationality Act of 1952 authorizes the Attorney General in his discretion to parole any alien into the United States temporarily, under such conditions as the Attorney General may prescribe, in emergencies or for reasons deemed strictly in the public interest.[19] The flexibility of the parole provision has enabled the United States to respond to a variety of refugee situations by accepting groups of refugees for resettlement outside normal immigration channels.

When the conditional entry provision was established in 1965, Congress intended that thereafter the parole provision would be administered solely on a case-by-case basis. As stated in the report of the Senate Committee on the Judiciary on the Immigration and Nationality Act Amendments of 1965:

> Inasmuch as definite provision has now been made for refugees, it is the express intent of the committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergency, individual, and isolated situations, such as the case of an alien who requires immedi-

[19] Act of Jun. 27, 1952, 66 Stat 188.

ate medical attention, and not for the immigration of classes or groups outside of the limit of the law.[20]

Because of the limitations of the conditional entry provision, however, parole continued to be used as the major authority for the entrance of groups of refugees into the United States.

Cuban refugees, for example, began to be paroled into the United States in 1961 when diplomatic relations between the United States and Cuba were severed. As Western Hemisphere natives, Cubans were not eligible for conditional entry when that provision became law, since it applied only to the Eastern Hemisphere. After the Cuban airlift program was announced by President Johnson in 1965, the number of these refugees admitted under the parole authority increased dramatically. Between 1962 and the end of May 1979, over 690,000 Cubans entered the United States under the Attorney General's parole authority, the largest number of refugees from a single nationality ever accepted into the United States.

The vast majority of over 360,000 Indochinese refugees who entered the United States between 1975 and mid-1980 did so under a series of parole authorizations. In the spring of 1975, at the time of the U.S. withdrawal from Vietnam, about 130,000 refugees were evacuated from Indochina. Most of these refugees were resettled in the United States, entering the country under the parole provision. Subsequent to the Communist takeovers in Vietnam, Cambodia, and Laos, Indochinese refugees were also eligible to enter the United States under the conditional entry provision, but the number of conditions entries available did not approach the number of refugees the United States chose to accept. Indochinese refugee parole programs were authorized or extended by the Attorney General 10 times: three times in 1975, once in 1976, once in 1977, three times in 1978, twice in 1979.

The original parole criteria in 1975 were fairly specific, designed to expedite the admission of certain Vietnamese relatives of U.S. citizens and permanent resident aliens. As the evacuation continued, the parole criteria were expanded, almost on a daily basis, to respond to the emergency situation. In addition to various categories of Vietnamese, the parole of certain Cambodians evacuated by the United States was authorized at this time.

In August 1975 two parole programs were authorized, one for additional Vietnamese and Cambodian refugees, and another to assist allies of the United States from Laos. A major parole program was authorized, one for additional Vietnamese and Cambodian refugees, and another to assist allies of the United States from Laos. A major parole program was authorized in May 1976 to accommodate 11,000 refugees who had escaped from Vietnam, Cambodia, and Laos, primarily persons with relatives in the United States, and persons who had been associated with the United States or governments friendly to the United States. Refugees had begun to escape from Vietnam by boat, and these so-called boat people were encountering considerable difficulty in finding safe-havens. Some boat people were included in the 1976 parole program, but a continuing exodus of substantial numbers of refugees from Indochina was not generally anticipated at this time.

[20] U.S. Congress, Senate Committee on the Judiciary. Amending the Immigration and Nationality Act, and for other purposes. Report to accompany H.R. 2580. Senate Report No. 748, 89th Cong., 1st sess. Washington, U.S. Government Printing Office, 1965, p. 17.

Some Members of Congress and the Ford administration concluded that relying on the parole provision was not a desirable means of formulating U.S. refugee policy. Accordingly, the Ford administration agreed not to authorize additional parole programs until legislation establishing new, systematic refugee admission procedures was enacted.

In 1977 conditional entry numbers were beginning to be used for boat people, but the magnitude of this problem was greater than the conditional entry provision could accommodate. In part because of the increasing numbers of refugees, a 1977 parole program was established for 15,000 refugees, including boat cases and refugees who had escaped by land to Thailand. Although the Carter administration agreed with the need for new refugee legislation, it did not feel that it was obligated to conform to the Ford administration's agreement not to use the parole authority until such legislation was enacted.

Three Indochinese refugee parole programs were authorized in 1978, for 7,000 refugees in January, 25,000 refugees in June, and 21,875 refugees in December. The parole provision was also being used extensively on behalf of refugees from other parts of the world. The December Indochinese refugee parole program was designed in part in response to two congressional enactments calling for the parole of additional refugees from Cambodia.[2]

In April 1979 the Attorney General authorized the parole of 40,000 Indochinese refugees through September 30, 1979. In reaction to the refugee crisis caused by tens of thousands of boat people fleeing Vietnam, President Carter announced, in late June 1979, that the rate under which we were admitting Indochinese under the parole authority would double to 14,000 per month. This rate continued under another parole authorization that was required pending the enactment of the Refugee Act.

