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. II of II

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EXHIBIT 6

Memorandum

C-1588-P

Subject	Date
Family Fairness: Guidelines For Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens	FEB 2 1990

To

Regional Commissioners
Eastern
Northern
Southern
Western

From

Office of the Commissioner

On November 13, 1987, the Service implemented guidelines on granting voluntary departure to the ineligible spouses and children of legalized aliens, the so-called "family fairness" policy.

The Service is likely to face the issue of family fairness for several more years, because of the length of time needed for newly legalized aliens to acquire lawful permanent resident status and then to wait for a visa preference number to become available for family members. Accordingly, the Service is clarifying its family fairness policy, to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens.

Effective February 14, 1990, the following policy is to be implemented by all district directors in determining the eligibility for voluntary departure of ineligible spouses and children of legalized aliens.

1. Voluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the legalized alien, who can establish that they have been residing in the United States since on or before November 6, 1986, if

   - the alien is admissible as an immigrant, except for documentary requirements;

   - the alien has not been convicted of a felony or three misdemeanors committed in the United States;

   - the alien has not assisted in the persecution of any person or persons on account of race, religion,

Appendix I, continued

nationality, membership in a particular social group or political opinion.

2. Voluntary departure will be granted for a one-year period to aliens who meet these requirements. Cases will be reviewed on an annual basis thereafter by district directors to determine whether extensions of voluntary departure should be issued.

- A grant of voluntary departure based on family fairness will be terminated if the legalized family member loses his or her status.

- A grant of voluntary departure based on family fairness will be terminated if the alien fails to maintain the requirements outlined in Paragraph 1.

- A grant of voluntary departure issued pursuant to this policy shall not be terminated for the sole reasons that the legalized family member has become a lawful permanent resident.

3. Documentary evidence must be submitted to establish

- the family relationship, through marriage certificates for spouses and birth or baptismal certificates for children and

- residence with the legalized alien, through a sworn affidavit, under penalty of perjury, by the legalized alien.

4. Work authorization will be granted to aliens who qualify for voluntary departure under Paragraph One and as provided in Paragraph Two.

5. In the case of a child born after November 6, 1986, no deportation proceedings shall be instituted as long as a parent maintains his or her status as a legalized alien.

The Legalization and Special Agricultural Worker Programs will eventually bring permanent lawful immigration status to nearly 3 million aliens. It is critical that the Service continue to respond to the needs of these aliens and their immediate family members in a consistent and humanitarian manner.

GENE MCNARY
Commissioner

EXHIBIT 7

Memorandum

Subject	Date
Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues	MAY - 6 1997

To

Regional Directors
District Directors
Officers-in-Charge
Service Center Directors

From

Office of Programs

This memorandum outlines changes in the handling of I-360 self-petitions for immigrant status filed by battered spouses and children of U.S. citizens and permanent residents aliens and addresses related issues. It should be read as a supplement to the guidance issued by the Office of Programs on April 16, 1996.

Background

The issue of domestic violence and its potential impact on spouses and children who would normally be entitled to immigration benefits under the I-130 petitioning process was first addressed by Congress in the Violence Against Women Act ("VAWA") which was enacted as part of the Violent Crime Control Act of 1994 ("Crime Bill"). The VAWA contains provisions to limit the ability of an abusive U.S. citizen ("USC") or lawful permanent resident ("LPR") to utilize the spouse' or child's immigration status in order to perpetuate the abuse. The Service published an interim rule on March 26, 1996 (59 FR 13061-13079) establishing the procedures for qualified abused spouses and children to self-petition for immigrant classification using the Form I-360. This rule was accompanied by extensive field instructions in the Office of Programs' memorandum of April 16, 1996.

In the autumn of 1996, Congress enacted various new provisions relating to battered aliens, in both the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA" or "the welfare law") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA" or "the immigration bill"). None of these new provisions directly affect the legal standards applicable to adjudication of I-360 applications. The new provisions do, however, provide additional benefits and protections for battered aliens, and have created the need for INS to restructure how we handle this category of very sensitive cases. This memorandum outlines those changes, and instructs field offices on the handling of pending cases and new cases received.

Centralization at the Vermont Service Center

On April 7, 1997, the Service published a notice in the Federal Register at 16607-08 establishing the Vermont Service Center as the direct mail filing location for all Forms I-360 filed by self-petitioning battered spouses and children (Attachment A). This centralization was necessitated by the new welfare provisions which make certain battered aliens -- including self-petitioners and others -- eligible for public benefits. In addition to adjudicating I-360 self-petitions, the Vermont Service Center will serve as a central "clearinghouse" for inquiries from federal, state and local benefit-granting agencies regarding pending or recently-adjudicated cases, as discussed in more detail in the Verification section, below. Finally, as an alien may be eligible for public benefits not only upon the approval of the relevant immigrant status, but also upon having filed a petition which makes a prima facie case for such status, the Vermont Service Center will also begin making prima facie determinations pursuant to an interim rule expected to be published in the Federal Register prior to June 1, 1997.

While these are sensitive cases which require special handling, the move to centralized filing is expected to have only minimal impact on caseloads in the district offices. Since the beginning of the fiscal year, according to G-22 statistics, fewer than 500 cases have been filed Servicewide. Centralization allows the Service to have a small corps of officers well-versed in the complexity and sensitivity of VAWA adjudications, and will also allow for better monitoring of the caseload and any fraud trends.

Although the direct mail notice allows self-petitioners to continue to file locally until May 7, INS field offices and the other service centers are encouraged to forward to the Vermont Service Center those I-360s for which review/adjudication has not been initiated. All I-360 self-petitions received on or after May 7 shall be forwarded to the Vermont Service Center, but the 30 day transition period requires that no office refuse to receive an I-360 submitted before June 6, 1997. Immediate relatives, who were previously able to file concurrent I-360 self-petitions and I-485 adjustment applications, should be advised to retain their I-485s pending the Vermont Service Center's adjudication of the I-360 self-petition. The battered alien I-360s are to be mailed to:

INS Vermont Service Center
Attn: Family Services Product Line (VAWA)
75 Lower Weldon Street
St. Albans, VT 05479-0001

As inquiries from benefit-granting agencies can be expected in many cases, offices are encouraged to expedite handling of all pending cases which they do not forward to the Vermont Service Center. Nothing in this move to centralize direct mail filing changes the ability of the Vermont Service Center to transfer I-360s to district offices when an interview or investigation of suspected fraud is merited.

Deferred Action and Employment Authorization

In the April 16 memorandum, INS offices were encouraged to utilize voluntary departure and deferred action in order to provide approved VAWA self-petitioners with employment authorization pending the availability of a visa number. Since that time, in IIRIRA, Congress has limited grants of voluntary departure to no more than 120 days, and INS regulations no longer allow for work authorization during any period of voluntary departure. 2 changes

Starting June 1, when the Vermont Service Center approves a VAWA self-petition, it will then also assess, on a case-by-case basis, whether to place the alien in deferred action status pursuant to new deferred action guidelines in the Interim Enforcement Procedures (a forthcoming document which will be available on the 96Act bulletin board, as well as in printed versions). By their nature, VAWA cases generally possess factors that warrant consideration for deferred action. In an unusual case, there may be factors present that would militate against deferred action; cases should therefore receive individual scrutiny. Although the Vermont Service Center is not required to obtain Regional Director approval for deferred action, it will report all grants of deferred action to the Eastern Regional Office for statistical and tracking purposes. In addition, a process for periodic review of the deferred action decisions made by the Vermont Service Center is planned.

If the alien is placed in deferred action, the Vermont Service Center will notify the alien that he or she may submit an I-765, Application for Employment Authorization. After the initial deferred action decision and issuance of a one-year employment authorization document, the Vermont Service Center will hold these files and review the deferred action decision upon each application for extension of work authorization. When the Vermont Service Center is notified by the National Visa Center or by an INS district office that the alien is seeking a visa abroad or has filed an adjustment application, the Vermont Service Center will forward the file to the appropriate office.

In cases where the I-360 was approved prior to April 1, many aliens may have current grants of voluntary departure. Upon expiration of voluntary departure, and for other cases adjudicated before June 1, district offices are strongly encouraged to utilize deferred action to provide work authorization pending the availability of a visa. As described in more detail below, battered aliens are now eligible for certain public benefits, which are often necessary for the victim to be able to leave the abusive situation. To deny such aliens work authorization when they are able to obtain public assistance is counter to the spirit of welfare reform. Moreover, for many individuals, the ability to work is necessary in order to save the funds necessary to pay for the adjustment application and the penalty fee. As it has already been determined that these aliens face extreme hardship if returned to the home country and as removal of battered aliens is not an INS priority, the exercise of discretion to place these cases in deferred action status will almost always be appropriate.

Non-Disclosure Provisions and Other Limitations in IIRIRA § 384

non disclosure of information

Section 384 of IIRIRA strictly prohibits the release of any information relating to a VAWA self-petitioner, and also precludes any INS officer from making an adverse determination of admissibility or deportability based solely on information furnished by an abusive relative. Any violation of this section can subject an INS officer to disciplinary action and a fine of up to $5,000. This provision is discussed in more detail in IIRIRA Implementation Memo #96act.036 (Attachment B).

Verification of Status for Benefit-Granting Agencies

Public benefits ① self-pet ② battered abused alien ③ benefit grant. agency will assess abuse claims

Section 501 of IIRIRA amends the welfare law to provide that certain battered aliens are "qualified aliens" for purposes of eligibility for some public benefits. This includes not only those aliens who can self-petition for immigrant status under the VAWA provisions, but also other aliens who have been abused by a member of their household. In cases other than VAWA self-petitioning cases, it is the benefit-granting agency, not the INS, which will assess the claims of abuse. Benefit providers, however, will request that INS verify the alien's status or the fact that a petition is pending on behalf of the alien. Detailed procedures for verification of these and other categories of qualified aliens under welfare law are being provided to benefit-granting agencies by the Department of Justice in a document entitled "Interim Guidance on Verification," which is expected to be published in the Federal Register later this month. An INS field directive designed for immigration status verifiers will be issued in conjunction with publication of the Interim Guidance on Verification.

Although some verification inquiries relating to battered aliens will be handled through the normal status verification channels, many of the inquiries will fall outside the type of inquiries which status verifiers typically handle. For example, because of the dynamics of abusive relationships, the abuse victim will not always have access to approval notices or other documentation relating to their cases. Moreover, because aliens can be eligible for public benefits upon filing a petition which makes a prima facie case for status, benefit providers will sometimes be seeking information on pending cases, including a determination as to whether the petition makes a prima facie case for eligibility for the status sought.

The Vermont Service Center will serve as the "clearinghouse" for these unusual types of inquiries, which will be submitted by fax using an inquiry format patterned on the sample at Attachment C. It is anticipated that the Vermont Service Center will be able to handle the vast majority of inquiries, which should pertain to cases pending there or in one of the other service centers. For those inquiries which pertain to cases pending in district offices or sub-offices, the Vermont Service Center will forward the inquiries by fax to the attention of a designated Service

Center liaison officer in each district or sub-office. Each district and sub-office should complete the liaison designation form at Attachment D and fax to Lisa Batey at 202/514-9262 prior to May 20 (the list of designees will be shared with INS regional offices and all four Service Centers). The designated liaison should ensure that a response is provided to the requesting agency, with a copy to the Vermont Service Center, within five working days. Information on pending or completed cases should not be given over the telephone, but rather should be sent via facsimile.

As you will note, the sample inquiry format includes a limited waiver of the non-disclosure provisions of IIRIRA § 384. At present, such a waiver is necessary before INS can provide any information relating to a VAWA self-petitioner, even to another governmental entity for purposes of determining eligibility for public benefits. Because of IIRIRA § 642, no waiver is necessary in other categories of cases, such as where the alien seeking benefits is the beneficiary of a spousal I-130 petition, but has suffered abuse at the hands of another household member. If there is any doubt as to whether a waiver is required, the officer should seek guidance from his or her district counsel. If there are waiver questions which cannot be resolved locally, please contact Lisa Batey of the Headquarters Office of Programs, at 202/514-9089.

Providing Information on Filing of I-360 Self-Petitions

Some battered aliens who are eligible to self-petition have chosen not to do so, instead relying upon the I-130 petition filed by their abuser. This not only allows the abuser to continue to control the spouse's or child's immigration status by withdrawing the petition, but also places a battered spouse at risk should the abuser subsequently obtain a divorce before the spouse is able to adjust status. For these and other reasons, such as easier determinations as to welfare eligibility and employment authorization, an immigration officer who deals with a battered alien should inform that alien about the process for self-petitioning, despite the fact that an I-130 petition is still pending on his or her behalf. The Interim Guidance on Verification similarly urges benefit agency caseworkers to give such aliens the number for the INS Forms Line [1-800-870-3676] and for the National Domestic Violence Hotline [1-800-799-7233] for assistance in preparing self-petitions.

Making Prima Facie Determinations

As noted above, Section 501 of IIRIRA includes in the definition of "qualified alien" for public benefit purposes those aliens who have filed a self-petition, or are the beneficiary of a spousal or parental petition, which sets forth a prima facie case for immigrant status under a variety of provisions. Specifically, those with approved petitions or pending petitions which make a prima facie case for status under any of the following Immigration and Nationality Act ("INA") provisions are included:

- spouse or child of a USC under 204(a)(1)(A)(i)
- spouse, child or unmarried son or daughter of an LPR under 204(a)(1)(B)(i)
- widow(er) of a USC under 204(a)(1)(A)(ii)
- self-petitioning battered spouse or child of a USC or LPR under 204(a)(1)(A)(iii)-(iv) or 204(a)(1)(B)(ii)-(iii)

In all but the latter category, battery or abuse will not be part of the INS adjudication, but rather will be assessed by the benefit-granting agency pursuant to the Interim Guidance on Verification.

In the case of self-petitioning battered spouses and children, the Vermont Service Center will begin making prima facie determinations no later than June 1, 1997, following publication of an interim rule in the Federal Register. If the self-petition and accompanying documentation are adequate, the self-petitioner will receive a decision or a Notice of Prima Facie Determination ("NPFD") within three weeks of filing. The approval notice or NPFD may be presented to benefit granting agencies as evidence of the applicant's status as a "qualified alien". The NPFD will be valid for 150 days, to allow time for the submission of any supplemental evidence and for adjudication of the self-petition.

In those cases which are not handled by the Vermont Service Center, benefit-granting agencies will be expecting decisions or prima facie determinations within a similar three-week time frame. As the non-VAWA cases are simpler adjudications based purely on family relationship, there are no plans to define what would constitute a prima facie case. Instead, when a benefit-granting agency inquires about a pending case, INS offices should expedite the adjudication of the case in order to minimize the time during which the alien is unable to receive public assistance for which he or she may be eligible.

Aliens Seeking Issuance of Notices to Appear

An individual may also be eligible for public benefits if he or she makes a prima facie case for cancellation of removal as a battered spouse or child under INA § 240A(b)(2). INS district offices shall promptly issue a Notice to Appear to any alien who makes a credible request to be placed in proceedings in order to raise a claim for cancellation of removal under section 240A(b)(2). District offices may want to do a search of the CLAIMS system to determine if a self-petition was filed and denied. It is important to note, however, that some individuals who are ineligible for status pursuant to the self-petitioning provisions will be eligible for cancellation (e.g., where the marriage has been terminated). Once proceedings have been initiated, the alien can contact the immigration court to seek a determination that he or she has demonstrated a prima facie case for cancellation of removal.

Other District Office Issues

While centralizing I-360 adjudications was motivated in part by the goal of having a small corps of officers well-trained in domestic violence issues, district adjudications officers will still interact with self-petitioners during the adjustment process. The nature of domestic violence and the sensitivity needed in dealing with victims are topics to which few INS officers will have had exposure. District offices are strongly encouraged to identify two or more officers (depending upon the size of the district) to handle all adjustments following from I-360 approvals. The designated officers should have the experience, discretion and communications skills to be able to balance sensitivity in dealing with true victims with vigilance against fraud, and would ideally also serve as the designated Service Center liaison officer described at pages 4-5, above.

Recognizing the need for more training on complex and subtle domestic violence issues, Headquarters is looking into opportunities to provide informational materials and perhaps training sessions. In addition, a number of reputable non-profit organizations throughout the country provide training for personnel who work with domestic violence victims, and are willing to share their expertise with INS offices. Last year, for example, training for San Francisco adjudicators was provided by representatives of the Family Violence Prevention Fund. The training was well-received by district personnel, and was given at no cost to the district. Managers interested in obtaining materials or in fostering contacts with local organizations which work with victims of domestic violence should contact either of the persons named below for information about organizations active in their area.

* * * * *

The Office of Field Operations concurs with this memorandum. Addressees are strongly encouraged to distribute copies of this memorandum widely, particularly to adjudications and investigations officers. Questions about this policy or about the interim rule published in the Federal Register may be directed to Lisa Batey, Headquarters Office of Programs, 202/514-9089, or Karen FitzGerald, Headquarters Benefits Division, at 202/305-4904.

Paul W. Virtue
for Acting Executive Associate Commissioner

EXHIBIT 8

U.S. Department of Justice
Immigration and Naturalization Service

HQINV 50/1

425 I Street NW
Washington, DC 20536

AUG 30 2001

MEMORANDUM FOR MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF FIELD OPERATIONS

FROM: Michael D. Cronin
Acting Executive Associate Commissioner
Office of Programs

SUBJECT: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – "T" and "U" Nonimmigrant Visas

The following instructions provide interim guidance to INS relating to the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Pub. L. No. 106-386, 114 Stat 1464, (October 28, 2000). This memorandum establishes interim procedures to be followed while the regulations implementing the T and U visa status are being promulgated by INS. The guidance in this memorandum is effective immediately, and will remain in effect until regulations on T and U visa status are in place. This guidance supercedes or augments any previous national or local guidance on T and U visas.

BACKGROUND

The VTVPA reflects the United States Government's strong stance against trafficking and its intent to vigorously pursue the prosecution of traffickers and the protection of victims. It provides access to social services and benefits for some victims, creates stronger criminal penalties and enhanced sentencing for traffickers, and creates a new nonimmigrant classification for victims of severe forms of trafficking ("T Visa" or "T").[1] The VTVPA also reauthorizes and amends the Violence Against Women Act (VAWA) and adds a second new nonimmigrant classification for victims of other specific crimes ("U Visa" or "U").[2]

[1] The statutory purposes of the Trafficking Victims Protection division of the VTVPA "are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." VTVPA§102(a)

[2] The "U Visa" related statutory purpose includes the intent "to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes...committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States..." VTVPA§1513(a)(2)(A)

DEFINITIONS

Following are several definitions critical to the understanding of this guidance.

Severe Forms of Trafficking in Persons as defined by VTVPA §103(8). The term "severe forms of trafficking in persons" means-

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Certain Criminal Activity for "U Visa" Purposes as defined by VTVPA §1513 (b)(3) refers to one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

Possible Victim is any alien who may be eligible for benefits under the "T" or "U" visa categories.

GENERAL GUIDANCE

The VTVPA creates two new nonimmigrant classifications. These two classifications provide an immigration mechanism for cooperating victims to remain temporarily in the United States to assist in investigations and prosecutions and provide humanitarian protection to victims. The "T" classification is available to victims of severe forms of trafficking and their families and is limited to 5,000 principal aliens per year. The "U" classification is available to victims of certain criminal activity (see Definitions) and their families and is limited to 10,000 principals per year.

The "T" and "U" provisions of the VTVPA went into effect upon enactment, but regulations for implementation and for the processing of applications have not yet been finalized. In the interim, aliens who are identified as possible victims in the above categories **should not be removed from the United States until they have had the opportunity to avail themselves of the provisions of the VTVPA**. Existing authority and mechanisms such as parole, deferred action, and stays of removal will be used to achieve this objective, including continued presence for victims of severe forms of trafficking, as described in interim policy guidelines for continued presence and in the regulations implementing Section 107 (c) of the VTVPA.

IDENTIFICATION OF POSSIBLE VICTIMS

In the absence of governing regulations, Service personnel should ensure broad interpretation of the guidance to ensure an alien is not removed from the United States if it appears that they fit into one of these victim categories. This guidance is an interim measure aimed only at identifying possible victims who may be eligible for relief under the new nonimmigrant classifications.

Service personnel may encounter possible victims in a variety of circumstances, such as at a Port of Entry (POE), between POEs, in detention, in adjudication processes, in Immigration Court, and/or in the course of investigative activities. At times, Service personnel will be the first point of contact with the possible victim; at other times contact may be established through a prosecutor's office, through a local or federal law enforcement agency, or through an attorney. Regardless of the manner of encounter, if the individual is identified as a possible victim, Service personnel should take the necessary steps to ensure that the individual is not prematurely removed. Circumstances will vary from case to case, and INS personnel should keep in mind that it is better to err on the side of caution than to remove a possible victim to a country where he or she may be harmed by the trafficker or abuser, or by their associates.

Possible "T" Victims: The VTVPA specifies that four conditions must be satisfied to classify an alien as a principal "T" nonimmigrant.

1. The alien is or has been a victim of a severe form of trafficking in persons; and

2. The alien is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a POE, on account of such trafficking; and

3. The alien has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking - or - the alien is under the age of 15; and

4. The alien would suffer extreme hardship involving unusual and severe harm upon removal.

Additionally, to avoid extreme hardship, the Attorney General may provide "T" nonimmigrant status to the spouses, children, and, in the case of those under age 21, the parents of "T" nonimmigrants.

Possible "U" Victims: The VTVPA specifies that four conditions must be satisfied to classify an alien as a principal "U" nonimmigrant:

1. The alien has suffered substantial physical or mental abuse as a result of having been a victim of the certain criminal activity (see Definitions); and

2. The alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning that certain criminal activity described in Definitions;

3. The alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official; to a Federal, State, or local prosecutor; to a Federal or State judge, to the Service; or to other Federal, State, or local authorities investigating or prosecuting one of the certain criminal activities described in Definitions; and

4. The criminal activity described violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.

Additionally, to avoid extreme hardship, the Attorney General may provide "U" nonimmigrant status to the spouses, children, and, in the case of a child under the age of 16, the parents of "U" nonimmigrants. This would require certification by a government official that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or in the case of an alien child, the parent of the alien. It should be noted that trafficking victims might also be eligible for "U" nonimmigrant classification.

WORK AUTHORIZATION

Service personnel are instructed to use existing authority and mechanisms to prevent removal of possible "T" and "U" victims. These mechanisms include parole, deferred action, continuances, and stays of removal. Individuals who are identified as possible "T" or "U" victims may be granted work authorization pursuant to existing authority and utilizing existing application procedures. For instance, potential applicants that are paroled may be granted work authorization pursuant to 8 C.F.R. §274a.12(c)(11); potential applicants that are placed on deferred action may be granted work authorization pursuant to 8 C.F.R. §274a.12(c)(14); and potential applicants that are granted a stay of removal may be granted work authorization in accordance with the provisions of 8 C.F.R. §274a.12(c)(18). Governing regulations concerning continued presence for victims and other information related to this topic are also contained in the Department of Justice and Department of State interim rule published in the Federal Register on July 24, 2001 concerning the Protection and Assistance for Victims of Trafficking.

JUVENILES

Each District has a juvenile coordinator who should be contacted regarding juvenile victims.

RECORD KEEPING

It is imperative that documentation is maintained on possible victims. As such, information about the possible victim including all pertinent information surrounding the possible victim's circumstances must be maintained in the alien's A-file. If no A-file exists for the individual, one should be created. The use of standard sworn statements and/or applicable question and answer

forms must be maintained for the record. As evidence of contact with the possible victim, the INS investigator and/or officer will include any necessary notes and memorandum for the record.

CONTINUED PRESENCE

Aliens who are victims of severe forms of trafficking and are potential witnesses may be eligible for a "T" nonimmigrant classification and shall be processed in accordance with the guidance contained in the policy memorandum dated August 20, 2001, entitled Interim Guidance #1 – Continued Presence. Governing regulations concerning continued presence are also contained in the Department of Justice and Department of State interim rule published in the Federal Register on July 24, 2001 concerning the Protection and Assistance for Victims of Trafficking, as 28 CFR Part 1100.35.

LEGAL PROCEEDINGS

No alien identified as a possible victim eligible for "T" or "U" nonimmigrant classification should be removed from the United States until they have had the opportunity to avail themselves of the provisions of the VTVPA. When a possible "T" or "U" victim is encountered during the course of proceedings, the District Counsel's office should contact the District Victim-Witness Coordinator so that appropriate action can be taken in accordance with the instructions in this memo. The District Counsel's office has the discretion to seek a continuance of the proceedings or to request administrative closure or termination.

FEDERAL OBLIGATIONS TO VICTIMS

Some of the provisions included in the VTVPA replicate INS responsibilities that are currently included in 42 U.S.C. 10606-10607 (the Victim's Rights and Restitution Act) and the *Attorney General Guidelines for Victim and Witness Assistance, 2000 edition*. This includes the referral of victims of Federal crime to medical care and assistance and the provision of reasonable protection. Victims who fall into the statutory definition of victim found in the *Attorney General Guidelines for Victim and Witness Assistance* must be afforded all the rights contained in that directive.[3] Service personnel should continue to involve the District and Sector Victim-Witness Coordinators in referring these victims for services.

This guidance is to be followed until such time as the alien's status has been confirmed, and, where the alien is an actual or possible material witness, the alien has had an opportunity to be considered for a "T" or a "U" nonimmigrant classification, as appropriate.

[3] For purposes of the Attorney General Guidelines for Victim and Witness Assistance, the term "victim" means a person that has suffered direct physical, emotional, or pecuniary harm as the result of a (federal) crime, including ....in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, another person or persons as listed in 42 U.S.C. 10607. The Attorney General designated District Directors and Chief Patrol Agents of the office having primary responsibility for conducting a Federal investigation as the responsible officials to identify victims of Federal crime.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely to guide INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

EXHIBIT 9

INTERIM RELIEF FOR CERTAIN FOREIGN ACADEMIC STUDENTS ADVERSELY AFFECTED BY HURRICANE KATRINA
Frequently Asked Questions (FAQ)

On November 25, 2005. U.S. Citizenship and Immigration Services (USCIS) published a Federal Register Notice (Notice), which temporarily suspended the applicability of certain requirements related to on-campus and off-campus employment for a specifically designated group of F-1 students. This temporary relief enables qualified F-1 students, who were adversely affected by Hurricane Katrina, to work additional hours on-campus, or work off-campus if employment authorization is granted. F-1 students who are granted employment authorization pursuant to the Notice may likewise reduce their course load for the duration of their employment authorization to the minimum course load requirement set forth in the Notice.

Since the Notice does not cover Katrina-impacted foreign academic students who have failed to maintain their F-1 status, such persons, and their F-2 dependents, may request a grant of deferred action and short-term employment authorization based on economic necessity.

Q. Why is USCIS taking this action?

A. Hurricane Katrina caused severe loss of life and extensive property damage, and disrupted normal activities, in the states of Alabama, Louisiana, and Mississippi. As a result of this catastrophic natural disaster, many of the approximately 5,500 F-1 students, who were enrolled in DHS-approved academic institutions located in the areas adversely affected by Hurricane Katrina, have been suffering severe economic hardship and have been experiencing difficulty in satisfying the normal regulatory requirements for maintaining valid F-1 status, which include the pursuit of a "full course of study." See 8 CFR 214.2(f)(6). USCIS is taking action to provide temporary relief to these F-1 students.

Q. For whom specifically is USCIS taking this action?

A. The interim relief covered in this FAQ was developed specifically for F-1 students who: (1) on August 29, 2005, were lawfully present in the United States in F-1 status and were enrolled in a DHS-approved institution located in an area adversely affected by Hurricane Katrina; and (2) are experiencing severe economic hardship as direct result of Hurricane Katrina. Hereinafter, this group will be referred to as "*Affected F-1 Students.*"

Q. Which DHS-approved academic institutions have been deemed to be located in the areas adversely affected by Hurricane Katrina?

A. Following is a list of the specific campuses of DHS-approved academic institutions that have been deemed to be located in the areas adversely affected by Hurricane Katrina.

SCHOOL NAME	CAMPUS NAME	CITY	STATE	ZIP CODE
Archdiocese of New Orleans	Academy of the Sacred Heart	New Orleans	LA	70115
Archdiocese of New Orleans	Christian Brothers School	New Orleans	LA	70124
Archdiocese of New Orleans	Henriette DeLille	New Orleans	LA	70126
Archdiocese of New Orleans	Holy Cross	New Orleans	LA	70117
Archdiocese of New Orleans	Holy Ghost	New Orleans	LA	70115
Archdiocese of New Orleans	Holy Name of Jesus	New Orleans	LA	70118
Archdiocese of New Orleans	Holy Rosary Academy	New Orleans	LA	70119
Archdiocese of New Orleans	House of the Holy Family	New Orleans	LA	70126
Archdiocese of New Orleans	Immaculate Heart of Mary	New Orleans	LA	70126
Archdiocese of New Orleans	Marian Central Catholic Middle School	New Orleans	LA	70122
Archdiocese of New Orleans	Our Lady of Lourdes	New Orleans	LA	70115
Archdiocese of New Orleans	Resurrection of Our Lord	New Orleans	LA	70127
Archdiocese of New Orleans	St. Alphonsus	New Orleans	LA	70130
Archdiocese of New Orleans	St. Anthony of Padua	New Orleans	LA	70119
Archdiocese of New Orleans	St. Benedict the Moor	New Orleans	LA	70126
Archdiocese of New Orleans	St. David	New Orleans	LA	70117
Archdiocese of New Orleans	St. Dominic	New Orleans	LA	70124
Archdiocese of New Orleans	St. Frances Xavier Cabrini	New Orleans	LA	70122
Archdiocese of New Orleans	St. Joan of Arc	New Orleans	LA	70118
Archdiocese of New Orleans	St. Joseph Central Catholic Elementary	New Orleans	LA	70122
Archdiocese of New Orleans	St. Leo the Great	New Orleans	LA	70119
Archdiocese of New Orleans	St. Mary of the Angels	New Orleans	LA	70117
Archdiocese of New Orleans	St. Paul the Apostle	New Orleans	LA	70126
Archdiocese of New Orleans	St. Pius X	New Orleans	LA	70124
Archdiocese of New Orleans	St. Raymond	New Orleans	LA	70122
Archdiocese of New Orleans	St. Stephen	New Orleans	LA	70115
Archdiocese of New Orleans	Stuart Hall School for Boys	New Orleans	LA	70118
Archdiocese of New Orleans	Ursuline Academy	New Orleans	LA	70118
Archdiocese of New Orleans	All Saints	New Orleans	LA	70114
Archdiocese of New Orleans	Holy Name of Mary	New Orleans	LA	70114
Archdiocese of New Orleans	Our Lady of Divine Providence	Metairie	LA	70003
Archdiocese of New Orleans	Our Lady of Perpetual Help	Kenner	LA	70062
Archdiocese of New Orleans	St. Angela Merici	Metairie	LA	70002
Archdiocese of New Orleans	St. Benilde	Metairie	LA	70001
Archdiocese of New Orleans	St. Catherine of Siena	Metairie	LA	70005
Archdiocese of New Orleans	St. Christopher	Metairie	LA	70001
Archdiocese of New Orleans	St. Clement of Rome	Metairie	LA	70002
Archdiocese of New Orleans	St. Edward the Confessor	Metairie	LA	70001
Archdiocese of New Orleans	St. Elizabeth Ann Seton	Kenner	LA	70065
Archdiocese of New Orleans	St. Francis Xavier	Metairie	LA	70005
Archdiocese of New Orleans	St. Louis King of France	Metairie	LA	70005
Archdiocese of New Orleans	St. Mary Magdalen	Metairie	LA	70003
Archdiocese of New Orleans	St. Matthew the Apostle	River Ridge	LA	70123

Archdiocese of New Orleans	St. Philip Neri	Metairie	LA	70003
Archdiocese of New Orleans	St. Rita	Harahan	LA	70123
Archdiocese of New Orleans	Immaculate Conception	Marrero	LA	70072
Archdiocese of New Orleans	Our Lady of Prompt Succor	Westwego	LA	70094
Archdiocese of New Orleans	St. Anthony	Gretna	LA	70053
Archdiocese of New Orleans	St. Cletus	Gretna	LA	70053
Archdiocese of New Orleans	St. Joseph the Worker	Marrero	LA	70072
Archdiocese of New Orleans	St. Rosalie	Harvey	LA	70058
Archdiocese of New Orleans	Visitation of Our Lady	Marrero	LA	70072
Archdiocese of New Orleans	Our Lady of Perpetual Help	Belle Chasse	LA	70037
Archdiocese of New Orleans	Our Lady of Prompt Succor	Chalmette	LA	70043
Archdiocese of New Orleans	St. Louise DeMarillac	Arabi	LA	70032
Archdiocese of New Orleans	St. Mark	Chalmette	LA	70043
Archdiocese of New Orleans	St. Robert Bellarmine	Arabi	LA	70032
Archdiocese of New Orleans	Sacred Heart of Jesus	Norco	LA	70079
Archdiocese of New Orleans	St. Charles Borromeo	Destrehan	LA	70047
Archdiocese of New Orleans	Ascension of Our Lord	LaPlace	LA	70068
Archdiocese of New Orleans	Our Lady of Grace	Reserve	LA	70084
Archdiocese of New Orleans	St. Joan of Arc	LaPlace	LA	70068
Archdiocese of New Orleans	St. Peter	Reserve	LA	70084
Archdiocese of New Orleans	Mary, Queen of Peace	Mandeville	LA	70471
Archdiocese of New Orleans	Our Lady of Lourdes	Slidell	LA	70458
Archdiocese of New Orleans	St. Margaret Mary	Slidell	LA	70458
Archdiocese of New Orleans	St. Peter	Covington	LA	70433
Archdiocese of New Orleans	Annunciation	Bogalusa	LA	70427
Archdiocese of New Orleans	Brother Martin	New Orleans	LA	70122
Archdiocese of New Orleans	Cabrini	New Orleans	LA	70119
Archdiocese of New Orleans	DeLaSalle	New Orleans	LA	70115
Archdiocese of New Orleans	Jesuit	New Orleans	LA	70119
Archdiocese of New Orleans	Mount Carmel Academy	New Orleans	LA	70124
Archdiocese of New Orleans	Redeemer-Seton	New Orleans	LA	70122
Archdiocese of New Orleans	St. Augustine	New Orleans	LA	70119
Archdiocese of New Orleans	St. Gerard Majella Alternative School	New Orleans	LA	70122
Archdiocese of New Orleans	St. Mary's Academy	New Orleans	LA	70126
Archdiocese of New Orleans	Xavier University Prep	New Orleans	LA	70115
Archdiocese of New Orleans	Archbishop Chapelle	Metairie	LA	70003
Archdiocese of New Orleans	Archbishop Rummel	Metairie	LA	70001
Archdiocese of New Orleans	Archbishop Blenk	Gretna	LA	70053
Archdiocese of New Orleans	Archbishop Shaw	Marrero	LA	70072
Archdiocese of New Orleans	Immaculata	Marrero	LA	70072
Archdiocese of New Orleans	Archbishop Hannan	Meraux	LA	70075
Archdiocese of New Orleans	St. Charles Catholic	LaPlace	LA	70068
Archdiocese of New Orleans	Pope John Paul II	Slidell	LA	70461
Archdiocese of New Orleans	The Saint Paul's School	Covington	LA	70433
Archdiocese of New Orleans	St. Scholastica Academy	Covington	LA	70433

Bass Memorial Academy	Bass Memorial Academy	Lumberton	MS	39455
Delgado Community College	Delgado Community College	New Orleans	LA	70119
Dillard University	Dillard University	New Orleans	LA	70122
East Central Community College	East Central Community College	Decatur	MS	39327
East Mississippi Community College	Scooba Campus	Scooba	MS	39358
Ecole Classique	Ecole Classique	New Orleans	LA	70112
English Language Center	University of South Alabama	Mobile	AL	36688
Faulkner State Community College	Faulkner State Community College	Bay Minette	AL	36507
Faulkner University	Faulkner University at Mobile	Mobile	AL	36609
John Curtis Christian School	John Curtis Christian School	River Ridge	LA	70123
Kaplan Test Prep, a division of Kaplan, Inc.	Kaplan Test Prep - New Orleans, LA	New Orleans	LA	70118
Louisiana State University Health Sciences Center	Louisiana State University Health Sciences Center	New Orleans	LA	70006
Loyola University New Orleans	Loyola University New Orleans	New Orleans	LA	70118
Lutheran High School	Lutheran High School	Metairie	LA	70002
Meridian Community College	Meridian Community College	Meridian	MS	39307
Metairie Park Country Day School	Metairie Park Country Day School	Metairie	LA	70005
Mississippi Gulf Coast Community College	Perkinston Campus	Perkinston	MS	39573
Mississippi Gulf Coast Community College	Jefferson Davis Campus	Gulfport	MS	39507
Mississippi Gulf Coast Community College	Jackson County Campus	Gautier	MS	39553
Mobile County Public Schools	Division Of Student Support Services	Mobile	AL	36602
Mobile County Public Schools	Baker High	Mobile	AL	36608
Mobile County Public Schools	Blount High	Prichard	AL	36610
Mobile County Public Schools	Bryant High	Irvington	AL	36544
Mobile County Public Schools	Citronelle High	Citronelle	AL	36522
Mobile County Public Schools	Davidson High	Mobile	AL	36609
Mobile County Public Schools	Montgomery High	Semmes	AL	36575
Mobile County Public Schools	Murphy High	Mobile	AL	36606
Mobile County Public Schools	Rain High	Mobile	AL	36605
Mobile County Public Schools	Satsuma High	Satsuma	AL	36572
Mobile County Public Schools	Shaw High	Mobile	AL	36608
Mobile County Public Schools	Theodore High	Theodore	AL	36582
Mobile County Public Schools	Vigor High	Prichard	AL	36610
Mobile County Public Schools	Williamson High	Mobile	AL	36605
Modern Languages Institute	Modern Languages Institute	New Orleans	LA	70130
New Orleans Baptist Theological Seminary	New Orleans Baptist Theological Seminary	New Orleans	LA	70126
Nicholls State University	Nicholls State University	Thibodaux	LA	70301
Notre Dame Seminary	Notre Dame Seminary	New Orleans	LA	70118
Nunez Community College	Nunez Community College	Chalmette	LA	70043
Our Lady Holy Cross College	Our Lady Holy Cross College	New Orleans	LA	70131
Picayune School District	Picayune Memorial High School	Picayune	MS	39466
Remington College	Remington College	Metairie	LA	70005
Reserve Christian School	Reserve Christian School	Reserve	LA	70084
Ridgewood Preparatory School	Ridgewood Preparatory School	Metairie	LA	70001
Riverside Academy Corporation	Riverside Academy	Reserve	LA	70084

Saint Joseph Seminary College	St. Benedict	St. Benedict	LA	70457
School of Urban Missions	New Orleans School of Urban Missions	Gretna	LA	70053
Southeastern Baptist College	Southeastern Baptist College	Laurel	MS	39440
Southeastern Louisiana University	Southeastern Louisiana University	Hammond	LA	70402
Southern University at New Orleans	Southern University at New Orleans	New Orleans	LA	70126
Spring Hill College	Spring Hill College	Mobile	AL	36608
St. Paul's Episcopal School	St. Paul's Episcopal School	Mobile	AL	36608
St. Stanislaus College Prep	St. Stanislaus College Prep	Bay St. Louis	MS	39520
St. Stanislaus College Prep	Mercy Cross High School	Biloxi	MS	39530
St. Stanislaus College Prep	St. John High School	Gulfport	MS	39501
St. Stanislaus College Prep	Resurrection Catholic School	Pascagoula	MS	39567
St. Stanislaus College Prep	Nativity, B. V. M.	Biloxi	MS	39530
St. Stanislaus College Prep	Sacred Heart	Hattiesburg	MS	39401
The University of Southern Mississippi	Hattiesburg Campus	Hattiesburg	MS	39406
The University of Southern Mississippi	English Language Institute	Hattiesburg	MS	39406
Top Garden School	Top Garden School	Irvington	AL	36544
Tulane University	Tulane University	New Orleans	LA	70118
United States Sports Academy	United States Sports Academy	Daphne	AL	36526
University of Mobile	University of Mobile	Mobile	AL	36613
University of New Orleans	University of New Orleans	New Orleans	LA	70148
University of New Orleans	UNO Intensive English Language Program	New Orleans	LA	70148
University of South Alabama	University of South Alabama	Mobile	AL	36688
William Carey College	William Carey College	Hattiesburg	MS	39401
Xavier University of Louisiana	Xavier University of Louisiana	New Orleans	LA	70125

Q. Will *Affected F-1 Students* who have since transferred to other DHS-approved institutions still qualify for the interim relief discussed in this FAQ?

