Refugee Council USA

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June 28, 2017

The Honorable John F. Kelly
Secretary of Homeland Security
Office of the Secretary
Washington, DC 20528

The Honorable Rex Tillerson
Secretary of State
Office of the Secretary
Washington, DC 20520

Dear Secretary Kelly and Secretary Tillerson:

On behalf of Refugee Council USA (RCUSA), a coalition dedicated to refugee protection and welcome, representing the interests of hundreds of thousands of refugees and millions of supporters and volunteers across the country, I write to share our collective recommendations in response to this week's Supreme Court announcement regarding the implementation of Executive Order 13780 (*Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017*).

The Court granted a partial stay on the injunctions that had placed key parts of the Administration's travel ban on hold. Because the Court's decision is narrow in its application -- applying only to foreign nationals who cannot claim a "bona fide relationship with a person or entity in the United States" -- we trust that the Administration's implementation efforts will reflect the significant "bona fide relationships" that already exist for refugees waiting to come to the United States.

The Supreme Court Order provided guidance as to the meaning of a "bona fide relationship" with a person, noting that this would include relatives such as a mother-in-law, extending beyond the nuclear family. The Order stated that a bona fide relationship with an entity should be "formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2."

By the time they have been assigned case numbers by the U.S. Refugee Admissions Program (USRAP), each refugee has established a "bona fide relationship" with a U.S. Refugee Admissions Program Resettlement Support Center (RSC). Such relationship may be entered into only after the applicant has established that he or she has ties to the United States. The USRAP is "by invitation only" based on ties to United States interests. Under the Supreme Court Order, refugee applicants who qualify for a processing priority should continue to have access to refugee resettlement.

For most refugees, these "bona fide relationships" run even deeper than the ties to the RSC. They may include ties to U.S.-based voluntary resettlement agencies, faith-based groups and other communities that have committed to co-sponsor refugees, as well as U.S.-based attorneys or legal assistance organizations. The majority of refugee applicants have family links to the United States as well, links which are included in their case file.

Additional examples of refugee applicants in the U.S. Refugee Admissions Program who have even deeper "bona fide" relationships with people and/or entities in the United States, include:

- By definition, all P3, 1-730, and Visa 93 refugee applicants are eligible to apply to the USRAP due to their relationship with family members in the United States.

- P2 groups like the Direct Access Program (DAP) eligibility for Iraqis includes 6 categories establishing ties to the United States based on work for the US government or a US-based entity or family connections with individuals in the United States. DAP eligibility for Syrians includes Syrian nationals with an approved I-130 petition. Religious minorities from the former Soviet bloc and Iran must have "anchors" in the United States to apply for the program, and children from Central America must have lawfully present parents in the United States

While the Court's decision should allow refugees to continue to arrive, we also call on the Departments of State and Homeland Security to implement the Executive Order's case-by-case waiver provisions. The Administration should ensure that there is a clear interagency procedure in place to make use of these exemptions in order to protect vulnerable refugees who may need them.

In addition, we request a blanket waiver be made for unaccompanied refugee minors, apart from any pre-existing relationship with an individual or entity, such as foster care parents. This population of extraordinarily vulnerable refugee children, who have lost or been separated from their parents, often have no other options. As a result, they should not be left in harm's way.

Finally, we urge you to conduct your review of security vetting in refugee processing with two overarching goals in mind: maintaining a robust refugee admissions program and keeping the U.S. safe. We encourage the Administration to evaluate existing security procedures immediately, and to conclude a review as swiftly as possible to prevent further uncertainty and hardship for refugee families waiting overseas. We urge that any inefficiencies in the security vetting process be addressed, and that processes be improved to allow applicants a meaningful opportunity to identify and correct erroneous security information that unjustly bars refugees from the program. We also ask that any review include civil society and refugee service organizations with expertise in refugee processing. We believe it is vital to utilize the full expertise of the existing resettlement program when conducting such an important evaluation.

We thank you for taking our recommendations under consideration. Naomi Steinberg, Director of RCUSA, is our point of contact for further information. Her e-mail address is: nsteinberg@rcusa.org, and her phone number is: 202-319-2103.

Sincerely,

Hans Van de Weerd
Chair, Refugee Council USA

Enclosure: RCUSA USRAP Review Principles Letter

Cc: Simon Henshaw, Acting Assistant Secretary and Principal Deputy Assistant, Population, Refugees, and Migration, U.S. Department of State

Mark Storella, Deputy Assistant Secretary, Population, Refugees, and Migration, U.S. Department of State

Larry Bartlett, Director of Refugee Admissions, U.S. Department of State

Admiral Garry E. Hall, Special Assistant to the President and Senior Director for International Organizations and Alliances, National Security Council

Zina Bash, Special Assistant to the President

Dan Coats, Director of National Intelligence

DRAFT

Ting Xue, a committed Christian, is a refugee who fled from religious persecution in his native China. He now lives in Denver with his wife, a lawful permanent resident who likewise hails from China, and their young daughter. Xue has a job, pays taxes, and is active in a local evangelical church. But if the federal government has its way, Xue will soon be separated from his young family and sent back to China. He is fighting hard for his freedom.

Ting Xue's story is a living parable that reveals a deeply-troubling truth: For years, the federal government has routinely denied claims, such as Ting Xue's, for asylum. That mean-spirited practice results from the steely determination of a cadre of immigration law judges, who wield enormous power over life and limb, to deny claims for asylum and dispatch individuals back to face the tender mercies of their countries of origin. Appointed by the Attorney General, these 300 judges across the country do so by erecting a virtually unsurmountable barrier for an asylum claimant, such as Xue, who seeks to demonstrate the pivotal requirement of a "well-founded fear of persecution" based on religion. That's the legal key that unlocks the door to freedom in the United States.

The facts in Ting Xue's case are clear and undisputed. Xue grew up in a Christian family in China, was baptized at the age of 12, and long active in an underground church in his community. As a young adult, in addition to Sunday worship services, Xue faithfully attended Friday evening fellowship gatherings, which moved from house to house in order to avoid detection. On one fateful Friday evening, however, police entered the venue du jour and arrested the attendees who were peacefully reading the Bible, singing hymns and enjoying Christian fellowship.

Along with his fellow worshipers, Xue was hauled to a local police station, interrogated by three officers, roughed up when he claimed not to know who the "leaders" of the underground church were, and then locked up in a windowless jail cell with four fellow believers for three days and four nights. The conditions were despicable one straw mattress for five prisoners, a single bucket for their toilet, and a bowl of porridge twice a day. The prisoners were mocked, particularly when they prayed together before their simple meals. Jailers taunted them with cries of "We are your God," and "pray to your Jesus to rescue you."

Before his release from police custody, Xue was forced to sign a pledge that he would never attend the underground church again. He was also warned that a second offense would carry a harsh punishment. For good measure, his jailers ordered him to show up at the police station weekly for ideological education. Xue signed the pledge, but violated it two weeks later. He returned to the underground church, but grudgingly abided by the command to appear for his weekly dose of Communist ideology: Love your country, work hard, and cease assembling in the name of Jesus.

Two months later, police again intruded into the Friday evening gathering of young adults, arrested everyone, and sent several of Xue's colleagues to prison for one-year terms. Working overtime at his job on that Friday evening, Xue was spared, but his family determined that he needed to go away. With funds raised by his uncles, Xue left China and entered the United States illegally. He was soon apprehended by U.S. immigration authorities, when he claimed the right to remain in the United States as a refugee fleeing religious persecution.

Under federal law, to remain in the country, asylum claimants must establish a "well-founded fear of persecution" on grounds of religious or political belief and practice were they deported back to their country of origin. Responding to Xue's undisputed portrayal of his own plight, an immigration law judge in Denver concluded that his story (which the judge fully credited) showed merely a restriction in his freedom, but that the conditions he likely faced upon return did not rise to the level of "persecution." As the judge saw it, all Xue needed to do to avoid running afoul of the anti-faith zealots in China was to worship in secret.

This wildly wrongheaded decision was not only upheld by the Board of Immigration Appeals, likewise appointed by the Attorney General, but by a unanimous three-judge panel of the federal appeals court sitting in Denver. As matters stand, Xue's last hope is to get relief from the Supreme Court, which will consider his petition for review early this coming fall. Many faith-community organizations have rallied around to support Xue's position as a matter of law and human decency.

For years, Xue's tragic situation has been replicated throughout America's broken asylum adjudicatory system. Time and again, asylum claimants from around the world are told to go home. All they need to do, they are informed, is to hide their faith or their politics. Stop practicing and professing in any community or public setting, even in an underground church or political setting, and you'll be fine. Just keep silent.

Time and again, federal judges have rejected this widespread bureaucratic approach to asylum claims. In a brilliant opinion a few years ago, Judge Richard Posner reminded immigration judges: "Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn't follow that Rome did not persecute Christians…" Posner went on to observe: "One aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population."

Just so. China is pre-Constantine Rome, minus the lions. But persecution is nonetheless widespread and growing. As Sarah Cook demonstrates in an impressive book, The Battle for China's Spirit, controls over religion in China have been on the rise since 2012, seeping into new areas of daily life. Xi Jinping is at the vanguard of this new wave of official repression. He makes nice with President Trump at Mar a Lago, but party minions back home fully understand his anti-liberty, militantly-secularist message about Christians. Here's what Xi Jinping said in April of last year: "Communist Party Cadres must be unyielding Marxist Atheists. We should guide and educate the religious circle and their followers."

"Guidance and education" means prison for increasing numbers of believers in China, and the courageous lawyers who represent them. Freedom House researchers have identified hundreds of cases of Chinese citizens sentenced to prison for exercising their basic human rights guaranteed by the Universal Declaration of Human Rights. Former prisoners have detailed a shocking array of cruel beatings, long-term shackling, electric baton shocks and injection with unknown drugs. That's the China of Xi Jinping.

So what is to be done here at home?

For Xue, his fate now rests in the hands of the Supreme Court. The Court can and should bring clarity to the law, particularly the meaning of the all-important term, "persecution," a word that Congress left undefined. But more broadly, this evil manifestation of the "deep state" provides the still-new

Administration with an opportunity to bring about humane and sensible reform. Start with the immigration law judges. Unlike federal judges, they are subject to the command and control of the Attorney General. Ironically, the Attorney General needs to take a page from the repressive Xi Jinping and "guide and educate" the Department's immigration judges, followed by the Board of Immigration Appeals. They all need retraining-- now. And the Justice Department's Civil Division needs to stop defending the indefensible. "Confessing error" in Ting Xue's sad case would be a good start. The Solicitor General should say, in the spirit of Fiorello LaGuardia, "When we make a mistake, it's a beaut." More generally, President Trump should not do what his predecessors, both Democrat and Republican, allowed their Attorneys General to do.

As her guiding philosophy, Margaret Thatcher was wont to say: "Keep the best, reform the rest." Reform of the administration of America's asylum laws is long overdue. It's a worthy and noble cause for Attorney General Jeff Sessions to pursue, and for the nation's Chief Executive to embrace.

State of California

Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

July 21, 2017

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

RE: June 29, 2017 letter from Ken Paxton re *Texas, et al., v. United States, et al.*, Case No. 1:14-cv-00254 (S.D. Tex.)