After 1972 parole was also used to an increasing extent to supplement the conditional entry provision to expedite the entrance of Soviet and other Eastern European refugees. In January 1977 the parole of 4,000 Soviet refugees was authorized by the Attorney General; the parole of 5,000 additional Soviet refugees was authorized in December 1977; and the parole of 12,000 more refugees from the Soviet Union and other East European countries was authorized in June 1978. The parole of 25,000 Soviet and other Eastern European refugees, through September 30, 1979, was authorized in April 1979. Until the enactment of the Refugees Act, the United States continued the parole of Soviet and Eastern European refugees at the rate of 3,000 per month.

Many of the refugees the United States has accepted have not been admissible under the conditional entry provision because of its ideological and geographic limitations. Refugees who are fleeing from non-Communist countries or from countries outside the Middle East are ineligible for conditional entry, and the parole provision has been used to assist them. Table III prepared by the Senate Judiciary Committee, summarizes the use of the Attorney General's parole authority to admit refugees.

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[2] One provision of the fiscal year 1979 Department of Justice Appropriations Act, Public Law 95 431, Act of Oct 10 1978 expressed the sense of the Congress that the Attorney General should parole an additional 17,000 Cambodian refugees into the United States over a 2 year period. One provision of the fiscal year 1979 Department of Justice Authorization Act Public Law 95 624 Act of Nov 9 1978 directed the Attorney General to develop parole eligibility criteria to enable a large number of Cambodian refugees to qualify for the then current Indochinese refugee parole program

TABLE III.—HISTORICAL SUMMARY OF REFUGEE PAROLE ACTION

Year	Country and class of people	Total
1956	Orphans from Eastern European countries	925
1956–57	Refugees from Hungary	38, 045
1960–65	Refugee escapees from Eastern European countries	19, 754
1962	Chinese refugees from Hong Kong and Macao	14, 741
1962 through May 31, 1979	Refugees from Cuba	692, 219
1973 through May 31, 1979	Refugees from the Soviet Union	35, 758
1975 through May 31, 1979	Indochinese refugees	208, 200
1975–77	Chilean detainees	1, 310
1975–77	Chilean refugees from Peru	112
1976–77	Latin American refugees (Chileans, Bolivians, and Uruguayans)	343
1978–79	Lebanese refugees	[1] 1, 000
1979	Cuban prisoners and families	[1] 15, 000
	Total	1, 027, 407
	Average per year	44, 670

[1] Authorized.

Source U.S. Congress, Senate, Committee on the Judiciary, Senate Report No. 96-256, p. 6.

The Refugee Act limited the use of parole for the admission of refugees.

C. Withholding deportation because of anticipated persecution

Section 243(h) of the Immigration and Nationality Act authorizes the Attorney General to withhold deportation of an alien to any country where the alien would be subject to persecution on account of race, religion, or political opinion.[22] This provision originally authorized relief from deportation because of physical persecution only, but the scope of section 243(h) was expanded in 1965. Section 243(h) is applicable only to aliens who are in the United States and who are deportable under the terms of the Immigration and Nationality Act. Section 243(h) was amended by the Refugee Act.

D. Asylum

In 1968, the United States became a party to the 1967 U.N. Protocol Relating to the Status of Refugees, which incorporates by reference provisions of the 1951 United Nations Convention Relating to the Status of Refugees. The Protocol and Convention do not require a country to accept refugees, but they insure that refugees within the country will have certain legal and political rights and protections.

Two provisions which relate to asylum are articles 32 and 33 of the Convention. Article 32 prohibits the expulsion of a refugee lawfully in a country except for reasons of national security or public safety, and provides that expulsion must be in accordance with due process of law. Article 33 prohibits the expulsion or return of a refugee to any country where his life or freedom would be threatened on account of race, religion, nationality, social group, or political opinion, except for reasons of the host country's national security or public safety.

Before the enactment of the Refugee Act there was no asylum per se in the Immigration and Nationality Act, beyond withholding of deportation under section 243(h), discussed above. When the United States became a party to the Protocol, Congress and the administration believed that the United States could comply with its provisions without having to amend the Immigration and Nationality Act, and no immediate change was made in U.S. immigration policy or pro-

[22] Act of June 27, 1952, 66 Stat. 214, as amended by the Act of Oct. 3, 1965, 79 Stat. 918.

cedures. However, a 1970 incident involving the return of a Lithuanian seaman who was attempting to enter the United States was seen by many as a particularly dramatic illustration of the need to establish specific asylum procedures. Soon thereafter, interim instructions regarding the handling of requests for asylum were issued by the Department of State.

In 1972 the Department of State issued a policy statement regarding the handling of requests for asylum. In 1973 the Immigration and Naturalization Service issued regulations designed in part to meet obligations imposed by other provisions of the Protocol regarding refugee travel documents.