A. *Affected F-1 Students*, who have since transferred to another DHS-approved institution, but who otherwise satisfy the eligibility criteria listed above in this FAQ under the section *"For whom specifically is DHS taking this action,"* remain eligible for the interim relief discussed in this FAQ.

Q. Which *Affected F-1 Students* are covered by the Notice and what relief is available to these students?

A. To be covered by the Notice, an *Affected F-1 Student* must be maintaining valid F-1 status, which includes pursuing a full course of study. *Affected F-1 Students* covered by the Notice may obtain short-term employment authorization for off-campus employment or additional hours of on-campus employment. Furthermore, *Affected F-1 Students* who are granted employment authorization pursuant to the Notice may consequently reduce their course load to no less than the minimum course load requirement set forth in the Notice for the duration of their employment authorization.

F-2 dependents (spouse or minor children) of *Affected F-1 Students* who are covered by the Notice would be considered, if otherwise eligible, to be maintaining valid F-2 status, provided the *Affected F-1 Student* continues to maintain valid F-1 status. F-2 dependents of *Affected F-1 Students* covered by the Notice, however, are not authorized to engage in employment in the United States, irrespective of whether the *Affected F-1 Student* has been granted employment authorization.

Q. How do *Affected F-1 Students* covered by the Notice apply for on-campus employment authorization pursuant to the Notice?

A. *Affected F-1 Students* covered by the Notice, who wish to pursue more than 20 hours per week of on-campus employment pursuant to the Notice, must obtain permission from their current Designated School Official (DSO). Complete instructions can be found in the Notice under the section entitled, *"How may F-1 students covered by this Notice obtain employment authorization pursuant to this Notice?"*

Q. How do *Affected F-1 Students* covered by the Notice apply for off-campus employment authorization pursuant to the Notice?

A. *Affected F-1 Students* covered by the Notice, who wish to obtain off-campus employment authorization pursuant to the Notice, must file a complete Form I-765, Application for Employment Authorization, with required supporting documentation and prescribed fee, with the USCIS Texas Service Center at:

U.S. Citizenship and Immigration Services
Texas Service Center
P.O. Box 853062
Mesquite, TX 75815-3062

The front of the envelope, on the bottom right-hand side, should include the following notation: "HURRICANE KATRINA SPECIAL STUDENT RELIEF." Complete instructions can be found in the Notice under the section entitled, *"How may F-1 students covered by this Notice obtain employment authorization pursuant to this Notice?"*

Q. What is the minimum course load requirement set forth in the Notice for *Affected F-1 Students* who are granted employment authorization pursuant to the Notice?

A. *Affected F-1 Students* engaged in undergraduate studies and who are granted employment authorization pursuant to the Notice must remain registered for a minimum of six (6) semester/quarter hours of instruction per academic term. *Affected F-1 Students* engaged in graduate studies and who are granted employment authorization pursuant to the Notice must remain registered for a minimum of three (3) semester/quarter hours of instruction per academic term.

Q. How is off-campus employment authorization granted pursuant to the Notice different from off-campus employment authorization granted pursuant to the existing provision [See 8 CFR 214.2(f)(9)(ii)]?

A. One key difference between off-campus employment authorization provided by the Notice and off-campus employment authorization under the existing provision is that *Affected F-1 Students* who are granted employment authorization pursuant to the Notice may reduce their course load for the duration of their employment authorization.

Q. What relief is available to *Affected F-1 Students* not covered by the Notice?

A. *Affected F-1 Students* not covered by the Notice may request deferred action and employment authorization based on economic necessity. A grant of deferred action in this context means that, during the period that the grant of deferred action remains in effect, DHS will not seek the removal of the *Affected F-1 Student* (or his or her F-2 dependents) based on the fact that the *Affected F-1 Student's* failure to maintain status is directly due to Hurricane Katrina. A grant of deferred action, however, does not provide an alien any legal immigration status in the United States. *Affected F-1 Students* who are granted deferred action are eligible to apply for short-term employment authorization, provided they demonstrate economic necessity.

F-2 dependents of *Affected F-1 Students* who are granted deferred action would also be eligible for deferred action for the period granted to the *Affected F-1 Student*. Although F-2 dependents are not authorized to engage in employment in the United States, F-2 dependents who are granted deferred action are eligible to apply for short-term employment authorization, provided they likewise demonstrate economic necessity.

Q. Will *Affected F-1 Students* not covered by the Notice who are granted deferred action be required to file for reinstatement?

A. Yes. Since deferred action does not confer any lawful status on an alien, *Affected F-1 Students* who were granted deferred action must apply and be approved for reinstatement in order to resume their F-1 status. See 8 CFR 214.2(f)(16). F-2 dependents, who were granted deferred action, are not required to apply for reinstatement, but would be considered, if otherwise eligible, to be maintaining valid F-2 status, provided the *Affected F-1 Student* is approved for reinstatement to valid F-1 status.

Q. How may *Affected F-1 Students* not covered by the Notice and their F-2 dependents (spouse and minor children) request deferred action and employment authorization based on economic necessity?

A. *Affected F-1 Students* not covered by the Notice and their F-2 dependents (spouse and minor children) may individually request deferred action by submitting a letter requesting consideration. The letter must contain the name and the SEVIS ID number of the applicant, and a written affidavit or unsworn declaration confirming that the applicant meets the eligibility criteria listed above in this FAQ under the section *"For whom*

specifically is DHS taking this action." Since individuals who are granted deferred action are eligible to apply for employment authorization, *Affected F-1 Students* and their F-2 dependents who are applying for deferred action, may apply concurrently for employment authorization by filing a Form I-765, Application for Employment Authorization, with required supporting documentation and prescribed fee. Both letter requesting deferred action and the completed Form I-765 should be mailed to the USCIS Texas Service Center at:

U.S. Citizenship and Immigration Services
Texas Service Center
P.O. Box 853062
Mesquite, TX 75815-3062

The front of the envelope, on the bottom right-hand side, should include the following notation: "HURRICANE KATRINA SPECIAL STUDENT RELIEF."

Q. How may *Affected F-1 Students* request a waiver of the Form I-765 filing fee?

A. An *Affected F-1 Student* who is unable to pay the prescribed Form I-765 filing fee should include with the application package a written affidavit or unsworn declaration, requesting a fee waiver and explaining the reasons why s/he is unable to pay the prescribed fee.

Q. How long will the interim relief discussed in this FAQ remain in effect?

A. The interim relief discussed in this FAQ will remain in effect until February 1, 2006. Following February 1, 2006, *Affected F-1 Students* will again be subject to the normal regulatory requirements, including those related to employment authorization and maintenance of a full course of study. DHS will continue to monitor the adverse impact of Hurricane Katrina in the affected areas to determine if modification of the interim relief is warranted and will announce any such modifications in the *Federal Register*.

Q. Is there a cut-off date for filing for the interim relief discussed in this FAQ?

A. No. USCIS has not established a cut-off date for filing for the interim relief discussed in this FAQ. However, any benefits granted pursuant to the interim relief discussed herein will expire no later than February 1, 2006. While USCIS will exercise its best efforts to process such applications in as prompt a manner as possible, *Affected F-1 Students* (and their F-2 dependents) applying for such benefits should bear in mind this expiration date when submitting their application packages.

Q. Are *Affected F-1 Students* (both those covered by the Notice and those who are not) required to report their current address to DHS?

A. Yes. All aliens who are required to be registered with DHS also are required to inform DHS of their current address. F-1 students (and their F-2 dependents) are among

the aliens who are required to be registered. Section 265 of the INA requires aliens to report a change of address within 10 days of such change. If the alien fails to comply with the change of address requirements, s/he may be removable under Section 237(a)(3)(A) of the INA and subject to criminal or monetary penalties under Section 266(b) of the INA. Under 8 CFR 214.2(f)(17), F-1 students can satisfy this requirement by providing notice of a change of address within 10 days to their DSO, provided the DSO enters this information in SEVIS within 21 days of notification by the student. F-1 students who are subject to NSEERS must provide required updated information, including any change of address, pursuant to the terms of that program. See 8 CFR 264.1(f).

Q. Where are the cited Forms and additional information available?

A. Individuals may obtain the cited Forms from the USCIS website at http://uscis.gov/ or by contacting the USCIS Forms Line at 1-800-870-3676. Additional information is through the USCIS National Customer Service Center at 1-800-375-5283.

See the November 25, 2005 Press Release

Rev: November 25, 2005

Back to USCIS.gov

EXHIBIT 10

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Domestic Operations (MS-2110)
Washington, DC 20529-2110

U.S. Citizenship and Immigration Services

SEP 4 2009

Memorandum

TO: Field Leadership

FROM: Donald Neufeld
Acting Associate Director, Office of Domestic Operations

SUBJECT: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children

I. Purpose

This amended memorandum provides guidance to U.S. Citizenship and Immigration Services (USCIS) field offices and service centers regarding the processing of surviving spouses of deceased U.S. citizens and qualifying children of the surviving spouses. It affords a new process by which they may apply for deferred action. This policy guidance will be in effect until further notice and may be revised as needed. This memorandum revises and replaces in its entirety the June 15, 2009 "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children".

II. Background

Section 205.1(a)(3)(i)(C) of title 8 of the Code of Federal Regulations (8 CFR) requires that the approval of Form I-130, *Petition for Alien Relative*, be automatically revoked upon the death of the petitioner if the beneficiary[1] has not adjusted status in the United States or been inspected and admitted as an immigrant. In such instances, the beneficiary may request a reinstatement of the approval and USCIS, in its discretion, may grant such a request for humanitarian reasons. 8 CFR 205.1(a)(3)(i)(C)(2).

However, 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 (1) the immigrant petition filed by the citizen on behalf of the surviving spouse has not been adjudicated by USCIS at the time of the citizen's death, or (2) no petition was filed by the

[1] Depending on context, the term beneficiary in this guidance may include both actual and potential beneficiaries of Forms I-130 filed on their behalf.

citizen before the citizen's death. This issue has caused a split among the circuit courts of appeal and is also the subject of proposed legislation in the U.S. Congress (e.g., bills S. 815 and H.R. 1870).

III. Policy Guidance

This policy guidance covers only (1) surviving spouses of U.S. citizens who died before the second anniversary of the marriage, who have not remarried and were not legally separated or divorced from the citizen spouse at the time of the citizen's death, and who are residing in the United States,[2] and (2) such surviving spouses' qualifying children. For purposes of this policy guidance, "qualifying children" are any children of the surviving spouse of the deceased U.S. citizen who remain unmarried and under 21 years of age and are residing in the United States (age determinations for beneficiaries of Forms I-130 should be made as provided in section 201(f) of the INA).

This guidance applies to the aforementioned applicants without regard to their manner of entry into the United States. Such surviving spouses are covered without restrictions on how long the U.S. citizen spouse has been deceased as long as the surviving spouse has not remarried.[3]

This guidance does not cover surviving spouses or qualifying children of deceased U.S. citizens who are residing outside the United States or surviving spouses and children of a lawful permanent resident or other non-U.S. citizen. This guidance also does not cover surviving spouses or qualifying children of deceased U.S. citizens if the surviving spouse remarried at any time after the U.S. citizen's death (regardless of whether the subsequent marriage has been terminated). This guidance does not cover any beneficiary who was legally separated or divorced from his or her U.S. citizen spouse at the time of the citizen's death, or such beneficiary's children.

Since current section 201(b)(2)(A)(i) of the Immigration and Nationality Act (INA) treats covered widow(er)s of U.S. citizens and their children as immediate relatives based upon a self-petition, they are not covered by this guidance. They may file a Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, in accordance with the instructions on the Form.

In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens, USCIS is instituting the following policy guidance, which is effective immediately and until further notice.

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[2] Section III(A) of this memorandum, however, regarding humanitarian reinstatement, shall apply to surviving spouses outside the United States.

[3] This guidance is applicable to a beneficiary who entered the United States on a K-1 Nonimmigrant Visa and married a U.S. citizen, including cases in which the marriage was to a U.S. citizen other than the U.S. citizen petitioner who filed the I-129F. If the U.S. citizen spouse died before the second anniversary of the marriage, the widow(er) is eligible for deferred action or humanitarian reinstatement as described herein. Nothing in this memorandum, however, is intended to provide or imply eligibility for immigrant classification or adjustment of status of any person granted deferred action or humanitarian reinstatement, including widow(er) of U.S. citizens other than U.S. citizens who filed the Form I-129F who are subject to section 245(d) of the INA.

It is not necessary for the widow(ers) of citizens to seek deferred action under the guidance in this memorandum, in a case governed by First, Sixth or Ninth Circuit law. Courts in those jurisdictions have held that the visa petitioner's death does *not* end a surviving spouse's eligibility for classification as an immediate relative. *Taing v. Napolitano,* 567 F.3d 19 (1st Cir. 2009); *Lockhart v. Napolitano,* 561 F.3d 611 (6th Cir. 2009); *Freeman v. Gonzales,* 444 F.3d 1031 (9th Cir. 2006). Litigation on this issue is currently pending in the Supreme Court. *Robinson v. Napolitano,* No. 09-94 (Cert petition filed July 23, 2009). Until such time as the Supreme Court decides the *Robinson* case on the merits, however, the *Taing, Lockhart* and *Freeman* cases remain the law in their respective circuits.

In the First, Sixth and Ninth Circuits, therefore, an officer should approve a Form I-130, and should also treat a pre-approval death as still valid, if the Form I-130 is approvable, apart from the issue of the petitioner's death. No request for reinstatement of a pre-death approval will be necessary. Should the beneficiary in a First, Sixth or Ninth Circuit case bring to the attention of USCIS a Form I-130 that was denied or revoked on or after August 30, 2001, solely because the petitioner had died officers should consider the *Taing, Lockhart* and *Freeman* decisions as a proper basis for reopening, *on USCIS motion,* the Form I-130, as well as any related Form I-485.[4] It is not necessary for the beneficiary to file a formal motion or pay any filing fee; any written request, such as a letter, will suffice. For purposes of this paragraph, a Form I-130 will be considered a First, Sixth or Ninth Circuit case if:

- the Form I-130 is pending in, or the original decision was made by, a USCIS office in the First, Sixth or Ninth Circuit; or
- either the petitioner or the beneficiary resided in First, Sixth or Ninth Circuit at the time of the petitioner's death. [5]

Whether an alien is actually admissible is not an issue in the adjudication of a Form I-130. *Matter of O-,* 8 I&N Dec. 295 (BIA 1959). In light of the judgment in *Hootkins v. Napolitano,* ___ F.Supp. 2d ___ , 2009 WL 2222839 (C.D.Cal. 2009), an officer will not consider the presence or absence of Form I-864 from a substitute sponsor in deciding whether to approve or deny a Form I-130 in a First, Sixth or Ninth Circuit case. The *Hootkins* court ruled, however, that the Class Plaintiffs had failed to prove their claim that an alien widow(er) whose Form I-130 is approved under Freeman does not need a Form I-864 from a substitute sponsor. 2009 WL 2222839 at *17, n. 23. The widow(er), therefore, must submit a new Form I-864 to obtain approval of the Form I-485, unless the Form I-485 applicant is exempt from this requirement under 8 CFR 213a.2(a)(2)(ii). Thus, the officer will treat the provision in AFM 21.5(a)(4)(B)(2) that requires submission of a new Form I-864 from a

[4] No action is necessary if the Form I-130 was denied or revoked before August 30, 2001. A civil action must generally be brought against the United States within 6 years after the cause of action accrues. 22 U.S.C. 2401(a). August 30, 2001, is selected as the cut-off date for reopening First, Sixth and Ninth Circuit cases since that is 6 years before the filing of *Hootkins v. Napolitano,* ___ F.Supp. 2d ___ (C.D.Cal. 2009), which began as a putative nation-wide class action.

[5] The First Circuit includes Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico; the Sixth Circuit includes Kentucky, Michigan, Ohio, and Tennessee; and the Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam. 28 U.S.C. § 41.

substitute sponsor as applying *only* to the adjudication of the Form I-485, and not to the adjudication of the Form I-130.

A widow(er) who is not able to submit a new Form I-864 from a substitute sponsor may seek deferred action, even if the Form I-130 itself is approved. In the case of a widow(er) whose Form I-485 cannot be approved because of the lack of a new Form I-864 from a substitute sponsor, a final decision on the Form I-485 will be held in abeyance during the period in which a grant of deferred action is in effect.

The *Taing, Lockhart* and *Freeman* cases apply only to First, Sixth and Ninth Circuit cases involving Forms I-130 filed for the spouses of citizens. These cases do not apply to a Form I-130 filed by a citizen for a step-child. Even if the citizen's widow(er) may have a Form I-130 and Form I-485 approved, therefore, any children of the widow(er) who are also beneficiaries of Forms I-130 filed by the deceased citizen may seek deferred action under this guidance.

A. Form I-130 Approved Prior to the Death of the U.S. Citizen Spouse (Petitioner)

Upon the death of the U.S. citizen petitioner, the approved Form I-130 is automatically revoked pursuant to 8 CFR 205.1(a)(3)(i)(C). The beneficiary, however, may request reinstatement of the revoked petition pursuant to 8 CFR 205.1(a)(3)(i)(C)(2). USCIS may then exercise discretion and grant the reinstatement after considering the facts and humanitarian considerations of the particular case. If the request for humanitarian reinstatement is approved, the beneficiary may proceed to the adjustment of status or consular processing stage.

This memorandum does not alter the process for reviewing a Form I-130 returned to USCIS by a U.S. Consular Officer overseas when the beneficiary is seeking a humanitarian reinstatement. If USCIS reinstates the Form I-130 returned by the consular officer, the I-130 should be forwarded to the National Visa Center to allow the beneficiary to resume consular processing. Section III(A) of this guidance, relating to humanitarian reinstatement, applies to beneficiaries who are within or outside the United States.

If a beneficiary covered by this guidance requests humanitarian reinstatement, adjudicators should presume that humanitarian reasons support a grant of the request. Absent extraordinary factors or a failure to meet the regulatory requirements of 8 CFR 205.1(a)(3)(i)(C)(2), adjudicators should favorably exercise discretion accordingly. If the request for reinstatement cannot be granted for any reason other than confirmed or suspected fraud or issues of criminality or national security, the beneficiary should be informed that he or she may request deferred action in the manner described in III(E) below.

B. Form I-130 Pending at the Time of Death of the U.S. Citizen Spouse (Petitioner) – Married Less than 2 Years at Time of Death

Once USCIS has received a copy of the U.S. citizen petitioner's death certificate, the pending, stand-alone Form I-130 should be held in abeyance at the pending location. Petitions may be transferred to

the Vermont Service Center to be consolidated with the A-file housing a deferred action request, if such a request is made by the beneficiary (see further guidance below).

Any concurrently filed Form I-485, *Application to Register Permanent Residence or Adjust Status*, and Form I-130, should be held in abeyance at the National Benefits Center until further guidance is issued. The beneficiary will remain eligible to receive the interim benefits of advance parole and employment authorization on the basis of the pending adjustment of status application.

If a Form I-485 was not concurrently filed, the beneficiary should be informed that he or she may request deferred action in the manner described in section III (E) below.

Note: In instances where the beneficiary and deceased U.S. citizen petitioner were married for at least two years at the time of the petitioner's death, the pending Form I-130 should be handled under existing procedures, including conversion of the Form I-130 to a Form I-360 for special immigrant classification as a widow/widower to the extent provided by 8 CFR 204.2(i)(1)(iv).

C. Form I-130 Denied (Prior to the Issuance of this Guidance) due to the Death of the U.S. Citizen Spouse (Petitioner)

A beneficiary who is the surviving spouse of a U.S. citizen petitioner and whose petition was denied by USCIS (1) due to the death of the U.S. citizen petitioner, and (2) prior to the issuance of this guidance, may request deferred action in the manner described in section III(E) below.

D. Form I-130 Not Filed Prior to the Death of the U.S. Citizen Spouse

A beneficiary who was legally married to a now deceased U.S. citizen at the time of the U.S. citizen's death, but for whom no Form I-130 was filed, may request deferred action in the manner described in section III(E) below.

If the beneficiary was not legally married to, or was legally separated from, the deceased U.S. citizen at the time of the U.S. citizen's death, a qualifying relationship does not exist. The beneficiary is therefore not eligible to submit Form I-360 based on the specific policy guidance set forth in section III(E) below.

E. Required Documentation for Requests for Deferred Action

Beneficiaries may request deferred action by submitting the following:

1) A Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, with the appropriate, non-waiveable filing fee (currently $375), completed in the format explained below; and
2) All of the documents requested in the Form I-360 filing instructions for widow/widowers.

The beneficiary of the Form I-360 must check box "**m. Other, explain:**" in Part 2 of the petition and cite the basis for eligibility as "**Deferred Action -- Surviving spouse of a deceased U.S.**

citizen, married less than 2 years." The Form I-360 must be submitted to the Vermont Service Center for deferred action consideration. Note that while USCIS is utilizing Form I-360 for these deferred action requests, such filings are NOT special immigrant self-petitions under current law. They should be adjudicated as requests for deferred action only. In addition to the Part 2 information described above, the applicant must complete Parts 1, 3, 4, 7, 9, 10 and 11 of the Form I-360.

F. Decision on Requests for Deferred Action

Requests for deferred action based on the specific policy guidance set forth in this memorandum may only be considered for: 1) surviving spouses of U.S. citizens whose U.S. citizen spouse died before the second anniversary of the marriage and who are unmarried and residing in the United States; and 2) their qualifying children who are residing in the United States.

The following persons are ineligible for deferred action: 1) beneficiaries whose immigrant visa petition was denied or revoked for any reason other than or in addition to the death of the petitioning U.S. citizen spouse; 2) widow(er)s who have remarried or were legally separated or divorced from the U.S. citizen spouse at the time of the U.S. citizen's death; and 3) beneficiaries with other serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons. A grant of deferred action is a discretionary action on the part of USCIS. It is intended that this discretion should be liberally applied to provide a humanitarian benefit to eligible beneficiaries. However, deferred action may be denied for serious adverse factors, whether or not such factors are specifically identified in this guidance.

Requests for deferred action based on the specific policy guidance set forth in this memorandum will not be considered for beneficiaries who: 1) are surviving spouses or qualifying children of non-U.S. citizens; 2) are residing outside the United States; 3) meet the conditional marriage period set forth in INA 201(b)(2)(A)(i); or 4) have remarried subsequent to the U.S. citizen's death (regardless of whether the subsequent marriage has been terminated).

Once a decision on the request for deferred action has been made, the decision must be communicated to the beneficiary via a decision letter. If the request has been granted, the deferred action grant letter must state that the beneficiary is eligible to file Form I-765, *Application for Employment Authorization*. If the request has been denied, the deferred action denial letter must cite the reasons for the denial. A decision on a request for deferred action falls within the discretion of the Secretary. A denial of a request for deferred action is not subject to administrative appeal or judicial review. See INA § 242(a)(2)(B), and (g).

G. Validity Period for Deferred Action

For any deferred action request received on or before May 27, 2011, the validity period of deferred action based on the policy guidance set forth in this memorandum is two (2) years from the date of grant of the Form I-360 request for deferred action.

H. Eligibility for Employment Authorization

The appropriate classification for Form I-765 filed on the basis of a deferred action grant is (C)(14) pursuant to 8 CFR 274a.12(c)(14). Beneficiaries may submit Form I-765, with the appropriate filing fee (currently $340), using this classification at any time after the grant (but prior to the expiration) of deferred action. However, they must demonstrate an economic necessity. The validity period for an employment authorization document (EAD) under the classification (C)(14), based on the specific policy guidance set forth in this memorandum is two (2) years, not to exceed the expiration date of the grant of deferred action.

All requests for employment authorization based on the policy guidance set forth in this memorandum must contain the appropriate required supporting documentation. Applicants must follow currently established filing procedures for the Form I-765 in accordance with the instructions on the form. Fee waiver of the Form I-765 fee is available on a case-by-case basis for substantiated inability to pay as provided in 8 CFR 103.7(c)(1).

A beneficiary whose Form I-485 is being held in abeyance may also file a Form I-765, with the appropriate filing fee. The appropriate classification for employment authorization filed on such a basis is (C)(9) pursuant to 8 CFR 274a.12(c)(9). Evidence of an economic necessity is not required if using this classification. A beneficiary whose application is being held in abeyance may have been issued an employment authorization document valid for one year under category (C)(9). When such an applicant files a Form I-765 for renewal of his or her EAD under the classification (C)(9) based on the specific policy guidance set forth in this memorandum, the validity period will be **two (2) years**. An applicant with a valid EAD under the classification (C)(9) may file for renewal no more than 90 days prior to the expiration date of the valid document. The employment authorization may then be granted for two (2) years based on the specific policy guidance set forth in this memorandum.

I. Effect of Grant of Deferred Action

The grant of deferred action by USCIS does not confer or alter any immigration status. It does not convey or imply any waivers of inadmissibility that may exist, regardless of whether that inadmissibility is known to DHS or other agencies at the time of the request for deferred action. A grant of deferred action also does not eliminate any period of prior unlawful presence. However, periods of time in deferred action do not count as unlawful presence for the purposes of sections 212(a)(9)(B) and (C) of the INA. Any period of time in deferred action qualifies as a period of stay authorized by the Secretary of Homeland Security for those purposes.

As noted earlier in this memorandum, in the case of a widow(er) whose Form I-485 cannot be approved because of the lack of a new Form I-864 from a substitute sponsor, a final decision on the Form I-485 will be held in abeyance during the period in which a grant of deferred action is in effect.

J. Eligibility for Advance Parole

Beneficiaries granted deferred action based on the policy guidance set forth in this memorandum or whose applications for adjustment of status are being held in abeyance may request advance parole. Such request may be made by filing Form I-131, *Application for Travel Document*, in accordance with the Form I-131 instructions and with the appropriate fee. Note, however, that departure from the United States and return, even under a grant of advance parole, may adversely affect eligibility for adjustment of status of aliens with past periods of unlawful presence.

K. Implementation

USCIS offices and centers are to begin implementing the instructions established in this memorandum immediately.

L. Contact Information

Questions regarding this memorandum should be directed to the Office of Domestic Operations through appropriate channels.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person.

Distribution:

Regional Directors
District Directors
Field Office Directors
National Benefits Center Director
Service Center Directors

EXHIBIT 11

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 12

CO 241.11-P

TO : Commissioner

DATE: 15 JUL 1976

FROM : Sam Bernsen
General Counsel

SUBJECT: Legal Opinion Regarding Service Exercise of Prosecutorial Discretion

You have asked for my opinion regarding the authority of the Service to exercise prosecutorial discretion in administrative proceedings arising under the Immigration and Nationality Act. You have also asked for my opinion regarding the appropriate time and manner for the exercise of such discretion.

Prosecutorial discretion refers to the power of a law enforcement official to decide whether or not to commence or proceed with action against a possible law violator. See generally, K. Davis, Administrative Law Treatise, 1970 Supp., §4.08, at 188. This power is not restricted to those termed prosecutors, but is also exercised by others with law enforcement functions such as police and officials of various administrative agencies. 1/ The power extends to both civil and criminal cases. 38 Op. Att'y Gen. 98, 102 (1934)

The reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There simply are not enough resources to enforce all of the rules and regulations presently on the books. As a practical matter, therefore, law enforcement officials have to make policy choices as to the most effective and desirable way in which to deploy their limited resources. Thus, for example, police and prosecutors may choose to concentrate on apprehension and prosecution of perpetrators of violent crimes, while choosing not to proceed against those committing so-called "victimless crimes," such as certain consensual sex acts and possession of small amounts of marihuana. In addition, there are times when defects in the quality, quantity, or method of gathering evidence will make it difficult to prove the matter before a court.

Aside from purely practical considerations, it is also obvious that in enacting a statute the legislature cannot possibly contemplate all of the possible circumstances in which the statute may be applied. In some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose. For instance, a prosecutor may well decide not to proceed against a terminally ill individual, even in the presence of overwhelming evidence of guilt.

1/ See, e.g., [illegible] v. [illegible], 386 U.S. 171, 182 (1967) (General Counsel of NLRB has unreviewable discretion to refuse to institute unfair labor practice complaint).

General Authority of Executive Branch

The ultimate source for the exercise of prosecutorial discretion in the Federal Government is the power of the President. Under Article II, Section 1 of the Constitution, the executive power is vested in the President. Article II, Section 3, states that the President "shall take care that the laws be faithfully executed."

Most discussions of the exercise of prosecutorial discretion on the federal level center on the Attorney General, since he is the chief legal officer of the Federal Government. Nevertheless, prosecutorial discretion is also exercised by a wide variety of other government officials with law-enforcement responsibilities. 2/

The Attorney General has the authority "to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases." U.S. v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888). The power of the Attorney General to exercise his prosecutorial discretion does not end with the entry of judgment, but also embraces execution of the judgment. U.S. v. Morris, 23 U.S. (10 Wheat.) 246 (1825); 38 Op. Att'y Gen. 98, 102 (1934).

In a 1934 opinion, Attorney General Cummings pointed to three sources for the Attorney General's exercise of prosecutorial discretion: (1) inherent authority, (2) court decisions, and (3) various statutory enactments. 38 Op. Att'y Gen. 98 (1934). 3/

The inherent authority can be traced to the common law, where a prosecuting attorney had authority to terminate a suit at any time. See Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868). As Attorney General Taney stated in 2 Op. Att'y Gen. 482, 486 (1831):

> An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done. If he abuses this power, he is liable to the client whom he injures.... An attorney of the United States, except in so far as his power may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting.

2/ Id.

3/ See also 2 Op. Att'y Gen. 482, 486 (1831); 22 Op. Att'y Gen. 491, 494 (1899); 23 Op. Att'y Gen. 507, 508-09 (1901). See generally Schwartz, Federal Criminal Jurisdiction and Prosecutors Discretion, 13 Law & Contemp. Prob. 64 (1948).

Numerous Supreme Court decisions have confirmed the power of the Attorney General to exercise his discretion in the institution, control, and settlement of suits in behalf of the United States. See e.g., Confiscation Cases, supra; U.S. v. San Jacinto Tin Co., supra; U.S. v. Throckmorton, 98 U.S. 61, 70 (1878); In re Neagle, 135 U.S. 1, 67 (1890); New York v. New Jersey, 256 U.S. 296, 308 (1921); Kern River Co. v. U.S., 257 U.S. 147, 155 (1921); Ponzi v. Fessendon, 258 U.S. 254, 262 (1922); Petite v. U.S., 361 U.S. 529 (1960). 4/

There is also a long line of lower court cases recognizing this authority. See e.g., U.S. v. Alessio, 528 F.2d 1079 (9 Cir. 1976); U.S. v. Cawley, 481 F.2d 702 (5 Cir. 1973); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379 (2 Cir. 1973); U.S. v. Kysar, 459 F.2d 422, 424 (10 Cir. 1972); Spillman v. U.S., 413 F.2d 527, 530 (9 Cir. 1969); Newman v. U.S., 382 F.2d 479 (D.C. Cir. 1967); U.S. v. Cox, 342 F.2d 167 (5 Cir. 1965), cert. denied, Cox v. Hauberg, 381 U.S. 935 (1965); Goldberg v. Hoffman, 225 F.2d 463 (7 Cir. 1955); District of Columbia v. Buckley, 128 F.2d 17, 20-21 (D.C. Cir. 1942); Pugach v. Klein, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); U.S. v. Woody, 2 F.2d 263 (D. Mont. 1924).