Dear Mr. President:

We write to urge you to maintain and defend the Deferred Action for Childhood Arrivals program, or DACA, which represents a success story for the more than three-quarters of a million "Dreamers" who are currently registered for it. It has also been a boon to the communities, universities, and employers with which these Dreamers are connected, and for the American economy as a whole.

Since 2012, nearly 800,000 young immigrants who were brought to this country as children have been granted DACA after completing applications, submitting to and passing a background check, and applying for a work permit. In the case of young adults granted DACA, they are among our newest soldiers, college graduates, nurses and first responders. They are our neighbors, coworkers, students and community and church leaders. And they are boosting the economies and communities of our states every day. In fact, receiving DACA has increased recipients' hourly wages by an average of 42 percent[1] and given them the purchasing power to buy homes, cars and other goods and services, which drives economic growth for all.[2]

In addition to strengthening our states and country, DACA gives these bright, driven young people the peace of mind and stability to earn a college degree and to seek employment that matches their education and training. The protection afforded by

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DACA gives them dignity and the ability to fully pursue the American dream. For many, the United States is the only country they have ever known.

The consequences of rescinding DACA would be severe, not just for the hundreds of thousands of young people who rely on the program and for their employers, schools, universities, and families but for the country's economy as a whole. For example, in addition to lost tax revenue, American businesses would face billions in turnover costs, as employers would lose qualified workers whom they have trained and in whom they have invested.[3] And as the chief law officers of our respective states, we strongly believe that DACA has made our communities safer, enabling these young people to report crimes to police without fear of deportation.

You have repeatedly expressed your support for Dreamers. Today, we join together to urge you not to capitulate to the demands Texas and nine other states set forth in their June 29, 2017, letter to Attorney General Jeff Sessions. That letter demands, under threat of litigation, that your Administration end the DACA initiative. The arguments set forth in that letter are wrong as a matter of law and policy.

There is broad consensus that the young people who qualify for DACA should not be prioritized for deportation. DACA is consistent with a long pattern of presidential exercises of prosecutorial discretion that targeted resources in a constitutional manner. Indeed, as Justice Antonin Scalia recognized in a 1999 opinion, the Executive has a long history of "engaging in a regular practice . . . of exercising [deferred action] for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). DACA sensibly guides immigration officials' exercise of their enforcement discretion and reserves limited resources to address individuals who threaten our communities, not those who contribute greatly to them.

Challenges have been brought against the original DACA program, including in the Fifth Circuit, but none have succeeded. On the other hand, in a case relating to Arizona's efforts to deny drivers' licenses to DACA recipients, the Ninth Circuit stated that it is "well settled that the [DHS] Secretary can exercise deferred action." *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957, 967-968 (9th Cir. 2017). The court also observed that "several prior administrations have adopted programs, like DACA, to prioritize which noncitizens to remove." *Id.* at 976.[4]

As the Fifth Circuit was careful to point out in its ruling in the *Texas* case, the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")

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initiative that was struck down is "similar" but "not identical" to DACA. *Texas v. United States*, 809 F.3d 134, 174 (5th Cir. 2015). Indeed, as DHS Secretary Kelly pointed out in a press conference the day after his June 15 memorandum explaining that DACA would continue, DACA and DAPA are "two separate issues," appropriately noting the different populations addressed by each program. Notably, only a fraction of the 25 states which joined with Texas in the DAPA case before the Supreme Court chose to co-sign the letter threatening to challenge DACA.

Among other significant differences, DACA has been operative since 2012 while DAPA never went into effect. More than three-quarters of a million young people, and their employers, among others, have concretely benefitted from DACA, for up to five years. The interests of these young people in continuing to participate in DACA and retain the benefits that flow from DACA raise particular concerns not implicated in the pre-implementation challenge to DAPA. Further, the Fifth Circuit placed legal significance on the "economic and political magnitude" of the large number of immigrants who were affected by DAPA, *Texas*, 809 F.3d at 181; thus, it is notable that many fewer people have received DACA (about 800,000) than would have been eligible for DAPA (up to 4.3 million).

One additional, but related, issue concerns DHS's current practices regarding DACA recipients. A number of troubling incidents in recent months raise serious concerns over whether DHS agents are adhering to DACA guidelines and your repeated public assurances that DACA-eligible individuals are not targets for arrest and deportation. We urge you to ensure compliance with DACA and consistent enforcement practices towards Dreamers.

Mr. President, now is the time to affirm the commitment you made, both to the "incredible kids" who benefit from DACA and to their families and our communities, to handle this issue "with heart." You said Dreamers should "rest easy." We urge you to affirm America's values and tradition as a nation of immigrants and make clear that you will not only continue DACA, but that you will defend it. The cost of not doing so would be too high for America, the economy, and for these young people. For these reasons, we urge you to maintain and defend DACA, and we stand in support of the effort to defend DACA by all appropriate means.

Sincerely,

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cc: The Honorable John F. Kelly, Secretary of Homeland Security
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BOB FERGUSON
Washington State Attorney General

cc: The Honorable John F. Kelly, Secretary of Homeland Security
The Honorable Jeff Sessions, Attorney General of the United States

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

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodriguez
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.

[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).

The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others

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

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

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

November 19, 2014

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

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

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

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

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

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

I.

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

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

A.

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

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

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

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

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

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

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

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

132 S. Ct. at 2499.

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

A.

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

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

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

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

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.

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

1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.

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

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

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

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

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

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

III.

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

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

UNITED STATES DISTRICT C●URT
EASTERN DISTRICT ●F NEW Y●RK

x

16 CV 4756(NGG J●)

MAKE THE R●AD NEW Y●RK and
MARTIN JONATHAN BATALLA VIDAL,

Plaintiffs,

against

KATHY A. BARAN, ET AL.,

Defendants.

x

United States Courthouse
Brooklyn, New York

September 14, 2017
2:30 p.m.

TRANSCRIPT ●F CIVIL CAUSE F●R PRE M●TI●N C●NFERENCE
BEF●RE THE H●N●RABLE NICH●LAS G. GARAUFIS
UNITED STATES SENI●R DISTRICT JUDGE
UNITED STATES MAGISTRATE JUDGE JAMES ●RENSTEIN

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THE COURT: You may be seated in the back and on the side. Call the case, please.

THE COURTROOM DEPUTY: Everybody on the Vidal matter please state your appearances for the record.

THE COURT: All right. For the plaintiff.

MR. WISHNIE: Good afternoon, Your Honor, for plaintiffs, Michael Wishnie, Jerome N. Frank Legal Services Organization, Yale Law School. With me today is law student intern, Susanna Evarts. Ms. Evarts will be prepared to address the Court regarding the claims set forth in our filings.

Attorney Karen Tumlin of the National Immigration Law Center will be prepared to address the Court regarding case management and scheduling, any matters like that. I'll invite everybody else to introduce themselves.

THE COURT: That's fine, please go ahead.

MR. COX: Justin Cox with the National Immigration Law Center.

MS. JOACHIN: Mayra Joachin, National Immigration Law Center.

MS. HANSON: Jessica Hanson, National Immigration Law Center.

MS. TAYLOR: Amy Taylor, Make The Road New York.

MS. ORIHUELA: Marisol Orihuela, Jerome N. Frank Legal Services Organization.

MR. AHMAD: Muneer Ahmad, Jerome N. Frank Legal Services Organization.

THE COURT: Thank you. Yes.

MS. RILEY: Good afternoon, Your Honor, Susan Riley, chief of the civil division in the U.S. Attorney's Office.

THE COURT: Nice to see you again, Ms. Riley.

MS. RILEY: Thank you, Your Honor.

I'd like to introduce to you our Deputy Assistant Attorney General for the civil division in Washington, D.C., Brett Shumate. He will be presenting the government's arguments today.

Also at counsel table is John Tyler, an assistant director in the Federal Programs Branch in the civil division Department of Justice in Washington, D.C. With us also is Brad Rosenberg, also of the Federal Programs Branch of the civil division in Washington, D.C. Lastly, but not least, Joe Marutollo of our offices, USAO office, chief of immigration litigation.

THE COURT: He has replaced Mr. Dunn?

MS. RILEY: Yes, he has, Your Honor.

THE COURT: Who has taken the bench in New York City.

MS. RILEY: Yes, he has.

THE COURT: How nice for him.

MS. RILEY: Yes, it is, Your Honor.

THE COURT: All right. It's nice to see every one from out of town, New Haven and Washington.

With me is Magistrate Judge James Orenstein, who is also assigned to this case and we thought for the purposes of efficiency the two of us would preside over this proceeding. You may be seated.

This case was brought last year and it was, in effect, stayed while the political process continued and here we are on September 14th, 2017, and we've been asked by the plaintiffs to file a second amended complaint.

So why don't we start with the application made by the plaintiff.

MS. EVARTS: Good afternoon, Your Honor, thank you. I would like to first start by introducing my client, Martin Batalla Vidal and many members of Make the Road New York who are with us today.

THE COURT: Where is your client?

MR. VIDAL: Right here, Your Honor.

THE COURT: Nice to meet you.

MS. EVARTS: Second, with your permission, I would like to state the case briefly as we see it.

THE COURT: Have you been keeping up with all the news from Washington and Florida that's been articulated by the President in the last 12 hours about this case not about this case about the DACA situation?

MS. EVARTS: Yes, I have, Your Honor.

THE COURT: Okay, fine. I'll be asking the other side a few questions about that. Go ahead.

MS. EVARTS: The Trump administration's decision to terminate the DACA program was both heartless and cruel and it was also illegal. The purpose of the Administrative Procedure Act, the APA, is to ensure that when an agency undertakes action that it think through its decision and it think through the cost of taking that action and make a deliberate decision, especially this is especially true when people's lives are at stake.

THE COURT: They didn't follow the Administrative Procedure Act when the established DACA, did they? That was done without an opportunity for notice and comment, right?

MS. EVARTS: That is correct, Your Honor.

THE COURT: So going in there hasn't been the APA wasn't followed but you're saying they should be following it in connection with the rescission.

MS. EVARTS: Yes.

THE COURT: Is that it?

MS. EVARTS: We are, Your Honor.

THE COURT: Okay.

MS. EVARTS: And while we fully acknowledge that an agency can change its policy, when it does it needs to be legal, it cannot be pretextual and it needs to be

constitutional. The agency has failed all three of those.

After its termination of the DACA program, we proposed to amend our complaint in order to bring claims, statutory claims and constitutional claims. Our statutory claims arise under the Administrative Procedure Act and the Regulatory Flexibility Act. And our constitutional claims arise under the equal protection guarantee of the Fifth Amendment along with the due process clause of the Fifth Amendment.

And I can describe the claims in more depth if you would like, Your Honor.

THE COURT: Well, briefly speaking, you are proposing to amend the complaint, according to your letter, to make certain claims for individuals who are not yet plaintiffs in the case, right?

MS. EVARTS: That is correct, Your Honor.

THE COURT: And also to make claims on behalf of a class or a number of classes.

MS. EVARTS: That is correct, Your Honor.

THE COURT: Can you describe the class or classes that you propose to include in your amended complaint.

MS. EVARTS: Yes, Your Honor. We propose a nationwide class that would be nationwide. And I can get into more detail. We also expect in our class certification motion, if you grant us leave to amend our complaint, that we

will also more fully flesh out the particular aspects of the class that we propose.