In 1974 the Immigration and Naturalization Service issued asylum regulations as part of 108 of title 8 of the Code of Federal Regulations, under the general authority of section 103 of the Immigration and Nationality Act. The asylum regulations were revised in May 1979. The Refugee Act required new asylum regulations to be developed by June 1, 1980.[23]

E. Special legislation providing permanent resident status to refugees

Of our four refugee procedures, conditional entry, parole, withholding deportation because of anticipated persecution, and asylum, only conditional entry was a component of the normal immigration admission process. As mentioned above, refugees granted conditional entry were able to obtain permanent resident status after 2 years in the United States under the special adjustment of status procedures authorized by sections 203 (g) and (h) of the Immigration and Nationality Act.

Refugees granted parole may be admitted for permanent residence under the general adjustment of status procedures authorized by section 245 of the Immigration and Nationality Act, but they must do so within the numerical limitations and other restrictions imposed on immigration generally. For this reason, special adjustment of status legislation was enacted to enable Hungarian, Cuban, and Indochinese refugees paroled into the United States to be admitted for permanent residence outside normal immigration channels. More recently, legislation was enacted as part of Public Law 95–412 [24] to enable refugees paroled into the United States who were not otherwise eligible for such special refugee adjustment of status benefits to be granted permanent resident status without numerical limitation.

The special legislation providing adjustment of status for the Hungarian refugees has been previously noted (see page CRS–13).

During the mid-1960's, the Immigration and Nationality Act did not permit the adjustment of status of Western Hemisphere natives. The Act of November 2, 1966,[25] enabled Cuban refugees to adjust their status to that of permanent residents. Eligible refugees must have been in the United States for at least 2 years (amended to 1 year by the Refugee Act). Adjustment of status is retroactive to the date of the alien's arrival in the United States or to 30 months prior to the date of enactment, whichever is later. The Immigration and Nationality Act Amendments of 1976 specified, in part, that Cuban refugees who

[23] Interim asylum regulations were published by the cutoff date and were open to comment until July 31, 1980. U.S. Department of Justice, Aliens and Nationality, Refugee and Asylum Procedures. Federal Register, v. 45, No. 107, June 2, 1980, p. 37392.
[24] Act of Oct. 5, 1978, 92 Stat. 907.
[25] 80 Stat. 1161.

adjust their status will not be charged against the numerical ceiling on Western Hemisphere immigration, thus enacting into law an administrative practice that had been underway since September 1976.

To facilitate the adjustment of status of Indochinese refugees, title I of Public Law 95-145 [26] authorized the creation of a record of permanent residence for certain aliens from Vietnam, Cambodia, and Laos who were in the United States at the time of the evacuation from Vietnam or who were paroled into the United States prior to January 1, 1979, at the discretion of the Attorney General. Refugees in the United States at least 2 years (amended to 1 year by the Refugee Act) can obtain permanent residence status retroactive to March 31, 1975 or the date of their arrival in the United States, whichever is later. Adjustment of status under this act is not subject to the Immigration and Nationality Act's numerical limitations, and aliens are exempted from the exclusion provisions relating to labor certification, public charges, documentary requirements, literacy requirements, and foreign medical graduates.

A provision of Public Law 95-412 [27] enabled aliens paroled into the United States prior to September 30, 1980, to adjust their status without numerical limitation, to that of permanent resident after 2 years in the United States. The adjustment of status provision of Public Law 95-412 was of particular importance to refugees from the Soviet Union because of the increased use of the parole provision on behalf of such refugees. The provision's eligibility date was changed to April 1, 1980, by the Refugee Act and the required period for residence was reduced to 1 year.

The procedures for withholding deportation because of anticipated persecution, and asylum, do not provide for admission to the United States. When deportation is withheld or asylum is granted, another provision of the Immigration and Nationality Act must be used to enable the alien to acquire a status which will enable him to remain in the United States. For example, the alien may be granted voluntary departure status, or paroled into the United States, for a specified period of time.

F. Other legislation impacting on refugee admissions

The Immigration and Nationality Act Amendments of 1976, Public Law 94-571,[28] extended the immigrant visa preference system to the Western Hemisphere. This resulted in the authorization of 7,200 conditional entries from the Western Hemisphere per year.

In addition to its adjustment of status provisions discussed above, Public Law 95-412 combined the Eastern and Western Hemisphere immigration ceilings into one worldwide ceiling of 290,000. This resulted in an annual allocation of 17,400 for the conditional entry provision. Because few Western Hemisphere natives had been able to meet the conditional entry provision's ideological or geographic requirements, the Western Hemisphere's numbers had been largely unused. One effect of the imposition of the worldwide ceiling was to make conditional entry numbers that would have otherwise been allocated to the Western Hemisphere only, available to refugees all over the world who meet the eligibility requirements.

[26] Act of Oct. 28, 1977, 91 Stat. 1223.
[27] Act of Oct. 5, 1978, 92 Stat. 907.
[28] Act of Oct. 20, 1976, 90 Stat. 2703.

Public Law 95–412 also established a Select Commission on Immigration and Refugee Policy to review that policy and make administrative and legislative recommendations. The report of the Commission is due March 1, 1981.