A final source for the Attorney General's authority to exercise prosecutorial discretion can be found in the various statutes creating his office and conferring upon him the power to supervise and conduct the litigation and other legal affairs of the United States. 28 U.S.C. §§515-519, 547; Judiciary Act of 1789, Ch. 20, §35, 1 Stat. 92; Act of June 22, 1870, Ch. 150, 16 Stat. 162.

Most of the aforementioned federal cases dealing with prosecutorial discretion state that the power of the executive authorities is plenary and may not be reviewed by the judiciary. Nevertheless, dicta in several court decisions has indicated that selective prosecution based upon certain suspect classifications may violate the Constitution. 5/ Courts have also indicated that they will not tolerate an arbitrary exercise of prosecutorial discretion by an ad-

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4/ See also Oyler v. Boles, 368 U.S. 448 (1962) (selective prosecution by state authorities not a violation of constitutional rights where not based upon unjustifiable standard); Linda R.S. v. Richard D., 410 U.S. 614 (1973) (private party has no standing to compel prosecution by state authorities).

5/ Oyler v. Boles, supra at note 4 (selection not based on unjustifiable standard such as race, religion, or other arbitrary classification); Nader v. Saxbe, 497 F.2d 676, 679 n. 19 (D.C. Cir. 1974) (exercise of prosecutorial discretion, like any other exercise of executive discretion, subject to statutory and constitutional limits enforceable through judicial review); U.S. v. Sacco, 428 F.2d 264, 271 (9 Cir. 1970), cert. denied, 400 U.S. 903 (1970) (selective prosecution not a constitutional violation where no allegation that it was based on constitutionally suspect classification).

ministrative agency. 6/

Prosecutorial Discretion in Immigration Cases

It has been pointed out that prosecutorial discretion may be exercised in administrative, as well as criminal contexts. 7/ One of the earliest manifestations of prosecutorial discretion in an immigration-related field is Department of Justice Circular Letter Number 107, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization. That letter states:

> In the opinion of the department, as a general rule, good cause is not shown for the institution of proceedings to cancel certificates of naturalization alleged to have been fraudulently or illegally procured unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country.

This policy still governs denaturalization cases. See Interp. 340.1(f).

The Attorney General has exercised prosecutorial discretion in the immigration area in the cases of aliens deportable under §241(a)(4) of the Immigration and Nationality Act who are eligible to receive state court expungements at a future date. In a letter to the Commissioner of Immigration, dated January 17, 1961, Attorney General Rogers stated that the Service should "withhold or terminate proceedings under section 241(a)(4) of the Immigration and Nationality Act in the cases of youthful offenders who are eligible for an honorable discharge from the control of the California Youth Authority."

6/ Moog Industries, Inc. v. F.T.C., 355 U.S. 411 (1958) and F.T.C. v. Universal Rundle Corp., 387 U.S. 244, 251 (1967) (FTC does not have unbridled power to institute proceedings that will arbitrarily destroy one of many law violators in an industry); Lennon v. INS, 527 F.2d 187, 195 (2 Cir. 1975) (dictum) (courts will not condone selective prosecution based upon secret political grounds); Lennon v. United States, 387 F. Supp. 651, 564 (S.D.N.Y. 1975) (Government cannot institute deportation proceedings solely as penalty for exercise of constitutional rights). See also U.S. v. Berrios, 501 F.2d 1207, 1209 (2 Cir. 1974). See generally K. Davis, Administrative Law Treatise §28.16, at 982 (1958); Note, Reviewability of Prosecutorial Discretion: Failure to Prosecute, 75 Colum. L. Rev. 130 (1975).

7/ See e.g., Vaca v. Sipes, supra note 1. See also Bachowski v. Brennan, 502 F.2d 79, 87 (3 Cir. 1974), reversed on other grounds, Dunlop v. Bachowski, 421 U.S. 560 (1975), where the court stated that prosecutorial discretion could be exercised in administrative contexts, "which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights."

Numerous administrative decisions have affirmed the power of Service officers to exercise prosecutorial discretion. For instance, in Matter of Vizcarra-Delgadillo, 13 I&N Dec. 51, 53 (BIA 1968), the Board of Immigration Appeals upheld the authority of the District Director to move that proceedings be terminated as improvidently begun. The Board commented on the nature of the District Director's authority:

> Those charged with responsibility for enforcing the criminal laws have prosecutive discretion in determining whether to initiate criminal prosecution in a given case. A similar discretion not to proceed in a given case must be accorded to those responsible for immigration law enforcement. And where, following the formal start of deportation proceedings, additional facts or policy considerations arise which lead those responsible to conclude that this is not the sort of case in which such proceedings should have been started in the first place, 8 CFR 242.7 wisely provides the mechanics for termination on the ground that the proceeding was "improvidently begun." (Footnotes omitted)

Another case, Matter of Andrade, I.D. 2276 (BIA 1964), dealt with a minor who had been convicted of a marihuana violation which was expunged under a state law comparable to the Federal Youth Corrections Act. An order of deportation was initially entered. Thereafter, however, in connection with a petition for certiorari filed in the United States Supreme Court, the Solicitor General urged the Service to reconsider its policy with respect to such expungements and to administratively set aside the order of deportation. In response to this suggestion, the Service moved for termination of the deportation proceedings. The Board granted the Service's motion stating that, "the Service's determination not to initiate or press deportation proceedings in a given case or class of cases is a matter of prosecutorial judgment which we do not review."

Many other administrative decisions recognize and affirm the Service's power to exercise prosecutorial discretion. See e.g., Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971); Matter of Wong, 13 I&N Dec. 701 (BIA 1971); Matter of Gallares, I.D. 2177 (BIA 1972); Matter of Merced, I.D. 2273 (BIA 1974), aff'd per curiam Merced v. INS, 514 F.2d 1070 (5 Cir. 1975); Matter of Lennon, I.D. 2304 (BIA 1974), rev'd on other grounds, Lennon v. INS, 527 F.2d 187 (2 Cir. 1975). See also Matter of Anaya, I.D. 2243 (BIA 1973), aff'd per curiam, Anaya v. INS, 500 F.2d 574 (5 Cir. 1974); Matter of Felix, I.D. 2149 (BIA 1972). See also Roberts, The Exercise of Administrative Discretion Under the Immigration Laws, 13 San Diego L. Rev. 144, 149-52 (1975).

The Service's power to exercise prosecutorial discretion is inherent in the nature of its enforcement function and does not depend upon any specific provision of the Immigration and Nationality Act. The Service has nevertheless promulgated regulations and operations instructions dealing with the exercise of prosecutorial discretion.

8 CFR 242.7(a) sets forth the authority of the District Director to cancel or move for cancellation of deportation proceedings if "he is satisfied that the respondent is actually a national of the United States, or is not deportable under the immigration laws, or is deceased, or is not in the United States, or that the proceeding was improvidently begun." (underscoring supplied).

It is obvious that the "improvidently begun" ground is in addition to the "not deportable" ground and includes individuals who are deportable, but whose departure the Service, for policy or humanitarian reasons, does not choose to enforce. Operations Instruction 103.1(c)(1)(ii) lists various factors to be considered in determining whether to place an alien in the "deferred action" (formerly "nonpriority") category, meaning that deportation proceedings will not be instituted or continued against the alien. 8/

In addition to the discretion not to institute deportation proceedings, prosecutorial discretion may be exercised in connection with various other discretionary remedies, such as voluntary departure, 9/ and stays of deportation. 10/

Courts have acknowledged that a determination whether or not to enforce a deportable alien's departure in a particular case is normally within the sound discretion of the Service officer having responsibility over the case. See e.g., Balanos v. Kiley, 509 F.2d 1023 (2 Cir. 1975); Vassiliou v. INS, 461 F.2d 1193 (10 Cir. 1972); Spata v. INS, 442 F.2d 1013 (2 Cir. 1971), cert. denied, 404 U.S. 857 (1971); Armstrong v. INS, 445 F.2d 1395 (9 Cir. 1971); Bowes v. District Director, 443 F.2d 30 (9 Cir. 1971); Manantan v. INS, 425 F.2d 693 (7 Cir. 1970); Discaya v. INS, 339 F. Supp. 1034 (N.D. Ill. 1972). See also Pignatello v. Attorney General, 350 F.2d 719, 725 (2 Cir. 1965). However, in Lennon v. U.S., 387 F. Supp. 561 (S.D.N.Y. 1975), the court indicated that a claim of selective deportation presents a proper issue for judicial review, and in Lennon v. INS, 527 F.2d 187, 195 (2 Cir. 1975), the court indicated in dictum that selective deportation based on political motives will not be tolerated. See also Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974).

In Vergel v. INS, ____ F.2d _____, Civ. No. 75-1526 (8 Cir. June 2, 1976), the court sustained an order of deportation, but noted that there was a substantial

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8/ See also Wildes, The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, (two parts) 53 Interpreter Releases 25, 33 (1976).

9/ 8 CFR 244.1, 244.2. See Matter of Anaya, I.D. 2243 (BIA 1973), aff'd per curiam, 500 F.2d 574 (5 Cir. 1974); Matter of Felix, I.D. 2149 (BIA 1972)

10/ 8 CFR 243.4.

basis for allowing the alien to remain in the United States in the "deferred action category" under O.I. 103.1(a)(1)(ii). The court stated that it would be "appropriate for the District Director to make further inquiry to that end," and stayed its mandate for 90 days in order to allow the District Director to consider the alien's claim.

In several other cases, courts have upheld deportation orders while suggesting that the Service might appropriately exercise prosecutorial discretion to stay execution of the orders. See e.g., U.S. v. McAlister, 395 F.2d 852 (3 Cir. 1968); 11/ Lieggi v. INS, Civ. No. 75-1393 (7 Cir. January 27, 1976), reversing 389 F. Supp. 12 (N.D. Ill. 1975); 12/ Dunn v. INS, Civ. No. 72-2186 (9 Cir. February 20, 1974), cert. denied 419 U.S. 919 (1974). 13/

Proper Time for Exercise

Normally the appropriate time for the exercise of prosecutorial discretion is prior to the institution of proceedings. The primary reason for this is the humanitarian factor; it makes little sense to put an alien through the ordeal and expense of a deportation proceeding when his actual removal will not be sought.

In addition, there are practical considerations. Deportation proceedings tie up Government manpower and resources that could be used in performing other important functions. Given the present illegal alien problem such a use of scarce resources on aliens whom the Service does not ultimately intend to deport is indefensible. Moreover, once a final administrative order of deportation is issued, the Service cannot prevent the alien from seeking judicial review. When a case with extremely appealing factors goes to court, it may place the Service in an unfavorable light, both before the court and in the forum of public opinion.

There are some situations, however, where prosecutorial discretion is properly exercised after the institution or completion of deportation proceedings. The sympathetic or humanitarian factors may not arise or become apparent until after the case has been started. In other cases involving aliens who may have committed serious offenses but are allowed to remain on the representation that

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11/ "Therefore, we think it would be appropriate for the Department to make further inquiry to the end that, if justified, appellant's deportation at least be stayed during his good behavior."

12/ "We agree...that this is a hardship case. Therefore the Government should afford petitioner any administrative remedy that may still be available...."

13/ "While this is a case in which the administrative discretion of the INS might have been exercised with greater compassion the scope of our review in this area is extremely narrow."

they are the sole support of United States citizen families, it may be desirable to have a final order of deportation outstanding for immediate execution in the event of any further misconduct.

Conclusion

The power of various officers of the Executive Branch to exercise prosecutorial discretion is inherent and does not depend on express statutory authorization. Officers of the Service have been recognized as possessing such power, and provision for its exercise has been made in both the regulations and the operations instructions.

Although there is authority for the plenary nature of prosecutorial discretion, the trend, especially in administrative contexts, is towards judicial review of prosecutorial discretion to ascertain that it is not being exercised in a way that would be constitutionally suspect or grossly unfair. Consequently, the Service's attempts to set forth some standards for the exercise of prosecutorial discretion are particularly appropriate.

Finally, prosecutorial discretion may be exercised before, during, or after the completion of deportation proceedings. Normally, however, such discretion is best exercised prior to the institution of proceedings.

CC: W/F - Opinions of the General Counsel, 1976

CC: CO 240-P

PWS:amb

EXHIBIT 13

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately.

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term 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, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years 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." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

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. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. <u>How important is the Federal interest in the case, as compared to other cases and priorities</u>? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

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[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien–if served with an NTA–would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict

[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- Immigration status: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- Length of residence in the United States: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- Criminal history: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien's age at the time the crime was committed and whether or not he or she is a repeat offender.
- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- Immigration history: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.

- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.
- Likelihood of achieving enforcement goal by other means: In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.
- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.
- Effect of action on future admissibility: The effect an action such as removal may have on an alien can vary–for example, a time-limited as opposed to an indefinite bar to future admissibility–and these effects may be considered.
- Current or past cooperation with law enforcement authorities: Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.
- Honorable U.S. military service: Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).
- Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.
- Resources available to the INS: As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly "right" answer. Choosing a course of action in difficult

cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter

will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority – such as this memorandum–from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.

EXHIBIT 14

Office of the Principal Legal Advisor
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

As you know, when Congress abolished the Immigration and Naturalization Service and divided its functions among U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (CIS), the Office of the Principal Legal Advisor (OPLA) was given exclusive authority to prosecute all removal proceedings. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002) ("the legal advisor * * * shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review"). Complicating matters for OPLA is that our cases come to us from CBP, CIS, and ICE, since all three bureaus are authorized to issue Notices to Appear (NTAs).

OPLA is 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 reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

Since the NTA-issuing authorities are no longer all under the same roof, adhering to INS OGC's attorney-client model would minimize our efficiency. This is particularly so since we are litigating our hundreds of thousands of cases per year with only 600 or so attorneys; that our case preparation time is extremely limited, averaging about 20 minutes a case; that our caseload will increase since Congress is now providing more resources for border and interior immigration enforcement; that many of the cases that come to us from NTA-issuers lack supporting evidence like conviction documents; that we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets; that we have growing collateral duties such as

assisting the Department of Justice with federal court litigation; that in many instances we lack sufficient staff to adequately brief Board appeals or oppositions to motions to reopen; and that the opportunities to exercise prosecutorial discretion arise at many different points in the removal process.

To elaborate on this last point, the universe of opportunities to exercise prosecutorial discretion is large. Those opportunities arise in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs or what charges and evidence to base them on. They arise in the course of litigating the NTA in immigration court, when we may want, among other things, to move to dismiss a case as legally insufficient, to amend the NTA, to decide not to oppose a grant of relief, to join in a motion to reopen, or to stipulate to the admission of evidence. They arise after the immigration judge has entered an order, when we must decide whether to appeal all or part of the decision. Or they may arise in the context of DRO's decision to detain aliens, when we must work closely with DRO in connection with defending that decision in the administrative or federal courts. In the 50-plus immigration courtrooms across the United States in which we litigate, OPLA's trial attorneys continually face these and other prosecutorial discretion questions. Litigating with maximum efficiency requires that we exercise careful yet quick judgment on questions involving prosecutorial discretion. This will require that OPLA's trial attorneys become very familiar with the principles in this memorandum and how to apply them.

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration 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. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

Given the complexity of immigration law, a complexity that federal courts at all levels routinely acknowledge in published decisions, your expert assistance to the U.S. Attorneys is critical.[1] It is all the more important because the decision whether to

[1] As you know, if and when your resources permit it, I encourage you to speak with your respective United States Attorneys' Offices about having those Offices designate Special Assistant U.S. Attorneys from OPLA's ranks to handle both civil and criminal federal court immigration litigation. The U.S.

proceed with litigating a case in the federal courts must be gauged for reasonableness, lest, in losing the case, the courts award attorneys' fees against the government pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating.

* * * * * * * * * *

With this background in mind, I am directing that all OPLA attorneys apply the following principles of prosecutorial discretion:

1) Prosecutorial Discretion Prior to or in Lieu of NTA Issuance:

In the absence of authority to cancel NTAs, we should engage in client liaison with CBP, CIS (and ICE) via, or in conjunction with, CIS/CBP attorneys on the issuance of NTAs. We should attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.

It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons exist, a stayed removal order might yield enhanced law enforcement cooperation. See Attachment A (Memorandum from Wesley Lee, ICE Acting Director, Office of Detention and Removal, Alien Witnesses and Informants Pending Removal (May 18, 2005)); see also Attachment B (Detention and Removal Officer's Field Manual, Subchapters 20.7 and 20.8, for further explanation on the criteria and procedures for stays of removal and deferred action).

Examples:

- **Immediate Relative of Service Person**- If an alien is an immediate relative of a military service member, a favorable exercise of discretion, including not issuing an NTA, should be a prime consideration. Military service includes current or former members of the Armed Forces, including: the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts. OPLA counsel should analyze possible eligibility for citizenship under

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Attorneys' Offices will benefit greatly from OPLA SAUSAs, especially given the immigration law expertise that resides in each of your Offices, the immigration law's great complexity, and the extent to which the USAOs are now overburdened by federal immigration litigation.

sections 328 and 329. See Attachment C (Memorandum from Marcy M. Forman, Director, Office of Investigations, Issuance of Notices to Appeal, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004)).

- **Clearly Approvable I-130/I-485**- Where an alien is the potential beneficiary of a clearly approvable I-130/I-485 and there are no serious adverse factors that otherwise justify expulsion, allowing the alien the opportunity to legalize his or her status through a CIS-adjudicated adjustment application can be a cost-efficient option that conserves immigration court time and benefits someone who can be expected to become a lawful permanent resident of the United States. See Attachment D (Memorandum from William J. Howard, OPLA Principal Legal Advisor, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005)).

- **Administrative Voluntary Departure**- We may be consulted in a case where administrative voluntary departure is being considered. Where an alien is eligible for voluntary departure and likely to depart, OPLA attorneys are encouraged to facilitate the grant of administrative voluntary departure or voluntary departure under safeguards. This may include continuing detention if that is the likely end result even should the case go to the Immigration Court.

- **NSEERS Failed to Register**- Where an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien's hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements. See Attachment E (Memorandum from Victor Cerda, OPLA Acting Principal Legal Advisor, Changes to the National Security Entry Exit Registration System (NSEERS)(January 8, 2004)).

- **Sympathetic Humanitarian Factors**- Deferred action should be considered when the situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. DHS has the most prosecutorial discretion at this stage of the process.

2) Prosecutorial Discretion after the Notice to Appear has issued, but before the Notice to Appear has been filed:

We have an additional opportunity to appropriately resolve a case prior to expending court resources when an NTA has been issued but not yet filed with the immigration court. This would be an appropriate action in any of the situations

identified in #1. Other situations may also arise where the reasonable and rational decision is not to prosecute the case.

Example:

- **U or T visas**- Where a "U" or "T" visa application has been submitted, it may be appropriate not to file an NTA until a decision is made on such an application. In the event that the application is denied then proceedings would be appropriate.

3) Prosecutorial Discretion after NTA Issuance and Filing:

The filing of an NTA with the Immigration Court does not foreclose further prosecutorial discretion by OPLA Counsel to settle a matter. There may be ample justification to move the court to terminate the case and to thereafter cancel the NTA as improvidently issued or due to a change in circumstances such that continuation is no longer in the government interest.[2] We have regulatory authority to dismiss proceedings. Dismissal is by regulation without prejudice. See 8 CFR §§ 239.2(c), 1239.2(c). In addition, there are numerous opportunities that OPLA attorneys have to resolve a case in the immigration court. These routinely include not opposing relief, waiving appeal or making agreements that narrow issues, or stipulations to the admissibility of evidence. There are other situations where such action should also be considered for purposes of judicial economy, efficiency of process or to promote justice.

Examples:

[2] Unfortunately, DHS's regulations, at 8 C.F.R. 239.1, do not include OPLA's attorneys among the 38 categories of persons given authority there to issue NTAs and thus to cancel NTAs. That being said, when an OPLA attorney encounters an NTA that lacks merit or evidence, he or she should apprise the issuing entity of the deficiency and ask that the entity cure the deficiency as a condition of OPLA's going forward with the case. If the NTA has already been filed with the immigration court, the OPLA attorney should attempt to correct it by filing a form I-261, or, if that will not correct the problem, should move to dismiss proceedings without prejudice. We must be sensitive, particularly given our need to prioritize our national security and criminal alien cases, to whether prosecuting a particular case has little law enforcement value to the cost and time required. Although we lack the authority to sua sponte cancel NTAs, we can move to dismiss proceedings for the many reasons outlined in 8 CFR § 239.2(a) and 8 CFR § 1239.2(c). Moreover, since OPLA attorneys do not have independent authority to grant deferred action status, stays of removal, parole, etc., once we have concluded that an alien should not be subjected to removal, we must still engage the client entity to "defer" the action, issue the stay or initiate administrative removal.

- **Relief Otherwise Available**- We should consider moving to dismiss proceedings without prejudice where it appears in the discretion of the OPLA attorney that relief in the form of adjustment of status appears clearly approvable based on an approvable I-130 or I-140 and appropriate for adjudication by CIS. See October 6, 2005 Memorandum from Principal Legal Advisor Bill Howard, supra. Such action may also be appropriate in the special rule cancellation NACARA context. We should also consider remanding a case to permit an alien to pursue naturalization.[3] This allows the alien to pursue the matter with CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

- **Appealing Humanitarian Factors**- Some cases involve sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this, as noted above, include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. OPLA attorneys should consider these matters to determine whether an alternative disposition is possible and appropriate. Proceedings can be reinstituted when the situation changes. Of course, if the situation is expected to be of relatively short duration, the Chief Counsel Office should balance the benefit to the Government to be obtained by terminating the proceedings as opposed to administratively closing proceedings or asking DRO to stay removal after entry of an order.

- **Law Enforcement Assets/CIs**- There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States for a period of time to assist with investigation or to testify at trial. Moving to dismiss a case to permit a grant of deferred action may be an appropriate result in these circumstances. Some offices may prefer to administratively close these cases, which gives the alien the benefit of remaining and law enforcement the option of calendaring proceedings at any time. This may result in more control by law enforcement and enhanced cooperation by the alien. A third option is a stay.

4) **Post-Hearing Actions**:

Post-hearing actions often involve a great deal of discretion. This includes a decision to file an appeal, what issues to appeal, how to respond to an alien's appeal, whether to seek a stay of a decision or whether to join a motion to reopen. OPLA

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[3] Once in proceedings, this typically will occur only where the alien has shown prima facie eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 CFR §1239.1(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. Matter of Cruz, 15 I&N Dec. 236 (BIA 1975); see Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA's reliance on Matter of Cruz when petitioner failed to establish prima facie eligibility.).

attorneys are also responsible for replying to motions to reopen and motions to reconsider. The interests of judicial economy and fairness should guide your actions in handling these matters.

Examples:

- **Remanding to an Immigration Judge or Withdrawing Appeals**- Where the appeal brief filed on behalf of the alien respondent is persuasive, it may be appropriate for an OPLA attorney to join in that position to the Board, to agree to remand the case back to the immigration court, or to withdraw a government appeal and allow the decision to become final.

- **Joining in Untimely Motions to Reopen**- Where a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is legally eligible to be granted that relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1003.23, strongly consider exercising prosecutorial discretion and join in this motion to reopen to permit the alien to pursue such relief to the immigration court.

- **Federal Court Remands to the BIA**- Cases filed in the federal courts present challenging situations. In a habeas case, be very careful to assess the reasonableness of the government's detention decision and to consult with our clients at DRO. Where there are potential litigation pitfalls or unusually sympathetic fact circumstances and where the BIA has the authority to fashion a remedy, you may want to consider remanding the case to the BIA. Attachments H and I provide broad guidance on these matters. Bring concerns to the attention of the Office of the United States Attorney or the Office of Immigration Litigation, depending upon which entity has responsibility over the litigation. See generally Attachment F (Memorandum from OPLA Appellate Counsel, U.S. Attorney Remand Recommendations (rev. May 10, 2005)); see also Attachment G (Memorandum from Thomas W. Hussey, Director, Office of Immigration Litigation, U.S. Department of Justice, Remand of Immigration Cases (Dec. 8, 2004)).

- **In absentia orders.** Reviewing courts have been very critical of in absentia orders that, for such things as appearing late for court, deprive aliens of a full hearing and the ability to pursue relief from removal. This is especially true where court is still in session and there does not seem to be any prejudice to either holding or rescheduling the hearing for later that day. These kinds of decisions, while they may be technically correct, undermine respect for the fairness of the removal process and cause courts to find reasons to set them aside. These decisions can create adverse precedent in the federal courts as well as EAJA liability. OPLA counsel should be mindful of this and, if possible, show a measured degree of flexibility, but

only if convinced that the alien or his or her counsel is not abusing the removal court process.

5) **Final Orders- Stays and Motions to Reopen/Reconsider**:

Attorney discretion doesn't cease after a final order. We may be consulted on whether a stay of removal should be granted. See Attachment B (Subchapter 20.7). In addition, circumstances may develop whether the proper and just course of action would be to move to reopen the proceeding for purposes of terminating the NTA.

Examples:

- **Ineffective Assistance**- An OPLA attorney is presented with a situation where an alien was deprived of an opportunity to pursue relief, due to incompetent counsel, where a grant of such relief could reasonably be anticipated. It would be appropriate, assuming compliance with Matter of Lozada, to join in or not oppose motions to reconsider to allow the relief applications to be filed.
- **Witnesses Needed, Recommend a Stay**- State law enforcement authorities need an alien as a witness in a major criminal case. The alien has a final order and will be removed from the United States before trial can take place. OPLA counsel may recommend that a stay of removal be granted and this alien be released on an order of supervision.

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Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

Official Use Disclaimer:

This memorandum is protected by the Attorney/Client and Attorney Work product privileges and is for Official Use Only. This memorandum is intended solely to provide legal advice to the Office of the Chief Counsels (OCC) and their staffs regarding the appropriate and lawful exercise of prosecutorial discretion, which will lead to the efficient management of resources. It is not intended to, does not, and may not be relied upon to create or confer any right(s) or benefit(s), substantive or procedural, enforceable at law by any individual or other party in

removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse. Finally this internal guidance does not have the force of law, or of a Department of Homeland Security Directive.

EXHIBIT 15

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

NOV - 7 2007

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge

FROM: Julie L. Myers
Assistant Secretary

SUBJECT: Prosecutorial and Custody Discretion

This memorandum serves to highlight the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers. The commitment by ICE to facilitate an end to the "catch and release" procedure for illegal aliens does not diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to meritorious health related cases and caregiver issues.

The process for making discretionary decisions is outlined in the attached memorandum of November 7, 2000, entitled "Exercising Prosecutorial Discretion." Field agents and officers are not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process.

For example, in situations where officers are considering taking a nursing mother into custody, the senior ICE field managers should consider:

- Absent any statutory detention requirement or concerns such as national security, threats to public safety or other investigative interests, the nursing mother should be released on an Order of Recognizance or Order of Supervision and the Alternatives to Detention programs should be considered as an additional enforcement tool;
- In situations where ICE has determined, due to one of the above listed concerns or a statutory detention requirement to take a nursing mother into custody, the field personnel should consider placing a mother with her non-U.S. citizen child in the T. Don Hutto or Berks family residential center, provided there are no medical or legal issues that preclude their removal and they meet the placement factors of the facility. For a nursing mother with a U.S. citizen child, the pertinent state social service agencies should be contacted to identify and address any caregiver issues the alien mother might have in order to maintain the unity of the mother and child if the above listed release condition can be met;
- The decision to detain nursing mothers shall be reported through the programs' operational chain of command.

Requests for Headquarters assistance to address arrests and custody determinations as they relate to this issue may be addressed to the appropriate Assistant Director for Operations within OI or DRO.

Attachment

EXHIBIT 16

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 17

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 18

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.

[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 19

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL.	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	Civil Action B-94-228
	§	
THE UNITED STATES OF AMERICA, ET AL.,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Motion to Dismiss and Amended Motion to Dismiss the Plaintiffs' Original Complaint. The Defendants' Motion is predicated on two grounds: First, that the Plaintiffs' cause of action is not justiciable; and second, that the specific counts fail to state a claim upon which relief can be granted.

The Plaintiffs' Complaint seeks to assign to the federal government responsibility for the financial consequences of illegal immigration.

On August 3, 1994, the following Plaintiffs filed their Original Complaint:

(1) The State of Texas, on its own behalf and on behalf of all Texans as *parens patriae*;

(2) Ann Richards, Governor of the State of Texas;

(3) El Paso Independent School District and La Joya Independent School District on their own behalf and on behalf of all independent school districts in Texas;

(4) Harris County Hospital District, Dallas County Hospital District, and Bexar County Hospital District on their own behalf and as class representatives of all hospital districts in

Hospital District on their own behalf and as class representatives of all hospital districts in Texas;

(5) Harris County, Dallas County, and Hidalgo County on their own behalf and as class representatives of all counties in Texas; and

(6) The City of Odessa on its own behalf and as class representatives of all municipalities in Texas.

A hearing on all pending motions was conducted December 14, 1994, wherein all parties appeared. After the Court issued a preliminary ruling from the bench indicating its inclination to grant the Defendants' Motion to Dismiss, the Court invited the State of Texas and the Defendants to file additional briefs if they so chose. Later, upon the request of Plaintiffs' counsel, the deadline for additional briefs was extended to December 31, 1994.

After consideration of the parties' briefs and the proffered evidence, the Court is of the opinion that the Defendants' Motion to Dismiss should be granted.

STANDARD OF REVIEW

The Defendants seek dismissal of the entire complaint under Federal Rule of Civil Procedure 12(b)(6) for the Plaintiffs' failure to state a claim upon which relief may be granted. A plaintiff must, pursuant to Rule 8(a), present "a short and plain statement of the claim showing that the pleader is entitled to relief." In deciding whether to dismiss the Plaintiffs' cause of action, the Court must take all the facts alleged by the Plaintiffs as true and judge such facts in a light most favorable to the Plaintiffs.

THE PLAINTIFFS' COMPLAINT

The crux of the Plaintiffs' Complaint goes to the Federal Government's alleged failure

to prevent illegal immigration into the State of Texas, forcing Texas to allocate state funds to pay the associated costs for health and human services, criminal justice, and education.

In Count I, the Plaintiffs argue that the Naturalization Clause of the U.S. Constitution requiring the federal government to "establish an uniform Rule of Naturalization" constitutionally obligates the federal government to pay for the development, implementation, enforcement, and consequences of its immigration policy. Indeed, the Plaintiffs argue, the federal government preempts the field, constitutionally prohibiting Texas from implementing, enforcing or paying for its own immigration policy. According to the Plaintiffs, the alleged failure of the federal government to pay for the financial consequences of the federal immigration policy violates Article 1, Section 8, Clause 4 of the U.S. Constitution.

Count II of the Complaint also arises from Article I, Section 8, Clause 4. Using the same reasoning as in Count I, the Plaintiffs assert that the Defendants have failed in their constitutional duty to control illegal immigration and safeguard the nation's borders. Due to this failure, the Plaintiffs have been forced to pay the financial consequences of the presence of illegal immigrants in Texas.

Count III asserts a violation of the Tenth Amendment to the Constitution. The Plaintiffs reason that, by failing to pay for the financial consequences of illegal immigration, the Defendants have forced the state and local agencies to provide and finance services for illegal immigrants. By such force, the Plaintiffs claim that the Federal Defendants have commandeered these state and local agencies, stripping them of their discretion.

Count IV and V state violations of the Guaranty Clause of the U.S. Constitution. The Plaintiffs reason that the political accountability of elected official to the citizenry has been

In the benchmark case addressing the political question doctrine, the Supreme Court stated that the "nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). In *Baker*, the Supreme Court upheld the justiciability of legislative reapportionment in Tennessee. In reaching its conclusion that the political question doctrine should not be invoked to bar judicial consideration, the Supreme Court fashioned the following analysis:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

Unquestionably, immigration and naturalization issues have a textually demonstrable commitment to Congress pursuant to Article I, Section 8, Clause 4 of the U.S. Constitution.

The dominant considerations in determining whether an issue is a political question are "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 706 (1962), *citing Coleman v. Miller*, 307 U.S. 433, 454-455.

The Court in this case finds no manageable standard by which the Court may fairly judge the federal immigration policy. In order to find a failure of the federal immigration policy, the Court must evaluate that policy. However, it is not possible for the Court to determine at what increment the complex federal immigration policy violates the Constitution.

Only in a political forum can the myriad causes of illegal immigration and its costs and benefits be laid fully on the table. This Court has only before it the limited issue of the State's entitlement to restitution.

The Supreme Court reasoned in *Nixon v. United States*, ___ U.S. ___, 113 S.Ct. 732, 735 (1993), that the "lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." For the Court to fashion a remedy taking the multiplicity of relevant factors and solutions into account is unfeasible and unjustly expedient. Clearly, the problem of illegal immigration into the United States cries out for a political solution in a legislative arena. Indeed, it defies a judicial solution.

Thus, the Court shall grant the Defendants' Motion to Dismiss because the Plaintiffs' Complaint is nonjusticiable.

B. Plaintiffs Lack Standing

In *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992), the Court dictated three requirements for standing:

> (1) The plaintiff must have suffered an "injury in fact"--an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.
> (2) There must be a causal connection between the alleged injury and the defendant's conduct. The injury must be fairly traceable to the defendant's actions and not the result of the independent action of some third party not before the court.
> (3) It must be likely--not speculative--that the injury will be redressed by a favorable decision.

While the Texas Plaintiffs' expenditures on illegal immigrants may constitute an injury in fact that might be redressed through a favorable judicial decision, the Court finds no causal

connection between their injury and the Defendants' conduct. As the Defendants argue in their Motion to Dismiss, the Plaintiffs' injury stems from the "conscious actions of aliens to enter Texas illegally." The Plaintiffs respond that the Defendants' denial of causation is belied by the Defendants' enormous expenditures toward prevention of illegal immigration. The Plaintiffs cannot understand why the Defendants expend such funds if there is no cause and effect relationship between the Defendants' immigration policy and the existence or level of immigration.

However, the Plaintiffs' argument is facile. No one can seriously argue that the Defendants' policy actually causes or encourages persons to immigrate illegally into the state of Texas. Rather, the federal immigration policy is a preventative *response* to illegal immigration--not a stimulus. The Plaintiffs' injury cannot be fairly traced to the Defendants' preventative efforts.

Therefore, the Court shall grant the Defendants' Motion to Dismiss because the Plaintiffs lack standing.

C. Sovereign Immunity

In addition to monetary relief, the Plaintiffs have requested equitable and declaratory relief as well. Thus, even if sovereign immunity bars the Plaintiffs' claims for monetary relief, the Court must still decide whether the Plaintiffs are entitled to the equitable and declaratory relief requested in the specific Counts. Therefore, the Court will not rule on the issue of sovereign immunity without first determining whether the Plaintiffs are otherwise entitled to relief.

II. SPECIFIC COUNTS OF PLAINTIFFS' CAUSE OF ACTION:

A. Violation of Article I, Section 8 of the Constitution

The Defendants seek dismissal of the Plaintiffs' claims sounding in the Naturalization Clause. In Counts I and II, the Plaintiffs argue that Article I, Section 8, Clause 4 of the Constitution grants exclusive jurisdiction of immigration policy and enforcement to the federal government. From that premise, the Plaintiffs reason that the federal government has the constitutional obligation to pay for the development, implementation, enforcement and consequences of its immigration policy. Arguing that the federal government has failed to meet this constitutional obligation, thereby creating financial consequences for the Texas Plaintiffs, the Plaintiffs conclude that the Defendants have violated the Naturalization Clause of the Constitution.

The Plaintiffs expand this reasoning in their Response to the Defendants' Motion to Dismiss. In that pleading, the Plaintiffs assert that responsibility to pay the costs of illegal immigration is "inextricably linked with, and the necessary counterpart to, 'authority'" over immigration and naturalization. However, this argument is a vague truism without legal substance.

Certainly, basic virtue demands that responsibility must accompany authority. But, this hardly leads to the conclusion that the federal government's exclusive authority over immigration and naturalization implies a duty to pay for the remotely incidental consequences of that authority. In many respects, the Plaintiffs' cause of action amounts to a series of unsupported assertions based on the erroneous proposition that the Naturalization Clause mandates the Federal Government to pay for the financial consequences of its policy, regardless of how remotely linked those costs are to that policy.