THE COURT: When could you have this second amended complaint filed so we can move along with this case, and as the government as the Attorney General has established certain deadlines for making application to extend these permits.

Just state your name for the court reporter.

MS. TUMLIN: Absolutely. Karen Tumlin for plaintiffs. Your Honor, the plaintiffs are prepared to file our second amended complaint on Tuesday, the 19th, if that would work for the Court.

THE COURT: All right. And so you are pretty far along then in preparing your second amended complaint.

MS. TUMLIN: We're working diligently, Your Honor.

THE COURT: Okay, well, that's what weekends are for.

MS. TUMLIN: Turns out.

THE COURT: Let me just ask the government welcome, first of all, sir.

MR. SHUMATE: Thank you, Your Honor.

THE COURT: Let me just ask you, are you the career person in your position at the justice department or are you the political appointee?

MR. SHUMATE: I'm the political appointee, Your

Honor.

THE COURT: Which means you know more about what the President is thinking than a career person would.

MR. SHUMATE: I don't think you should assume that, Your Honor, but

THE COURT: Okay.

MR. SHUMATE: I'm the Deputy Assistant Attorney General for the Federal Programs.

THE COURT: Well, it is nice to have you here.

MR. SHUMATE: Thank you.

THE COURT: So I take it from your correspondence that you don't object to the filing of the second amended complaint.

MR. SHUMATE: That's correct, Your Honor.

First of all, I just wanted to say that we recognize the importance of this case, the significance of the issues that are presented, and the public interest in the case. So we obviously have no objection to the filing of the amended complaint. We see it makes perfect sense to move this case along quickly, so we're not opposing the amended complaint.

What the government would be willing to do is file a motion to dismiss within 30 days of when we see the amended complaint. Even though we typically have 60 days, we're willing to move very quickly to put the Court in a position to address what we think are fundamental flaws in the claims that

the plaintiffs propose to bring by the end of the year. And as you know, there is a March deadline in DHS's memorandum. In the event the Court does not dismiss the case, we feel the Court should do that, the Court will be able to take some action and we can move to PI briefing potentially next year if the plaintiffs so choose to do so.

But we think the best course of action would be, for example, if the plaintiffs were to file the amended complaint next week, we would file a motion to dismiss within 30 days, say October 20th, the plaintiffs could have another 30 days or so to file an opposition, which we would propose November 17th, we would file a reply on December 15th and then the Court could hold a hearing, if it decided to do so, at the end of the year and the Court would be in a position to make the decision on our motion to dismiss end of this year, early next year. So that would

THE COURT: Okay. Let me just ask you this. Isn't there there's a first deadline that was set forth by the Attorney General in his statement and that I think was October 5th. What was that deadline for?

MR. SHUMATE: So it's actually October 5th, that's correct, it is actually a DHS deadline for renewal applications for certain categories of individuals whose permits expire. So, yes, that deadline is upcoming.

One thing the plaintiffs had asked us to consider is

whether DHS would consider extending that deadline in light of the hurricanes in Texas and Florida. We took that issue very seriously, we took it to DHS, they have considered our request. Their position right now is that that deadline will remain October 5th as of now, but I am authorized to say that they are actively considering whether to extend the deadline in light of the hurricanes. So that's what I know about the October 5th deadline. As of right now, it still stands.

THE COURT: I'm more concerned about the October 5th deadline in terms of how it might prejudice the rights of certain persons who are already covered by the DACA certificates or permits, work permits and so on that have already been issued. And so I'm not worried I mean, we're all concerned about what has happened with the hurricanes, but if you're living in Michigan or in Oregon or in Vermont, you don't have a problem with the hurricane, you've got a problem with the fact that based on this deadline you may be preempted from making an application to extend the benefit that you received under DACA. So since this is a nationwide program, I think we should just not focus on people in the impacted areas from the hurricanes, we need to focus on everybody. If this is going to be an application for a nationwide class, we have to think of the whole country, so and then there's also the question of whether DHS and the immigration officials have the latitude, absent DACA, to grant certain applications

irrespective of whether DACA exists and whether this, in effect, creates a legislative rule on the part of DHS that bars people, based on their classification, from being considered for this kind of benefit or remedy or exception to the general rule.

I'm just wondering, have you all thought about the question of whether that kind of hard and fast deadline for certain categories of individuals covered by DACA would, in effect, constitute a legislative rule, irrespective of whether the creation of DACA violated that in effect the requirement that legislative rules not be established.

MR. SHUMATE: Thank you, Your Honor. We certainly understand the plaintiffs' concern about the October 5th deadline. In DHS's judgment, 30 days was a sufficient amount of time to allow individuals to complete the paperwork to file for renewals. I think there is a virtue in having a clear deadline that people know about, that's clear and why we're reporting. So in their discretion they thought that was appropriate and, in their defense, Your Honor, this is a decision that has been made to wind down the program. It was not an abrupt decision, so the program is not ending immediately. Nobody is losing their DACA benefits immediately. The opportunity has been provided to renew certain applications and so we think that is eminently reasonable.

And our position in the case is that this decision to rescind DACA is not subject to judicial review of the APA at all. So it is not subject to the arbitrary and capricious decision making requirement, it's not subject to notice in common rule making, so this was an eminently reasonable decision that, you know, it's an exercise of prosecutorial discretion. We had to decide how to wind it down in some way, so they felt this was just a reasonable way to establish some deadlines so folks would have clear notice of what the deadlines would be.

THE COURT: Well, the Attorney General said in his statement that DACA is unconstitutional and yet in this process you're allowing people to renew, certain people, whose coverage ends by a certain time to renew even though it is an allegedly unconstitutional procedure. Is that what do I get that right or do I get that wrong?

MR. SHUMATE: That is right. The Attorney General and DHS both decided that this is an unlawful program and what they decided was it was a decision based on litigation risk. That if we did not wind down the program in a responsible way it was very likely that the other states were going to go to the Southern District of Texas and ask for an immediate preliminary injunction in which case the program could have been ended immediately. So in their judgment what they decided to do is we're going to have a responsible way to

wind this program down that gives folks a chance to know when the deadlines are, gives an opportunity to apply for renewal permits so people aren't losing their benefits immediately. So it was a decision based on litigation risk that if we didn't wind this down in a responsible way, then the District Court in Texas would do it for us.

MS. TUMLIN: If I may speak briefly to the October 5th and the notice issue. Leaving aside the tremendous turmoil that states and individuals impacted by the hurricanes but looking at the entire country, one of the things that we're greatly troubled by as plaintiffs and would like to address to the Court is, the renewal process for DACA how it has worked traditionally is 180 days before someone's work authorization in DACA is set to expire they get a notice and that notice directs them to file the renewal application between 120 and 150 days. And those notices and I think the government can of course correct me if this is not the case have continued to go out, but what that means with the hard and fast October 5th deadline is, individuals whose DACA is expiring between February and March, have received notices that are false and misleading in this context that has changed. They don't state that you only have until October 5th and our understanding is there is no plan to provide individualized notice that provides the right date and provide a warning to individuals that if they don't submit

their renewal applications three weeks from today, not in the 120 or 150 day window, that they risk losing their chance to renew.

THE COURT: I see. So let me just move on to the next question, which is after you file your second amended complaint, assuming that the problem isn't resolved legislatively by the political branches, if you will, of the federal government, between now and October 5th

MS. TUMLIN: Correct.

THE COURT: then do you anticipate requesting some kind of preliminary injunctive relief? What can we expect, what can the Court expect from the plaintiffs, the new the current plaintiff and any additional plaintiffs at that point. I'm just trying to plan for what may happen. My hope would be, frankly, that the executive branch would put a voluntary halt to this, the termination process, to permit Congress and the President to find a legislative solution so the courts are not involved.

There are apparently 800,000 individuals who are affected potentially by what's happening with DACA, and that doesn't even cover family members of those people who are also potentially affected. There are people who are working supporting families. We're not talking about people who are children, we're talking about people who are grown and in the work force many, many of them, and they support families, they

support their parents, they support their own children some of them. This is a much wider situation than just the individuals. And this affects others as well. They pay taxes, they pay rent, they pay for mortgages, they support their communities, and so I'm concerned, the Court is concerned that the government if it proceeds with these arbitrary deadlines, which is what they are, they are just arbitrary deadlines, that the consequence will be far greater in scope than simply you can't apply and down the road some judge or the Congress will solve the problem and all will be well, all right. We can't expect that in this environment that is a likely outcome. It's a hoped for outcome. And from what the President has said in the last 24 hours, I'm encouraged that this can be resolved by a legislative solution. But you're here because you anticipate that it may not be resolved by a legislative solution. So I'm just wondering whether you have a plan since you're plaintiffs.

MS. TUMLIN: Yes.

THE COURT: So tell us, give us a little bit of a hint as to where we're going to go from here apart from the filing of a second amended complaint.

MS. TUMLIN: Absolutely, Your Honor, I appreciate that. And I'd like to do that in two tracks: One, talking about what the Court might anticipate what plaintiffs' plan might be for the October 5th and then we can turn to the other

deadline, which is the March deadline.

So with respect to whether any type of injunctive relief or temporary restraining order would be sought in advance of the October 5th deadline, a couple of things would be useful. I think having, first and foremost, a date certain by when the defendants can provide an answer whether the government will voluntarily extend that deadline and perhaps coming back and having another conference when we're closer to that date, perhaps around September the 25th would be amenable to plaintiffs or 26th. We're sitting three weeks today from the deadline for October 5th. But at that point we can make a determination and be ready to set a schedule if we were still in a situation where the defendants had not moved the October 5th date and it became necessary to seek immediate relief. So that would be one plan, Your Honor.

We could if that became necessary, a need for temporary restraining order that's something we could file on Monday, October the 2nd.

THE COURT: So you're saying something like Thursday, September 28th might be a good date?

MS. TUMLIN: I was suggesting the Monday or Tuesday, the 25th or 26th for a conference, Your Honor, to see the defendants may have more information at that time and then if we're in resolution, terrific, we can focus on the March 5th date. If not, we could proceed to set a schedule for a

temporary restraining order if that's still necessary.

THE COURT: Let me hear from the deputy assistant attorney general.

MR. SHUMATE: Thank you, Your Honor. We obviously have no objection to coming back for another status conference. I think we can also just engage with the plaintiffs and let them know the government's position or file a letter with the Court letting the Court know what DHS has decided on the October 5th deadline. It may obviate the need for a status conference, I can't speak to that now, it's still actively under consideration.

THE COURT: Well, let me say this with great respect for the Department of Homeland Security, that it would be helpful if we could try to avoid judicial intervention in this case if all that it takes, at least at this point, is to extend one deadline, the reason for which is unknown to me and probably unknown to many people, but which is so close in time that taking into account the President's comments where he said in a tweet today I do follow the President's tweets Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military, question mark. Really. And I think that the message that's being sent is that there is room for a solution and to set to keep a deadline that is so close in time to today while a solution is being engineered and it's

difficult to engineer these solutions for reasons that I need not go into, you can read about them in the media that it would be useful to take some of the pressure off the various parties, particularly those who are affected, these people, these good, educated and accomplished young people who the President speaks about with admiration, so that way at least we wouldn't have to deal with a potential judicial intervention at this early stage and we would give the Congress and the President the opportunity to work through some of the difficulties that they may face in engineering the solution. And that's really that's the Court's hope. The Court can stay out of this and that the political branches of the government can resolve this. And it would appear there is some progress being made in that regard and DHS I believe would be well served by giving that process the chance to bear fruit.

So I wish you would take that back to your client.

Who is the secretary of DHS now that General Kelly has become Chief of Staff?

MR. SHUMATE: Acting Secretary Duke.

THE COURT: You know, General Kelly, according to the Daily News at least, was at the dinner last night at the White House with the democratic leaders of the House and the Senate where the President and leadership, the minority leadership had a discussion about this very issue, so he's

very familiar with this situation and I'm sure he could be helpful as well.

MR. SHUMATE: Yes, Your Honor, we will absolutely take your concerns back to our clients.

I think one thing to keep in mind is if the plaintiffs intend to move for a TRO or a preliminary injunction so close to that October 5th deadline, we do have serious concerns about the merits of their claims. That they are going to ask for that type of emergency relief, they are going to have a show a likelihood of success in the merits, so

THE COURT: I know all the rules.

MR. SHUMATE: Right. We think it really makes sense to initiate a briefing schedule on our motion to dismiss so we can get moving quickly to put the Court in a position to address what we think are substantial defects in their claims. So what we would propose

THE COURT: But that motion to dismiss goes beyond October 5th, right?

MR. SHUMATE: Yes.

THE COURT: The schedule we don't even have a motion until when, according to your schedule?

MR. SHUMATE: October 20th. But the plaintiffs have not yet indicated whether they for certain intend to move for a TRO or a preliminary injunction before that October 5th

deadline. So I think barring some kind of a commitment that they intend to do that, it would be well served and Court would be to go ahead and initiate a briefing schedule on our motion to dismiss.

THE COURT: What is the injury to the government in moving the date by which someone would have to apply for a continuation of a work permit, for instance, from October 5th to December 15th for instance, just for the sake of argument? What is the harm that's done in that situation when all it basically does is it affords the Congress during the latter part of this session and the White House to draw up and enact a legislative solution.

MR. SHUMATE: The harm would be, Your Honor, interference with a decision that is committed to the executive branch. This is all about prosecutorial discretion. The deferred action is a restraint on deportation. It's a decision not to deport.

So if an Article III Court were to second guess the decisions of the executive branch has made about how to exercise its prosecutorial discretion, that would be interference with the executive branch's prerogatives in terms of how it exercises discretion under the immigration laws.

THE COURT: Well, I understand that argument and I even made that argument when I was chief counsel of the FAA in Washington from time to time, but the flip side of that is

that the President has said that he doesn't want to throw out good, educated and accomplished young people who have jobs, some serving in the military. And so it might appear to be arbitrary and capricious to establish a hard and fast policy that would throw these people out of the country even though they meet all of these wonderful standards that he recognizes and he is, after all, not the Secretary of Homeland Security, he's the president. So his own statements would belie any effort to throw these people out without good cause and it would just seem to be arbitrary and I'm not concluding that, but it could be argued with some merit that it constitutes an arbitrary and capricious act if it doesn't afford the DHS with flexibility where it is a hard and fast rule. And so that's one of my concerns.

So take that back to your clients so that they understand that the Court has deep concerns about how this would play out if there isn't some flexibility and movement with regard to this date that's been established for October 5th. That's the only date that I'm concerned about right now.

The ultimate outcome of this case should not be in a Court of law in my opinion. It should be handled by the political branches. But if it can't be handled by the political branches, I have an obligation within the law to protect the 800,000 people or at least those who are within my

jurisdiction, which could be tens of thousands of people, from any arbitrary and capricious implementation of legislative rule, which this may or may not be.

I just want you to understand that in view of where we are today, this afternoon, I don't know about tomorrow, this afternoon it would make sense in my view to be more flexible about the cutoff date so that we could actually resolve this in a more orderly and appropriate way.

That's what I would like you to take back to the acting secretary.

MR. SHUMATE: Absolutely, Your Honor.

THE COURT: Thank you. Judge Orenstein.

JUDGE ORENSTEIN: Thank you, Judge Garaufis. I wanted to jump in only because you teed up the issue and it's going to affect something that I'll be addressing when we get to other pretrial matters.

I want to understand the harm relating to the October 5th deadline. Are you saying the harm that you're seeking to avoid is not necessarily related to the deadline itself but to judicial control of the deadline?

MR. SHUMATE: I would also say that there is a concern that if we start pushing this October 5th deadline back we're going to jam officials at the DHS who process the applications.

JUDGE ORENSTEIN: Right.

MR. SHUMATE: So they need a certain amount of time to process the flood of applications. I'm not sure exactly how much time they need, but that's something we can talk about

JUDGE ORENSTEIN: That's a separate issue.

MR. SHUMATE: Separate issue.

JUDGE ORENSTEIN: In terms of the harm arising from the wrong branch of government making the decision, I'm just having trouble understanding what you're saying. Is it that the harm is infringing on the Executive's exercise of prosecutorial discretion as to when to discontinue its exercise of prosecutorial discretion that it believes to be an unconstitutional exercise of that discretion?

MR. SHUMATE: That's correct, Your Honor.

JUDGE ORENSTEIN: You want to control how long you do something that you believe to be unconstitutional.

MR. SHUMATE: Because this is a matter the enforcement and

JUDGE ORENSTEIN: Why are you doing something that's unconstitutional at all?

MR. SHUMATE: Because the Attorney General decided that it would be harsh we'd be in a much different situation if the Attorney General had decided we need to end this program now. We need to wind this down in an orderly fashion. So it wasn't just a decision that DACA is

unconstitutional, it was also a policy judgment that in light of the importance of this issue that really Congress should make this decision, we're going to wind this down in an orderly manner rather than just cutting it off tomorrow, which would be you know, I'm sure we would be arguing about TRO in a different matter, so

JUDGE ORENSTEIN: But if the judiciary says it's appropriate under applicable law for that process that you believe to be unconstitutional to go longer, that itself is an unconstitutional intrusion on the President.

MR. SHUMATE: I think it would be a violation of separation of powers or

JUDGE ORENSTEIN: Thank you.

MR. SHUMATE: Yes, Judge.

THE COURT: And the other question is, with regard to those whose DACA status expires after March 5th, 2018, those individuals would be barred from applying for a renewal. I don't know where that date came from but that's the other piece of this.

MR. SHUMATE: I think

THE COURT: So, in other words, it would be okay to extend someone's coverage by DACA if their status expires before March 5th that would be okay, but it would be unconstitutional and improper to extend someone whose coverage expires after March 5th, 2018.

MR. SHUMATE: These are decisions that are committed to the executive branch and the Attorney General and DHS decided that in the exercise of their discretion, they're going to wind down this program that had substantial litigation risk, that they believe as a policy matter really Congress should make this decision. Let's give a six month window to wind this down in an orderly fashion.

Yes, they may seem arbitrary, but these are decisions that are best left by the decisions best made by the executive branch because these are competing policy interests. So while they may seem arbitrary in the abstract, these are decisions that have to be committed to the executive branch or else courts are going to be second guessing. If October 5th is arbitrary what's to say that November 5th isn't arbitrary or December 5th isn't arbitrary. So it's entirely reasonable for the government to set a hard deadline, that is, everybody knows about, that folks have 30 days to meet that deadline.

So, again, we will go back to DHS and absolutely express the Court's concern about that deadline. But I do believe that that is an eminemtly reasonable decision to make by the executive branch in their discretion. We're going to wind this down in an orderly fashion, let's set October 5th as the deadline for these renewal applications and March 5th as the deadline to wind down the program altogether.

THE COURT: Now you've got a president who has basically said that this is going to affect all these wonderful people and we have to find a legislative solution and you're putting the President, in effect, up against the wall and he's got to solve this problem by a date that's been set by a bureaucrat at the Department of Homeland Security. I don't understand how that makes sense if the President has already stated he's committed to finding a political solution, meaning that the political branches, Congress and the President would find a solution. Isn't it time to go back and you said you will, but it's not just you're not just doing it for the Court, you're doing it for the administration that and there are people who, obviously, oppose this kind of solution that the President is hinting at and there's going to be give and take, and the concern of the Court is that October 5th is three weeks away and the date that was set was set before the president made his statements and it would make a lot of sense from various vantage points to extend this deadline. And you know something about deadlines, they can be extended. No one will be harmed by extending this deadline. Certainly not the $800,000 people who are sweating over whether someone is going to knock on their door and send them to a country they don't even know, where they speak a language they don't even speak.

So, on the one hand, those are the only they are

really the only people who are going to be injured here. The other people who are going to be injured are people who have a political axe to grind or they have a philosophical disagreement or whatever it happens to be, but you can always the fact is you can always deport them later if you can't reach an agreement and the courts let you do it. You can always deport them later. And they're not going to object to being here an extra six months or an extra year while you find them.

So I don't see what the there is no harm done, in the Court's view, by allowing this legislative process to play out and not establishing this October 5th deadline and also barring people whose permits expire after, what is it, March 5th from applying. You can always deny them. You have discretion. And that's another point that has to be made.

Even without DACA, the Department of Homeland Security would still have discretion to allow people to remain in the United States. So you don't need DACA for that. DACA established a protocol that helped the people at Homeland Security understand what the priorities of the prior administration were, that's what DACA did. It was not a statute, it wasn't even a formal rule making. So that's another concern just add that to my concern for your clients.

Is there anything else before we set your schedule

for your motion to dismiss?

Anything else from the plaintiff?

MS. TUMLIN: No, Your Honor, we'd be happy to move on to scheduling on the motion to dismiss and then class cert.

THE COURT: Okay. On the motion to dismiss, tell me what your schedule is.

MR. SHUMATE: So our thought was as soon as they file the amended complaint we would file our motion to dismiss within 30 days, I think that would probably put us around October 20. The plaintiffs could have 30 days to file an opposition, so around November 17th, and then we could file a reply December 15th and the Court could hold a hearing after that.

THE COURT: All right, any disagreement over that, that schedule?

MS. TUMLIN: No, Your Honor, that's workable. The one thing plaintiffs would be interested perhaps preceding around the October 20th date would be a meet and confer with the government on a Rule 26 discovery schedule, and then a date to present a report to the Court.

JUDGE ORENSTEIN: We'll take that up separately and that's on the agenda for today.

THE COURT: Okay. And judge Orenstein will be handling that whole discovery process and he'll go over that with you in a few minutes.

MS. TUMLIN: Your Honor, just to clarify, we did have a chance to confer with the defendants that under these dates we think it would be efficient for plaintiffs to be moving on those same dates for our class cert. So on the October 20th date you would receive the motion for class certification from the plaintiffs with the defendants' motion under Rule 12 and then we would oppose and reply on the same dates.

THE COURT: Is that agreeable?

MR. SHUMATE: Yes, Your Honor.

THE COURT: So both sides will be sending me Christmas presents in December.

MS. TUMLIN: Many.

THE COURT: I want to thank you all.

All right. Which brings us to the discovery issue.

JUDGE ORENSTEIN: Right. You want to be heard, Mr. Shumate?

MR. SHUMATE: Sure.

JUDGE ORENSTEIN: Go ahead.

MR. SHUMATE: Oh, no, I'm sorry.