Despite the Texas Plaintiffs' contrary protestations, their argument indeed depends on the existence of a causal link between the federal government's immigration policy and its financial consequences on Texas. For, how can the Defendants be held financially accountable for their policy if it is not shown that their policy causes financial consequences? Further, while the Plaintiffs deny that they are asking the Court to evaluate the Federal Government's immigration enforcement efforts, such an evaluation is an essential prerequisite to a judicial determination that the Defendants have violated a duty under the Naturalization Clause.

To hold the federal government accountable for the financial consequences of illegal immigration likens to blaming the crowing rooster for the rising of the sun. This is perhaps the greatest weakness in the Plaintiffs' cause of action. They have failed to establish a true causal connection between the costs of illegal immigration and the federal immigration policy. So long as our relatively prosperous and stable nation shares the planet with countries stricken by civil unrest, social disorder and poverty, the influx of illegal immigrants into the United States is inevitable.

As the Defendants aptly note, the Plaintiffs' complaint arises from their dissatisfaction with the federal government's allocation of resources and execution of discretionary policies. For example, pursuant to 8 U.S.C. §1103, the Attorney General is authorized to perform such acts as she deems necessary for carrying out her statutory authority. Moreover, §1103 states that the Attorney General "shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the [Immigration and Naturalization]

Service as to him shall appear necessary and proper."

Clearly, the statute commits the decisionmaking to the discretion of the Attorney General. Such a statutory delegation of Congressional authority is in keeping with the Constitution's Naturalization Clause mandating Congress to "establish an uniform Rule of Naturalization." Thus, there exists a textually demonstrable commitment of the issue to a coordinate political department.

Such a commitment was demonstrated by the Supreme Court when it held that an agency's refusal to take enforcement action was not reviewable. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649 (1985). There, the Food and Drug Administration's refused to take enforcement actions under the Federal Food, Drug, and Cosmetic Act with respect to drugs used for lethal injections to carry out the death penalty. Nevertheless, the Court warned that an agency decision is only "presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-833, 105 S.Ct.at 1656.

The *Chaney* Court also noted that in cases where an agency's inaction is so extreme as to amount to an abdication of its statutory responsibilities, the statute conferring authority on the agency might indicate that such decisions were not committed to agency discretion. *Id.* at n. 4. But in the instant case, there is no abdication.

Clearly, the federal government proactively pursues a policy addressing illegal immigration, though by no means has such action equalled the demands created by the throngs of immigrants crossing our borders. Thus, while the Plaintiffs cannot complain that the Defendants are doing nothing to curb illegal immigration, it can be argued fairly that the

federal government is failing to do enough. But the Court refuses to find that this incremental failure amounts to a failure of constitutional proportions, particularly in light of inevitably limited resources, the numerous causes stimulating illegal immigration, as well as the substantial efforts already in place to address illegal immigration.

Indeed, courts are loathe to micromanage an agency's task. In *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851 (1975), the Supreme Court found that the Labor-Management Reporting and Disclosure Act's (LMRDA) language supplied sufficient standards to rebut the presumption of unreviewability. The Court found no merit to the Secretary of Labor's contention that his decisions were unreviewable because the Court found that the statute at issue withdrew discretion from the Secretary and provided mandatory guidelines for his enforcement of the statute. *Id.* at 567, n. 7, 95 S.Ct. 1858. Adopting the lower court's analysis, the Court found that the underlying statute limited the Secretary's discretion by clearly defining the factors he must consider to determine whether a statutory violation exists. *Id.* (citing *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974)).

Nevertheless, the *Heckler* Court found its prior decision in *Dunlop* to be consistent with the general presumption of unreviewability of decisions not to enforce because the LMRDA, unlike the Immigration and Naturalization Act, clearly withdrew discretion from the agency and provided guidelines for enforcement. *Heckler*, 470 U.S. at 834, 105 S.Ct. at 1657. More importantly for our purposes, the Court stated:

> The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress... *Id.*

The Texas Plaintiffs' claims similarly go to the "vigor" with which the Federal

Defendants exercise their power over immigration. However, where the complaint goes to the degree of enforcement and not to complete abdication, this Court will not review the federal government's enforcement decisions relating to immigration and naturalization absent a clear showing of a constitutional violation.

Therefore, the Court shall dismiss Counts I and II of the Plaintiffs' Complaint.

B. Count III - Violation of the Tenth Amendment to the Constitution

In Count III of their Complaint, the Plaintiffs argue that the actions of the Federal Defendants have diminished the ability of the State of Texas and her political subdivisions to govern themselves in violation of the Tenth Amendment. The Plaintiffs claim that the Defendants have "commandeered" state and local agencies which provide the necessary services to undocumented aliens by their failure to pay for the financial consequences of the federal immigration policy. The Plaintiffs reason in their Complaint that the federal policy has "coerced the Texas Plaintiffs into delivering social, health, educational, and correctional services of the large number of undocumented immigrants residing in Texas as a result of Federal Immigration Policy."

In their response, the Defendants point to the dichotomy established in *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992), wherein the Supreme Court distinguished Congressional actions that directly compel State conduct from those actions that only command State conduct indirectly. In that case, the Supreme Court found that a provision in the Low-Level Radioactive Waste Policy Act requiring states to take title of their undisposed waste was unconstitutional in its coercive nature.

The Plaintiffs' reasoning based on *New York* falls because there is no explicit mandate

and no coercion from the federal government in the instant case. Very simply, the Plaintiffs' predicament is the creation of third parties. Thus, while *New York* and its heritage basically prohibit the federal government from compelling states to enact a legislative program, no such force exists in this case. As the Defendants' aptly note in their Motion to Dismiss, the Plaintiffs can point to no statute, regulation or command of the federal government mandating the provision of public services to undocumented aliens.

In the instant case, unlike *New York*, Congress has developed the immigration policy and has not commanded the State of Texas to adopt specific policies in response to illegal immigration. The Plaintiffs mistakenly attribute their voluntary response to illegal immigration--a response compelled by extrinsic circumstances--to some coercive command from the federal government. The cost of illegal immigration borne on the Texas Plaintiffs results not from the Defendants' actions, but from the Plaintiffs' own decision to address the issues raised by illegal immigrants' presence in Texas.

Accordingly, the Court shall dismiss the Plaintiffs' Tenth Amendment claim.

C. Counts IV and V - Violation of the Guarantee Clause

Counts IV and V of the Plaintiffs' Complaint are basically the same. Both Counts enunciate the Plaintiffs' argument that the Defendants' actions violate Article IV, Section 4 of the United States Constitution guaranteeing to every state a republican form of government. The Plaintiffs reason that the failure of the federal government to assume financial responsibility for its immigration policy has foisted a financial burden upon the Plaintiffs, thereby diminishing the power of Texans to determine their own spending priorities.

The Texas Plaintiffs claim that they have no choice but to apprehend, prosecute and

incarcerate undocumented aliens who commit crimes in Texas. Moreover, the Texas Plaintiffs must provide health, social and educational services to the undocumented population. Such an infringement upon the Plaintiffs' coffers, according to the Plaintiffs' argument, necessarily undermines state officials' ability to respond to voters' demands. As stated in the Plaintiffs' Complaint, this compulsory financial burden has caused "the unilateral severance of political accountability" between Texas voters and their elected officials."

The Defendants respond that the Texas Plaintiffs "have not been required by any statute, regulation or command of defendants to undertake those obligations." Indeed, the Plaintiffs have never alleged that they have been overtly forced by statute or directive to provide services to undocumented immigrants. Instead, the Plaintiffs argue that they have been forced to provide services due to circumstances created by the Defendants.

However, the Court disagrees. The Court remains unconvinced for reasons aforementioned that the Defendants have caused the heavy migration of undocumented immigrants. The State of Texas remains free to allocate state funds and determine state policy pursuant to the wishes of the electorate.

The Court therefore shall dismiss the Plaintiffs' claim under the Guarantee Clause.

D. Count VI - Violation of the Annexation Guaranty

In their penultimate claim, the Texas Plaintiffs cite the "Articles of Annexation For Annexing Texas to the United States," codified at 5 U.S. Stat. 797. This Annexation Guaranty was established by a Joint Resolution passed on March 1, 1845. According to the Texas Plaintiffs, the Annexation Guaranty formed a condition precedent to Texas' admission to the Union "as well as a statutory commitment by the United States to protect the state's

'Republican Form of Government.'" The Plaintiffs claim that this promise has been violated by the Defendants' alleged interference with the ability of Texas citizens to democratically determine their own spending priorities.

For the reasons given in its discussion of Counts IV and V, the Court disagrees with the Plaintiffs' arguments in this Count and accordingly shall dismiss their claim herein.

E. Count VII – Administrative Procedures Act

According to the Texas Plaintiffs, the Federal Defendants have failed in their obligation to enforce and effectively administer the immigration laws, as well as in their alleged obligation to pay the costs of illegal immigration, in violation of the Administrative Procedure Act (APA). Such a dereliction of duty, say the Plaintiffs, is arbitrary, capricious and an abuse of discretion.

The Plaintiffs find the Defendants' underlying duty in the Immigration and Naturalization Act, 8 U.S.C. §1103, wherein Congress delegated the administration of the immigration laws to the U.S. Attorney General, who in turn delegated authority to the Immigration and Naturalization Service, 28 C.F.R. §§0.105(a) *et seq.* and 8 C.F.R. §2.1 and §100.2(a). The Plaintiffs argue that Attorney General Janet Reno, and those to whom she has delegated authority over the administration of the immigration laws, have violated the mandate of §1103 which assigns to the Attorney General the "power and duty to control and guard the boundaries and borders of the United States against the illegal entry of immigrants."

The Court does not agree, and shall not so find, that the presence of illegal immigrants in the State of Texas and the costs created by their presence results from any abdication of the Defendants' duty to control illegal immigration. While it is true that an agency action

becomes judicially reviewable where the agency has abdicated its bounden duty, there is no abdication in the instant case. Though all parties desire an improved federal immigration process, any failure to achieve such improvement, and the resulting costs to the State, do not amount to federal abdication. Simply put, the inability of the Defendants to control illegal immigration to the Plaintiffs' satisfaction does not give rise to a claim under the APA. There is neither a refusal by the Defendant to enforce the immigration laws nor a federal policy so extreme as to amount to an abdication of statutory responsibilities. *See Heckler*, 470 U.S. at 833 note 4, 105 S.Ct. at 1656.

Though Congress has expressly assigned to the Attorney General the duty to control illegal immigration, it has left the means for carrying out that duty to her discretion. Even if the Court agreed that the Attorney General was given a nondiscretionary duty to control illegal immigration, the Court still does not find that she has failed to fulfill that duty. While our current immigration enforcement process cannot be labelled a resounding success, neither is it a failure of constitutional proportion

Accordingly, the Plaintiffs' Administrative Procedures Act claim shall be dismissed.

THEREFORE, it is **ORDERED** that the Defendants' Motion To Dismiss shall be **GRANTED** as to all claims within the Plaintiffs' Complaint, and the Plaintiffs' Complaint shall be **DISMISSED** in its entirety for its failure to state a claim upon which relief can be granted.

Done this 7th day of August, 1995, in Brownsville, Texas.

FILEMON B. VELA
UNITED STATES DISTRICT JUDGE

EXHIBIT 20

Counselor of the Department of State, Ambassador Thomas A. Shannon
Testimony to Senate Foreign Relations Committee, July 17, 2014

Mr. Chairman, Mr. Ranking Member, distinguished Members of the Committee, thank you for this opportunity to testify before you on the "Crisis in Central America and the Exodus of Unaccompanied Minors." It is an honor to appear before you with my distinguished colleague from the Department of Justice.

We are facing an acute crisis on our southern border, as tens of thousands of children leave Honduras, Guatemala, and El Salvador to travel through Mexico to the United States. Driven by a mixture of motives and circumstances, these children are seeking reunification with their parents, better life opportunities, and, in some cases, safety from violence and criminal gang activity.

The human drama of this migration is heightened by the nefarious role of human smugglers. Smuggling networks exploit these children and their parents, preying on their desperation and hope, while exposing the children to grave dangers, abuse, and sometimes injury and death along a journey of more than one thousand miles.

Last week, in testimony before the Senate Appropriations Committee, the Secretaries of Homeland Security and Health and Human Services laid out the dimensions of this crisis, and its impact on existing resources at the Department of Homeland Security, the Department of Health and Human Services, local law enforcement agencies, state humanitarian and disaster response teams, municipal and state government, and on local communities as they face an unprecedented surge in attempted migration to the United States by unaccompanied children, even as overall migration remains at historic lows.

The President's supplemental budget request of $3.7 billion dollars is aimed at addressing this crisis, especially the resource and infrastructure challenges we have along our southern border. The need for additional funding to meet these challenges is great, but it is necessary to ensure that these children, an especially vulnerable class of migrant, are treated in a humane and dignified fashion as we protect our border, enforce our laws, and meet our international obligations.

The supplemental request for the U.S. Department of State and USAID also identifies additional funding to address the factors that are pushing children from their homes in Guatemala, Honduras, and El Salvador. In tandem with existing resources and programs, this funding would allow us to enhance our engagement in Central America and fashion an integrated and comprehensive approach to the

economic, social, and security challenges that lie behind the current migration crisis.

In my testimony today, I would like to lay out for the Committee our understanding of the crisis, the diplomatic steps we have taken so far to address the problem, the response we have received from the Central American countries and Mexico, and how we would use supplemental funding to counter the underlying causes of the crisis.

The Issue

Migration by unaccompanied children is not a new phenomenon. It has ebbed and flowed for some time. However, what has changed is the size of the migration and the source countries. In the past, most children migrating illegally to the United States were Mexican nationals. Under existing law, these children could be returned to Mexico through expedited removal. In 2008, we returned 34,083 unaccompanied (Mexican) children to Mexican authorities. Vigorous enforcement of our laws, new forms of law enforcement partnerships with Mexico through the Merida Initiative, and efforts by the Government of Mexico to address the factors driving such migration helped reduce by half the number of unaccompanied children from Mexico who were apprehended attempting to enter the United States.

As you are well aware, this decline has been offset by a surge in unaccompanied children migrating from Central America. While we have witnessed an increase in such migrants from Central America over the past several years, more than 50,000 unaccompanied children from Central America have been apprehended along our southwest border this fiscal year. Of these migrants, nearly three-quarters are males between the ages of 15 and 17.

Efforts by the U.S. government, the United Nations High Commission of Refugees, and NGOs to understand the drivers of this migration and information collected in interviews conducted by Customs and Border Protection officials highlight the mixed motives behind this surge in Central American migration. For the most part, these children have abandoned their homes for a complex set of motives that combine a desire to be with their parents and pursue a life of greater opportunity and wider possibility. Underlying some of this migration is a fear of violence in their home communities, and a fear that criminal gangs will either forcibly recruit or harm them.

In short, this migration trend is the product of economic and social conditions in Honduras, El Salvador, and Guatemala. A combination of poverty, ineffective public institutions, and crime have combined to push these children from their homes and to begin an arduous and dangerous journey.

While the United States has been the primary destination of these migrants, largely because family members are already here, the impact of the migration has been felt throughout the region. The United Nations High Commission on Refugees has identified a more than 400 percent increase in asylum requests made by unaccompanied children from Honduras, Guatemala, and El Salvador in neighboring countries.

To address the challenge posed by the migration of unaccompanied children, we have fashioned a five-part strategy designed to stem the flow of migrants, screen them properly for international protection concerns, and then begin timely repatriation. This strategy consists of:

-- One: Establishing a common understanding of what is happening and why between the United States, the three source countries -- Guatemala, Honduras, and El Salvador -- and the major transit country, Mexico.

-- Two: Fashioning a common public messaging campaign to deter migration, especially by children. This campaign highlights the dangers of migration, but also counters misinformation of smugglers seeking clients.

-- Three: Improving the ability of Mexico and Guatemala to interdict migrants before they cross into Mexico and enter the established smuggling routes that move the migrants to our border.

-- Four: Enhancing the capacity of Guatemala, Honduras, and El Salvador to receive and reintegrate repatriated migrants to break the cycle of migration and discourage further efforts at migration.

-- Five: Addressing the underlying causes of migration of unaccompanied children by focusing additional resources on economic and social development, and enhancing our citizen security programs to reduce violence, attack criminal gang structures, and reach out to at-risk youth.

This cooperative effort is defined by collaboration between the United States, Mexico, Guatemala, Honduras, and El Salvador. It is a new approach to address

migration issues that reflects the ties and common interests created among our countries by demographics, trade relations, and increased security cooperation.

So far, our diplomatic outreach has created a common understanding of the problem of migration by unaccompanied minors and the responsibility of all the countries to address it. President Obama's outreach to Mexican President Enrique Pena Nieto; Vice-President Biden's trip to Guatemala to meet with the leaders of Guatemala, El Salvador, and Honduras; Secretary Kerry's meeting with these leaders in Panama; DHS Secretary Johnson's trip to Guatemala to meet with President Perez Molina; Under Secretary of State Sarah Sewall's trip to Honduras; and my own engagement with the Foreign Ministers of Guatemala, El Salvador, Honduras, and Mexico were all part of intense engagement over the last several weeks.

Our engagement has allowed us to fashion a common public message that has received support from the highest levels of government in Guatemala, Honduras, and El Salvador. For example, the visits of the First Ladies of these countries to the southern border to meet with unaccompanied children, and their subsequent public statements urging their compatriots not to send their children north or expose them to smugglers have echoed powerfully in their counties. Combined with public messaging campaigns by our Embassies, the governments of these countries and Mexico, we have helped create a new and dynamic debate about illegal migration that undermines efforts by smugglers to entice young people into migration through misinformation about the risks of the journey and the benefits they will supposedly receive in the United States.

The July 7 announcement of Mexican President Pena Nieto of a new Mexican southern border strategy was a welcome step towards improving Mexico's ability to exercise greater control along its border with Guatemala and Belize. Announced in the presence of the Guatemalan president, this initiative is a manifestation of a new willingness to work together along their common border. To match this level of cooperation, we are working to provide support to Mexico's southern border initiative and intend to provide $86 million in existing International Narcotics Control and Law Enforcement (INCLE) funds, and we are working with Guatemala to improve its border controls, with special focus on building joint task forces that link all agencies with responsibility for border control. On July 15, the Government of Mexico named a coordinator for its Southern Border Initiative. Senator Humberto Mayans Cabral, head of the Senate's Southern Border Commission, will act as a "czar" to oversee and direct the Mexican government's efforts to stem illegal migration across its southern border.

In regard to repatriation and reintegration, Vice President Biden announced during his trip to Guatemala $9.6 million to improve the ability of the source countries to increase the number of repatriated migrants they can receive and assist in their reintegration. On July 9, DHS Secretary Johnson signed two memorandums of cooperation with the Guatemala counterpart. The first focuses on enhancing cooperation on immigration, border security, and information sharing. The second provides a process to share information on Guatemalan nationals repatriated to Guatemala. On July 14, USAID provided approval to the International Organization for Migration to commence this work. On July 14, Honduras received a repatriation flight of adults with children recently apprehended at the Southwest border.

Our work in Mexico through the Merida Initiative, and in Central America through the Central America Regional Security Initiative (CARSI), has allowed us to build the relationships, understanding, and capacity to help the Central American source countries address underlying causes of migration by unaccompanied children. Our development assistance work conducted by USAID has also allowed us to build assistance partnerships that can be turned to helping our partner countries address the economic and social development issues that also contribute to migration.

Keeping Our Strategic Focus

Our assistance to the seven countries of the region currently falls under the umbrella of CARSI. Since 2008, Congress has appropriated $642 million on programs that have been predicated on the view that establishing a secure environment and functional law enforcement institutions is the first and essential step in creating conditions for investment and economic growth. We know thanks to a recent independent evaluation by Vanderbilt University that USAID's work with at-risk youth in select municipalities is highly successful in reducing crime and increasing the reporting of it. Likewise, the Department of State's Bureau of International Narcotics and Law Enforcement Affairs has demonstrated impressive results with its Model Police Precinct program in El Salvador and Guatemala. Still, those and other successful U.S. programs are relatively small in scale and should be scaled up with the committed involvement of the countries concerned.

We have learned a lot since CARSI began in 2008, and we now seek to build on those experiences. Specifically, we need to link our work on citizen security with

our efforts to promote economic growth, opportunity, and job creation. Without addressing the economic and social development challenges, we cannot meet the concerns and aspirations of the adolescents and young adults fleeing Central America. Many of the new proposals in the supplemental request are intended to create the opportunity and organization that Central American economies currently lack.

The Supplemental Request

The supplemental request, although focused largely on addressing resource and infrastructure issues along our border, also has an important component focused on the work I have described and designed to be a down payment on that new strategic objective. The $300 million request allocates $5 million on public diplomacy and messaging, and $295 million in Economic Support Funds (ESF) on an initiative broadly grouped under the headings of prosperity, governance, and security.

The $125 million directed toward prosperity would focus on improving economic opportunity and creating jobs, improving customs and border controls to enhance revenue collection and economic integration, and investing in energy to reduce the cost and improve access to energy as a driver of economic growth and investment.

The $70 million requested for governance would focus on improving public sector management, fiscal reform, and strengthening the independence, transparency, and accountability of the judiciaries in Guatemala, Honduras, and El Salvador. The purpose of these funds would be to promote rule of law, attack corruption, and enhance the efficiency and efficacy of government.

The $100 million requested for security would focus on expanding community-based programs to reduce youth crime and violence, expand national police capacity, attack gangs and transnational organized crime, promote prison reform, and enhance migrant repatriation capacity. These funds would enhance our work with partners to expand and nationalize our citizen security efforts and address the violence that is one of the principal drivers of migration.

We believe this request is reasonable and necessary. It builds on work we are already doing in Central America, takes advantage of existing expertise and experience, and expands our ability to encourage Guatemala, Honduras, and El Salvador to work with us closely on an issue of compelling human drama and national interest.

Moving forward we hope to work with Congress to broaden the scope of our efforts and deepen our engagement with Central America. We must build a new, comprehensive, and collaborative approach with Central America and Mexico to problems that have an immediate manifestation in migration, but underlie the larger development and security challenges facing our closest neighbors. By working to meet the challenge of illegal migration of unaccompanied children to the United States, we will be advancing broader interests in the region and giving substance to our vision of an Americas where democracy and markets deliver economic and social development. I thank you for the opportunity to discuss the crisis of unaccompanied children with you and look forward to your questions.

EXHIBIT 21

STATEMENT
OF

CRAIG FUGATE
Administrator
Federal Emergency Management Agency
U.S. Department of Homeland Security

And

R. GIL KERLIKOWSKE
Commissioner
U.S. Customs and Border Protection
U.S. Department of Homeland Security

And

THOMAS S. WINKOWSKI
Principal Deputy Assistant Secretary
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

FOR A HEARING ON
"Challenges at the Border: Examining the Causes, Consequences, and Response to the Rise in Apprehensions at the Southern Border"

BEFORE THE

U.S. SENATE
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
July 9, 2014

Chairman Carper, Ranking Member Coburn, and Members of the Committee:

Thank you for the opportunity to testify today about our efforts to address the recent rise of unaccompanied children and others crossing our border in the Rio Grande Valley (RGV). As you know, Secretary Johnson testified on June 24th before the House Committee on Homeland Security about this situation. Our testimony today echoes and reaffirms his comments.

We face an urgent situation in the RGV. Last fiscal year, CBP apprehended more than 24,000 unaccompanied children at the border. By mid-June of this fiscal year, that number has doubled to more than 52,000. Those from Guatemala, El Salvador, and Honduras make up about three quarters of that migration.

As Secretary Johnson said on June 24th, this is a humanitarian issue as much as it is a matter of border security. We are talking about large numbers of children, without their parents, who have arrived at our border—hungry, thirsty, exhausted, scared and vulnerable. How we treat the children, in particular, is a reflection of our laws and our values.

Therefore, to address this situation, our strategy is three-fold: (1) process the increased tide of unaccompanied children through the system as quickly as possible; (2) stem the increased tide of illegal migration into the RGV; and (3) do these things in a manner consistent with our laws and values as Americans.

So, here is what we are doing:

First, on May 12th, Secretary Johnson declared a Level IV condition of readiness within DHS, which is a determination that the capacity of CBP and ICE to deal with the situation is full and we need to draw upon additional resources across all of DHS. He appointed Deputy Chief Vitiello to coordinate this effort within DHS.

Second, on June 1st, President Obama, consistent with the Homeland Security Act, directed Secretary Johnson to establish a Unified Coordination Group to bring to bear the assets of the entire federal government on the situation. This Group includes DHS and all of its components, the Departments of Health and Human Services, Defense, Justice, State, and the General Services Administration. Secretary Johnson, in turn, designated FEMA Administrator Fugate to serve as the Federal Coordinating Official for the U.S. Government-wide response. Under Administrator Fugate's supervision, there are now more than 140 interagency personnel and members stationed in FEMA's National Response Coordination Center dedicated to this effort.

Third, we established added capacity to deal with the processing and housing of the children, we are creating additional capacity in places, and we are considering others. To process the increased numbers of unaccompanied children in Texas, DHS has had to bring some of the children to our processing center at Nogales, Arizona before they are transferred to HHS. We are arranging additional processing centers to handle the rise in the RGV. Meanwhile, the Department of Defense (DoD) has provided space at Lackland Air Force Base in Texas for HHS to house the children before HHS can place them. DoD is also providing facilities at Fort Sill,

Oklahoma and Ventura, California for the same purpose. DHS and HHS are working to continue to identify additional facilities for DHS and HHS to house and process the influx of children.

Fourth, DHS and HHS are increasing Spanish-speaking case management staff, increasing staff handling incoming calls from parents or guardians, raising awareness of the Parent Hotline (provided by FEMA and operated by HHS), surging staff to manage the intake of CBP referrals to track shelter bed capacity, and facilitate shelter designations. We are developing ways to expedite background checks for sponsors of children, integrate CBP and HHS information sharing systems, and increase capacity to transport and place children. (As Secretary Johnson noted on June 24th, and we reaffirm today, the Border Patrol and other CBP personnel, as well as personnel from ICE, FEMA, the Coast Guard, and HHS, are doing a remarkable job in difficult circumstances. Not-for-profit groups like the HHS-grantee BCFS[1] also have stepped in quickly and are doing a remarkable job sheltering the unaccompanied children at Lackland, identifying and then placing them consistent with HHS' legal obligations. All of these dedicated men and women deserve our recognition, support and gratitude.)

Fifth, DHS is building additional detention capacity for adults who cross the border illegally in the RGV with their children. For this purpose DHS established a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico. The establishment of this temporary facility will help CBP process those encountered at the border and allow ICE to increase its capacity to house and expedite the removal of adults with children in a manner that complies with federal law. Artesia is one of several facilities that DHS is considering to increase our capacity to hold and expedite the removal of the increasing number of adults with children illegally crossing the southwest border. DHS will ensure that after apprehension, families are housed in facilities that adequately provide for their safety, security, and medical needs. Meanwhile, we will also expand use of the Alternatives to Detention program to utilize all mechanisms for enforcement and removal in the RGV Sector. DOJ is temporarily reassigning immigration judges to handle the additional caseload via video teleconferencing. These immigration judges will adjudicate these cases as quickly as possible, consistent with all existing legal and procedural standards, including those for asylum applicants following credible fear interviews with embedded DHS asylum officers. Overall, this increased capacity and resources will allow ICE to return unlawful migrants from Central America to their home countries more quickly.

Sixth, DHS has brought on more transportation assets to assist in the effort. The Coast Guard is loaning air assets to help transport the children. ICE is leasing additional charter aircraft.

Seventh, throughout the RGV Sector, we are conducting public health screening for all those who come into our facilities for any symptoms of contagious diseases or other possible public health concerns. Both DHS and HHS are ensuring that the children's nutritional and hygienic needs are met while in our custody; that children are provided regular meals and access to drinks and snacks throughout the day; that they receive constant supervision; and that children who exhibit signs of illness or disease are given proper medical care. We have also made clear that all

[1] BCFS—not an acronym—was formerly known as Baptist Child Family Services.

individuals will be treated with dignity and respect, and any instances of mistreatment reported to us will be investigated.

Eighth, working through FEMA's National Response Coordination Center, we are coordinating with voluntary and faith-based organizations to help us manage the influx of unaccompanied children crossing the border. The American Red Cross is providing blankets and other supplies and, through their Restoring Family Links program, is coordinating calls between children in the care of DHS and families anxious about their well-being.

Ninth, to stem the tide of children seeking to enter the United States, we have also been in contact with senior government officials of Guatemala, El Salvador, Honduras, and Mexico to address our shared border security interests, the underlying conditions in Central America that are promoting the mass exodus, and how we can work together to assure faster, secure removal and repatriation. Last month, President Obama spoke with Mexican President Peña Nieto about the situation, as has Secretary Kerry. On June 20th, Vice President Biden also visited Guatemala to meet with regional leaders to address the influx of unaccompanied children and families from Central America and the underlying security and economic issues that are causing this migration. The Vice President announced that the U.S. will be providing a range of new assistance to the region, including $9.6 million in additional funding for Central American governments to receive and reintegrate their repatriated citizens, and a new $40 million U.S. Agency for International Development program in Guatemala over 5 years to improve citizen security. An additional $161.5 million will be provided this year under the Central American Regional Security Initiative to further enable Central American countries to respond to the region's most pressing security and governance challenges. Secretary Johnson is in Guatemala as we speak. The government of El Salvador has sent additional personnel from its consulate in the U.S. to South Texas to help expedite repatriation to its country.

Tenth, DHS, together with DOJ, has added personnel and resources to the investigation, prosecution and dismantling of the smuggling organizations that are facilitating border crossings into the RGV. Homeland Security Investigations, which is part of ICE, is surging 60 additional criminal investigators and support personnel to their San Antonio and Houston offices for this purpose. In May, ICE concluded a month-long, targeted enforcement operation that focused on the logistics networks of human smuggling organizations along the southwest border, with operations in El Paso, Houston, Phoenix, San Antonio, and San Diego that resulted in 163 arrests of smugglers. ICE will continue to vigorously pursue and dismantle these alien smuggling organizations by all investigative means to include the financial structure of these criminal organizations. These organizations not only facilitate illegal migration across our border, they traumatize and exploit the children who are objects of their smuggling operation. We will also continue to work with our partners in Central America and Mexico to help locate, disrupt, and dismantle transnational criminal smuggling networks.

Eleventh, we are initiating and intensifying our public affairs campaigns in Spanish, with radio, print, and TV spots, to communicate the dangers of sending unaccompanied children on the long journey from Central America to the United States, and the dangers of putting children into the hands of criminal smuggling organizations.

In collaboration with DHS, the Department of State has launched public awareness campaigns in El Salvador, Guatemala, and Honduras, to warn families about the dangers encountered by unaccompanied minors who attempt to travel from Central America to the U.S., and to counter misperceptions that smugglers may be disseminating about immigration benefits in the United States. Our embassies in Central America have collaborated with CBP to ensure both the language and images of the campaign materials would resonate with local audiences. Secretary Johnson has personally issued an open letter (*see* attached) to the parents of those who are sending their children from Central America to the U.S., to be distributed broadly in Spanish and English, to highlight the dangers of the journey, and to emphasize there are no free passes or "permisos" at the other end. We are stressing that Deferred Action for Childhood Arrivals, or "DACA," does not apply to children who arrive now or in the future in the United States, and that, to be considered for DACA, individuals must have continually resided in the U.S. since June 2007. We are making clear that the "earned path to citizenship" contemplated by the Senate bill passed last year would not apply to individuals who cross the border now or in the future; only to those who have been in the country for the last year and a half.

Twelfth, given the influx of unaccompanied children in the RGV, we have increased CBP staffing and detailed 115 additional experienced agents from less active sectors to augment operations there. Secretary Johnson is considering sending 150 more Border Patrol agents based on his review of operations there this past week. These additional agents allow RGV the flexibility needed to achieve more interdiction effectiveness and increase CBP's operational footprint in targeted zones within its area of operations.

Thirteenth, in early May, Secretary Johnson directed the development of a Southern Border and Approaches Campaign Planning effort that is putting together a strategic framework to further enhance security of our southern border. Plan development will be guided by specific outcomes and quantifiable targets for border security and will address improved information sharing, continued enhancement and integration of sensors, and unified command and control structures as appropriate. The overall planning effort will also include a subset of campaign plans focused on addressing challenges within specific geographic areas, all with the goal of enhancing our border security.

Finally, we will continue to work closely with Congress on this problem, and keep you informed. DHS is updating Members and staff on the situation in conference calls, and we are facilitating site visits to Border Patrol facilities in Texas and Arizona for a number of Members and their staff.

Secretary Johnson has directed his staff and agency leaders to be forthright in bringing him every conceivable, lawful option for consideration, to address this problem. In cooperation with the other agencies of our government that are dedicating resources to the effort, with the support of Congress, and in cooperation with the governments of Mexico and Central America, we believe we will stem this tide. Thank you.

An open letter to the parents of children crossing our Southwest border

This year, a record number of children will cross our Southern border illegally into the United States. In the month of May alone, the number of children, unaccompanied by a mother or father, who crossed our southern border reached more than 9,000, bringing the total so far this year to 47,000. The majority of these children come from Honduras, El Salvador and Guatemala, where gang and drug violence terrorize communities. To the parents of these children I have one simple message: Sending your child to travel illegally into the United States is not the solution.

It is dangerous to send a child on the long journey from Central America to the United States. The criminal smuggling networks that you pay to deliver your child to the United States have no regard for his or her safety and well-being – to them, your child is a commodity to be exchanged for a payment. In the hands of smugglers, many children are traumatized and psychologically abused by their journey, or worse, beaten, starved, sexually assaulted or sold into the sex trade; they are exposed to psychological abuse at the hands of criminals. Conditions for an attempt to cross our southern border illegally will become much worse as it gets hotter in July and August.

The long journey is not only dangerous; there are no "permisos," "permits," or free passes at the end.

The U.S. Government's Deferred Action for Childhood Arrivals program, also called "DACA," does not apply to a child who crosses the U.S. border illegally today, tomorrow or yesterday. To be eligible for DACA, a child must have been in the United States prior to June 15, 2007 – seven years ago.

Also, the immigration reform legislation now before Congress provides for an earned path to citizenship, but only for certain people who came into this country on or before December 31, 2011 – two and one half years ago. So, let me be clear: There is no path to deferred action or citizenship, or one being contemplated by Congress, for a child who crosses our border illegally today.

Rather, under current U.S. laws and policies, anyone who is apprehended crossing our border illegally is a priority for deportation, regardless of age. That means that if your child is caught crossing the border illegally, he or she will be charged with violating United States immigration laws, and placed in deportation proceedings – a situation no one wants. The document issued to your child is not a "permiso," but a Notice To Appear in a deportation proceeding before an immigration judge.

As the Secretary of Homeland Security, I have seen first-hand the children at our processing center in Texas. As a father, I have looked into the faces of these children and recognized fear and vulnerability.

The desire to see a child have a better life in the United States is understandable. But, the risks of illegal migration by an unaccompanied child to achieve that dream are far too great, and the "permisos" do not exist.

Jeh C. Johnson
Secretary of the U.S. Department of Homeland Security

EXHIBIT 22

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, DC 20529

U.S. Citizenship and Immigration Services

Current Statistics: Deferred Action for Childhood Arrivals: Pending, Receipts, Rejected, Approvals, and Denials

U.S. Citizenship & Immigration Services Deferred Action for Childhood Arrivals Pending, Receipts, Rejected, Approvals, and Denials from August 15, 2012 -December 5, 2014					
Type of Filing	**Pending**	**Receipts**	**Rejected**	**Approvals**	**Denials**
Initials	52,421	719,746	42,632	630,032	36,860
Renewals	89,912	199,830	10,598	110,182	32
Grand Total	**142,333**	**919,576**	**53,230**	**740,214**	**36,892**

Please note:
1) The report reflects the most up-to-date data available at the time the report is generated.
2) The duplicates and rejected cases have been removed.
3) 137 cases were received but closed for reasons other than denial.
Database Queried December 8, 2014
Report Created: December 10, 2014
System: CIS Consolidated Operational Repository (CISCOR)
By: Office of Performance and Quality (OPQ), Performance Analysis & External Reporting (PAER), DL

Parameter
Date: Pending, Receipts, Rejections, Approvals and Denials from 08/01/2012 to 12/05/2014
Form Type(s): I-821D
Data Type: Pending, Receipts, Rejections, Approvals and Denials

EXHIBIT 23

1300 Pennsylvania Avenue, NW
Washington, DC 20229

U.S. Customs and Border Protection

USBP Nationwide Apprehensions by Requested Citizenship
FY2010 - FY2014

Data includes Deportable Aliens Only

Data Source: Enforcement Integrated Database as of End of Year Dates

Citizenship	FY2010	FY2011	FY2012	FY2013	FY2014
EL SALVADOR	13,723	10,874	22,158	37,149	66,638
GUATEMALA	18,406	19,061	35,204	54,692	81,116
HONDURAS	13,580	12,197	30,953	46,865	91,475
MEXICO	404,365	286,154	265,755	267,734	229,178
Total	**450,074**	**328,286**	**354,070**	**406,440**	**468,407**

EXHIBIT 24

Statement

by

Secretary Jeh C. Johnson

U.S. Department of Homeland Security

Hearing before the

House Committee on Homeland Security

December 2, 2014

Thank you Chairman McCaul, Ranking Member Thompson, and Committee members for the opportunity to testify today.

On November 20 President Obama announced a series of executive actions to begin to fix our immigration system. The President views these actions as a first step toward reform of the system, and continues to count on Congress for the more comprehensive reform that only legislative changes can provide.

The actions we took will begin to fix the system in a number of respects.

To promote border security for the future, and to send a strong message that our borders are not open to illegal migration, we prioritize the removal of those apprehended at the border and those who came here illegally after January 1, 2014, regardless of where they are apprehended. We also announced the next steps to strengthen our border security efforts as a part of our Southern Border Campaign Strategy, which I first announced earlier this year.

To promote public safety, we make clear that those convicted of crimes, criminal street gang members, and national security threats are also priorities for removal.

To promote accountability, we encourage those undocumented immigrants who have been here for at least five years, have sons or daughters who are citizens or lawful permanent residents, and do not fall into one of our enforcement priorities, to come out of the shadows, get on the books, and pass national security and criminal background checks. After clearing all their background checks, these individuals are eligible for work authorization and will be able to pay taxes and contribute more fully to our economy. The reality is that, given our limited resources, these people are not priorities for removal—it's time we acknowledge that and encourage them to be held accountable. This is simple common sense.

To rebuild trust with state and local law enforcement which are no longer honoring ICE detainers, we are ending the controversial Secure Communities program as we know it, and making a fresh start with a new program that fixes existing problems.

To promote U.S. citizenship, we will enable applicants to pay the $680 naturalization fee by credit card and expand citizenship public awareness.

To promote the U.S. economy, we will take administrative actions to better enable U.S. businesses to hire and retain qualified, highly skilled foreign born workers.

The reality is that, for decades, Presidents have used executive authority to enhance immigration policy. President Obama views these actions as a first step toward

the reform of the system, and continues to count on Congress for the more comprehensive reform that only changes in law can provide.

I recommended to the President each of the Homeland Security reforms to the immigration system that he has decided to pursue. These recommendations were the result of extended and candid consultations I had with the leadership of Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). Along the way, I also spoke with members of the workforce who implement and enforce the law to hear their views. In my own view, any significant change in policy requires close consultation with those who administer the system. We also consulted a wide range of stakeholders, including business and labor leaders, law enforcement officers, religious leaders, and members of Congress from both sides of the aisle. We also consulted with the Department of Justice, and we received a formal, written opinion from the Justice Department's Office of Legal Counsel concerning enforcement prioritization and deferred action, and that opinion has been made public.

Here is a summary of our executive actions:

Strengthening border security. Our executive actions emphasize that our border is not open to future illegal migration and that those who come here illegally will be sent back, unless they qualify for some form of humanitarian relief under our laws. The reality is that, over the last fifteen years spanning the Clinton, Bush, and Obama Administrations, much has been done to improve border security. But, through the executive actions announced last week, we can and will do more.

Today, we have unprecedented levels of border security resources—personnel, equipment and technology—along our Southwest border. This investment has produced significant positive results. Apprehensions have declined from over 1.6 million in 2000 to around 400,000 a year—the lowest rate since the 1970s. According to Pew Research, the number of undocumented immigrants in this country grew to a high of 12.2 million in 2007 and has remained, after a slight drop, at about 11.3 million ever since. That means this population has stopped growing for the first time since the 1980s, and over half of these individuals have been in the United States for 13 years.

Without a doubt, we had a setback this summer. We saw an unprecedented spike in illegal migration into South Texas—from Guatemala, Honduras, and El Salvador. And as everyone knows, it consisted of large numbers of unaccompanied children and adults with children. We responded with more security and law enforcement resources; more processing centers; more detention space; more Border Patrol agents in the Rio Grande Valley; more prosecution of criminal smuggling organizations; an aggressive public message campaign; engagement of Central American leaders by the President and the Vice President; and increased interdiction efforts by the Government of Mexico. And,

since the spring, the numbers of unaccompanied children crossing the southern border illegally have gone down considerably: May – 10,578; June – 10,620; July – 5,499; August – 3,138; September – 2,426; October – 2,529.

However, we are not finished with the work of securing our border. We can and will do more—that's a critical component of the President's executive actions.

We will build upon the border security infrastructure we put in place last summer. We announced several days ago the opening of another detention facility for adults with children in Dilley, Texas, that has the capability to detain over 2,000 individuals. At the same time, we will close the smaller, temporary facility for adults with children at Artesia, New Mexico. We are developing a "Southern Border Campaign Strategy" to fundamentally alter the way in which we marshal resources to the border under the direction of three new Department task forces. They will follow a focused risk-based strategy, with the overarching goals of enforcing our immigration laws and interdicting individuals seeking to illegally cross land, sea and air borders. These actions are designed to send a clear message: in the future, those who attempt to illegally cross our borders will be sent back.

Creating new and clearer enforcement prioritization policies. This new policy will also have a strong border security component to it, in addition to prioritizing for removal public safety and national security threats. Virtually every law enforcement agency engages in prosecutorial discretion. With the finite resources an agency has to enforce the law, it must prioritize use of those resources. To this end, DHS will implement a new and clearer enforcement and removal policy. The new policy places: (i) top priority on national security threats, convicted felons, criminal gang participants, and illegal entrants apprehended at the border; (ii) second-tier priority on those convicted of significant or multiple misdemeanors and those who entered or re-entered this country unlawfully after January 1, 2014, -- regardless of whether they are apprehended at the border -- or significantly abused the visa or visa waiver programs; and (iii) the lowest priority are those who are non-criminals but who have failed to abide by a final order of removal issued on or after January 1, 2014.

Giving people the opportunity to be held accountable. The reality is that, undocumented immigrants who have been in this country for years, raising American families and developing ties to the community. Many of these individuals have committed no crimes and are not enforcement priorities. It is time that we acknowledge this as a matter of official policy and encourage eligible individuals to come out of the shadows, submit to criminal and national security background checks, and be held accountable.

We will therefore offer, on a case-by-case basis, deferred action to individuals who (i) are not removal priorities under our new policy, (ii) have been in this country at

least 5 years, (iii) have sons or daughters who are U.S. citizens or lawful permanent residents, and (iv) present no other factors that would make a grant of deferred action inappropriate. The reality is that our finite resources will not and should not be expanded to remove these people. We are also amending eligibility for the Deferred Action for Childhood Arrivals (DACA) program. At present, eligibility is limited to those who were under 31 years of age on June 15, 2012, entered the United States before June 15, 2007, and were under 16 years old when they entered. We will amend eligibility for DACA to cover all undocumented immigrants who entered the United States before the age of 16, not limited to those born after June 15, 1981. We are also adjusting the cut-off date from June 15, 2007 to January 1, 2010 and expanding the period of work authorization from two years to three years.

President Obama's Administration is not the first to undertake such actions. In fact, the concept of deferred action is an established, long-standing administrative mechanism dating back decades, and it is one of a number of similar mechanisms Administrations have used to grant temporary immigration relief for humanitarian and other reasons. For example, Presidents Reagan and Bush authorized executive action to shield undocumented children and spouses who did not qualify for legalization under the Immigration Reform and Control Act of 1986. This "Family Fairness Program" used a form of relief known at the time as "indefinite voluntary departure," which is similar to the deferred action authority we use today.

Fixing Secure Communities. We will end the Secure Communities program as we know it. The overarching goal of the program is a good one, but it has attracted widespread criticism in its implementation and has been embroiled in litigation. Accordingly, we will replace it with a new "Priority Enforcement Program" that closely and clearly reflects DHS's new top enforcement priorities. The program will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies but will, for the most part, limit the circumstances under which DHS will seek an individual in the custody of state and local law enforcement—specifically, only when an individual has been convicted of certain offenses listed in Priorities 1 and 2 of our new enforcement priorities outlined above.

Pay reform for ICE ERO officers. We will conduct an expeditious review of personnel reforms for Immigration and Customs Enforcement (ICE) officers engaged in removal operations, to bring their job classifications and pay coverage in line with other law enforcement personnel, and pursue regulations and legislation to address these issues.

Extending the provisional waiver program to promote family unity. The provisional waiver program we announced in January 2013 for undocumented spouses and children of U.S. citizens will be expanded—to include the spouses and children of lawful permanent residents, as well as the adult children of U.S. citizens and lawful

permanent residents. At the same time, we will clarify the "extreme hardship" standard that must be met to obtain the provisional waiver.

Supporting military families. We will work with the Department of Defense to address the availability of parole-in-place and deferred action, on a case-by-case basis, for the spouses, parents, and children of U.S. citizens or lawful permanent residents who seek to enlist in the U.S. Armed Forces.

Increasing access to U.S. citizenship. We will undertake options to promote and increase access to naturalization and consider innovative ways to address barriers that may impede such access, including for those who lack resources to pay application fees. To enhance access to U.S. citizenship, we will (i) permit the use of credit cards as a payment option, and (ii) enhance public awareness around citizenship. USCIS will also include the feasibility of a partial fee waiver as part of its next biennial fee study.

Supporting U.S. business and high-skilled workers. Finally, DHS will take a number of administrative actions to better enable U.S. businesses to hire and retain qualified, highly skilled foreign-born workers. For example, because our immigration system suffers from extremely long waits for green cards, we will amend current regulations and make other administrative changes to provide needed flexibility to workers with approved employment-based green card petitions.

Overall, the executive actions the President announced last week will not only bolster our border security, they will promote family unity, increase access to U.S. citizenship, grow and strengthen the competitiveness of the U.S. economy, and create jobs, particularly in the high-skilled labor sectors.

Again, the President views these actions as a first step toward the reform of our immigration system and he continues to count on Congress for the more comprehensive reform that only legislative changes can provide. In the meantime, we will use our executive authority to fix as much of our broken immigration system as possible.

I look forward to answering your questions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

I. INTRODUCTION

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

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

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

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

employing the authority delegated to it by Congress.

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

D) Defendants have not complied with the APA.

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

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

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

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

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

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

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

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

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

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

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

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

III. STANDARD OF REVIEW AND GOVERNING LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 26

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

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

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

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

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

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

IV. STANDING MANDATED BY ALLEGATIONS TAKEN AS TRUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. DEFENDANTS' CHALLENGE TO PLAINTIFF'S STANDING

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

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

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

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

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

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

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

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

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

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

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

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

Defendants' arguments are without merit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. PAST DEFERRED ACTION DOES NOT MAKE DEFERRED ACTION LEGAL

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

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

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

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

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

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

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

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

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

Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C., 25, November 19, 2014, citing Johnson Deferred Action Memorandum at 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Vermuele, *supra* at 3.

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

Id. at 4.

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

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

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

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

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

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

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

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

work permit.

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

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

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

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

XIV. CONCLUSION

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

Dated: December 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Exhibit A

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

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 14-0180
ELECTRONICALLY FILED

v.

ELIONARDO JUAREZ-ESCOBAR,

Defendant.

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

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

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

I. Introduction[1]

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

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

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

---

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

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

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

II. Procedural Posture

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

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

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

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

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

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

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

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

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

B. Procedural History to Date

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

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

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

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

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

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

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

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

C. Request for Legal Briefing by This Court

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

1. Does the Executive Action announced by President Obama on November 20, 2014, apply to this Defendant?

    A. If yes, please provide the factual basis and legal reasoning.

    B. If no, please provide the factual basis and legal reasoning.

2. Are there any constitutional and/or statutory considerations that this Court needs to address as to this Defendant? If so, what are those constitutional and/or statutory considerations, and how should the Court resolve these issues?

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

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

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

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

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

A. Separation of Powers Under the Constitution

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

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

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

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

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

B. Substance of the Executive Action

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

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

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

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

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

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

1. Deferred Action

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

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

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

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

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

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

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

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

Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C., 25, November 19, 2014, citing Johnson Deferred Action Memorandum at 4.

2. Removal Deportation Priorities

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

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

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

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

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

C. Differentiation Between Executive Action and Executive Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Opinion of the Office of Legal Counsel

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

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

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

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

2. President Obama's Justification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Conclusion

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

IV. Is the Executive Action Applicable to this Defendant?

A. The Three Priorities for Removal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 365-66.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 363-64 (footnotes omitted).

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

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

Id. at 374.

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

V. Conclusion

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

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

VI. Order of Court

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

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

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

cc: All Registered ECF Counsel and Parties

Exhibit B

THE IMPERIAL PRESIDENCY

OBAMA'S AMNESTY QUASHED BY CHRISTMAS?

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

Published: 6 days ago

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

Follow 674 followers Subscribe to feed (http://www.wnd.com/author/lklayman/feed/)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Click the button below to sign up for Larry Klayman's commentaries by email, and keep up to date with special offers from WND. You may change your email preferences at any time.

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momprayn • 3 days ago

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

1 • Reply • Share ›

EaglesGlen • 5 days ago

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

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

3 • Reply • Share ›

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

4 • Reply • Share ›

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

2 • Reply • Share ›

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

10 • Reply • Share ›

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

4 • Reply • Share ›

Jimh77 • 6 days ago
Vote Wisely 2016

What if 20 Million Illegal Aliens were
deported from America ?

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

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

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

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

see more

16 • Reply • Share ›

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

1 • Reply • Share ›

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

What if 20 Million Illegal Aliens
Vacated America ?

January 27, 2012
at 11:14am

What if they left

Best on the
subject to present date.

What if 20 Million
Illegal Aliens Vacated America ?

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

see more

1 • Reply • Share ›

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

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

This comment was deleted.

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

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

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

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

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

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

Not on your life.
3 • Reply • Share ›

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

Areminder ➚ harrydweeks • 5 days ago

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

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

3 ^ | v • Reply • Share ›

momprayn ➚ Areminder • 3 days ago

AMEN !

^ | v • Reply • Share ›

357x6 • 6 days ago

Godspeed, Larry.

5 ^ | v • Reply • Share ›

PaganTeaPartier • 6 days ago

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

9 ^ | v • Reply • Share ›

Areminder ➚ PaganTeaPartier • 5 days ago

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

2 ^ | v • Reply • Share ›

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Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiff,

v.

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

and

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

and

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

Defendants.

Case 1:14-cv-01966

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

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

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

people.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

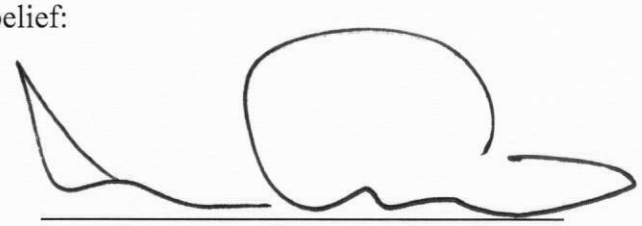
30) Therefore, the problem is not a lack of resources by the Department of Homeland Security, but a lack of desire by the Obama Administration to enforce the law.

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

has locked up only about 1% of that total.

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

Dated: December 1, 2014



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

Exhibit 1

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: November 5, 2014

CONTACT: Sheriff Joe Arpaio

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

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

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

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

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

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

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

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

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

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

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Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: October 27, 2014

CONTACT: Sheriff Joe Arpaio

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

Suspect Arrested in Maricopa County Four Times

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

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

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

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

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

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

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.

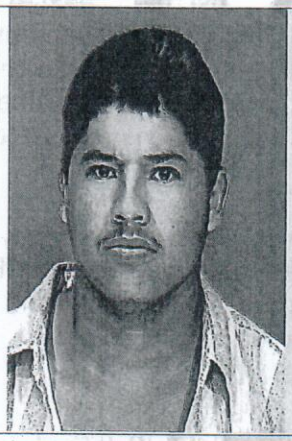
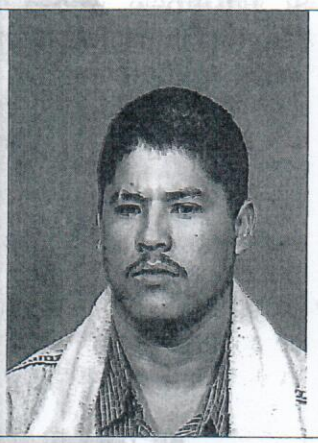
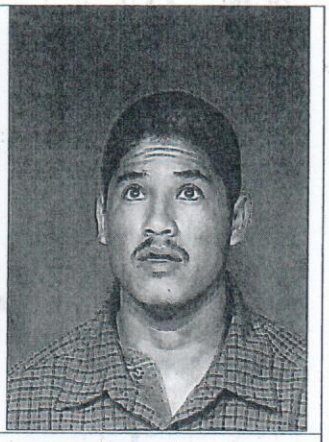
Marquez/Bracamonte was arrested yet again on May 4, 2001 for the sale of narcotic drugs and possession of marijuana for sale. He was released to ICE 3 days later.

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

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

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

Pursuant to 28 U.S.C. §1746, I, Sheriff 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) I am the elected Sheriff of Maricopa County, State of Arizona. I have held the Office of Sheriff since 1993. Previously, I served as a Regional Director for the Department of Justice in the Drug Enforcement Agency fighting crime and drug trafficking around the world, after serving as a police officer for five years in Washington, D.C. and Las Vegas, Nevada. I infiltrated drug organizations from Turkey to the Middle East to Mexico, Central, and South America to cities around the United States. I also served as head of the Drug Enforcement Agency for Arizona.

3) By this lawsuit, I am seeking to have the President and the other Defendants obey the U.S. Constitution and the immigration laws, which prevents the Obama Administration's Executive Order (hereinafter "Executive Actions") from having

been issued in the first place.

4) I am aware that President Obama has acknowledged repeatedly prior to November 20, 2014 that his actions of granting Executive Actions are unconstitutional.

5) Specifically, I am aware that on March 28, 2011, President Obama stated: "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 . . . 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."

6) I am also aware that on May 10, 2011, President Obama stated: " . . . 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."

7) I am aware that on July 25, 2014, President Obama stated: "[n]ow, I swore an oath to uphold the laws on the books . . . . Now, I know some people want me to bypass Congress and change the laws on my own . . . . Believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how – that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written."

8) I am aware that on July 1, 2014, the President stated: "[t]here are those in the immigrants' rights community who have argued passionately that we should simply provide those who are [here] legally 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."

9) The unconstitutional act of the President's Executive Actions must be enjoined by a court of law on behalf of not just myself and my Office which represents the people of Maricopa County, Arizona, but all of the American people.

10) As a result of President Obama's Executive Order, which was announced on November 20, 2014, my Sheriff's Office responsible for Maricopa County, Arizona, and the people of Maricopa County has already suffered and will suffer significant harm.

11) This unconstitutional act by the President has had and will continue to have a serious detrimental impact on my carrying out the duties and responsibilities for which I am charged as elected Sheriff of Maricopa County, Arizona.

12) Specifically, President Obama's Executive Actions have and will continue to severely strain our resources, both in manpower and financially, necessary to protect the citizens I was elected to serve.

13) For instance, among the many negative effects of Defendants' Executive Actions is the increased release of criminal aliens back onto the streets of Maricopa County, Arizona, and the rest of the nation.

14) In addition, the flood of illegal aliens into Arizona has cost and will cost my Sheriff's Office money and resources.

15) Based on my personal and professional experience, President Obama's June 15, 2012 Executive Order concerning adults who arrived illegally as children, which Obama has called Deferred Action for Childhood Arrivals (DACA), is likely to cause an

increased flood of illegal aliens into Arizona.

16) 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 what is in effect amnesty to those who make it to the United States.

17) Based on my experience, with President Obama's Executive Actions, even if new illegal aliens coming into Maricopa County, Arizona may not qualify under the Executive Actions, floods of new illegal aliens have and will swarm across the border because they are attracted to the idea of what is, in effect, amnesty.

18) The increased flow of illegal aliens has caused and will cause in the future an increase in property damage, crime, and burdened resources in Maricopa County, throughout Arizona, and across the border region.

19) 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 their use of their own land.

20) Within my jurisdiction, my Office must respond to all such reports and investigate such criminal activity.

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

22) In October 2014, 307 illegal immigrants were arrested by my deputies and officers in Maricopa County and given detainers by Immigration and Customs Enforcement ("ICE"). Of that number, 96 are repeat offenders (31.2%), having had prior bookings with detainers placed on them. Among those include two illegal aliens who have been

booked into my jail 19 times each, one of which had 11 prior detainers, and extraordinarily, within the last year. These statistics mirror what has happened in every month of 2014.

23) Because of serious harm to my Office and the duties I was elected to fulfill as a law enforcement officer, on November 3, 2014, I met with Congressman Matt Salmon (AZ-05) to discuss the possibility of launching a congressional hearing into why ICE keeps releasing illegal aliens charged of crimes back onto the streets of our communities. (Exhibit 1).

24) I also wrote the Honorable Jeh Johnson in June of 2014 – after he had visited Arizona just a week before I mailed the letter and failed to meet with me – extending the invitation to meet with him again, hoping to improve local/federal cooperation. (Exhibit 2 and Exhibit 3).

25) My duty is to investigate fraud and where appropriate, refer for prosecution. This will necessarily increase expenditures by my Office in policing employment related fraud in Maricopa County, since some of the illegals being hired are likely to be convicted criminals under the President's Executive Actions.

26) I performed a survey for the last 3 months.

27) I found out that over 1,200 illegal aliens were booked in our jails over the last three (3) months, arrested for committing crimes in Maricopa County under Arizona law, such as child molestation, burglary, shoplifting, theft, etc. These statistics do not include illegal aliens charged for violating immigration laws. Legal recourse with regard to immigration law violators rests with the federal government. Our jurisdiction relates to state crimes.

28) I found that over one-third (over 400) of these 1,200 illegal aliens arrested recently in Maricopa County had already arrested by law enforcement in the past for committing different crimes earlier within Maricopa County under Arizona law.

29) These are criminals whom I turned over to ICE for possible deportation. However, based on my experience, many of these illegals are not deported and are still committing criminal acts in Maricopa County.

30) Over one-third of the criminals law enforcement had arrested who were illegal aliens had been released in the past. Some of them had incurred criminal records within Maricopa County at least 6, 7, or 8 times. However, they keep coming back. I want to know why they are not being deported.

31) I am aware that an Immigration Enforcement Report for the fiscal year of 2013, by ICE, indicates that ICE reported 722,000 encounters with illegal aliens, most of whom came to their attention after incarceration for a local arrest. http://cis.org/catch-and-release.

32) I am also aware that the ICE officials followed through with immigration charges for only 195,000 of these individuals. Among those released by ICE, 68,000 had criminal convictions. http://cis.org/catch-and-release.

33) The total number of inmates booked into Maricopa Sheriff's Office custody with INS "detainers", some of whom are illegal aliens, since February 1, 2014 until December 17, 2014 is 3,816. (Exhibit 4).

34) The booking and first day cost to book an inmate into jail is $266.41. The total cost of booking, including the first day in jail is $1,016,620.56 (3,816 x $266.41). (Exhibit 4).

35) For all bookings, the average stay in jail is 27.5 days and the daily housing cost is $81.85. The first day in jail has already been accounted for. (Exhibit 4).

36) For 3,816 total inmates to stay in jail for 26.5 days, it costs $8,276,999.40. (Exhibit 4).

37) The total cost for 3,816 inmates to be booked into jail and stay for 27.5 days is $9,293,619.96. (Exhibit 4).

38) Based on the average length of stay, I estimate that Maricopa County incurred an additional expense of $9,293,619.96 from February 1, 2014 through December 17, 2014 for inmates flagged with INS detainers. (Exhibit 4).

39) Under current law, I turn over those committing crimes in Maricopa County who turn out to be citizens of foreign countries to DHS to be deported. But by contrast, under President Obama's new Executive Action, those illegal aliens will not be subject to deportation once the inmates complete their sentences. At that time, they are turned over to ICE for possible deportation. This costs an enormous amount of time and money.

40) As demonstrated by Exhibit 5, I have personally been threatened several times by persons with bodily injury and death because of my stance on illegal immigration. It therefore stands to reason that illegal aliens are inclined to target me. This directly impacts my constitutional rights and causes me and my Sheriff's Office harm. (Exhibit 5).

41) I am aware that the President claims that he must enforce these Executive Actions for illegal aliens because of a lack of resources for enforcing the immigration laws.

42) However, from my perspective and experience, the federal government is simply

shifting the burden and the expense to the states, the counties, and the county offices such as mine.

43) I am also aware that the President claims he must enforce these Executive Actions to some illegal aliens in order to focus deportation efforts on those illegal aliens who have criminal records or are dangerous.

44) However, I know from my experience in law enforcement in Maricopa County, Arizona that this argument is false.

45) The Obama Administration is frequently not deporting dangerous criminals, even when I hand them over to ICE.

46) Even when my Sheriff's Office arrests illegal aliens for committing crimes in Maricopa County under Arizona State law, and hands those criminals over to ICE to be deported, the Obama Administration still does not deport those criminals.

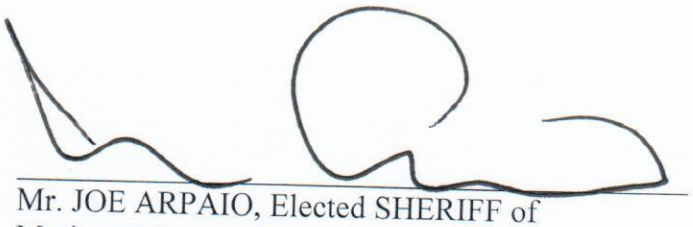
47) In these cases, my Sheriff's Office has undertaken the work and expended the considerable resources to apprehend these persons for violating Arizona law.

48) 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.

49) 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 19, 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.

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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."

###

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.

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

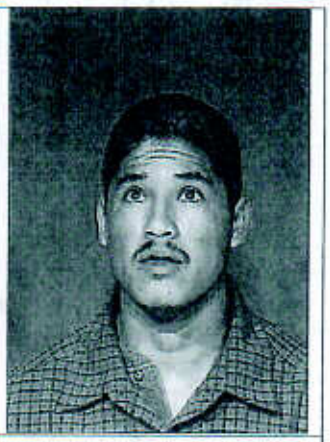
Marquez/Bracamonte was arrested yet again on May 4, 2001 for the sale of narcotic drugs and possession of marijuana for sale. He was released to ICE 3 days later.

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

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

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

MUG SHOTS

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

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

For Release: October 6, 2014 **CONTACT:** Sheriff Joe Arpaio

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

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

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

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

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

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

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

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

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

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

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

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

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

Maricopa County Sheriff's Office Headquarters

Joe Arpaio
Sheriff

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 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**

Total Pages Transmitted, Including this Cover Page: **3 pages**

Comments or Instructions to Receiver: **Please see attached correspondence.**

To be completed by fax operator

Transmitted Date: June 30, 2014 Time: 5:05 pm

MCSO Return Facsimile Number:
(602) 876-0067

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.

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

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

Exhibit 3

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
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.

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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

550 West Jackson Street
Phoenix, AZ 85003

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

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 4

Donald Marchand - SHERIFFX

From: Casey Price - SHERIFFX
Sent: Wednesday, December 17, 2014 2:04 PM
To: Mike Olson - SHERIFFX; Donald Marchand - SHERIFFX; Brandon Jones - SHERIFFX
Cc: Joseph LeGer - SHERIFFX; William Sciury - SHERIFFX
Subject: Price Tag

The total number of Inmate's booked into MCSO custody with INS Detainers since February 01, 2014 until December 17, 2014 is **3,816**.
The booking and first day cost to book a person into jail is $266.41.
The total cost of booking, including the first day in jail is (3816 X $266.41) = **$1,016,620.56**

The average stay in jail is 27.5 days. The daily housing cost is $81.85. We have already accounted for the first day in jail with the booking cost.

3,816 total inmates to stay in jail for 26.5 days is **$8,276,999.40.**

The total cost for 3,816 inmates to be booked into jail and stay for 27.5 days is **$9,293,619.96**.

Month	Detainers
Feb	370
March	394
April	388
May	401
June	390
July	393
Aug	379
Sep	318
Oct	307
Nov	302
17-Dec	174
Total	3816

$266.41	Booking Cost
3816	Total Inmates with Detainers
$1,016,620.56	Total Cost of Booking

26.5	Avarage Stay in Jail (Days)
3816	Total Inmates with Detainers
$81.85	Daily Housing Cost
$8,276,999.40	Total Cost of Inmates stay in Jail based on average stay

$9,293,619.96	Total cost for inmate to be booked and with avarage stay

Sergeant Casey Price A8356
Administrative Sergeant
Central Intake Division
602.876.8011

Exhibit 5

(http://www.huffingtonpost.com/2014/12/17/raul-castro-speech_n_6341802.html)
Raul Castro Welcomes Renewal Of Relations With U.S. (http://www.huffingtonpost.com/2014/12/17/raul-castro-speech_n_6341802.html)

(http://www.huffingtonpost.com/2014/12/14/missing-students-mexico_n_6321866.html)
Damning Report Claims Mexican Federal Police Participated In Disappearance Of 43 Students (http://www.huffingtonpost.com/2014/12/14/missing-students-mexico_n_6321866.html)

(http://www.huffingtonpost.com/2014/12/15/california-undocumented-immigrant-drivers-license_n_6330608.html)
Undocumented Immigrants Flock To Get Driver's Licenses Under New California Law (http://www.huffingtonpost.com/2014/12/15/california-undocumented-immigrant-drivers-license_n_6330608.html)

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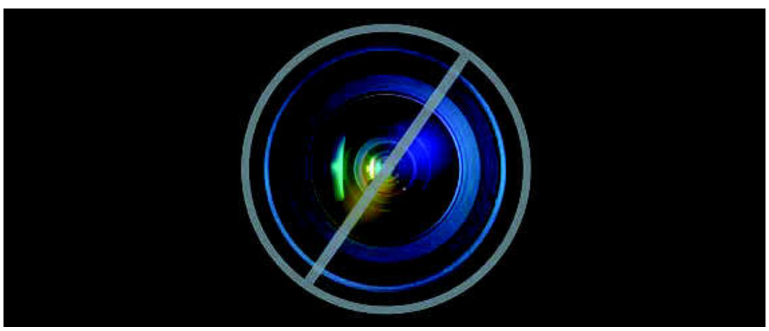
Sheriff Joe Arpaio Threatened By Inmate Samuel Matta For Deporting Family

Reuters

Posted: 07/11/2012 11:02 pm EDT | Updated: 09/10/2012 5:12 am EDT



REUTERS (http://www.reuters.com/)

By David Schwartz

PHOENIX, July 11 (Reuters) - An inmate has been indicted for allegedly plotting to kill a hard-line Arizona sheriff to hold him "personally accountable" for deporting his family members to Mexico, sheriff's officials said on Wednesday.

Samuel Matta, 29, was served with the indictment in prison on Wednesday stemming from an alleged scheme to assassinate Maricopa County Sheriff Joe Arpaio with a high-powered rifle, said Sergeant Brandon Jones, a sheriff's spokesman.

Matta, who authorities say is a documented gang member, planned to act on the plot once he was released from prison, Jones said.

Arpaio, who styles himself as "America's toughest sheriff," is one of the leading proponents of the Mexico border state's crackdown on illegal immigrants passed in 2010, but partially blocked by the courts.

In May, the U.S. Justice Department filed suit against Arpaio accusing him of civil rights violations and saying he and his office intentionally engaged in racial profiling and unlawful arrest of Latinos in violation of their constitutional rights.

The tactics used by the sheriff, who has denied any abuses and has vowed to fight the suit, will come under scrutiny beginning July 19 when another racial profiling lawsuit is heard in U.S. District Court in Phoenix.

Sheriff's investigators said they were tipped to the assassination plot by a jail inmate and learned that Matta was angry that his family had been deported to Mexico from their home in El Mirage, Arizona, west of Phoenix.

MORE:

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

NEWSRelease

August, 21, 2013

BOMB THREATS AGAINST SHERIFF ARPAIO AND OFFICE ON UPSURGE AS ANOTHER SUSPECT IS INDICTED

4 Bomb Threats in last 4 Months

(Phoenix, AZ) Bomb threats against Maricopa County Sheriff Joe Arpaio and his office are keeping investigators busy as yet another suspect is indicted.

On Monday, August 19th, 2013 a Boston, Massachusetts man was indicted by a Maricopa County grand jury and a warrant was issued for 47 year old Robert Paul Menard. Maricopa County Sheriff's deputies traveled to and tracked down Menard in Massachusetts after he threatened to bomb the Sheriff's office several days ago.

This is the fourth bomb threat against Arpaio or his office since April.

***In late July, a male suspect from Alberta, Canada threatened to brutally murder Arpaio, his wife and his children and extended family members and then bomb his home. That crime is still under investigation by the Royal Canadian Mounted Police. Sheriff's deputies here in Phoenix initiated the investigation and identified the suspect after intercepting an email sent by the man.**

***In April, a bomb capable of serious injury or death and addressed to Sheriff Arpaio was intercepted by U.S. Postal authorities in Flagstaff. That investigation is ongoing by federal authorities.**

100 West Washington, Suite 1900, Phoenix, Arizona 85003 | Phone (602)876-1801 | Fax: (602)258-2081 | Media Contact: mediarequest@mcso.maricopa.gov

***In May, the Sheriff's Office new headquarters building now under construction at 5th Avenue and Jackson in downtown Phoenix was targeted by unknown persons. A threatening message was inscribed on the building indicating a bomb had been placed inside. No arrests have yet been made.**

Other recent threats against the Sheriff and his office not involving explosive devices have been initiated and investigated by Maricopa County Sheriff's deputies resulting in arrests/charges.

***In June, Cesar Nunez, made known his intention to kill Arpaio and was tracked down by Maricopa County Sheriff's deputies. Deputies travelled to California and worked with local authorities there to charge the suspect.**

***In July, a Peoria, Arizona suspect, Fred Cusick, threatened to kill the Sheriff and was arrested and booked into jail.**

***In February, Ignacio Carbajal was arrested by Sheriff Arpaio's deputies who tracked him to a location in Scottsdale. Carbajal threatened to travel from his family's home in Mexico to Arizona to kill Sheriff Arpaio.**

All three aforementioned threats against Arpaio came as a result of the Sheriff's widely known stance on illegal immigration.

Brian Mackiewitz, lead Sheriff's investigator in the threats against Arpaio, says that the escalation in number and the gravity of these recent threats lead him to believe these are "increasingly dangerous times for Sheriff Arpaio and members of this office and that all Sheriff's employees must be on the alert and watchful." END

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOSEPH M. ARPAIO, :
:
Plaintiff, :CA No. 14-1966
:
v. :
:
BARACK OBAMA, et al, :
:
Defendants. :

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE BERYL A. HOWELL

UNITED STATES DISTRICT JUDGE

Monday, December 22, 2014

APPEARANCES:

For the Plaintiff: FREEDOM WATCH
BY: LARRY KLAYMAN, ESQ.
2020 Pennsylvania Avenue, NW.
Washington, D.C. 20006
(310)595-0800

For the Defendant: U.S. DEPARTMENT OF JUSTICE.
BY: KATHLEEN HARTNETT, ESQ.
Washington, D.C.