JUDGE ORENSTEIN: Let me just frame the issue. So as Ms. Tumlin was saying, the issue comes with a Rule 26 conference and let me ask you, have the parties conferred already about just the threshold issue of whether there is discovery and what discovery is appropriate at this stage?

MR. SHUMATE: Yes, we have.

THE COURT: What have you come up with?

MR. SHUMATE: Our position is that no discovery is appropriate in this case. The primary claims that are being brought are APA claims, which typically are not susceptible to discovery they're the Court makes a decision based on the record that is before the Court, we don't look behind that record. So we have decisions, the Court you know, assuming the claims survive a motion to dismiss, the Court will decide whether this action on its face is arbitrary and capricious. So at least for the APA claims we don't think discovery is appropriate.

On the constitutional claims, again, we don't think discovery is appropriate. We think those claims are susceptible to a motion to dismiss.

JUDGE ORENSTEIN: But typically at least my cases, I know Ms. Riley knows this because I've had the U.S. Attorney's Offices in many cases and some of her colleagues are here, typically the mere fact that the motion to dismiss is not in itself a reason to postpone discovery and, as we've been talking about it at some length today, the parties on both sides, obviously the plaintiffs and the class that they hope to represent and the many government officials who have administrative tasks, they all have an interest in knowing what's coming on October 5th and March 5th. It strikes me

that if there is going to be discovery there's going to be little enough time to do it to allow an orderly resolution of the merits.

So here's what I'm going to propose. I really don't anticipate we can give you all a fair chance to argue the issue much less have resolve today, but I would like to very quickly we'll set a schedule very quickly to confer about this and tee up with your respective positions in letters two things: One, the threshold issue of whether discovery should proceed and, second, this will require a real meet and confer, assuming that it does, what it should look like, what deadlines we should set, how if at all it should be phased. To the extent it goes forward there are going to be, I'm sure, some very contentious issues because I know you want to rely on a very concrete administrative record, I imagine you want to get into the intent of various actors and that will implicate the question of depositions. Please identify the issues that are going to divide you and come up with a proposal for getting done what you would agree has to be done if discovery goes forward and what issues need to be resolved, because we need to address them quickly.

MR. SHUMATE: Your Honor, we will certainly do that. I would just say here that the government will strongly oppose any discovery here and to the extent the Court wants to move quickly and plaintiffs want to move quickly, any attempt to

get discovery of cabinet officials is going to be strongly opposed by the government.

JUDGE ORENSTEIN: I anticipate that there are a lot of contentious issues here, I'm not making an assumption one way or the other about how they play out, but if the parties are going to get the rulings that they need in time to have a practical effect, we're going to have to have those discovery issues resolved quickly. So I want you to get started on meeting and conferring.

Unless there's an objection to this schedule I'd like to have your respective positions, I don't care if it's two letters or one, your respective positions on the threshold issue of whether it should go forward by next Friday and so I guess that would be the 23rd, a week from tomorrow.

MS. TUMLIN: Twenty second.

MR. SHUMATE: Twenty second.

THE COURT: The 22nd.

JUDGE ORENSTEIN: The 22nd, okay. Thank you. I was looking at the wrong date.

So by September 22nd your respective positions and accompanying that either a joint proposal or competing proposals for a schedule. To the extent you can identify issues that you agree would need to be decided within a discovery regime and you want to propose dates for getting those done, all the better. And then let's I don't know if

you want to do this as a joint conference.

THE COURT: Yes, what I'm going to do here is I'm setting a status conference for Tuesday, September 26th at 4:00 p.m. It would be earlier but I have a I'm spending a great deal of time with the criminal division in Washington on a fraud trial next week and the week after and the week after and the week after. So my trial day ends at 4:00 p.m. and we'll take you promptly at 4:00 o'clock.

JUDGE ORENSTEIN: We'll address these issues there as well.

MR. SHUMATE: Just to be clear, what are we prepared to discuss on the status conference, the discovery issues, the October 5th deadline as well.

THE COURT: Oh, yes, absolutely.

You're going to tell me all about your discussions with your client, about how cooperative your client is going to be with my suggestion.

MR. SHUMATE: I will.

JUDGE ORENSTEIN: Anything else that we thought we needed to address in terms of discovery issues that have to be resolved early on.

THE COURT: Anything else from the plaintiff?

MS. TUMLIN: No, Your Honor.

JUDGE ORENSTEIN: Thank you.

MS. TUMLIN: Your Honors.

THE COURT: Does the plaintiff have anything else for today?

MS. TUMLIN: No, thank you, Your Honors.

THE COURT: All right. Is there anything else from the defemse?

MR. SHUMATE: No, Your Honor, thank you both.

THE COURT: Thank you very much everyone.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

s/ Georgette K. Betts — September 15, 2017

GEORGETTE K. BETTS — DATE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel. XAVIER BECERRA, in his official capacity as Attorney General of the State of California

Plaintiff,

v.

JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States; ALAN R. HANSON, in his official capacity as Acting Assistant Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and DOES 1-100,

Defendants.

Case No. 17-cv-4701

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff State of California, ex rel. Xavier Becerra, in his official capacity as Attorney General of the State ("Plaintiff") brings this complaint to protect California from the Trump Administration's attempt to usurp the State and its political subdivisions' discretion to determine how to best protect public safety in their jurisdictions. The Administration has threatened to withhold congressionally appropriated federal funds unless the State and local jurisdictions acquiesce to the President's immigration enforcement demands. This is unconstitutional and should be halted.

2. Congress has appropriated $28.3 million in law enforcement funding to California and its political subdivisions pursuant to the Edward Byrne Memorial Justice Assistance Grant ("JAG") program. The United States Department of Justice ("USDOJ"), led by Attorney General Jefferson B. Sessions III, and the Office of Justice Programs ("OJP"), led by Acting Assistant Attorney General Alan R. Hanson (collectively, with USDOJ and Attorney General Sessions, the "Defendants"), are responsible for administering these grants.

3. JAG awards are provided to each state, and certain local jurisdictions within each state, to, among other things, support law enforcement programs, reduce recidivism, conduct prevention and education programs for at-risk youth, and support programs for crime victims and witnesses. Every state is entitled by law to a share of these funds.

4. The JAG authorizing statute, 42 U.S.C. §§ 3750-3758, requires that jurisdictions comply with "applicable Federal laws." The statute governing OJP, 42 U.S.C. § 3712(a)(6) ("Section 3712"), also allows for the imposition of "special conditions," which historically have been understood to refer to conditions imposed to address performance issues with particular high-risk grantees, and not as conditions to be placed on *all* grantees.

5. In this year's JAG FY 2017 State Solicitation ("JAG State Solicitation"), for the first time, Defendants imposed two additional so-called "special conditions" on all JAG recipients that require compliance with immigration enforcement activities. These conditions require jurisdictions to: (a) provide federal immigration enforcement agents with the Department of Homeland Security ("DHS") access to detention facilities to interview inmates who are "aliens"

or believed to be "aliens" (the "access condition"); and (b) provide 48 hours' advance notice to DHS regarding the scheduled release date of an "alien" upon request by DHS (the "notification condition"). In effect, they attempt to create, without congressional approval, a national requirement that state and local law enforcement engage in specific behaviors to assist in the Executive's approach to federal immigration enforcement.

6. Based on one reading of these new conditions, California believes that its laws, in fact, comply with them. Nevertheless, Defendants' incorrect conclusions about California law have placed at risk the $28.3 million in JAG funds received by the State and its political subdivisions. The Transparency and Responsibility Using State Tools Act ("TRUST Act"), Cal. Gov't Code § 7282 *et seq.*, defines the circumstances in which a local law enforcement agency ("LEA") may detain an individual at the request of federal immigration authorities. The Transparent Review of Unjust Transfers and Holds ("TRUTH Act"), Cal. Gov't Code § 7283 *et seq.*, provides notice protections to inmates in state and local custody whom Immigration and Customs Enforcement ("ICE") wishes to interview. Defendant Sessions has inaccurately characterized California's laws as denying ICE access to jails in California.

7. To compound upon the peril to the State caused by Defendant Sessions' misinterpretation of California law, the grant conditions regarding access and notification also suffer from ambiguity. The access condition fails to specify whether jurisdictions are prohibited from notifying inmates of their basic rights prior to an ICE interview, which would conflict with the TRUTH Act. The notification condition is ambiguous as to whether it requires LEAs to hold individuals past their ordinary release when, for example, an individual is booked for a low-level infraction and promptly released, pays bail, or has his or her charges dropped. USDOJ has signaled that it interprets the notification condition as requiring that, once immigration officials have requested notice, state and local officials may not release an individual until federal agents have had 48 hours to try to take him or her into custody even if the federal notification request came less than 48 hours before the person's ordinary release. To comply with this requirement, LEAs would in some instances not only have to violate the TRUST Act, but would also have to violate the Fourth Amendment because ICE notification and detainer requests are not typically

supported by the probable cause required for detentions under the Fourth Amendment.

8. The ambiguity regarding how the Defendants will interpret and enforce the access and notification conditions harms California and its local jurisdictions. If California and local jurisdictions do not accept the funds authorized by the JAG statute and appropriated by Congress, important programs will need to be cut. And if this ambiguity pressures the State and/or its localities to change their public-safety oriented laws and policies in order to ensure they comply with these ambiguous conditions, they will have abandoned policies that the State and local jurisdictions have found to be effective in their communities. As a result, the State and its localities will lose control of their ability to focus their resources on fighting crime rather than federal immigration enforcement. And the trust and cooperation that the State's laws and local ordinances are intended to build between law enforcement and immigrant communities will be eroded.

9. Moreover, while Section 3712 allows for the imposition of "special conditions," it does not provide OJP with the authority to add these *particular* substantive immigration conditions. These are not special conditions, as that term is generally understood, since they are applicable to all recipients, not just high-risk grantees. In addition, they conflict with the JAG authorizing statute's Congressional intent to: (a) guarantee the delivery of appropriated formula grant funding to particular state and local jurisdictions so long as they satisfy the requirements found in federal law; and (b) not condition funding on immigration enforcement related activities.

10. Defendants also have exceeded constitutional limits under the Spending Clause of the United States Constitution. The access and notification conditions are not sufficiently related to the federal purpose areas of the JAG funding scheme designed by Congress, and the access and notification conditions are too ambiguous to provide clear notice to the State or its political subdivisions as to what is needed to comply. And depending on how compliance is measured, the notification condition would further offend the Spending Clause prohibition on conditioning funding on unconstitutional activities, here, by attaching funding conditions that may lead to a violation of the Fourth Amendment.

11. These conditions also violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 551

et seq., because of their constitutional infirmities, and because Defendants acted in excess of their statutory authority and in an arbitrary and capricious manner.

12. The California Legislature, as well as local governments throughout the State, carefully crafted a statutory scheme that allows law enforcement resources to be allocated in the most effective manner to promote public safety for all people in California, regardless of immigration status, national origin, ancestry, or any other characteristic protected by California law. The Defendants' actions and statements threaten that design and intrudes on the sovereignty of California and its local jurisdictions.