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

DEPUTY CLERK: Matter before the Court, Civil Action 14-1966, Joseph M. Arpaio v. Barack Obama, et al. Counsel please come forward and identify yourselves for the record.

MR. KLAYMAN: Good morning, Your Honor. Larry Klayman, nice to see you.

THE COURT: Yes, nice to see you, Mr. Klayman. How are you?

MR. KLAYMAN: Good. I wanted to ask permission, I have my paralegal and counsel sitting at the table with me. Counsel is from Virginia. He's a Virginia lawyer. His name is Jon Moseley.

THE COURT: Good morning, Mr. Moseley.

MR. KLAYMAN: My paralegal's name is Dina James.

THE COURT: What's your paralegal's name?

MR. KLAYMAN: Dina James.

THE COURT: That's absolutely fine.

MR. KLAYMAN: Thank you.

THE COURT: And for the government.

MS. HARTNETT: Good morning, Your Honor. Kathleen Hartnett from the Civil Division at the Department of Justice for the defendants.

THE COURT: Yes, I saw your notice last night, Ms. Hartnett.

MS. HARTNETT: Yes.

THE COURT: Am I pronouncing that correctly?

MS. HARTNETT: Yes, Your Honor.

THE COURT: Good morning, Ms. Hartnett.

MS. HARTNETT: With me at counsel table is Adam Kirschner from the Federal Programs Branch at the Department of Justice.

THE COURT: Good morning, Mr. Kirschner. All right.

So this morning I have in front of me two motions: the plaintiff's motion for preliminary injunction and the government's motion for dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). So why don't we start with you, Mr. Klayman.

MR. KLAYMAN: Thank you, Your Honor.

THE COURT: Since yours was the first motion filed.

MR. KLAYMAN: Does Your Honor have any timing limitations?

THE COURT: None.

MR. KLAYMAN: None, okay. Thank you.

THE COURT: We can go on as long as I have questions.

MR. KLAYMAN: Okay.

THE COURT: Or you have things to say.

MR. KLAYMAN: I look forward to it, questions.

Your Honor, this is a case at the pinnacle of national importance. It's not really just a question about immigration enforcement. It's a question about our Constitution. It's a question about whether the president can override Congress, go around Congress. And that's why this is so important. It reminds me of another case that I had the privilege of arguing about a year ago before Judge Leon, which was involving the NSA where he granted a preliminary injunction, and that's what we're seeking here.

THE COURT: Mr. Klayman, I did see reference in some parts of your brief to unlawful surveillance, warrantless unlawful surveillance and why it was in the public interest to grant the preliminary injunction.

MR. KLAYMAN: Perhaps it's on my mind. That was a brief that we filed, and then we filed a correction immediately after that. We were taking a little bit from a prior brief.

THE COURT: All right. So you filed a correction, I can see that. So you had success with one brief in front of another judge across the hall so you thought why not --

MR. KLAYMAN: Give it a try.

THE COURT: Give it a try, got it. Does that explain why I've got two motions for preliminary injunctions from you?

MR. KLAYMAN: That's correct.

THE COURT: One docketed at ECF 6 and one at ECF 7?

MR. KLAYMAN: That's correct.

THE COURT: All right. I just wanted to make sure --

MR. KLAYMAN: The latter one is the one that governs. We picked that up a few minutes after it was filed.

THE COURT: I got it, okay, thank you.

MR. KLAYMAN: I appreciate you bringing that to the record's attention.

Your Honor, on March 28, 2011, President Obama stated to the American people, "America is a nation of laws, which means that I as president am obligated to enforce the law. I don't have a choice about that. Congress passes a law. The Executive Branch's job is to enforce and implement these laws and then the judiciary 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."

THE COURT: Mr. Klayman, I've heard that speech

and I've also seen it referenced in papers, so there's no need for you to be repeating things. I have read the papers quite thoroughly, and so let's hear from you about things that you want to supplement your papers with since, even though I've said there's no time limit, I also don't want to repeat everything that's in the papers.

MR. KLAYMAN: I understand that. I wanted to --

THE COURT: Let me just ask you because there are a couple things that I wanted to be clear about in my own mind. The plaintiff's supplemental declaration that was filed on December 19th states in Paragraph 9 that he seeks an injunction, and I quote, "on behalf of not just myself and my office but all of the American people," which really addressed one of the questions I had in this case about whether Joseph Arpaio was suing, you know, in his personal capacity as a citizen of the United States or only in his official capacity as sheriff of Maricopa County or both.

MR. KLAYMAN: He's suing as both, Your Honor.

THE COURT: All right.

MR. KLAYMAN: As we set forth in this affidavit, and I might add we're not seeking an injunction for all of the American people. It will have that impact, of course, in terms of precedent, but he's representing the people of Maricopa County.

THE COURT: Okay. So his entire affidavit is all about -- and the reason I was confused is because his affidavits that you filed on his behalf are all about the harms to his office. And so, you know, I was a little bit confused in terms of the framing of the caption of the complaint and some of his statements in the declaration, including the one I just read about whether he was also complaining in his personal capacity. If he is suing in his personal capacity, on what basis would he have standing?

MR. KLAYMAN: Yes. I would look at Paragraph 40 of that affidavit, Your Honor. He's suing in part because --

THE COURT: You're talking about the supplemental affidavit?

MR. KLAYMAN: Supplemental affidavit. Because he himself has been threatened. He himself has been threatened by individuals on the basis of his stance on immigration.

THE COURT: Okay. Well, that leads me to my next question. If he's suing because of -- you're talking, for example, about the notice that you filed just last night about the bomb threats, which was the press release from Maricopa County about bomb threats to the plaintiff in this case, that's the nature of the personal

injury to him?

MR. KLAYMAN: In part, and there's another report which incorporates by reference into his affidavit which is attached as Exhibit 5 to that affidavit where an individual threatened him with death on the basis that his family was deported as a result of actions that were taken.

THE COURT: But if I read your notice last night, for example, it says specifically in the press release issued by the plaintiff and his office that the reason he received the death threats is because of his widely known stance regarding illegal immigration, and if that's the case, is there anything I could do here that would change the plaintiff's widely known stance on illegal immigration that would stop him from being threatened?

MR. KLAYMAN: Well, there's a nexus here, and it doesn't have to be an absolute nexus. In terms of standing, I think you asked me the standing question --

THE COURT: Let's hear your explanation of that nexus.

MR. KLAYMAN: Yes. The fact that he has himself filed this complaint which is seeking to enforce the immigration laws as they currently exist exacerbates a pre-existing condition where he's viewed as -- and he's

not because I know him quite well; he's a client as well as a friend. The image that's been created by some in the media, in particular, that he's anti-immigrant, he's not anti-immigrant, but he's been viewed as anti-illegal immigrant, people have threatened him repeatedly. There are protests going on as we speak in front of his sheriff's office in Phoenix today as a result of this complaint. And there is -- and you'll probably see press reports about that -- but there is a substantial likelihood that he will be threatened with severe bodily injury or death as a result of simply filing this case and trying to enforce the immigration laws.

THE COURT: Mr. Klayman, I come back again to the evidence that you have submitted, you have submitted in this case with statements issued by the sheriff's office, and I'm reading page 2 of the document docketed at ECF 21-1, page 2, "All three aforementioned threats against Arpaio came as a result of the sheriff's widely known stance on illegal immigration," and I take it that there's nothing that I can say or do that is going to change his widely known stance on illegal immigration which he says was the cause of the threats. Am I correct on that?

MR. KLAYMAN: That's one cause of the threats. And if you look at the actual attachments, Your Honor, the

exhibits, Exhibit 5 for instance, is that he was threatened with severe bodily injury or death by someone who as a result of his actions had his family deported from this country. What we are arguing in this case and the position that he's taken throughout is that we should enforce the immigration laws. He hands illegal aliens over to ICE --

THE COURT: Well --

MR. KLAYMAN: -- for deportation, yet they come back into his jail.

THE COURT: Okay. So I want to ask, just like I was a little puzzled by your papers about whether the plaintiff was suing in his personal or official capacity or both, I want to be clear about precisely what policies you're challenging here, Mr. Klayman. You have a broad phrase that you used, "the president's immigration policies." That just doesn't cut it for me when you're asking me to enjoin from the bench with the strike of my pen some national programs. I have to be absolutely clear what is it precisely you're asking me to challenge, you're asking me to enjoin and stop.

So let me be clear --

MR. KLAYMAN: Certainly.

THE COURT: -- and ask you to be clear about it.

So this is what I understand based on your

papers that you're challenging the policies that are announced in two memoranda: the memorandum from Janet Napolitano issued on June 15, 2012, entitled Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children, which I am going to refer to, as the parties do in their papers, as the DACA program, D-A-C-A.

You're also challenging the programs outlined in a memorandum from Secretary of Homeland Security Jeh Johnson, dated November 20, 2014, 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. I'll call that program, as the parties do, the DAPA program, D-A-P-A. And the revisions to the DACA program, as the parties do in their papers.

So as I understand it, you're challenging the DACA program, the 2014 revisions to the DACA program and the DAPA program.

MR. KLAYMAN: That's correct.

THE COURT: Do I have that right?

MR. KLAYMAN: You do.

THE COURT: All right. So you are not challenging the policies that are announced, for example, because I take it that there were about ten memoranda that

were issued by Secretary Johnson on November. You're not challenging, for example, the memorandum from DHS Secretary Jeh Johnson titled Expansion of the Provisional Waiver Program which allows, I guess, some eligible immigrants to travel overseas. You're not challenging that; is that correct?

MR. KLAYMAN: Correct.

THE COURT: And you're not challenging the memorandum on the same date, November 20, 2014, from the Secretary of DHS titled Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, which as I've read it defines the priorities 1, 2 and 3 for the undocumented immigrants who are the priorities for federal enforcement authority. Am I correct on that?

MR. KLAYMAN: You're correct.

THE COURT: And you're also not challenging the memorandum of the same date, November 20, 2014, by the Secretary of Homeland Security entitled Policies Supporting U.S. High-Skilled Business and Workers. Is that correct?

MR. KLAYMAN: Correct, Your Honor.

THE COURT: So we're really down to these DACA program, DACA revisions program and the DAPA program. Is that right?

MR. KLAYMAN: That is right.

THE COURT: So with respect to the DACA program, which has been in effect since 2012, two years, how is it that you can show any kind of irreparable harm since it's taken you two years to challenge that program?

MR. KLAYMAN: What's set forth in the supplemental affidavit of Sheriff Arpaio is that since this new executive order has a memorandum, whatever you want to call it, it's kind of murky as to what the president did through DHS, but it is in effect an executive action in any event, and the president admits that.

THE COURT: What's murky about it?

MR. KLAYMAN: Well, they call them memoranda rather than executive orders. Executive orders would ordinarily come out as an executive order. But we believe that for political purposes, because the president doesn't want to exceed the numbers of executive orders issued by other presidents, he's calling them memoranda right now and it's being implemented through the Department of Homeland Security.

THE COURT: Well, doesn't the president affect policy over the sprawling federal bureaucracy in a number of different ways? One way is executive orders; one way, signing statements. When they sign legislation into law, they have signing statements that tell agencies how the

president wants them interpreted. There are many different ways where presidents affect the execution of the laws.

MR. KLAYMAN: Absolutely.

THE COURT: I know you made this argument, but I'm not sure I really understand essentially what difference that makes. I want to make sure I'm not missing your point, Mr. Klayman. So what difference does it make?

MR. KLAYMAN: Well, the primary point is that what the president has done through these memoranda, which are executive actions, is not policy. He's enacting law. He's creating law. And he cannot override Congress in doing that under Article I, Section 1 of the U.S. Constitution; all legislative powers --

THE COURT: Why is it that you say it's not a policy? I mean, you know, I have information that's been submitted in the -- by you, actually, as part of the Department of Justice's OOC memorandum that the government's brief was talked about; that the resources in DHS to handle undocumented immigrants in this country, you know, only allows deportation of 400,000 out of the 11-point some, 11-plus million such immigrants. So they have to figure out their enforcement priorities.

So why -- do you dispute those numbers, first of

all; and second of all, why isn't that an appropriate focus of administrative, administration policy of how they are going to take limited resources and target it even if you disagree with their targets, but why isn't that an appropriate function, first of all, of the president to give that kind of guidance through his cabinet secretaries and why isn't that appropriate?

MR. KLAYMAN: First of all, I might say, Your Honor, that this is not in any way an attack on this particular president. Presidents in the past have violated executive orders and courts have overturned them. This president, in fact, just about a year ago had one overturned with regard to the National Labor Relations Board where he did an interim appointment. It's not unusual for courts to overturn executive actions. Presidents do try to extend their powers as much as they can, and that's the reason why we have the courts and that's the reason why I'm proud to be in front of you, because you are the protector of the American people.

But let me get to the point. I don't dispute the numbers. But this president in particular has not been shy about asking for money for appropriations. We're now at a budget deficit of $18 trillion. It's increased several trillion since he's been president. No request was ever made to Congress to increase the appropriation so

that border security could be enhanced and so people could be deported who are here illegally.

What's happened here -- and I don't mean any disrespect to the president -- is that he's trying to force the hand of the next Congress is that by putting in effect the law in effect -- in fact, he's made reference to that, some of the quotes I was going to read you, he's daring them to do what he wants and to enact. He said several times, 22 times in the past, that he's not an emperor. That he does not have the power to legislate as a president.

And that's the bottom line here. He did not ask for the money, but all of a sudden after the fact he and his colleagues at the Department of Homeland Security decide, well, we don't have the money so we have to leave all these people here. Here is an irony too --

THE COURT: Mr. Klayman, let me just say that, you know, I'm well aware of my power to undo executive actions of agencies. And I do exercise that power humbly when necessary. And I fully appreciate that you're inviting me in this case to protect Congress's prerogative to act in the immigration arena. But I have some pause, given the power of Congress to control purse, the purse strings, to tell the president exactly how Congress feels about whether the president's interpretation of the

immigration laws and enforcement priorities for the immigration laws are ones that Congress accepts or does not.

When it comes to deferred removal programs, the government's brief has outlined -- you know, the deferred removal programs have been longstanding in this country dating back to the 1970s. It was very interesting for me to read that and that Congress has, in fact, sanctioned the use of deferred removal programs in -- with reference to them embodied in the law.

So deferred removal programs per se are the kinds of enforcement prioritization that the executive branch has exercised over a number of administrations, over a number of years, at least 30, that Congress has sanctioned; and if Congress doesn't like it, doesn't Congress have the power to step in and address whatever misprioritization it thinks is going on here without the Court accepting your invitation and reaching out to intervene in this Legislative-Executive Branch squabble?

MR. KLAYMAN: You asked a really good question that has a number of different responses to it. First of all, we're talking here about, first talked about appropriation. We cited a Supreme Court case called *Chadha* where President Nixon decided he wasn't going to spend money that Congress had appropriated. Supreme Court

said, No, you can't make that decision. You can't override Congress; the money has been appropriated. This money has been appropriated maybe ipso, after the fact the president said it's not enough, but it's been appropriated for enforcement for deportation.

THE COURT: Well --

MR. KLAYMAN: He's shutting -- he's shutting down the potential of deportation.

THE COURT: But Mr. Klayman, this is not a case, I really -- I looked at *Chadha*, I appreciate how you're using *Chadha* in this case, but I really fail to see how *Chadha* is applicable here where *Chadha* was a blatant, you know, response by the president to the Congress, You've given me money and told me how you want me to spend it. I'm just not going to spend it the way you want. That is an appropriate role for the Court to step in and say No, no, no, you can't -- you are not the emperor, you have to follow the directions.

This program is a deferred removal program, you know, as I said, longstanding practice for prioritization of resources that have been provided by Congress. I just don't see how *Chadha* is at all applicable here.

MR. KLAYMAN: *Chadha* is applicable on two different grounds. One, with regard to purse strings or something for the Congress to decide, and Congress has

appropriated this money for use in large part in deportation proceedings against illegal aliens. Secondly --

THE COURT: I do think *Chadha* would be applicable if Congress passed a law saying to the president, You may not expend any funds for the DACA program, the revised, you know, DACA program, the revised DACA program or the DAPA program. Then if the president proceeded, I think then you might have a *Chadha* issue. But that's not what happened.

MR. KLAYMAN: Let me tell you respectfully, Your Honor, why you have it, Your Honor, just teeing the question up. That's why I started with that aspect of your question is because the money is being used not for purposes which it was appropriated, which was immigration enforcement of the current law, but if you look at these memoranda, they are deferring benefits which go part far beyond the current law.

For instance, it's in effect granting amnesty and immunity from prosecution authority. It's their employment authorization cards for the right to work, regardless of whether you're legal or illegal; the opportunity to use the law to get a work authorization card to get a state driver's license. From that you can get the right to vote -- not the right to vote but you can

present it and no questions are asked and sign up on the register to vote. Plus there are background checks here for nearly 5 million illegal immigrants. This costs money.

THE COURT: Mr. Klayman, really this is not a case about purported voter fraud. Is that what you're saying one of the harms is, voter fraud?

MR. KLAYMAN: It can be one of the harms. It's not something we put into the affidavit, but it can be. What I'm saying to Your Honor is is that the monies are being used for purposes that were not appropriated by Congress to use the monies for, and I just listed various aspects of that, including background checks for potentially 5 million illegal aliens. There has never been -- and this is the third part in answer to your question -- there's never been any deferred action here on this grand scale. 5 million people, nearly half of the illegal immigrant population. It's never been done to that extent.

I'm not condoning what President Bush did earlier for 1.2. But he didn't have all these different aspects to it when money was being spent for purposes that Congress had not authorized it for. And that's a important aspect here. This is a very expensive --

THE COURT: Are you saying, Mr. Klayman, that

the old, the longstanding prior deferred removal programs implemented from the '70s up to today did not carry with them a work permit certificate? Is that -- is that the factual matter of what you're saying, that this deferred removal program differs because it has a work certificate authorization?

MR. KLAYMAN: Some of them -- I'm sorry, I didn't mean to interrupt you. Some of them did not, yes.

THE COURT: But some of them did.

MR. KLAYMAN: I'm not sure. I'm trying to be -- I haven't studied the prior ones, okay.

In any event, what we said in our brief was it doesn't matter what other presidents did. We're challenging this now. And I can tell you if you know my reputation -- I think you do -- I gave President George W. Bush a pretty hard time. I just don't bring cases with regard to Democrat [sic] presidents. I sued them over warrantless wiretaps. The Cheney Energy Task Force. I'm thought of as a Libertarian conservative. My supporters weren't that kind to me over doing that.

I'm doing this on the basis of principle, and so is Sheriff Arpaio. It doesn't matter what Bush did in the past or Clinton or anybody else, this is not right and it's not legal.

And there are many aspects that go beyond the

work permits. They are dealing with background checks for nearly 5 million illegal aliens; and one of the problems here -- and we can to this later if you want, is that it's a blanket, in effect, amnesty to these people, because --

THE COURT: So can we go back to my original question?

MR. KLAYMAN: Yes.

THE COURT: Which is, I'm not sure I really fully understand your answer. Putting aside the revisions to the DACA program and the DAPA program, which are fairly of recent vintage, how can you establish irreparable harm from a program that you're only suing on two years after it came into effect, the DACA program?

MR. KLAYMAN: Number one, as set forth in the affidavit, since this has gone into effect on November 20, 2014 --

THE COURT: Oh, you're back to the bomb threats.

MR. KLAYMAN: No, not the bomb threats. What happens here is that illegal aliens who are turned over by the sheriff's office -- and this is primarily a case about his office. I just mentioned one aspect, personal aspect of it, but that's a very small part of this case. It's about the function of his office, which strains his resources and takes away law enforcement priorities to do things which unfortunately are not productive because of

the executive action of this president is that he turns over after sentences are fulfilled in his jail --

THE COURT: I do understand --

MR. KLAYMAN: -- and then they come back.

THE COURT: Part of your argument is that these three programs, DACA, revised DACA and the DAPA program are going to be a magnet for other immigrants to come illegally into the country. And that because of that magnet it's going to burden the resources of the plaintiff's sheriff's office. Do I have that right?

MR. KLAYMAN: No, that's just one part. That's a small part. That's what the government would like you to believe, okay. We're taught in law school, always shape the argument in the most favorable light. That argument is extremely disingenuous.

THE COURT: Well, that's why you're here, Mr. Klayman.

MR. KLAYMAN: Right.

THE COURT: So that you can respond. You asked for oral argument, so here you are.

MR. KLAYMAN: Okay. And I used to be a Justice Department lawyer too, so I know how we're taught, keep it simple. KISS over at the department. They want to keep it simple, it's not that simple. The reality is -- and this is where most of the harm comes in and it's set forth

in the supplemental affidavit in particular -- is that illegal immigrants who are serving time for crimes, when those sentence are concluded, are turned over to ICE, to DHS, the immigration authorities. Because the deportation laws were not being enforced or for that matter any other immigration law that's related thereto, these criminals wind up back in the jail, they wind up getting rearrested and that costs -- we detailed over $9 million of greater costs, which included part of this period.

THE COURT: Mr. Klayman, this is the fallacy, the logical fallacy that I perceive in that argument: Those are harms that the plaintiff is claiming even before the DACA program or the revised DACA program have gone into effect. So how can these programs that you're seeking to stop have any causative effect or redressability possibility for those particular harms that you have laid out in the plaintiff's original affidavit and the supplemental affidavit? And redressability and causation? Prerequisites for standing here.

MR. KLAYMAN: Let me turn your attention first to Paragraph 38 of the supplemental affidavit. Based on the average length of stay, I estimate that Maricopa County incurred an additional expense of $9,293,619.96 from February 1, 2014, through December 17, 2014. That's over a month -- that's about a month since this was

implemented. So there is an overlap. They are continuing to get these illegal immigrants who have been released come back into the jails, which are incurring expense. So yes, it does fall within the time period after this presidential memorandum was implemented on November 20. So that's in the record, Your Honor.

THE COURT: But it hasn't been implemented yet. It's been announced, but I think it has a 180-day lag period even before, you know, applications for eligibility determinations are made. Am I right on that date?

MR. KLAYMAN: Your Honor, having relied upon the argument in the Justice Department's brief, which was frankly misleading, notice that they didn't submit one affidavit. They did not go under oath on anything. They didn't want to put their money where their mouth is. There is nothing in that record which contravents our affidavit. They just threw in a bunch of documents. Why didn't they go under oath and swear what was going on, because what we know --

THE COURT: But Mr. Klayman, let's not -- let's not play to the gallery here. We all understand as lawyers, that it is your burden, not the government's to establish standing. It's your burden to introduce the affidavits --

MR. KLAYMAN: And we have.

THE COURT: -- to establish your standing. The government doesn't have that burden.

MR. KLAYMAN: It's a very low threshold at this point. Let me tell you why on standing. But let me back up on this. I just read to you one paragraph, more than one paragraph in the supplemental affidavit which deals with what's happening and how it's increasing costs to Maricopa County since these memoranda opinion were issued. In addition, we have set forth --

THE COURT: Because of the magnet effect?

MR. KLAYMAN: I'm not talking about magnet. Yes, there is a magnet, that's another aspect, but it's because illegal immigrants that have been arrested for crimes, for state crimes -- we don't enforce the federal immigration law, the United States has already, the U.S. Supreme Court said no, that's a federal province. I was actually part of that case as an amicus, because people who have been arrested, illegal immigrants for state crimes, once they serve their sentence are let out and turned over to ICE. They then are not in any way deported or having any action taken against them. They are let out into the Maricopa County community; they commit other crimes and they wind up back in the jail at a rate of 36 percent approximately.

THE COURT: And for --

MR. KLAYMAN: This has happened since the memorandum has come out.

THE COURT: Let me ask you, these are people who have committed, as you said, by your definition a state crime, been arrested for a state crime; whatever happens to them in the state criminal justice system happens and then they are turned over to ICE for processing. And what you're saying is that instead of -- ICE instead of deporting them releases them. Do I have that right?

MR. KLAYMAN: Well, they are not ordered to release them. If it's not a major crime, they are ordered to release them under this deferred action program. They are back out into the public domain, they are being rearrested for committing other crimes and they wind up back in the jail. These people are repeat offenders.

THE COURT: Your complaint is because one of the eligibility requirements for the DAPA program is that the particular undocumented immigrant does not fall within one of the categories of enforcement that's set out in the memorandum on enforcing, you know, that sets out the priorities 1, 2 and 3 for enforcement. Is that right?

MR. KLAYMAN: It could be a case, but it's also the case that this administration just simply is not even enforcing that aspect of things. Because what they're doing is they are just letting people out who have

committed crimes rather than -- if you commit a crime, you generally get deported, no matter what that crime may be, notwithstanding this criteria.

THE COURT: Well, as I've read the plaintiff's affidavit, he has a complaint that undocumented immigrants that are picked up by the Maricopa County Sheriff's Department, processes them and then they are turned over to ICE are being released. And that is the complaint that I take it predates the DACA program, the revised DACA program and the DAPA program; right?

MR. KLAYMAN: It's been a running complaint, but what happened here, Your Honor, is an exacerbation. I'm going to get to standing cases in a second. This is an exacerbation of the current situation, because it's not just that some of them, 36 percent, are coming back; but now under this program, this executive action, they are all going to be out there unless they commit some heinous crime. They are all going to be out in the community, vandalizing, assaulting, whatever the case may be. They are out there and they are coming back to the jails. And that increases the costs, and we documented from that time period I just read to you, increased it over $9 million. And that goes into the period after the president's executive action took effect.

Now, we also gave you the other day a case by

Judge Schwab in the Western --

THE COURT: Well, you keep saying "in effect," but what you mean is after the president's policies were announced, they are not in effect. And they are not even accepting applications, I think, until 180 days after the November 20 announcement; right?

MR. KLAYMAN: They are in effect -- you have 180 days to apply, okay.

THE COURT: Right.

MR. KLAYMAN: Okay. They are in effect right now. You can apply right now.

In addition, as is in the record, the Department of Homeland Security is hiring thousands of other employees to process. Now, granted these applications -- and here is another irony. They put in effect a fee of $465 to apply. How many illegal immigrants are going to come to the surface here and show their face when they have to ante up $465? Most of them in all likelihood want to remain illegal rather than having to pay it. The president's policies, and I'll get to that later --

THE COURT: Let me just say, it was curious to me to read in your briefs your expressions of concern over undocumented immigrants paying $465 to make their application for their eligibility review for the revised DACA program and the DAPA program and your concern that

they may not get a refund of their money. I take it you're not here on behalf of the undocumented immigrants who may be eligible for these programs.

MR. KLAYMAN: I'm not here on behalf of them, Your Honor; but as an aside, if you know anything about me, I'm not anti-immigration. In 1996 I did a presidential debate at the National Press Club that was trying to say that immigration is good for this country. I'm not anti. And that's the problem, people tar you with that, they think you're conservative, you're anti-immigrant, you're a homophobe and everything else. I'm not.

And the reality is that we are a system of laws and not men, as our second president, John Adams said. And those laws need to be respected. The precedent here is terrible. It's trashing our Constitution. It's more important than the immigration issue even. And that's what's at issue, and that's why the president 22 times said I can't do this, I'm not an emperor, why are you pressing on me? When it's politically convenient, then he does it. Other presidents have done the same thing, but that doesn't make it right and that's not precedent. What's precedent is the Constitution, that's what counts.

Now; let me get into the standing issues. Judge Helen Segal Huvelle, one of your colleagues, in a case,

Honeywell Intern, Inc. v. EPA, found that chemical manufacturers had standing because the challenged regulation could lead customers to seek out manufacturers' competitors in the future. She didn't require an absolute direct nexus for standing.

In fact, and this is ironic, the case involving SB 1070 -- and we also cited this case -- a Supreme Court case where the case was the U.S. Government and I was, I participated as an intervenor in that case, I represented the -- it tells you where I come from -- the Arizona Latino Republicans, Latinos, who were supporting that law, legal immigration. And in that case the Supreme Court did not throw the case out on standing, nor did the lower courts, but the administration was challenging whether these stop-and-ask situations by the police where they would stop someone on probable cause and ask for their immigration papers to see whether they were here legally. The administration was challenging that, and yet that law had not gone into effect yet. And standing was found by the lower courts and upheld by the Supreme Court.

THE COURT: Well, Mr. Klayman, you have put your finger on one of the critical issues for standing in this case, which is how much is the plaintiff's alleged injury, in fact, which has to be concrete and particularized for him to have standing in this case dependent on the actions

of multiple third parties in the form of undocumented immigrants. And when I look at, with all due respect, my colleague's opinions on this issue but, in fact, look at what binds me, which is the D.C. Circuit opinions, in cases such as *Crete Carrier Corp.* from 2004, the *National Wrestling Coaches Association* from also 2004, where the D.C. Circuit has made clear that when the injury, in fact, depends on what the conduct is of third parties, you've got a big standing problem. So how do you address those cases?

MR. KLAYMAN: These are not third parties here we're talking about. The president and his administration, the Department of Homeland Security is not third parties. This is a direct hit.

THE COURT: Well, the injury that the plaintiff is alleging here is because the -- as a result of the policies, third parties, undocumented immigrants are going to react in a particular way. One, they are going to use those policies as a magnet to come to the United States, increasing undocumented illegal immigration to the country; and two, that certain parts of those, that population are going to commit crimes.

MR. KLAYMAN: No --

THE COURT: That attacks the sheriff's resources.

MR. KLAYMAN: Okay. There you have it, Your Honor.

THE COURT: So it's those third parties --

MR. KLAYMAN: Yes, it's a direct impact on the sheriff's office. This sheriff stands in no different position than the 24 states that brought an action in Texas.

THE COURT: That case was not in front of me, and I don't think that that Court has yet opined on the --

MR. KLAYMAN: No, you're right, but there's a Court in the Western District of Pennsylvania that has opined and has found the president's actions unconstitutional, Western District of Pennsylvania, Judge Schwab.

THE COURT: Let's talk about that case. I found it a little bit --

MR. KLAYMAN: And he didn't opine. That's a ruling.

THE COURT: Some commentators have called that case complex. I just find it a puzzle. As I understand the context of that case, there was a defendant in front of the judge awaiting sentencing for illegal reentry, and the judge, as he was required to do, evaluated the sentencing factor, 18 U.S.C. 3553(a)(6), which calls upon sentencing courts to impose a sentence that avoids

unwarranted sentencing disparities among similarly situated defendants convicted of the same crime. And in the context of considering that factor, sentencing factor, unwarranted sentencing disparities among similarly situated defendants convicted of the same crime, reached out and decided that he had to decide the constitutionality of the DACA program in order to ascertain whether the time-served sentence called for in that case under the federal sentencing guidelines was, would result in an unwarranted sentencing disparity.

And then the Court -- the aspect of the case that puzzles me, among others, is that the Court concluded that this defendant wasn't eligible for the DAPA program and therefore was not similarly situated to defendants who might be eligible but then proceeded to evaluate the constitutionality of the program.

So it wasn't even having found that the defendant wasn't eligible for the DAPA program, that defendant was no longer -- was not similarly situated defendants who might be. I actually find it a real puzzle how he was able to then reach out and evaluate the constitutionality of this program, which didn't apply to the defendant in front of him.

MR. KLAYMAN: I didn't read it that way. Here is the way I read it.

THE COURT: All right.

MR. KLAYMAN: I read it that the defendant who was trying to change his plea, he was going to plea, was pleading to a crime where he could be deported under that provision. And the defendant was claiming, in effect the defense, that under this new DACA program, DAPA program, I should remain here, I don't want to be deported.

THE COURT: No, no, no. The defendant wasn't claiming that. In fact, the defendant didn't even raise this issue. The defendant was going to be sentenced to time served and didn't raise the issue at all. The Court sua sponte raised the issue, which is fine. Courts have a statutory obligation to consider that factor and look at the consideration for that factor. But I don't think the defendant even contended in the case, based on my reading of the opinion, that he was even eligible for the DAPA program.

MR. KLAYMAN: That's what I glean from it or whether it was expressed or whether it was implied, the defendant didn't want to be deported from the United States. So the judge reached that issue and he said, No, you're still subject to deportation because this was unconstitutional, you're not going to be able to have this umbrella.

THE COURT: Well, let me just say that case is

from another circuit. It's a District Court opinion, and because of the puzzling nature of how the judge reached the decision on the constitutionality, I really don't find it at all persuasive either. So let's, we can move on from the Pennsylvania District Court opinion.

MR. KLAYMAN: No, that's fine, but I was citing that, that there was a federal judge who found this unconstitutional. We got there from Texas as to whether Texas had anything to do with here.

THE COURT: Well, you raised it, Mr. Klayman. I just wanted to share with you my views so you wouldn't waste any more time.

MR. KLAYMAN: I understand. There are myriad of other cases that we cited in our briefs on standing. And one of them is *International Union of Bricklayers and Allied Craftsmen,* 761 F.2d 802, that is the D.C. Circuit in 1985, standing is found despite lack of details regarding specific future jobs. It was jobs impact into the future, not present. And standing can result -- we've ask for declaratory judgment here too, Your Honor, which is when harm is imminent. It doesn't actually have to occur right now, but it has to be imminent. So we have a declaratory judgment provision, too, as one of our counts.

THE COURT: With respect to your imminent harm, I did want to hear, Mr. Klayman, your response to the

government's argument that these, the deferred removal program because of its special targeting of priority enforcement, you know, immigrants, illegal immigrants, will actually help local law enforcement. So how do you respond to that argument?

MR. KLAYMAN: I don't think that's a sensical argument. It's not rationally based. It doesn't help local law enforcement to let people out on the streets who have committed crimes and are winding up back in the jail. It puts a strain on resources.

In the courtroom today is my brother. He's a policeman in Philadelphia. I wish he could come up here and testify. He knows all about that, criminals back on the streets in Philadelphia or anywhere else. And that's what's happening in Maricopa County. Maricopa County is the largest sheriff's office, at least in terms of land mass, in this country. It puts a great strain on the resources to have these people out there and not subject to deportation.

And that's the essence of our argument no matter how the government wants to couch it. You can't put lipstick on a pig. This is not a case about primarily drawing people to this country. This is a case about the burden on resources of this sheriff's office. It's already stretched incredibly thin, and that's what it's

about.

I know known Sheriff Arpaio for a long time. I never heard one negative biased remark against Latinos or I wouldn't represent him if he did. And SB 1070, I came in there and I told the Supreme Court, I said if Latinos' rights are violated in terms of stop and questioning and searched, Freedom Watch, my group, will be the first group that came to their defense. I lived in Miami for a long time. I represented the Cuban-American community, a lot of other communities. This is not about Latinos. This is about our laws and enforcing our laws.

THE COURT: I think I understand your arguments, Mr. Klayman. But if you have anything further, you can save it for your reply.

MR. KLAYMAN: Well, I did have a little -- I want to talk about the APA for a little, if I may.

THE COURT: All right.

MR. KLAYMAN: *National Resources Defense Council v. Environmental Protection Agency*, 643 F.3d 311 D.C. Circuit July 1, 2011, recent case. Wherein, you know, this is dealing with environmental protection, also questions of causation, because these questions are brought and standing is found with regard to APA edicts, some by executive order or memoranda which are to take effect in the future. Here is what's going to happen if

this goes into effect.

And standing has been found and preliminary injunctions have been granted. So there are a number of cases, Your Honor, and I know from the other case that we had that you're a very scholarly person and that you'll read those and have an open mind on this because this is not in any way geared against the Latino community or any other community. It's called protecting our Constitution.

With regard to the APA, there's a requirement when you have these kinds of substantive rights that are being doled out by presidential action or by an agency, an agency like the DHS whose memorandum that I enumerated before, there is a duty to have at least rule-making, notice and comment. And that's under Section 702 through 706, notice and comment. And under 7062, 5 U.S.C. 7062, the Court must hold unlawful and set aside any agency which is "arbitrary, capricious and abuse of discretion or otherwise not in accordance with law; B, contrary to constitutional right" -- constitutional right is what is at issue here in part -- "power, privilege or immunity; or C, in excess of statutory jurisdiction, authority or limitations or short of statutory authority."