13. California must apply for its JAG award by August 25, 2017, and the State's local jurisdictions that apply directly to USDOJ for JAG funding must apply by September 5, 2017, subject to the same conditions as the State. (JAG Solicitation for local jurisdictions ("JAG Local Solicitation") attached as Exhibit B. The JAG Local Solicitation, with the JAG State Solicitation, are referred to as "JAG Solicitations.") USDOJ is expected to provide its award notifications to state and local jurisdictions by September 30, 2017, but Defendants have announced that they will not provide any awards to jurisdictions that do not meet the access and notification conditions. California therefore immediately faces the prospect of losing $28.3 million for these "criminal justice" programs. Without this grant funding, California's award recipients and the programs funded will be harmed, which will have a detrimental effect on state and local law enforcement and budgets.

14. For these reasons, and those discussed below, the Court should strike down the access and notification conditions in the JAG Solicitations as unconstitutional and as a violation of the APA.

JURISDICTION AND VENUE

15. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because this case involves a civil action arising under the Constitution and the laws of the United States. The Court also has jurisdiction under 28 U.S.C. § 1346 because this is a civil action against the federal government founded upon the Constitution and an Act of Congress. Jurisdiction is proper under

the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06. The Court has authority to provide relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

16. Pursuant to 28 U.S.C. § 1391(e)(1) and (3), venue is proper in the Northern District of California because the Attorney General and the State of California have offices at 455 Golden Gate Avenue, San Francisco, California and at 1515 Clay Street, Oakland, California and Defendants have offices at 450 Golden Gate Avenue, San Francisco, California.

INTRADISTRICT ASSIGNMENT

17. Assignment to the San Francisco Division of this District is proper pursuant to Civil Local Rule 3-2(c)-(d) because Plaintiff, the State of California, and Defendants both maintain offices in the District in San Francisco.

PARTIES

18. Plaintiff State of California is a sovereign state in the United States of America. Xavier Becerra is the Attorney General of California, and as such, is the chief law officer in the State and has "direct supervision over every … sheriff and over such other law enforcement officers as may be designated by laws, in all matters pertaining to their respective offices." Cal. Const., art. V, § 13; Cal. Gov't Code § 12500, *et seq;* see *Pierce v. Super.*, 1 Cal.2d 759, 761-62 (1934) [Attorney General "has the power to file any civil action or proceeding directly involving the rights and interests of the state. . . and the protection of public rights and interests."]. California is aggrieved by the actions of Defendants and has standing to bring this action because of the injury to its sovereignty as a state caused by the challenged federal actions. The inclusion of unconstitutional and unlawful conditions as part of the JAG award impairs the State's exercise of its police power in a manner it deems necessary to protect the public safety. As a result of Defendants' unconstitutional actions, the State of California, including its political subdivisions, is in imminent danger of losing $28.3 million this fiscal year, including $17.7 million that is owed to the State itself.

19. Plaintiff Attorney General Xavier Becerra, on behalf of California, has standing to bring this action because funding for law enforcement throughout the State is at stake and as the Attorney General of the State of California, he is responsible for enforcing and protecting

California's laws, such as the TRUST and TRUTH Acts, which the access and notification conditions threaten.

20. Defendant U.S. Department of Justice ("USDOJ") is an executive department of the United States of America pursuant to 5 U.S.C. § 101 and a federal agency within the meaning of 28 U.S.C. § 2671. As such, it engages in agency action, within the meaning of 5 U.S.C. § 702 and is named as a defendant in this action pursuant to 5 U.S.C. § 702. USDOJ is responsible for administering the JAG funds appropriated by Congress.

21. Defendant Sessions III, is Attorney General of the United States, and oversees the USDOJ, including the Office of Justice Programs ("OJP"). Defendant Sessions has declared that "[s]ome jurisdictions, including the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests." Defendant Sessions also made a statement announcing the access and notification conditions on the U.S. Department of Justice website on July 25, 2017. He is sued in his official capacity pursuant to 5 U.S.C. § 702.

22. Defendant Alan R. Hanson is Acting Assistant Attorney General in charge of the OJP, which administers JAG funding and which set forth the so-called "special conditions" at issue. He is sued in his official capacity pursuant to 5 U.S.C. § 702.

23. Each of the Defendants named in this Complaint is an agency of the United States government bearing responsibility, in whole or in part, for the acts enumerated in this Complaint.

24. The true names and capacities of Defendants identified as DOES 1-100 are unknown to Plaintiff, and Plaintiff will amend this Complaint to insert the true names and capacities of those fictitiously named Defendants when they are ascertained.

FACTUAL ALLEGATIONS

I. CALIFORNIA'S LAWS SEEK TO PROTECT THE STATE RESIDENTS' SAFETY AND WELFARE BY FOCUSING LAW ENFORCEMENT ON CRIMINAL ACTIVITY AND BY BUILDING TRUST BETWEEN LAW ENFORCEMENT AND COMMUNITIES

25. California state and local LEAs, guided by the duly enacted laws of the State and ordinances of local jurisdictions, are tasked with effectively policing, protecting, and serving all

residents, including more than 10 million foreign-born individuals, who live in the State. California's laws implicated in this suit, the TRUST Act and the TRUTH Act, are a valid exercise of the State's police power to regulate regarding the health, welfare, and public safety of its residents.

26. California has also enacted other laws that strengthen community policing efforts by encouraging undocumented victims to report crimes to local law enforcement. For example, California's Immigrant Victims of Crime Equity Act, Cal. Penal Code § 679.10, which took effect on January 1, 2016, ensures that all immigrant crime victims have equal access to the U nonimmigrant visa. Laws such as this are specifically designed to encourage immigrants to report crimes so that perpetrators are apprehended before harming others.

27. The purpose of these California laws is to ensure that law enforcement resources are focused on a core public safety mission and to build trust and cooperation between law enforcement and the State's immigrant communities. When local and state LEAs engage in immigration enforcement, as Defendants contemplate, vulnerable victims and witnesses are less likely to come forward to report crimes.

28. California's laws are not unique. Many jurisdictions across the country have policies that define the circumstances under which local law enforcement personnel expend time and resources in furtherance of federal immigration enforcement. Those jurisdictions variously impose limits on compliance with ICE detainer requests, ICE notification requests about release dates, and ICE's access to detainees, or provide additional procedural protections to them.

A. The TRUST Act

29. In 2013, California enacted the TRUST Act, Cal. Gov't Code, § 7282 *et seq.* The TRUST Act defines the circumstances under which local LEAs may detain an individual at the request of federal immigration authorities. The TRUST Act went into effect on January 1, 2014.

30. The TRUST Act was intended to address numerous public safety concerns regarding the federal practice of issuing detainers to local law enforcement. Among the Legislature's concerns were that federal courts have concluded that detainer requests do not provide sufficient probable cause, and data showing that detainer requests "have erroneously been placed on United States

citizens, as well as immigrants who are not deportable." Assem. Bill No. 4, 1st Reg. Sess. (Cal. 2013) § 1(c).

31. The Legislature also found that "immigration detainers harm community policing efforts because immigrant residents who are victims of or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation." *Id.* § 1(d). The Legislature also considered data demonstrating that the vast majority of individuals detained had no criminal history or were only convicted of minor offenses, and research establishing that "immigrants, including undocumented immigrants, do not commit crimes at higher rates than American-born residents." *Id.*

32. The TRUST Act sets forth two conditions that must be met for local law enforcement to have discretion to detain a person pursuant to an "immigration hold" (also known as a "detainer request" or "detainer hold") that occurs when a federal immigration agent requests that the law enforcement official "maintain custody of the individual for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays." Cal. Gov't Code § 7282(c). First, the detention cannot "violate any federal, state, or local law, or any local policy," which includes the Fourth Amendment of the U.S. Constitution. *Id.* § 7282(a). Second, law enforcement officers may only detain someone with certain, specified criminal backgrounds, an individual on the California Sex and Arson Registry, or a person charged with a serious or violent felony who was the subject of a probable cause determination from a magistrate judge. *Id.* § 7282.5(a)(1)-(6). Only when both of these conditions are met may local law enforcement detain an individual "on the basis of an immigration hold after the individual becomes eligible for release from custody." *Id.* § 7282.5(b).

33. The TRUST Act limits an LEA's discretion as to when it may detain individuals pursuant to an immigration hold beyond their ordinary release. This limitation is consistent with federal law, in that USDOJ, DHS and the courts have repeatedly characterized detainer requests as voluntary.

34. The TRUST Act, however, does not limit, in any way, a jurisdiction from complying with notification requests so long as the jurisdiction is not required to hold the individual beyond when he or she is otherwise legally eligible for release. It also does not prohibit a jurisdiction

from allowing federal immigration enforcement agents to access its jails to interview inmates.

B. The TRUTH Act

35. In 2016, California enacted the TRUTH Act, Cal. Gov't Code § 7283 *et seq.*, which took effect on January 1, 2017. The purpose of the TRUTH Act is to increase transparency about immigration enforcement and "to promote public safety and preserve limited resources because entanglement between local law enforcement and ICE undermines community policing strategies and drains local resources." Assem. Bill No. 2792, Reg. Sess. (Cal. 2016) § 2(a)-(c), (g)-(i).

36. Under the TRUTH Act, before an interview with ICE takes place, a local law enforcement officer must provide the detained individual with a "written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present." Cal. Gov't Code § 7283.1(a). In addition, when a local LEA receives a detainer hold, notification, or transfer request, the local LEA must "provide a copy of the request to the [detained] individual and inform him or her whether the law enforcement agency intends to comply with the request." *Id.* § 7283.1(b). If the LEA complies with ICE's request to notify ICE as to when the individual will be released, it must also "promptly provide the same notification in writing to the individual and to his or her attorney or to one additional person who the individual shall be permitted to designate." *Id.*

37. The TRUTH Act does not limit, in any way, a jurisdiction from complying with notification requests; rather, it only requires that the jurisdiction also provide notice to the individual of its actions. It also does not prohibit a jurisdiction from allowing ICE to access its jails to interview inmates.

II. CONGRESS DID NOT INTEND JAG TO BE CONDITIONED ON STATE AND LOCAL LAW ENFORCEMENT ASSISTING IN FEDERAL IMMIGRATION ENFORCEMENT

38. JAG is administered by OJP within USDOJ. JAG funding is authorized by Congress under 42 U.S.C. §§ 3750-58. The authorizing statute has been amended numerous times since its inception in 1988, evolving into the JAG program as it exists today.

39. The Anti-Drug Abuse Act of 1988 amended the Omnibus Crime Control and Safe Streets Act of 1968 to create the Edward Byrne Memorial State and Local Law Enforcement Assistance

Programs grants ("Byrne Grants") "to assist States and units of local government in carrying out specific programs which offer a high probability of improving the functioning of the criminal justice system." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VI, § 6091(a), 102 Stat. 4181 (1988) (repealed 2006). Congress placed a "special emphasis" on programs that support national drug control priorities across states and jurisdictions. *Id.* Congress identified 21 "purpose areas" for which Byrne Grants could be used. Many of the purpose areas relate to the investigation, enforcement, and prosecution of drug offenses. *See id.*, tit. V, § 5104. Immigration enforcement was never specified in any of the grant purpose areas.

40. In amendments between 1994 and 2000, Congress identified eight more purpose areas for which Byrne funding could be used, bringing the total to 29. 42 U.S.C. § 3751(b) (as it existed on Dec. 21, 2000) (repealed 2006). For Fiscal Year 1996, Congress separately authorized Local Law Enforcement Block Grants ("LLEBG") that directed payment to units of local government for the purpose of hiring more police officers or "reducing crime and improving public safety." Local Government Law Enforcement Block Grants Act of 1995, H.R. 728, 104th Cong. (1995). Congress identified eight "purpose areas" for LLEBG, none of which were immigration enforcement.

41. The Byrne Grant and LLEBG programs were then merged to eliminate duplication, improve their administration, and to provide State and local governments "more flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" to local law enforcement. Pub. L. No. 108-447, 118 Stat. 2809 (2004); H.R. Rep. No. 109-233, at 89 (2005); *see also* 42 U.S.C. § 3750(a), (b)(1).

42. Now the JAG authorizing statute enumerates eight purpose areas for: (A) law enforcement programs; (B) prosecution and court programs; (C) prevention and education programs; (D) corrections and community corrections programs; (E) drug treatments and enforcement programs; (F) planning, evaluation, and technology improvement programs; (G) crime victim and witness programs; and (H) mental health programs related to law enforcement and corrections. 42 U.S.C. §3751(a)(1).

43. The purpose areas for these grants are to support "criminal justice" programs;

immigration enforcement is generally civil in nature. *See Arizona v. U.S.*, 567 U.S. 387, 396 (2012). Immigration enforcement was also never specified in the purpose areas for any of these grants throughout this entire legislative history.

44. In 2006, Congress repealed the only immigration-related requirement that had ever existed for JAG funding, a requirement that the chief executive officer of the state receiving JAG funding provide certified records of criminal convictions of "aliens." *See* Immigration Act of 1990, Pub. L. No. 101-649, tit. V, § 507(a), 104 Stat. 4978, 5050-51 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, tit. III, § 306(a)(6), 105 Stat. 1733, 1751 (1991) (repealed 2006). The repeal of this provision evidences Congress' intent not to condition JAG funding on immigration enforcement-related activities. This is consistent with the statutory scheme that does not include a purpose area connected to immigration enforcement.

45. In addition, more recently, Congress has considered but declined to adopt legislation that would penalize cities for setting their own law enforcement priorities and attempting to impose conditions similar to the conditions here.[1]

III. THE JAG AUTHORIZING STRUCTURE REQUIRES THAT STATE AND LOCAL JURISDICTIONS RECEIVE FORMULA GRANTS

A. The JAG Formula Structure and Conditions

46. When creating the merged JAG funding structure in 2006, Congress set a formula to apportion JAG funds to state and local jurisdictions. 42 U.S.C. § 3755. Population and violent crime rates are used to calculate each state's allocation. 42 U.S.C. § 3755(a)(1). Congress guarantees to each state a minimum allocation of JAG funds. 42 U.S.C. § 3755(a)(2).

47. In addition to determining the amount of money received by grantees within each state, Congress set forth how that money is to be shared between state and local jurisdictions. Under the statutory formula, 60 percent of the total allocation to a state must be given directly to the state. 42 U.S.C. § 3755(b)(1).

[1] *See, e.g.*, Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016) (cloture on the motion to proceed rejected).

48. The statutory formula also provides that 40 percent of the total allocation to a state must be given to local governments within the state. 42 U.S.C. § 3755(d)(1). Each unit of local government receives funds based on its crime rate. 42 U.S.C. § 3755(d)(2)(A).

49. According to Congress's JAG funding scheme, states and local governments that apply for JAG funds are required to make limited certifications and assurances. Beyond ministerial requirements identified in the authorizing statute, the chief executive officer of each applicant must certify that: (A) the law enforcement programs to be funded meet all requirements of the JAG authorizing statute; (B) all information in the application is correct; (C) there was coordination with affected agencies; and (D) the applicant will comply with all provisions of the JAG authorizing statute. 42 U.S.C. § 3752(a)(5).

50. Congress has enacted reductions or penalties in JAG funds when certain conditions occur, such as a state failing to substantially implement the Sex Offender Registration and Notification Act or a governor not certifying compliance with the national Prison Rape Elimination Act standards. *See* 42 U.S.C. §§ 16925, 15607(e)(2). Unlike the access and notification conditions, these conditions were explicitly added by Congress.

B. California's Allocation and Use of the JAG Award

51. Based on the formula prescribed by statute, California is expected to receive approximately $28.3 million in JAG funding in FY 2017, with $17.7 million going to the Board of State and Community Corrections ("BSCC"), the entity that receives the formula grant funds that are allocated to the State.

52. BSCC disburses JAG funding using subgrants predominately to local jurisdictions throughout California to fund programs that meet the purpose areas identified in the JAG authorizing statute. Between FY 2015-17, BSCC funded 32 local jurisdictions and the California Department of Justice.

53. In the past, BSCC prioritized subgrants to those jurisdictions that focus on education and crime prevention programs, law enforcement programs, and court programs, including indigent defense. Some examples of California jurisdictions' purpose-driven use of JAG funds include: (a) implementing educational programs to improve educational outcomes, increase graduation

rates, and curb truancy; (b) providing youth and adult gang members with multi-disciplinary education, employment, treatment, and other support services to prevent gang involvement, reduce substance abuse, and curtail delinquency and recidivism; (c) implementing school-wide prevention and intervention initiatives for some of the county's highest-risk students; (d) providing comprehensive post-dispositional advocacy and reentry services to improve outcomes and reduce recidivism for juvenile probationers; (e) providing a continuum of detention alternatives to juvenile offenders who do not require secure detention, which includes assessment, referral, case advocacy, home detention, reporting centers, non-secure, shelter, intensive case management and wraparound family support services; and (f) funding diversion and re-entry programs for both minors and young adult offenders.

IV. OJP HAS EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING THE NEW CONDITIONS

A. Description of the JAG Solicitation

54. On July 25, 2017, OJP announced the FY 2017 State JAG Solicitation. OJP set the deadline for applications as August 25, 2017. On August 3, 2017, OJP announced the FY 2017 JAG Local Solicitation with a deadline of September 5, 2017.

55. In the JAG Solicitations, for the first time in Fiscal Year 2017, OJP announced two additional substantive "special conditions" related to federal immigration enforcement. To receive a JAG award, jurisdictions must:

- permit personnel of the U.S. Department of Homeland Security ("DHS") to access any correctional or detention facility in order to meet with an "alien" (or an individual believed to be an "alien") and inquire as to his or her right to be or remain in the United States (the "access condition"); and
- provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an "alien" in the jurisdiction's custody when DHS requests such notice in order to take custody of the individual pursuant to the Immigration and Nationality Act (the "notification condition").

Exh. A, at 32. Both of these conditions exist in the State and Local JAG Solicitations.

56. Grant recipients, including the BSCC, must execute "Certified Standard Assurances" that it "will comply with all award requirements," including the access and notification conditions. *See id.* at Appx. IV.

57. Subgrantees must assure that they will comply with all award conditions, including the access and notification conditions. *See id*. at 20-21.

58. Based on information and belief, the state recipient must execute the Certified Standard Assurances by the application deadline on August 25, 2017. "OJP expects to issue award notifications by September 30, 2017." *Id*. at 31.

59. At no point has USDOJ or OJP provided any explanation as to how the access and notification conditions relate to Congress's intent in authorizing JAG.

B. OJP Lacks Statutory Authority to Impose "Special Conditions" of this Type

60. JAG's authorizing statute provides no authority for OJP to impose the access and notification conditions (the so-called "special conditions") on all grant recipients. Indeed, the same statute that authorizes JAG funding, the Omnibus Crime Control and Safe Streets Act of 1968, also authorizes funding pursuant to the Violence Against Women Act ("VAWA") that permits the Attorney General to "impose reasonable conditions on grant awards." 42 U.S.C. § 3796gg-1(e)(3). Congress's clear direction to USDOJ to add "reasonable conditions" pursuant to VAWA, but not for JAG, strongly indicates that Congress did not intend to confer discretion on OJP to add unlimited substantive conditions at its whim.

61. Although nothing related to the access and notification conditions is found within the statutory text or legislative history related to JAG, OJP claims it has the authority to add these conditions under Section 3712, which allows OJP to add "special conditions on all grants."

62. OJP's basis for using its purported authority to add these conditions here, without limitation, is statutorily and constitutionally flawed.

63. In 2006, when Section 3712 was amended to permit OJP to "plac[e] special conditions on all grants," the term "special conditions" had a precise meaning. According to a USDOJ regulation in place at the time, the agency could impose "special grant or subgrant conditions" on

"high-risk grantees" if the grant applicant: (a) had a history of poor performance; (b) was not financially stable; (c) had a management system that did not meet certain federal standards; (d) had not conformed to the terms and conditions of a previous grant award; or (e) was not otherwise responsible. 28 C.F.R. § 66.12 (removed December 25, 2014). This language was based on the grants management common rule adopted by the Office of Management and Budget ("OMB"), and followed by "all Federal agencies" when administering grants to state and local governments. OMB Circular A-102 (as amended Aug. 29, 1997). Other federal statutes and regulations have also historically identified "special conditions" as those that federal agencies may place on particular high-risk grantees who have struggled or failed to comply with grant conditions in the past, not on all grantees irrespective of performance.

64. Interpreting OJP's authority to permit it to impose any substantive conditions with respect to formula grants, like JAG, beyond what is allowed under federal law further conflicts with Congressional intent in establishing a prescribed formula grant structure. Congress designed JAG so that "*each State*" receives an allocation according to a precise statutory formula. 42 U.S.C. § 3755(a) (emphasis added). Likewise, Congress's formula provides allocation to "*each* unit of local government." 42 U.S.C. § 3755(d)(2) (emphasis added). As such, if USDOJ makes grants from funds that Congress appropriated to JAG, OJP must disburse the funds according to the statutory formula enacted by Congress so long as the jurisdiction complies with the conditions that exist in federal law.

65. The conditions also conflict with the immigration enforcement scheme set forth by Congress in the Immigration and Naturalization Act ("INA") that makes cooperation with immigration enforcement agencies voluntary. There is no provision in the INA, or any federal law, that requires jurisdictions to assist with otherwise voluntary immigration enforcement related activities in order to receive these federal funds.

66. While USDOJ has the ability to add conditions to JAG awards, it cannot add substantive grant conditions such as these, that are not tethered to any federal statute. For instance, it could add "special conditions" for high-risk grantees as described above. It could add conditions that stem from the authorizing JAG statute. And it could add conditions that Congress directed be

applied to federally funded programs. *See, e.g.,* 42 U.S.C. § 2000d-1; 29 U.S.C. § 794(a)(1); 20 U.S.C. § 1681(a)(1); 42 U.S.C. § 6102.

C. The Access and Notification Conditions do not Provide Jurisdictions with Clear Notice of what the Conditions Require

67. It is ambiguous what the access and notification conditions require grant recipients to do. For example, it is unclear whether the condition requiring jurisdictions to provide ICE jail access for interview purposes prohibits grant recipients from informing inmates of their right to have a lawyer present or decline an interview with ICE, which would implicate the notice requirements in the TRUTH Act.

68. It is also ambiguous as to whether the condition requiring compliance with immigration notification requests should be applied when an individual is scheduled to be released less than 48 hours after the jurisdiction receives a notification request, or if the individual becomes eligible for release without advance warning (*i.e.*, released on bail).