THE COURT: I know, Mr. Klayman, that under the APA should you prevail on your standing and the government's substantial challenge to standing here and

therefore this Court's subject matter jurisdiction, but let's say you prevail on that, as I appreciate that you said that one of the key major questions here is whether the programs that are challenged are a valid exercise of prosecutorial discretion, and, you know, I appreciate that you call them phony and disingenuous or the description of them is a valid exercise of prosecutorial discretion, you call that phony and disingenuous because the guidelines used a standardized approach and I was a little bit curious about that because it sort of seems like the Executive Branch is therefore sort of between a rock and a hard place.

If they have fairly clear guidelines for their enforcement priorities in the immigration arena, it's too standardized and, you know, you call it phony and disingenuous. But if they don't have very clear guidance somewhat, their priorities would be, they would certainly be subject to a challenge for being arbitrary, capricious and unreasonable under the APA. So where are you drawing that line --

MR. KLAYMAN: That's a good question.

THE COURT: -- with regard to what the APA program is in your view with these policies?

MR. KLAYMAN: First of all, why it is phony and disingenuous, no disrespect, I could have used stronger

language.

THE COURT: You could have used stronger language than phony and disingenuous? Those words sort of hopped off the brief to my eyes, fairly, you know, noteworthy.

MR. KLAYMAN: Okay.

THE COURT: In terms of your views.

MR. KLAYMAN: I could have used Woody Allen's expression, a sham was a sham was a sham. The reality here is that because the breadth is so broad and because it's clear to have prosecutorial -- prosecutorial discretion --

THE COURT: When you say "breadth," you mean the numbers?

MR. KLAYMAN: The numbers.

THE COURT: Okay.

MR. KLAYMAN: And there are no criteria to really determine, except a few criteria -- and I'll get into that -- what is at issue. So broad that an immigration enforcement person cannot possibly process the applications of 5 million illegal immigrants, and the law is clear, and even the Justice Department admitted in its earlier memorandum when the president said I can't be an emperor, is that you have to do it on a case-by-case basis.

So are we going to process 5 million illegal immigrants on a case-by-case basis? That's irrational. You talk about trying to save funds, and that's why it's phony and disingenuous. Just to process 5 million potential illegal immigrants for -- and using prosecutorial discretion is going to bust our budget to the point where we won't be able to do anything else at INS or anywhere else. You can't process that. And it requires a background check for either of them.

THE COURT: Why do you think it can't be processed? In the DACA program the government presented statistics that -- and you also challenged the DACA program -- that it resulted in a denial of 36,860 applications as of December 5, 2014. So those are tens of thousands of denials that were done on a case-by-case basis.

MR. KLAYMAN: Out of 766,000 illegals. That's a very low percentage.

THE COURT: But it's not 100 percent. It's not a hundred percent that we're just rubber stamping.

MR. KLAYMAN: No, we never said 100 percent, Your Honor, but most of these people are getting through the system. They are not being processed. That's why this is irrational is that you can't. There's no rational basis for us to process 5 million people doing background

checks with personnel. That's why there's an immediate impact. That's why they are hiring more people right now. The people they are hiring isn't even enough. This is all a manipulation to have the president step in to try to force the hand of Congress to meet his political promises that he made years ago. And right now the president -- and I don't mean this in a political sense, but he appears not to even care about his own party anymore. He's doing what he wants to do.

THE COURT: All right, Mr. Klayman. I think --

MR. KLAYMAN: Can I say one last thing?

THE COURT: One last thing.

MR. KLAYMAN: Yes, one last thing and that is that Your Honor's duty, in all due respect, and I know you take it seriously, is to enforce the law. And with regard to the rule-making in these presidential memorandum, and there's a couple of examples there, one is dealing with changing --

THE COURT: How about presidential memoranda, let's be clear. They are DHS --

MR. KLAYMAN: The president signs off of them, but they do come out of DHS. Even in those memoranda we cited in our brief where DHS and the president are admitting they have to do rule-making such as changing visa requirements based on employment. They in effect

have shot themselves in the foot with that admission in terms of the APA, because at a minimum they should have done rule-making here. Thirty days notice and comment, the American people have a right to comment on this, and what we're asking is not a lot. We're just saying, Your Honor, enjoin this and allow for rule-making, let them, let them publish a rule as they should do under the APA. Because we meet the requirements here for a rule. And courts have done that before. I realize this is a real big --

THE COURT: Mr. Klayman, you surprise me with your last comment. Because I had read your complaint as asking me to enjoin these programs as an unconstitutional violation of separation of powers and not just to stop them for a rule-making, notice of comment rule-making to take place. Am I wrong on that?

MR. KLAYMAN: Yes. And as I just read to you under 706, arbitrary and capricious and abuse of discretion are otherwise not in accordance with law. This is arbitrary, capricious and abuse of discretion.

THE COURT: Right. I'm just reading Count I of your complaint.

MR. KLAYMAN: And are contrary to constitutional rights.

THE COURT: Excuse me, Mr. Klayman, I'm reading

Count I of your complaint that says that it violates the Constitution and Paragraph 52 is ultravirus and you want a declaratory judgment to that effect to stop it in its tracks.

MR. KLAYMAN: Right. And the second count talks about violation of rule-making requirements.

THE COURT: Right.

MR. KLAYMAN: Third cause of action, violation of existing regulatory authority and we cite the APA, 5 U.S.C. 702 through 5 U.S.C. 706. This is not rocket science when it comes to the APA. When I was a Justice lawyer I represented the FDA, Consumer Product Safety Commission and the Federal Trade Commission. I had to defend regulations that were promulgated, some without notice and comment. And when the agency messed up, they had to go back and redo it or the Courts enjoined it.

THE COURT: All right. Thank you, Mr. Klayman.

MR. KLAYMAN: Thank you. I appreciate your questions and time.

THE COURT: And Ms. Hartnett.

MS. HARTNETT: Thank you, Your Honor. I'd be happy to address any specific questions that the Court has.

THE COURT: Yes. I mean, Mr. Klayman has raised this issue about, you know, undocumented immigrants

eligible for those programs who are accepted into the, I guess, both the DACA program and the revised DACA program and the DAPA program as receiving a certificate. Could you explain, what is this certificate?

MS. HARTNETT: I think that's a reference to an employment identification card, so when the person applies for either the DACA program or DAPA program, they both make an application for deferred action which is reviewed on a case-by-case basis and they also make an employment authorization card. And I believe that card, if it were to be issued, would be a piece of documentation that would identify the person as having received deferred action.

THE COURT: And does that -- and so the undocumented immigrant who receives this certificate, does the person get a Social Security number so if they do, if the person does get employment the person can pay taxes and enter the Social Security program? Is that also part of it?

MS. HARTNETT: Your Honor, I want to make sure I don't go beyond what we put before the Court in the brief, but I believe they do receive an identifying number which will allow them to have taxes taken from their wages going forward. This is part of, again, not the DACA and DAPA program itself but part of a pre-existing regulatory scheme that's been in place since 1981 which includes

people receiving deferred action among many other groups of people under the immigration laws as eligible for employment authorization while they are in that status which, again, is a temporary status that could be revoked at any time but allows them employment during that time period.

THE COURT: And one of the things that I talked to Mr. Klayman about is whether any of the other fairly long-standing deferred removal programs that have been implemented over the past 20, 30 years, did those also have this work certificate accompanying the grant of the deferred removal, you know, status?

MS. HARTNETT: Yes, Your Honor. I mean, among, one of the most significant examples would be the 1990 Family Fairness Program, which you'll see an opinion in our brief that applied to 1.5 million people and also included ability to apply for employment authorization. And, again, that would be something that would be standard regardless; if someone is in the deferred action category and has received deferred action according to preexisting regulation, they would be able to apply for employment authorization.

THE COURT: Okay. Now, one thing that I also wanted clarification on is in footnote 23 of your brief you cite statistics regarding the applicants under the

DAPA program, and you state that 42,632 applications have been rejected and 36,860 applications were denied. What's the difference between a rejection and a denial?

MS. HARTNETT: Thank you for asking and sorry we didn't provide that information in our brief. The rejection is something that -- and we can provide additional information to the Court if necessary. But a rejection would be something that would be facially not complying with the requirements, for example, maybe lacking a signature. I believe it was only one of the substantive requirements of the DACA program that would be kind of a facial basis for just rejecting the application and sending it back, and I think that was if the person was above the age of 30. I can confirm that.

But I think the most relevant statistic -- that is a relevant statistic because it shows some initial vetting going on and then the 36,000 number would be people whose application was actually processed and considered but rejected, and that could be for not meeting the other criteria or, as the DACA program sets forth, because discretion was determined to be inappropriate under a case-by-case basis.

THE COURT: Because Mr. Klayman, you know, did suggest that the 36,860 number of denied DACA applications was, you know, fairly low as a percentage of the total

numbers deemed eligible and granted. But, you know, I do think it's important to point out that there was this other 42,000, right.

MS. HARTNETT: That's correct.

THE COURT: That were rejected.

MS. HARTNETT: And also if I can add that it makes sense, the lower rate there is a significant rate, if not an extremely high rate. It does take some, for a person to come forward and identify themselves, one would imagine they want to met the criteria in light of what that meant to actually identify yourselves to the authorities. So at some level it seems reasonable that there be a relatively high rate of people to be accepted because one would have to be careful to make sure they met the criteria before they identified themselves.

THE COURT: The plaintiff has raised this in support of his irreparable harm requirement for preliminary injunctive relief as well as in support of his showing of an injury in fact to establish the necessary standing in the case that there are undocumented immigrants who commit crimes or picked up by the sheriff's office and then released to ICE and released into the community again and commit other crimes. And as I understand Mr. Klayman's argument -- and I'm sure he'll have an opportunity to apply and correct me if I'm

wrong -- but as I understand Mr. Klayman's argument, when the Maricopa County Sheriff's Office now takes these undocumented immigrants, turns -- who are committing state crimes, processed through the state system, turns them over to ICE, if they are eligible for this program they are just going to be released into the community again. So what happens to individuals in terms of their eligibility for either the DACA or the DAPA program if they've committed a crime on their deferred removal status?

MS. HARTNETT: Your Honor, so in the first place the person would likely, you know, not be eligible for DACA or DAPA if they had a significant criminal offense, and both of those programs incorporate into them a requirement that the person not be convicted of a significant crime and not be a national security or public safety threat.

So that's an initial response as to why -- there's several reasons why there's no nexus between these programs and the harms that are being alleged here, but that would be one of them.

But even assuming that the person had at some point committed a crime again, no basis in the record for concluding that, the status is revocable at any time. When I say "status," I mean the deferred action category.

When someone receives deferred action, it may be revoked at any time. They could be deported at any time. That could be another potential option for someone, if there were a hypothetical person who received DACA and DAPA and nonetheless committed a crime after that.

Again, there's no record evidence at all that any of the people about whom he's complaining were people that had received DACA or DAPA and then went on to commit a crime in the community. He seems to be, as the Court was indicating, challenging some other aspect of immigration enforcement at the federal issue that's not really at issue in this case.

THE COURT: All right. Could you clarify for me, because maybe it's just confused in my head, the effective date of the DAPA program and the revised DACA program, because I thought the revised DACA program had a 90-day date before it became effective and the DAPA program had 180-day date to be effective.

So could you just explain how those two dates operated. Are they effective now, as Mr. Klayman says, and the government's just receiving applications for a 90-day period and a 180-day period? Could you just explain whether I'm confused on the effective date.

MS. HARTNETT: No, you're not confused, and the programs are pursuant to memoranda. The terms of the

memoranda are not yet in effect. The revised DACA program applications should be, begin to be received starting on February 18 of 2015, approximately, but that would be the date, the 90-day date from the date of announcement. And for the DAPA program, that would take you to May 19, 2015, to even be able to submit an application. Because at that point there would still have to be a period of time for the consideration of the application, so even those dates would not be dates of necessarily beginning to grant requests under those applications.

Now, there is the ongoing DACA process from 2012, and that continues. But these, the revisions to the process will take effect pursuant to the memoranda.

THE COURT: So just so we're absolutely clear, the earliest date that anybody could be granted a DAPA deferred removal status is 180 days after November 20; is that right?

MS. HARTNETT: Correct, for DAPA, yes.

THE COURT: All right. Okay, good. I wanted to clarify that myself.

All right. Is there anything else you want to add to your papers?

MS. HARTNETT: If I could just make a couple of quick points. I wanted to react to one, there was some dispute here about what exactly was being complained of,

and I would direct the Court's attention to, among other things, Paragraph 16 of the supplemental declaration where the declarant does make the point that he seems to be attacking President Obama's six years of promising what is in effect amnesty, so I think again kind of to the point of another indicia here that we have a generalized grievance or a political dispute as opposed to an actual concrete dispute.

THE COURT: Well, I mean, Mr. Klayman's papers do refer to these programs, the challenged programs, DACA, revised DACA and DAPA as an amnesty. Does the government view them as an amnesty in any way, and why not?

MS. HARTNETT: No, Your Honor, we don't, and I think the repeated use of that term kind of obscures the actual nature of the program, which is the temporary deferral of deportation to allow the government to focus on its most critical pressing threats which include border security threats and national security and public safety threats and serious criminals. So this does not provide a legal status or a pathway to citizenship but is in essence a way to put a group of cases to the side after individualized consideration to really allow the enforcement authorities to really focus on the most critical priorities in light of limited resources.

THE COURT: But it is an amnesty to the extent

that if somebody who has been granted this deferred removal status is picked up by immigration authorities, they do get an amnesty from being deported; is that right?

MS. HARTNETT: They have their card that will provide the identification of them as a deferred action person, but at the same time, as I pointed out, that would be revocable at any time. To the extent that there would be some reason to revoke that at that time, they would be able to have that opportunity.

So, again, it's not an amnesty in the sense of creating any legal right or entitlement for the person. The person is simply put to the side as a matter of administrative convenience with some -- to help focus the efforts of the enforcement authorities in the meantime in light of the severe resource constraints that the agency faces.

THE COURT: All right. Anything else you want to respond to?

MS. HARTNETT: No. I guess one other just point of clarification about the funding of the program. There was some discussion about whether this would be taking resources away from the enforcement efforts to have to pay for the administration of the DACA and DAPA programs. And I think among other places at page 26 of the OOC opinion, but as the plaintiff acknowledges, there will be fees

collected and this will be funded through that. So as the OOC opinion pointed out, there would not be any indication that there would be a strain of resources for removal efforts by having the DAPA and DACA programs exist.

THE COURT: Thank you. Mr. Klayman.

MR. KLAYMAN: A few points. Some of the commentary that we heard in answer to your first question, it's not on the record, Your Honor. And there's no backup for that. So we ask Your Honor not to regard that in writing your opinion ultimately. Also I want to thank you for moving this case along quickly, because however you rule, it's clear this is probably going to the Supreme Court at some point.

THE COURT: I wouldn't predict.

MR. KLAYMAN: Make you more famous.

THE COURT: In this room I think you are the most famous person, Mr. Klayman.

MR. KLAYMAN: I'm glad you didn't say -- third point, with regard to injury, *United States v. Mills*, violation of the Constitution in and of itself has been found by the Supreme Court to give rise to irreparable injury.

The other thing I might add, and this was what was not stated accurately, is that in the memoranda today that are at issue here that you clarified at the beginning

of this hearing, it states explicitly that enforcement is to stop immediately. Everything stops to allow these people to come out from, you know, underground and come forward. And I ask you --

THE COURT: Where is that in, in which memorandum are you talking about? Are you talking about the November 20th memoranda?

MR. KLAYMAN: Yes. It's Exhibit D, Your Honor.

THE COURT: I mean, I'm looking another document, ECF 6-4, and on page 3 of that document where it states -- it has a justification for the case-by-case exercises of deferred action to encourage people to come out of the shadows, submit to background checks and so on, but I didn't see any reference in here to stopping removal proceedings for the priority, undocumented immigrants.

MR. KLAYMAN: If you look at page 5, it's the corollary what's being set there. It's implicit in that. Wherein it says, "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 and enforcement resources with regard to these individuals."

So what they are saying is we want to identify these people immediately because we don't want to have

them subject to deportation so as to prevent the further expenditure of enforcement resources. So it does have immediate effect in that regard. And the other two paragraphs are similar.

So that's the immediate harm. And -- but it doesn't have to be immediate harm. It has -- it can even just be imminent harm or respective harm, and that's what's important here.

And with regard -- we feel firmly Your Honor should make a ruling on the constitutionality, whether you agree with us or not. We ask that you make a ruling on that. But even under their concept of, this is not going to kick in --

THE COURT: So just like the judge in Pennsylvania, even if I don't have to and I don't have a case in controversy in front of me that entitles me as a Federal judge to make a ruling, you want me to just opine?

MR. KLAYMAN: We don't want you to be like the judge in Western District. We want you to be yourself. But the reality is you have to reach that issue because there is a case of controversy here and there is a constitutional issue, and it falls within the scope of Section 706 of the APA. That's one of the reasons why you should invalidate what they did under the APA. You have to reach the constitutional issue. I read that a couple

times.

But in addition, what I'm trying to say is that under their scenario of when this thing kicks in, you can make a ruling, an expedited ruling that they have to have notice and comment, 30 days. Since they are claiming that this is not going to take effect until some time in February, that if Your Honor makes a quick ruling they are going to have to do notice and comment and the American people are going to have a right to respond.

THE COURT: All right. Well, Mr. Klayman, let me just, you know, satisfy the curiosity of people who are listening. I am not prepared to issue a ruling today, although I appreciate all the points you've made about the importance of this issue and I will -- I do plan to be issuing an opinion very shortly on both your pending motion for a preliminary injunction and the government's pending motion to dismiss for lack of subject matter jurisdiction.

So you've all given me a lot to think about on a number of cases to review, and you've been presenting documents up until last night. And so I want an opportunity to fully consider those before I issue my ruling.

MR. KLAYMAN: Actually we filed last night because the ECF system was down.

THE COURT: I know. Sorry about that.

MR. KLAYMAN: We wanted -- we e-mailed them their document days ago so they would have it. But what I was basically saying the last point, if I may make a possible suggestion. You could issue an order quickly on the notice and comment and defer on the rest of it, because it's quite clear that this was not a policy, and even if it was, it would have to be under notice and comment. And if you issue that quickly, then it will give them the 30 days to publish the notice and comment. That should have been done, they admitted that in the memoranda with regard to other types of actions that they took such as visa status with regard to change of employment.

Thank you, Your Honor. I appreciate your time.

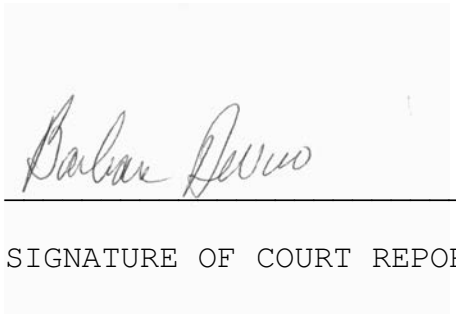
THE COURT: Thank you.

Thank you. You are all excused.

(Proceedings adjourned at 10:49 a.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Barbara DeVico, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



SIGNATURE OF COURT REPORTER

12-29-14

DATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH ARPAIO,

Plaintiff,

v.

BARACK H. OBAMA, *President, United States in his official capacity, et al.*,

Defendant.

Civil Action No. 14-01966 (BAH)

Judge Beryl A. Howell

MEMORANDUM OPINION

The plaintiff, the elected Sheriff of Maricopa County, brings suit against the President of the United States, and other Federal officials, alleging that certain immigration policies announced by the President in a nationwide address on November 20, 2014 are unconstitutional, otherwise illegal, and should be stopped from going into effect. *See* Pl.'s Mot. Prelim. Inj. ("Pl.'s Mot."), ECF No. 7. The plaintiff's suit raises important questions regarding the nation's immigration policies, which affect the lives of millions of individuals and their families. The wisdom and legality of these policies deserve careful and reasoned consideration. As the Supreme Court recently explained: "[T]he sound exercise of national power over immigration depends on the [Nation] meeting its responsibility to base its law on a political will informed by searching, thoughtful, rational civic discourse." *Arizona v. United States*, 132 S.Ct. 2492, 2510 (2012).

The key question in this case, however, concerns the appropriate forum for *where* this national conversation should occur. The doctrine of standing, in both its constitutional and prudential formulations, concerns itself with "'the proper—and properly limited—role of the courts in a democratic society.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v.*

Seldin, 422 U.S. 490, 498 (1975)). Standing "ensures that [courts] act as judges, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

The refusal to adjudicate a claim should not be confused with abdicating the responsibility of judicial review. "Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982). A court must refrain "'from passing upon the constitutionality of an act [of the representative branches], unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.'" *Id.* (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)) (alteration in original). Ultimately, "[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

Concerns over the judicial role are heightened when the issue before the court involves, as here, enforcement of the immigration laws. This subject raises the stakes of, among other factors, "immediate human concerns" and "policy choices that bear on this Nation's international relations." *Arizona v. United States*, 132 S.Ct. at 2499. "[O]ur Constitution places such sensitive immigration and economic judgments squarely in the hands of the Political Branches, not the courts." *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127,

1151 n.10 (D.C. Cir. 2014); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.").

The role of the Judiciary is to resolve cases and controversies properly brought by parties with a concrete and particularized injury— not to engage in policymaking better left to the political branches. The plaintiff's case raises important questions regarding the impact of illegal immigration on this Nation, but the questions amount to generalized grievances which are not proper for the Judiciary to address. For the reasons explained in more detail below, the plaintiff lacks standing to bring this challenge to the constitutionality and legality of the immigration policies at issue. Accordingly, the plaintiff's motion for a preliminary injunction, ECF No. 7, is denied and the defendants' motion to dismiss for lack of subject matter jurisdiction, ECF Nos. 13, 15, is granted.[1]

I. BACKGROUND

A. Executive Enforcement of Immigration Laws

The Immigration and Nationality Act ("INA"), codified as amended at 8 U.S.C. § 1101 *et seq.*, establishes a comprehensive statutory scheme that governs immigration and naturalization. The INA establishes categories of immigrants who are inadmissible to the United States in the first instance, *see* 8 U.S.C. § 1182, and immigrants who are subject to removal from the United States once here, *see* 8 U.S.C. § 1227. Under the INA, "[a]liens may be removed if they were

[1] The plaintiff filed a motion for preliminary injunction at ECF No. 6 and an amended, corrected motion for preliminary injunction at ECF No. 7. Plaintiff's counsel clarified at the motions hearing that the latter filed motion is the operative motion. See Rough Transcript of Preliminary Injunction Hearing (Dec. 22, 2014) ("Hrg. Tr.") at 3–4. Consequently, the plaintiff's motion for preliminary injunction docketed at ECF No. 6 is denied as moot.

inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona*, 132 S.Ct. at 2499 (citing 8 U.S.C. § 1227).

The Secretary of the Department of Homeland Security ("DHS") is "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). Although charged with enforcement of the statutory scheme, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), and indeed "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S.Ct. at 2499. Thus, to enable the "proper ordering of its priorities," *Heckler*, 470 U.S. at 832, and the marshalling of extant resources to address those priorities, the INA provides the Secretary of DHS with the authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under [the INA]." 8 U.S.C. § 1103(a)(3). Further, the Secretary of DHS is specifically charged with "establishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), to ensure that DHS's limited resources are expended in pursuit of its highest priorities in national security, border security, and public safety.

The context in which the immigration laws are enforced bears out the need for such prioritization. DHS estimates that approximately 11.3 million undocumented immigrants residing in the United States are potentially eligible for removal. Pl.'s Mot., Ex. B (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 1, (Nov. 19, 2014) ("OLC Opinion")) at 1, ECF No. 7-2. Of those, DHS estimates that the agency has the resources to remove fewer than

400,000 undocumented immigrants. *Id*. In addition, DHS faces additional challenges including: demographic shifts resulting in increased costs for managing and deterring unauthorized border crossings; increased complexity in removing aliens; congressional directives to prioritize recent border crossers and serious criminals; and the humanitarian and social consequences of separating families. *See* OLC Opinion at 11; Defs.' Mem. Opp. Pl.'s Mot. Prelim. Inj. ("Defs.' Mem."), Ex. 21 (*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*, 113th Cong. (2014) (statement of Craig Fugate, Administrator, Federal Emergency Management Agency, et al.)), ECF No. 13-21; *see also* Defs.' Mem. at 1.

To confront these challenges, the executive branch has long used an enforcement tool known as "deferred action" to implement enforcement policies and priorities, as authorized by statute. *See* 6 U.S.C. § 202(5). Deferred action is simply a decision by an enforcement agency not to seek enforcement of a given statutory or regulatory violation for a limited period of time. In the context of the immigration laws, deferred action represents a decision by DHS not to seek the removal of an alien for a set period of time. In this sense, eligibility for deferred action represents an acknowledgment that those qualifying individuals are the lowest priority for enforcement. Under long-existing regulations, undocumented immigrants granted deferred action may apply for authorization to work in the United States. *See* 8 C.F.R. § 274a.12(c)(14). These regulations were promulgated pursuant to the Immigration Reform and Control Act of 1986 and have been in effect, as amended, since 1987. *See* Control of Employment of Aliens, 52 Fed. Reg. 16216 (1987). Deferred action does not confer any immigration or citizenship status or establish any enforceable legal right to remain in the United States and, consequently, may be

canceled at any time. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("At each stage, the Executive has discretion to abandon the endeavor . . . .").

For almost twenty years, the use of deferred action programs has been a staple of immigration enforcement. The executive branch has previously implemented deferred action programs for certain limited categories of aliens, including: certain victims of domestic abuse committed by United States citizens and Lawful Permanent Residents;[2] victims of human trafficking and certain other crimes;[3] students affected by Hurricane Katrina;[4] widows and widowers of U.S. citizens;[5] and certain aliens brought to the United States as children.[6] Programs similar to deferred action have been used extensively by the executive branch for an even longer period of time.[7]

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[2] Defs.' Mem., Ex. 7 (Memorandum for Regional Directors et al., from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997)), ECF No. 13-7.

[3] Defs.' Mem., Ex. 8 (Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting 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)), ECF No. 13-8.

[4] Defs.' Mem., Ex. 9 (USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)*, at 1 (Nov. 25, 2005)), ECF No. 13-9 ("Since the Notice does not cover Katrina-impacted foreign academic students who have failed to maintain their F-1 status, such persons, and their F-2 dependents, may request a grant of deferred action and short term employment authorization based on economic necessity.").

[5] Defs.' Mem., Ex. 10 (Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009)), ECF No. 13-10.

[6] This is the DACA program challenged by the plaintiff. *See* Pl.'s Mot., Ex. A (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 1–2 (June 15, 2012)), ECF No. 6-1.

[7] In the 1970's through the 1990's, programs similar to deferred action were used to defer enforcement against undocumented immigrants who were awaiting approval of certain professional visas, *see United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979–81 (E.D. Pa. 1977), certain nurses eligible for H-1 visas, *see Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan 19, 1978); nationals of certain designated foreign states, *see* Defs.' Mem., Ex. 5 (*Moore, Charlotte J.*, Cong. Research Serv., *Review of U.S. Refugee Resettlement Programs and Policies* at 12-14 (1980)), ECF No. 13-5; and spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, *see* Defs.' Mem., Ex. 6 (Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990)), ECF No. 13-6.

Congress has acquiesced to, and even endorsed the use of, deferred action on removal of undocumented immigrants by the executive branch on multiple occasions. For example, in 2000, Congress expanded the deferred action program for certain victims of domestic abuse, permitting children over the age of twenty-one to be "eligible for deferred action and work authorization." 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV). Similarly, in 2008, Congress authorized the DHS to "grant . . . an administrative stay of a final order of removal" to individuals who could make an initial showing that they were eligible for a visa as victims of human trafficking and certain other crimes. *See* 8 U.S.C. § 1227(d)(1). Congress specifically noted that "[t]he denial of a request for an administrative stay of removal . . . shall not preclude the alien from applying for . . . deferred action." *See* 8 U.S.C. § 1227(d)(2). In Division B to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, known by its short title of the REAL ID Act of 2005, Congress provided that state-issued driver's licenses were acceptable for federal purposes only if the state verifies that an applicant maintains evidence of lawful status, which includes evidence of "approved deferred action status." *See* Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (2005) (codified at 49 U.S.C. § 30301 note).

B. Challenged Immigration Programs

Against this lengthy historical record of the use of deferred action as a tool to carry out "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), the executive branch has more recently employed this tool in three programs, which the plaintiff challenges as unconstitutional or otherwise in violation of the Administrative Procedure Act. Specifically, the plaintiff challenges a June 15, 2012 program—known as Deferred Action for Childhood Arrivals ("DACA")—whose guidance is outlined in a memorandum by the former DHS Secretary entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States

as Children." DACA permits, on a case-by-case basis, deferred action on removal for a period of two years for undocumented immigrants that: (1) are under the age of 31 as of June 15, 2012; (2) were under the age of 16 at the time of arrival in the United States; (3) have continuously resided in the United States for at least five years immediately preceding June 15, 2012; (4) were present in the United States on June 15, 2012; (5) are in school, have graduated from high school, have obtained a general education development certificate, or have been honorably discharged from the Coast Guard or the Armed Forces of the United States; and (6) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose no threat to the national security or public safety. *See* Pl.'s Mot., Ex. A (Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012)), at 1–2 , ECF No. 7-1.

The other two programs challenged by the plaintiff are outlined in a memorandum by the current DHS Secretary entitled "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." The memorandum revised the DACA program ("2014 DACA Revisions") and also created a new program that established guidelines for the request of deferred action by the parents of U.S. Citizens or Lawful Permanent Residents ("DAPA"). *See* Pl.'s Mot., Ex. D (Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, 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 (November 20, 2014) ("2014 Guidance Memorandum")), ECF No. 7-4.

The principal features of the 2014 DACA Revisions include: (1) removal of the age cap of 31 so that individuals may request deferred action under DACA regardless of their current age, as long as they entered the United States before the age of 16; (2) extension of the period of deferred action from two years to three years; and (3) adjustment of the relevant date by which an individual must have been in the United States from June 15, 2007 to January 1, 2010. *See* 2014 Guidance Memorandum at 3–4.

DAPA permits, on a case-by-case basis, deferred action on removal for a period of three years for illegal aliens who are parents of U.S. citizens and Lawful Permanent Residents. To be considered for deferred action under DAPA, an individual must meet the following guidelines: (1) have, as of November 20, 2014, a son or daughter who is a U.S. citizen or Lawful Permanent Resident; (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 U.S. Citizenship and Immigration Services; (4) have no lawful status as of November 20, 2014; (5) not fall within one of the categories of enforcement priorities set forth in additional agency guidelines;[8] and (6) present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate. *Id.*

[8] In a November 20, 2014 Memorandum entitled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," the Secretary of DHS set forth three categories of undocumented immigrants who are considered to be priorities for removal. The first category, representing the highest priority for civil immigration authorities, concerns undocumented immigrants who are threats to national security, border security, and public safety. The second category, representing the second-highest priority for civil immigration authorities, concerns undocumented immigrants who have committed certain misdemeanors or recently committed certain immigration violations. The third category, representing the third-highest priority for civil immigration authorities, concerns undocumented immigrants who have been issued a final order of removal on or after January 1, 2014. *See* Pl.'s Mot., Ex. F (Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, et al., *Policies for the Apprehension,*

C. Procedural Background

On November 20, 2014, in a televised address, President Barack Obama announced the principal features of the most recent deferred action programs, namely, the 2014 DACA Revisions and DAPA. On the same day, the plaintiff filed this action seeking invalidation of these two programs as well as DACA, which had been announced over two years earlier. Although the plaintiff's Complaint references a preliminary injunction, the plaintiff did not formally or separately move for a preliminary injunction, as required by the Local Civil Rules of this Court, until December 4, 2014. *See* Pl.'s Mot.; Local Civ. R. 65.1; Minute Order (Nov. 24, 2014).

In accordance with the Local Rules governing preliminary injunctions—which permit a defendant seven days to respond to a motion for preliminary injunction once served—the Court ordered the defendants to respond to the plaintiff's motion for preliminary injunction by December 15, 2014. Ordinarily, the Local Rules make no provision for a reply brief in a motion for preliminary injunction and the Court did not initially permit a reply brief in this case. *See* Local Civ. R. 65.1. In opposition to the motion for preliminary injunction, the defendants argued that the plaintiff lacked standing to bring this suit and requested dismissal of the suit. *See* Defs.' Mem. at 14. The defendants subsequently asked this Court to construe this opposition as a motion to dismiss for lack of subject matter jurisdiction. *See* Notice, ECF No. 15. Due to the dispositive nature of the defendants' objection, and to ensure fairness to all the parties, the Court afforded the plaintiff the opportunity to submit a response to the defendants' objections. In addition, the Court permitted the plaintiff to file a supplemental declaration in support of his standing to bring suit. The Court heard argument from both parties on December 22, 2014.

Detention and Removal of Undocumented Immigrants (November 20, 2014)) at 3–4 , ECF No. 7-6. The plaintiff does not challenge the guidelines set forth in this memorandum. *See* Hrg. Tr. at 11.

Now pending before the Court is the plaintiff's motion for a preliminary injunction and the defendants' motion to dismiss for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. LEGAL STANDARD

A. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011))). A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948 (2d ed. 1995)) (emphasis in original). The Supreme Court repeated this caution in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), stating that "[a] preliminary injunction is an extraordinary remedy never awarded as of right," *id.* at 24, and, again, that "injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* at 22.

Authority can be found in this Circuit for the so-called "sliding scale" approach to evaluating the four preliminary injunction factors, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley*, 644 F.3d at 392. In particular, even if the plaintiff only "raise[s] a serious legal question on the merits," rather than a likelihood of success on the merits, a strong showing on all three of the other factors may warrant entry of

injunctive relief. *Id.* at 398; *see also Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) ("[I]f the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success."); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("[A] court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.").

At the same time, the D.C. Circuit has acknowledged that the Supreme Court's decision in *Winter* "could be read to create a more demanding burden than the sliding-scale analysis requires." *Sherley*, 644 F.3d at 392 (internal quotations omitted).[9] Indeed, in *Winter*, the majority of the Supreme Court reversed a grant of injunctive relief, finding that the standard applied by the Ninth Circuit was "too lenient" in allowing injunctive relief on the "possibility" of irreparable injury, rather than its likelihood. *Winter*, 555 U.S. at 22; *see also Perry v. Perez***,** 132 S. Ct. 934, 942 (2012) ("Plaintiffs seeking a preliminary injunction of a statute must normally demonstrate that they are likely to succeed on the merits of their challenge to that law.").

In *Aamer v. Obama*, the D.C. Circuit declined to opine about the continued viability of the "sliding scale" analysis of the four preliminary injunction factors, stating that it "remains an open question 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." 742 F.3d at 1043; *see also Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065, 1074 (D.C. Cir. 2014) ("This circuit has repeatedly declined to take sides in a circuit split on the question of whether

[9] The plaintiff, in his briefing, notes only the sliding-scale analysis and ignores the voluminous case law describing the uncertainty regarding the continued viability of the sliding-scale analysis in this Circuit. *See* Pl.'s Mot. at 11.

likelihood of success on the merits is a freestanding threshold requirement to issuance of a preliminary injunction. . . . We need not take sides today.").

Under either approach, a court may not issue "a preliminary injunction based only on a possibility of irreparable harm . . . [since] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22; s*ee also In re Navy Chaplaincy*, 738 F.3d 425, 428 (D.C. Cir. 2013) (requiring proof that all four prongs of preliminary injunction standard be met before injunctive relief can be issued). Thus, the plaintiff bears the burden of persuasion on all four preliminary injunction factors in order to secure such an "extraordinary remedy."

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Indeed, federal courts are "forbidden . . . from acting beyond our authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008), and, therefore, have "an affirmative obligation 'to consider whether the constitutional and statutory authority exist for us to hear each dispute.'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (quoting *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992)). Absent subject matter jurisdiction over a case, the court must dismiss it. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); FED. R. CIV. P. 12(h)(3).

When considering a motion to dismiss under Rule 12(b)(1), the court must accept as true all uncontroverted material factual allegations contained in the complaint and "'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the

facts alleged' and upon such facts determine jurisdictional questions." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004))). The court need not accept inferences drawn by the plaintiff, however, if those inferences are unsupported by facts alleged in the complaint or amount merely to legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Moreover, in evaluating subject matter jurisdiction, the court, when necessary, may "'undertake an independent investigation to assure itself of its own subject matter jurisdiction,'" *Settles v. United States Parole Comm'n*, 429 F.3d 1098, 1107-1108 (D.C. Cir. 2005) (quoting *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987), and consider facts developed in the record beyond the complaint, *id.* *See also Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992) (in disposing of motion to dismiss for lack of subject matter jurisdiction, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."); *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 142 (D.D.C. 2005).

The burden of establishing any jurisdictional facts to support the exercise of the subject matter jurisdiction rests on the plaintiff. *See Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010); *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007).

III. DISCUSSION

The plaintiff concedes, as he must, that "he and other similarly situated state law enforcement and other officials have no authority" to enforce the immigration laws of the United States. Compl. at 19; *see also Arizona*, 132 S. Ct. at 2507. Nonetheless, the plaintiff seeks to

alter federal enforcement policy by asking the Court to halt three federal immigration programs that have the over-arching purpose of prioritizing federal enforcement efforts. *See Arizona,* 132 S. Ct. at 2499 (noting that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," who "as an initial matter, must decide whether it makes sense to pursue removal at all."). The plaintiff's inability to enforce federal immigration law is integrally related to the central question in this case: Whether the plaintiff has standing to demand changes to the "broad discretion" granted federal officials regarding removal. Despite the consequences of unlawful immigration in Maricopa County, the plaintiff cannot meet the requirements for standing to bring this suit.

A. The Plaintiff Lacks Standing

Article III of the Constitution restricts the power of federal courts to hear only "Cases" and "Controversies." "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alterations in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Indeed, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation on federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (alterations in original) (internal quotations omitted).

The Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Defenders of Wildlife,* 504 U.S. at 560. First, the plaintiff must have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations

and internal quotation marks omitted). Second, there must be "a causal connection between the injury and the conduct complained of," i.e., the injury alleged must be fairly traceable to the challenged action of the defendant. *Id.* Finally, it must be "likely" that the complained-of injury will be "redressed by a favorable decision" of the court. *Id.* at 561. In short, "[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). Likewise, when declaratory or injunctive relief is sought—relief the plaintiff seeks here—a plaintiff "must show he is suffering an ongoing injury or faces an immediate threat of [future] injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

The plaintiff fails to meet any of the three elements of constitutional standing. Each of these requirements is addressed *seriatim* below.

1. *Injury in Fact*

At the outset, the plaintiff's Complaint and motion for preliminary injunction fail to identify whether the plaintiff is bringing suit in his individual capacity or in his official capacity as the elected Sheriff of Maricopa County. *Compare* Compl. ¶ 3 (noting only that "[t]he Plaintiff Joe Arpaio is the elected Sheriff of Maricopa County, State of Arizona"), *with* ¶ 8 (detailing that each defendant was being sued "in their individual and official capacities"). The Court clarified during oral argument that the plaintiff is bringing suit in both his personal and official capacities. Hrg. Tr. at 5. Regardless of whether the plaintiff is suing in his individual or official capacity, or both, the plaintiff cannot demonstrate a cognizable injury from the challenged deferred action programs.

a) Personal Capacity

The law is well-settled that ordinarily, "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws . . . ." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897 (1984) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). This is merely the application of the long-standing principle that a plaintiff "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Defenders of Wildlife*, 504 U.S. at 573–74). As a result, a plaintiff who seeks to vindicate only the general interest in the proper application of the Constitution and laws does not suffer the type of direct, concrete and tangible harm that confers standing and warrants the exercise of jurisdiction. Yet, this is the type of suit the plaintiff attempts to bring in his personal capacity. *See* Supp. Decl. of Sheriff Joe Arpaio ¶ 3 ("Pl.'s Supp. Decl."), ECF No. 20-1 ("By this lawsuit, I am seeking to have the President and the other Defendants obey the U.S. Constitution and the immigration laws . . . .").

The plaintiff does offer one additional theory, however, in support of his claim of injury in his individual capacity. The plaintiff cites press reports and press releases from his own office that undocumented immigrants have targeted him for assassination as a result of the plaintiff's "widely known stance on illegal immigration." *See* Press Release, Bomb Threats against Sheriff Arpaio and Office on Upsurge as Another Suspect is Indicted, Maricopa County Sheriff's Office (August 21, 2013) ("Threats Press Release"), ECF No. 21-1. Such threats are deplorable and offensive to the entire justice system. Nevertheless, these allegations cannot confer standing on the plaintiff in his individual capacity in this case. In requesting injunctive

relief, the plaintiff "must show he is suffering an ongoing injury or faces an immediate threat of [future] injury." *Dearth*, 641 F.3d at 501. The plaintiff has presented no evidence that these threats are ongoing. "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Defenders of Wildlife*, 504 U.S. at 564 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974))).

Moreover, as will be discussed in detail below, even an ongoing threat to the plaintiff by undocumented immigrants would not provide the plaintiff with standing to challenge the deferred action programs at issue. The plaintiff must not only show that he is injured, but that the plaintiff's injury is fairly traceable to the challenged deferred action programs and that the injury is capable of redress by this Court in this action. The plaintiff cannot meet this showing. The challenge deferred action programs did not cause the threats to the plaintiff's life. Rather, criminal action by third-parties not before the court caused the threats to the plaintiff. Moreover, according to the plaintiff's press release, the alleged assassins were motivated by the plaintiff's "widely known stance on illegal immigration," a stance pre-existing this case and these challenged programs. *See* Threats Press Release. Furthermore, an injunction in this case would do nothing either to alter the plaintiff's views on "illegal immigration" or to redress the targeting of the plaintiff resulting from his "widely known stance on illegal immigration." This dooms the plaintiff's standing to bring this suit in his personal capacity as an ordinary citizen.

b) Official Capacity

Even if the plaintiff can circumvent these limitations by bringing suit in his official capacity as Sheriff of Maricopa County, the plaintiff still lacks standing.

The plaintiff claims that the challenged deferred action programs, which provide guidance to Federal law enforcement regarding the removal or non-removal of undocumented immigrants, inhibit his ability to perform his official functions as the Sheriff of Maricopa County. The plaintiff alleges that he is "adversely affected and harmed in his office's finances, workload, and interference with the conduct of his duties" as a result of the "increases in the influx of illegal aliens motivated by [these] policies of offering amnesty." Compl. ¶ 27. As support for this allegation, he alleges that "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" of the challenged policies. Compl. ¶ 30. The plaintiff further alleges that, "the experiences and records of the Sheriff's office show that many illegal aliens . . . are repeat offenders, such that Plaintiff Arpaio's deputies and other law enforcement officials have arrested the same illegal aliens for various different crimes." Compl. ¶ 31. According to the plaintiff, the "financial impact of illegal aliens in Maricopa County, Arizona was at least $9,293,619.96 in the costs of holding illegal aliens in the Sheriff's jails from February 1, 2014, through December 17, 2014, for those inmates flagged with INS 'detainers.'" Pl.'s Reply Defs.' Opp. Pl.'s Mot. Prelim. Inj. at 7 ("Pl.'s Reply"), ECF No. 19.

The plaintiff is correct that the regulation and impairment of a state officer's official functions may be sufficient to confer standing, but only in certain limited circumstances. *See, e.g.*, *Lomont v. O'Neil*, 285 F.3d 9, 13–14 (D.C. Cir. 2002) (holding that a state Sheriff and Police Chief had standing to challenge federal law permitting state police officials to provide certifications relating to the transfer of certain firearms); *Fraternal Order of the Police v. United States*, 152 F.3d 998, 1001–02 (D.C. Cir. 1998). Yet, neither *Lomont* nor *Fraternal Order of the Police* support the plaintiff's argument here, as both cases concerned the *direct regulation* of a

state officer's official duties. In contrast, the challenged deferred action programs do not regulate the official conduct of the plaintiff but merely regulate the conduct of federal immigration officials in the exercise of their official duties. Thus, even if the plaintiff's official functions could be viewed as a "legally protected interest," the challenged deferred action programs do not amount to "an invasion" of that interest in a manner that is "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560. Indeed, it is not apparent exactly what cognizable interest and injury the plaintiff can assert since, as the plaintiff's Complaint recognizes, the plaintiff has no legal authority to enforce the immigration laws of the United States. *See* Compl. at 19.

Ultimately, the plaintiff's standing argument reduces to a simple generalized grievance: A Federal policy causes his office to expend resources in a manner that he deems suboptimal.[10] To accept such a broad interpretation of the injury requirement would permit nearly all state officials to challenge a host of Federal laws simply because they disagree with how many—or how few—Federal resources are brought to bear on local interests. Fortunately, the standing doctrine is not so limp. As the Supreme Court has repeatedly emphasized: "'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

[10] Although prior case law has occasionally suggested that "generalized grievances" should be analyzed as part of prudential standing, the Supreme Court recently suggested that such concerns should be considered as part of Article III standing. *See Lexmark Int'l*, 134 S. Ct. at 1387 n.3 ("While we have at times grounded our reluctance to entertain [suits concerning generalized grievances] in the 'counsels of prudence' (albeit counsels 'close[ly] relat[ed] to the policies reflected in' Article III), we have since held that such suits do not present constitutional 'cases' or 'controversies.'" (internal citations omitted) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982))). Although there is some dispute within this Circuit as to whether prudential standing should be considered jurisdictional, there is no dispute that where the plaintiff cannot meet the irreducible constitutional minimum of Article III standing, the court need not address whether the plaintiff has prudential standing. *See generally Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012). Accordingly, the Court does not address whether prudential concerns prevent the plaintiff from establishing standing.

Article III case or controversy.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504 U.S. at 573); *see also* Pl.'s Supp. Decl. ¶ 3 ("By this lawsuit, I am seeking to have the President and other Defendants obey the U.S. Constitution and the immigration laws . . . ."). Simply put, a state official has not suffered an injury in fact to a legally cognizable interest because a federal government program is anticipated to produce an increase in that state's population and a concomitant increase in the need for the state's resources. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 520-521 (2007) (finding standing for Massachusetts because of state's "quasi-sovereign interests" relating to its "desire to preserve its sovereign territory" not because of the increase in state expenditures resulting from federal policy concerning global warming).

Moreover, the plaintiff's alleged injury is largely speculative. The plaintiff argues that the challenged deferred action programs will create a "magnet" by attracting new undocumented immigrants into Maricopa County, some of whom may commit crimes under Arizona law. Pl.'s Mot. at 16–17; *see also* Pl.'s Mot., Ex. G, Decl. of Sheriff Joe Arpaio ¶¶ 7, 11–14, ECF No. 7-7. Yet, the decision for any individual to migrate is a complex decision with multiple factors, including factors entirely outside the United States' control, such as social, economic and political strife in a foreign country. The plaintiff reduces this complex process to a single factor: the challenged deferred action programs.

Even drawing all inferences in favor of the plaintiff, the terms of the challenged deferred action programs do not support the plaintiff's theory. The challenged deferred action programs would have no impact on *new* immigrants, as the guidance defining the programs makes clear that these programs only apply to undocumented immigrants residing in the United States prior to January 1, 2010. 2014 Guidance Memorandum at 4. Thus, it is speculative that a program,

which does not apply to future immigrants, will nonetheless result in immigrants crossing the border illegally into Maricopa County (and other borders of this country).

The plaintiff has been unable to show that the challenged deferred action programs have interfered with his official duties as Sheriff in a manner that "is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" and has therefore failed in his burden to establish an injury in fact. *Defenders of Wildlife*, 504 U.S. at 560.

2. *Causation and Redressability*

The plaintiff's speculative injury is not the only infirmity in the plaintiff's standing theory. A plaintiff must not only show an "injury in fact," but must also show that the injury is fairly traceable to the allegedly harmful conduct and that the relief sought by the plaintiff will likely redress the injury. *Defenders of Wildlife*, 504 U.S. at 560. Two overarching principles apply to the causation and redressability inquiry in this case.

First, this case involves the purported "standing to challenge [an executive action] where the direct cause of injury is the independent action of . . . third part[ies]." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1269 (D.C. Cir. 2007). Indeed, it is the actions taken by undocumented immigrants—migrating to Maricopa County and committing crimes once there—that are purportedly the direct cause of the plaintiff's injury. As will be discussed, however, "courts [only] occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004).[11]

[11] The plaintiff attempts to rely upon the doctrine of competitor standing to avoid the strict limitations imposed on cases where the source of the plaintiff's harm is the independent actions of third parties. Yet, the cases on which the plaintiff relies, *see Mendoza v. Perez*, 754 F.3d 1002, 1012–14 (D.C. Cir. 2014); *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004); and *Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, No. 14-cv-529, 2014 WL 6537464, at *4 (D.D.C. Nov. 21, 2014), do not support the plaintiff's standing argument in this case. Standing was found in those cases because a plaintiff suffered an injury in fact "when an agency lift[ed] regulatory restrictions on their competitors or otherwise allow[ed] increased competition." *Mendoza*, 754 F.3d at

Second, and relatedly, the programs challenged by the plaintiff do not regulate the plaintiff directly; rather, they regulate federal immigration officials. As the Supreme Court has made clear, "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed" to confer standing. *Defenders of Wildlife*, 504 U.S. at 562 (emphasis in original). When standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (internal quotations and citations omitted); *see also id.* ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." (internal quotation marks omitted)).

The Court first addresses the plaintiff's failure to show causation before discussing the plaintiff's failure to demonstrate redressability.

a) Causation

The D.C. Circuit has identified "two categories of cases where standing exists to challenge government action though the direct cause of injury is the action of a third party." *Renal Physicians*, 489 F.3d at 1275. "First, a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *National Wrestling Coaches*, 366 F.3d at

1011 (quoting *La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). The doctrine of competitor standing is not implicated in this case, as the plaintiff's resources are not strained because he is forced to compete with undocumented immigrants in a limited market. Moreover, the plaintiff cannot rely on a supposed "procedural injury" because, since the plaintiff has no authority to enforce the Federal immigration laws, the plaintiff cannot demonstrate the challenged deferred action programs "threaten[] [a] concrete interest" of the plaintiff as opposed to an injury common to all members of the public. *Mendoza*, 754 F.3d at 1010.

940. Importantly, in this category of cases, the challenged government conduct must authorize the specific third-party conduct that causes the injury to the plaintiff. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) ("Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries . . . ."). In the present case, the challenged agency action—the ability to exercise enforcement discretion to permit deferred action relating to certain undocumented immigrants—does not authorize the conduct about which the plaintiff complains. The challenged deferred action programs authorize immigration officials to exercise discretion on removal; they do not authorize new immigration into the United States (let alone Maricopa County); they do not authorize undocumented immigrants to commit crimes; and they do not provide permanent status to any undocumented immigrants eligible to apply for deferred action under any of the challenged programs. Contrary to the plaintiff's assertion that a consequence of the challenged programs will be an increase in illegal conduct by undocumented immigrants and an increase in costs to the Maricopa County Sheriff's office, these programs may have the opposite effect. The deferred action programs are designed to incorporate DHS's enforcement priorities and better focus federal enforcement on removing undocumented immigrants committing felonies and serious misdemeanor crimes. Since the undocumented immigrants engaging in criminal activity are the cause of the injuries complained about by the plaintiff, the more focused federal effort to remove these individuals may end up helping, rather than exacerbating the harm to, the plaintiff.

Second, standing has been found "where the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little

doubt as to causation and the likelihood of redress." *National Wrestling Coaches*, 366 F.3d at 941. This record is sparse regarding a link between the challenged deferred action programs and the third-party conduct. Although the plaintiff has submitted numerous press releases and letters to officials documenting Maricopa County's struggle with illegal immigration along the southern border, the plaintiff has submitted no evidence showing that the challenged deferred action programs are, or will be, the cause of the crime harming the plaintiff or the increase in immigration, much less "substantial evidence." Indeed, the plaintiff severely undermines his own argument by stating that "millions more illegal aliens will be attracted into the border states of the United States, *regardless of the specific details*" of current executive branch immigration policies. Compl. ¶ 30 (emphasis added). If the details of the challenged deferred action programs do not matter as to whether or not the plaintiff will suffer an injury, then the plaintiff's injuries cannot be fairly traceable to these programs. Similarly, the plaintiff observes that "the Executive Branch is not deporting illegal aliens in any significant numbers" and that regardless of the provision of deferred action programs "illegal aliens are very unlikely to be deported." Pl.'s Mot. at 12. Implicit in this observation is the plaintiff's admission that regardless of the challenged deferred action programs, the plaintiff is likely to continue to suffer the claimed injury.

In sum, the plaintiff has failed to demonstrate that the challenged deferred action programs are the cause of his alleged injury.

b) Redressability

Similar to the causation requirement, "it is 'substantially more difficult' for a petitioner to establish redressability where the alleged injury arises from the government's regulation of a third party not before the court." *Spectrum Five LLC v. Fed. Commc'ns Comm'n*, 758 F.3d 254,

261 (D.C. Cir. 2014) (quoting *Nat'l Wrestling Coaches*, 366 F.3d at 933); *see also Defenders of Wildlife*, 504 U.S. at 562. The plaintiff must allege facts that are "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Renal Physicians*, 489 F.3d at 1275. In other words, the plaintiff must allege facts sufficient to demonstrate a substantial likelihood that, as a result of injunctive relief in this case, there would not be an increase in undocumented immigrants in Maricopa County and there would not be an increase in crimes committed by undocumented immigrants in Maricopa County. This is a "substantially more difficult" task. *Spectrum Five LLC*, 758 F.3d at 261.

On this point, the D.C. Circuit's decision in *National Wrestling Coaches* is instructive. There, plaintiffs challenged an interpretive rule promulgated by the Department of Education, which laid out three ways in which the Department would assess whether educational institutions had complied with Department regulations that required such institutions to select sports and levels of competition to "effectively accommodate the interests and abilities of members of both sexes.'" 366 F.3d at 934–35 (quoting 45 C.F.R. § 86.41(c)(1) and 34 C.F.R. § 106.41(c)(1)). That regulation had been promulgated pursuant to Title IX of the Education Amendments of 1972, which prohibited discrimination on the basis of sex in federally funded educational programs and activities. *See id.* at 934. The plaintiffs were "membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni," and their asserted injuries arose "from decisions by educational institutions to eliminate or reduce the size of men's wrestling programs to comply with the Department's interpretive rules implementing Title IX." *Id.* at 935.

Thus, in *National Wrestling Coaches*, like in the instant case, "the necessary elements of causation and redressability . . . hinge[d] on the independent choices of . . . regulated third part[ies]." *Id.* at 938. The D.C. Circuit found redressability lacking in *National Wrestling Coaches* because "nothing but speculation suggests that schools would act any differently than they do with the [challenged interpretive rule] in place" since "[s]chools would remain free to eliminate or cap men's wrestling teams and may in some circumstances feel compelled to do so to comply with the statute and the [previous Department] Regulations." *Id.* at 940. Further, the court found that "other reasons unrelated to the challenged legal requirements [*e.g.*, moral considerations, budget constraints] may continue to motivate schools to take such actions." *Id.* From this analysis, and a comprehensive review of the case law, the *National Wrestling Coaches* court concluded that "it is purely speculative whether a decision in appellants' favor would alter the process by which schools determine whether to field certain sports teams." *Id.* at 944.

The same concerns animating the outcome in *National Wrestling Coaches* drive the result in this case. Many "other reasons unrelated to the challenged legal requirements" may motivate the conduct allegedly causing harm to the plaintiff. Indeed, the motivation for any individual to come to the United States (or, once present here, to commit a crime in Maricopa County), does not rest solely upon the challenged deferred action programs. Such decisions are complicated and multi-faceted, involving both national and international factors. A ruling by this Court enjoining the challenged deferred action programs will likely not change the complex and individualized decision making of undocumented immigrants allegedly causing harm to the plaintiff. As noted, the plaintiff's briefing admits as much: "millions more illegal aliens will be attracted into the border states of the United States, *regardless of the specific details*" of the challenged deferred action programs. Compl. ¶ 30.

Moreover, the plaintiff acknowledges that the defendants only have limited resources to facilitate removal, *see* Hrg. Tr. at 14. Relief from this Court will not grant additional resources to the executive branch allowing it to remove additional undocumented immigrants or to prevent undocumented immigrants from arriving. Thus, the plaintiff's complaint regarding the large number of undocumented immigrants and the limited number of removals will not change as a result of any order by the Court in this litigation. Consequently, the plaintiff's alleged harm stemming from the expenditure of resources to deal with the large number of undocumented immigrants in Maricopa County will remain. In other words, regardless of the outcome of this case, the Court can afford no relief to the plaintiff's injury. *Cf. Bauer v. Marmara*, No. 13-ap-7081, 2014 WL 7234818, at *6 (D.C. Cir. December 19, 2014) (holding that plaintiff was "unable to satisfy the redressability prong of Article III standing because the court cannot compel the Government to pursue action to seek forfeiture of the disputed vessels").

"When redress depends on the cooperation of a third party, 'it becomes the burden of the [party asserting standing] *to adduce facts* showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.'" *U.S. Ecology v. U.S. Dep't of Interior*, 231 F.3d 20, 24–25 (D.C. Cir. 2000) (emphasis added) (quoting *Defenders of Wildlife*, 504 U.S. at 562); *see also Klamath Water v. Fed. Energy Reg. Comm'n*, 534 F.3d 735, 739 (D.C. Cir. 2008) ("In a case like this, in which relief for the petitioner depends on actions by a third party not before the court, the petitioner must demonstrate that a favorable decision would create 'a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002))). The plaintiff has been unable to meet this burden.

* * *

Taken together, the Court finds that the plaintiff has not and cannot show that: (1) he suffers a concrete and particularized injury (as opposed to a speculative and generalized grievance); (2) the cause of the plaintiff's injury can be fairly traced to the challenged deferred action programs; and (3) a favorable ruling by this Court would redress the plaintiff's alleged injury. A plaintiff "may be disappointed if the Government declines to pursue [enforcement], but disappointment of this sort is a far cry from the injury and redressability required to prove Article III Standing." *Bauer*, 2014 WL 7234818, at *6. As a result, the plaintiff lacks standing to bring this challenge, requiring dismissal of this lawsuit for lack of subject matter jurisdiction.

B. Preliminary Injunction

The plaintiff's motion for preliminary injunction likewise fails as the plaintiff can show neither a likelihood of success on the merits nor irreparable harm due to his lack of standing. As an initial matter, because "standing is a necessary predicate to any exercise of [the Court's] jurisdiction, the [plaintiff] and [his] claims have no likelihood of success on the merits," if the plaintiff lacks standing. *Smith v. Henderson*, 944 F. Supp. 2d 89, 99 (D.D.C. 2013) (internal quotations and citations omitted); *see also Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 241 (D.D.C. 2013) ("The first component of the likelihood of success on the merits prong usually examines whether the plaintiffs have standing in a given case." (internal quotations omitted)).

Moreover, the same problem that confronts the plaintiff's standing argument—the inability to obtain redress from an order by this Court—likewise dooms the plaintiff's ability to show irreparable harm. Indeed, "it would make little sense for a court to conclude that a plaintiff has shown irreparable harm when the relief sought would not actually remedy that harm." *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 153 (D.D.C. 2011); *see also Navistar, Inc. v.*

Environmental Protection Agency, No. 11-cv-449, 2011 WL 3743732, at *3 (D.D.C. Aug. 25, 2011) (Wilkins, J.) ("Because an injunction will not redress its alleged injuries, [the plaintiff's] claim that it will suffer irreparable harm in the absence of a preliminary injunction is tenuous at best.").

Nevertheless, even if the plaintiff were able to establish standing, the plaintiff would face a number of legal obstacles to prevail and, therefore, could not demonstrate a likelihood of success on the merits nor any of the other preliminary injunction factors.[12] While not necessary

[12] The plaintiff has highlighted a recently out-of-Circuit opinion from the Western District of Pennsylvania ("Pennsylvania court") to buttress his claims regarding his likelihood of success on the merits. *See* Pl.'s Notice of Suppl. Auth., ECF No. 14 (citing *United States v. Juarez-Escobar*, 2014 U.S. Dist. LEXIS 173350 (W.D. Pa. Dec. 16, 2014)). In that case, the court considered the applicability of the DAPA program to a criminal defendant (who had been arrested locally for driving under the influence with a minor present in the vehicle) in connection with the defendant's sentencing, upon his plea of guilty to illegal reentry in violation of 8 U.S.C. § 1326. *Id*. at *1–*4. Throughout the opinion, the court expresses an over-arching concern with the fairness of the prosecution in light of the uneven enforcement of the immigration laws. *See, e.g.*, *id*. at *5 ("Defendant appears before this Court, in part, because of arguably unequal and arbitrary immigration enforcement in the United States."); *id*. at *6–*7 (observing that "[h]ad Defendant been arrested in a 'sanctuary state' or a 'sanctuary city,' local law enforcement likely would not have reported him to Homeland Security" and "he would likely not have been indicted" and "would not be facing sentencing and/or deportation"); *id*. at *39–*40 (noting "an arbitrariness to Defendant's arrest and criminal prosecution" given existence of "'sanctuary cities' [where] . . . if an undocumented immigrant was arrested for a minor offense, local law enforcement would not automatically notify ICE"); *id*. at *41 (describing "Defendant's current criminal prosecution and the civil deportation hearing that will undoubtedly follow as a result of this criminal proceeding" as "arguably . . . arbitrary and random"). Consistent with this theme, the court reviewed the DAPA program to evaluate "whether it would unjustly and unequally impact this Defendant in light of this Court's obligation to avoid sentencing disparities among defendants with similar records who have been found guilty of similar conduct," citing 18 U.S.C. § 3553(a)(6). *Id*. at *24; *see also id*. at *12–*13 (expressing "concern[] that the Executive Action might have an impact on this matter, including any subsequent removal or deportation"). In other words, under the rubric of a sentencing factor that sentencing courts are required to consider under 18 U.S.C. § 3553(a), the Pennsylvania court set out to evaluate whether the DAPA program was applicable to the defendant and, if so, whether the consequences of his conviction, including deportation, would amount to an unwarranted sentencing disparity because similarly situated defendants could obtain deferred removal. *See* 18 U.S.C. § 3553(a)(6)(requiring sentencing court, "in determining the particular sentence to be imposed," to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

The Pennsylvania court ultimately determined that the DAPA program was not applicable to the defendant for two reasons: first, the court opined that the DAPA program "is unconstitutional," *id*. at *33, *58; and, second, even if the DAPA program were constitutional, the court made critical factual findings that the defendant did not meet the eligibility criteria for DAPA's deferred action, *id*. at *45 ("The bottom line for this Defendant is that . . . he does not fall into any newly created or expanded deferment category . . . ."); *id*. at *57 ("this Defendant is possibly not entitled to the deferred action status that would enable him to defer deportation"). Despite the defendant's lack (or "possible[]" lack) of eligibility for the DAPA program, the court viewed the defendant as "more 'family' than 'felon,'" *id*. at *45, *58, due to his "close bond with his brother," who resided in the United States, *id*. at *57–*58, prompting the court to give the defendant the opportunity to withdraw his guilty plea or proceed to sentencing, *id*. at *59.

to resolve this case, the Court outlines several of these obstacles. First, with respect to the plaintiff's likelihood of success on the merits, the challenged deferred action programs continue a longstanding practice of enforcement discretion regarding the Nation's immigration laws. Such discretion is conferred by statute, *see* 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3), and the manner of its exercise through deferred action on removal has been endorsed by Congress, *see, e.g.*, 8 U.S.C. § 1227(d)(2). Thus, the deferred action programs are consistent with, rather than contrary to, congressional policy. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

In addition, although the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of the law to the unconstitutional rewriting of the law for the following reason: The programs

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While fully respectful of the concern animating this decision, which focused on the fairness of the prosecution and guilty plea of the defendant for the crime of illegal reentry, this Court does not find the reasoning persuasive for at least three reasons. First, most notably, the Pennsylvania court's consideration of the constitutionality of the DAPA program flies in the face of the "'well-established principle governing the prudent exercise of [a] [c]ourt's jurisdiction that normally [a] [c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)); *see also United States v. Thomas*, 572 F.3d 945, 952 (D.C. Cir. 2009) (Ginsburg J., concurring). Thus, the Pennsylvania court appears to have put the proverbial "cart before the horse" since finding the defendant likely ineligible for the DAPA program made consideration of the program's constitutionality unnecessary. Second, the purported basis for the Pennsylvania court's consideration of the DAPA program was to avoid unwarranted sentencing disparities, as required by 18 U.S.C. § 3553(a)(6). Yet, the DAPA program has no bearing on the *sentence* imposed by the Pennsylvania court since, as the Supreme Court has made clear, "[r]emoval is a civil, not criminal, matter." *Arizona*, 132 S. Ct. at 2499. To the extent that the Pennsylvania court was focused on the defendant's likely deportation following the imposition of the sentence, this collateral consequence could not result in an *unwarranted* disparity since the defendant's likely ineligibility for DAPA means that the defendant was not similarly situated to persons who are eligible. Finally, even if the Pennsylvania court's concern were correct that the defendant was subject to potentially unequal enforcement of a criminal statute and faced prosecution in the Western District of Pennsylvania when he was unlikely to face prosecution in other districts, such enforcement disparities are inherent in prosecutorial discretion and have no bearing on the analysis under § 3553(a)(6), which requires consideration of *sentence* disparities among similarly situated defendants convicted of the same offense in federal court, not *enforcement* disparities. *Accord United States v. Washington*, 670 F.3d 1321, 1327 (D.C. Cir. 2012) ("U.S. Attorney's lawful exercise of discretion in bringing a federal prosecution" rather than local prosecution, which may result in different sentences, does not support a departure under § 3553(a)(6)); *United States v. Clark*, 8 F.3d 839, 842-843 (D.C. Cir. 1993)("reject[ing] the claim that the [U.S.] government's 'arbitrary use' of its discretion to indict defendants under either federal or D.C. law could be a mitigating circumstance within the meaning of § 3553(b)" or was appropriate to consider in exercise of district court's authority to avoid unwarranted sentencing disparities under § 3553(a)(6)).

still retain provisions for meaningful case-by-case review.[13] *See* 2014 Guidance Memorandum at 4 (requiring that a DAPA applicant present "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate"). This case-by-case decisionmaking reinforces the conclusion that the challenged programs amount only to the valid exercise of prosecutorial discretion and reflect the reality that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Finally, the challenged deferred action programs merely provide guidance to immigration officials in the exercise of their official duties. This helps to ensure that the exercise of deferred action is *not* arbitrary and capricious, as might be the case if the executive branch offered no guidance to enforcement officials. It would make little sense for a Court to strike down as arbitrary and capricious guidelines that help ensure that the Nation's immigration enforcement is not arbitrary but rather reflective of congressionally-directed priorities.[14]

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[13] Statistics provided by the defendants reflect that such case-by-case review is in operation. As of December 5, 2014, 36,860 requests for deferred action under DACA were denied and another 42,632 applicants were rejected as not eligible. Defs.' Mem., Ex. 22 (USCIS, Current Statistics: Deferred Action for Childhood Arrivals: Pending, Receipts, Rejected, Approvals, and Denials (2014)), ECF No. 13-22.

[14] The plaintiff makes three arguments in support of his motion for preliminary injunction based on the constitutional principles underlying the separation of powers. First, the plaintiff argues that the implementation of the challenged programs would use significantly all of the funds appropriated by Congress for immigration enforcement thereby frustrating the will of Congress. *See* Hrg. Tr. at 16–17; Pl.'s Mot. at 20. This is not so. "[T]he costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees." OLC Opinion at 27; 2014 Guidance Memorandum at 5 ("Applicants will pay the work authorization and biometrics fees, which currently amount to $465."). Should Congress disagree with the enforcement priorities set out by DHS in the challenged policies, Congress has the ability to appropriate funds solely for removal and the President cannot refuse to expend funds appropriated by Congress. *See Train v. City of New York*, 420 U.S. 35 (1975). Second, the plaintiff argues that the challenged deferred action programs violate *INS v. Chadha*, 462 U.S. 919 (1983), because the programs amount to unlawful legislation and/or rulemaking. Pl.'s Mot. at 20. This argument also misses the mark. Congress has delegated authority to DHS to establish priorities for the enforcement of the nation's immigration laws, *see* 6 U.S.C. 202(5), and, as *Chadha* recognizes, DHS is acting in an Article II enforcement capacity when determining issues of deportation. *See Chadha*, 462 U.S. at 953 n.16. Third, the plaintiff contends that the challenged deferred action programs violate the non-delegation doctrine. Pl.'s Mot. at 17. Yet, a finding of excessive delegation of authority is extremely rare, given the low threshold that legislation must meet to overcome a non-delegation doctrine claim. *See United States v. Ross*, 778 F. Supp. 2d 13, 26 (D.D.C. 2011) ("[o]nly twice in [the Supreme Court's] history, and not since 1935, has [it] invalidated a statute on the ground of excessive delegation of legislative authority") (citations and quotations omitted). The Supreme Court has

Second, the plaintiff cannot demonstrate irreparable harm since the plaintiff waited two years to challenge the DACA program and because any harm to the plaintiff is likely to occur regardless of the challenged policies.

Finally, both the public interest and the balance of the equities do not support a preliminary injunction. Halting these deferred action programs would inhibit the ability of DHS to focus on its statutorily proscribed enforcement priorities (national security, border security, and public safety) and would upset the expectations of the DACA program's participants and the potentially eligible participants in the other challenged programs when none of those participants are currently before this Court.

IV. CONCLUSION

For the foregoing reasons, the plaintiff's motion for preliminary injunction is denied and the defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

An appropriate Order accompanies this Memorandum Opinion.

Date: December 23, 2014

Digitally signed by Hon. Beryl A. Howell
DN: cn=Hon. Beryl A. Howell, o=U.S. District Court for the District of Columbia, ou=United States District Court Judge, email=Howell_Chambers@dcd.uscourts.gov, c=US
Date: 2014.12.23 20:30:27 -05'00'

BERYL A. HOWELL
United States District Judge

"'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001)).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH M. ARPAIO, *Sheriff, Maricopa County, Arizona*, Plaintiff, v. BARACK OBAMA, *in his individual and professional capacity as President, United States of America, et al.*, Defendants.	Civil Action No. 14-1966 (BAH) Judge Beryl A. Howell

ORDER

Upon consideration of the defendants' motion to dismiss for lack of subject matter jurisdiction, ECF Nos. 13, 15, and the plaintiff's motion for preliminary injunction, ECF No. 7, the related legal memoranda in support and in opposition, the declarations attached thereto, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that, because the Court lacks subject matter jurisdiction over this matter, the defendants' motion to dismiss is **GRANTED**; and it is further

ORDERED that the plaintiff's motion for preliminary injunction is DENIED;[1] and it is further

[1] The plaintiff's motion for a preliminary injunction docketed at ECF No. 6 is DENIED as moot.

ORDERED that the Clerk of the Court close this case.

SO ORDERED

Date: December 23, 2014

This is a final and appealable Order.

BERYL A. HOWELL
United States District Judge

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

NOTICE OF APPEAL

NOTICE is hereby given that Plaintiff Joseph Arpaio appeals to the U.S. Court of Appeals for the District of Columbia Circuit from the Memorandum Opinion and Order of this Court entered on December 23, 2014 (Docket Nos. 23, 24)(Exhibits 1, 2), which granted Defendants' Motion to Dismiss, dismissed all claims, and denied Plaintiff's Motion for Preliminary Injunction; and all other orders and rulings adverse to Plaintiff in this case.

Dated: December 23, 2014

Respectfully submitted,

/s/ *Larry Klayman*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2014 a true and correct copy of the foregoing Notice of Appeal (Civil Action Nos. 14-cv-1966) was submitted electronically to the District Court for the District of Columbia and served via CM/ECF upon the following:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2015 a true and correct copy of the foregoing was submitted electronically to the U.S. Court of Appeals for the District of Columbia Circuit and served via CM/ECF electronic service upon the following:

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