D. Interpreting the Notification Condition as a Requirement to Hold an Individual Past His or Her Ordinary Release would mean OJP is Conditioning Funding on Unconstitutional Activities

69. If OJP interprets the ambiguous notification condition to require a jurisdiction to hold an individual beyond his or her scheduled release date and time in order to comply with the 48-hour notice requirement, OJP would be transforming the notification request into a secondary immigration hold request. This would force jurisdictions to risk engaging in activities barred by the Fourth Amendment of the U.S. Constitution in order to receive federal funding. That is because jurisdictions would be required to detain individuals beyond when they would otherwise be eligible for release even if the jurisdiction lacks probable cause to do so.

70. As a matter of practice, when issuing detainer notification requests, ICE checks a box identifying whether: (a) there is a final order of removal; (b) removal proceedings are pending as to the individual; (c) "[B]iometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law;" and/or (d) "[S]tatements made by the alien to an

immigration officer and/or reliable evidence that affirmatively indicate that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law."[2]

71. The notification and detainer requests alone do not provide jurisdictions with any other individually particularized information about the basis for removability. And detainer and notification requests are typically only accompanied by an ICE administrative warrant, which has not been reviewed and approved by a neutral magistrate. As federal courts throughout the country have determined, jurisdictions that hold individuals beyond their ordinary release pursuant to ICE detainer requests violate the Fourth Amendment of the U.S. Constitution if the detainer requests are not supported by independent probable cause or a judicial warrant. *See, e.g., Cty of Santa Clara.,* slip op. at 6 (N.D. Cal. Apr. 25, 2017).

72. OJP appears to interpret the notification condition as requiring jurisdictions to hold an individual beyond when he or she is otherwise eligible for release if necessary to provide 48-hour notice to ICE before release. On August 3, 2017, OJP sent a letter to four local jurisdictions, including the California cities of Stockton and San Bernardino, interested in the Public Safety Partnership ("PSP") Program, a non-formula grant funding source administered through JAG. The letter asked jurisdictions to inform ICE whether the jurisdiction has a "statute, rule, regulation, policy, or practice that is designed to ensure that your correctional and detention facilities provide at least 48 hours' advance notice, *where possible*, to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien."[3]

73. A similar "where possible" limitation is not included in the JAG Solicitations. It thus appears that OJP may expect jurisdictions to detain individuals beyond their release date in order to comply with the condition which would require the recipient jurisdictions to potentially violate the Fourth Amendment. But even adding a "where possible" limitation does not cure the existing ambiguity. To cure the ambiguity and the Fourth Amendment problems with the

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[2] *See* Department of Homeland Security, Immigration Detainer Notice of Action, I-247A, https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

[3] *See* U.S. Department of Justice, *Alan Hanson Letters to Jurisdictions re PSP* (Aug 3. 2017), https://www.justice.gov/opa/press-release/file/986411/download (emphasis added).

notification condition, OJP would need to explicitly state that jurisdictions do not need to detain an individual beyond his or her ordinary release in order to comply with the condition.

V. USDOJ HAS MADE CLEAR THAT IT DOES NOT BELIEVE CALIFORNIA COMPLIES WITH THE ACCESS AND NOTIFICATION CONDITIONS

74. Although California's laws comply with the access and notification conditions under one interpretation of the conditions, Defendants have consistently stated or suggested their perception that California and its local jurisdictions fail to comply with these conditions.

A. California Has a Credible Fear that USDOJ Will Wrongly Withhold Funding Based on the Access Condition

75. On March 29, 2017, Defendant Sessions and then-DHS Secretary John Kelly sent a joint letter to the Chief Justice of California. The letter, which responded to the Chief Justice's expression of concern about ICE arrests occurring in state courthouses, stated that "[s]ome jurisdictions, including the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests."[4]

76. No California law prohibits ICE's access to jails. The TRUST Act only limits circumstances under which local law enforcement have discretion to comply with detainer requests. And the TRUTH Act only provides protections so that inmates are aware of their rights before they make the voluntary decision of whether to speak to ICE.

77. Defendant Sessions' inaccurate characterization of California law as denying ICE access to jails, and thereby failing to satisfy this new condition in the JAG Solicitations, places California and local jurisdictions at risk of not receiving the JAG funds.

[4] *Attorney General Jefferson B. Sessions and Secretary John F. Kelly Letter to the Honorable Tani G. Cantil* (Mar. 29, 2017), https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

B. California Has a Credible Fear that USDOJ Will Wrongly Withhold Funding Based on the Notification Condition

78. California has a credible fear that the notification condition requires local jurisdictions to hold an individual beyond his or her ordinary release and, therefore, USDOJ will find that California and its political subdivisions fail to comply with this condition because of the TRUST Act.

79. In addition to the ambiguous wording of the notification condition, Defendant Sessions has made numerous statements asserting his desire to take federal funding away from jurisdictions that do not comply with detainer requests. For instance, on March 27, 2017, Defendant Sessions exclusively discussed "policies" regarding refusals "to detain known felons under federal detainer requests."[5] Defendant Sessions threatened that "policies" that limit compliance with detainer requests placed jurisdictions "at risk of losing valuable federal dollars."[6]

80. Defendant Sessions' statements targeting jurisdictions that do not universally comply with detainer holds further corroborate that USDOJ intends to enforce this condition to require jurisdictions to hold individuals beyond their ordinary release.

VI. THE IMPOSITION OF THE ILLEGAL FUNDING CONDITIONS WILL CREATE IRREPARABLE HARM TO THE STATE AND ITS LOCAL JURISDICTIONS

81. The ambiguity in the access and notification conditions, in combination with Defendants' interpretations of California law, create the prospect that the State and/or its local jurisdictions will not apply for JAG unless there is clarification about the scope of the new conditions. That means a loss of up to $28.3 million in critical funds that would otherwise go toward programs throughout the State that reduce recidivism for at-risk youth, counter the distribution of illegal drugs, advance community policing, and improve educational outcomes.

82. Another prospect is that the State and/or its localities accept the funding and change their public-safety oriented laws and policies in order to ensure they are viewed as complying with these ambiguous access and notification conditions. Abandoning these policies, that law

[5] U.S. Department of Justice, *Attorney General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions* (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions.

[6] *Id.*

enforcement has found to be effective in their communities, could divert resources away from fighting crime and erode trust between the state and local governments and their immigrant communities that the TRUST and TRUTH Acts, as well as local ordinances, are intended to build.

83. In order to compel jurisdictions to adopt its federal immigration program, the Administration has admitted that it intends to force state and local jurisdictions to abandon policies these jurisdictions have adopted based on their considered judgment on how best to enhance public safety. The ambiguity of these conditions is part and parcel of the Administration's plan to create a chilling effect that makes state and local jurisdictions think twice about maintaining their current policies. If Defendants clarify the access condition to explain that they expect jurisdictions to not provide any procedural protections to detainees before an ICE interview, or the notification condition to mean that jurisdictions must provide ICE with 48-hour notice even if it means holding someone beyond his or her ordinary release, jurisdictions will still feel pressured to change their laws or policies to avoid losing any federal funding.

84. Compelling state and local governments to make a decision without providing clarity about the scope of the conditions, or construing these funding conditions to prohibit jurisdictions from providing notice protections for inmates or requiring jurisdictions to detain individuals beyond their ordinary release, undermines public safety, is unconstitutional, and should be halted.

FIRST CLAIM FOR RELIEF

VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS

85. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

86. Article I, Section I of the United States Constitution enumerates that "[a]ll legislative Powers herein granted shall be vested in [the] Congress."

87. Article I, Section VIII of the United States Constitution vests exclusively in Congress the spending power to "provide for . . . the General Welfare of the United States."

88. Defendants have exceeded Congressional authority by adding conditions requiring jurisdictions to provide access to detention facilities to interview inmates and to comply with notification requests that are not conferred by the JAG authorizing statute or any other federal

law. *See* 42 U.S.C. §§ 3750-58. The new access and notification conditions therefore unlawfully exceed the Executive Branch's powers and intrude upon the powers of Congress.

89. For the reasons stated herein, the access and notification conditions in the JAG Solicitations are unlawful, unconstitutional, and should be set aside under 28 U.S.C. § 2201.

SECOND CLAIM FOR RELIEF

VIOLATION OF CONGRESSIONAL SPENDING AUTHORITY

90. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

91. Congress' spending power is not unlimited. When "Congress desires to condition the States' receipt of federal funds, it 'must do so (a) unambiguously …, enable[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation;'" (b) by placing conditions that are related "to the federal interest in particular national projects or programs;" and (c) to not "induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

92. To the extent that Congress delegated its authority to impose conditions (special conditions or otherwise) on JAG funding (which Plaintiff does not concede), the access and notification conditions violate the Spending Clause of the U.S. Constitution.

93. The access and notification conditions are unrelated to the "federal interest in particular national projects or programs" for which Congress intended JAG funding to be used.

94. The access and notification conditions violate the Spending Clause because they are ambiguous and do not provide the State with notice to make a "choice knowingly" of whether to comply.

95. Additionally, if the notification condition requires jurisdictions to hold individuals beyond their ordinary release to comply with the notification condition, that condition would also violate the independent constitutional bar prong of the Spending Clause by requiring local law enforcement to comply even when doing so would violate the Fourth Amendment of the U.S. Constitution.

96. For the reasons stated herein, the access and notification conditions in the JAG Solicitations are unlawful, and should be set aside under 28 U.S.C. § 2201.

THIRD CLAIM FOR RELIEF

VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

(Constitutional Violations and Excess of Statutory Authority)

97. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

98. Defendant USDOJ is an "agency" under the APA, 5 U.S.C. § 551(1), and the JAG solicitation is an "agency action" under the APA, *id.* § 551(13).

99. The JAG Solicitations constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." Id. § 704.

100. The APA requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(B)-(C).

101. Defendants' imposition of the access and notification conditions in the JAG Solicitations is unconstitutional because Defendants overstepped their powers by exercising lawmaking authority that is solely reserved to Congress under Article I, Section I of the U.S. Constitution. Also, Defendants' imposition of the access and notification conditions in the JAG Solicitations was in excess of their statutory authority. Furthermore, both conditions violate the Spending Clause because they are unrelated to the federal purpose of the grant, ambiguous, and/or tied to unconstitutional activities.

102. Because Defendants acted unconstitutionally and in excess of their statutory authority through the JAG Solicitations, these actions are unlawful and should be set aside under 5 U.S.C. § 706.

FOURTH CLAIM FOR RELIEF

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

(Arbitrary and Capricious)

103. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

104. Defendant USDOJ is an "agency" under the APA, 5 U.S.C. § 551(1), and the JAG solicitation is an "agency action" under the APA, *id.* § 551(13).

105. The JAG Solicitations constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id.* § 704.

106. The APA requires that a court "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." *Id.* § 706(2)(A).

107. The imposition of the access and notification conditions is arbitrary and capricious and an abuse of discretion because Defendants have relied on factors that Congress did not intend by adding these conditions to JAG funding.

108. For the reasons discussed herein, the access and notification conditions in the JAG solicitation are unlawful and shall be set aside under 5 U.S.C. § 706 for being arbitrary and capricious and an abuse of discretion.

FIFTH CLAIM FOR RELIEF

DECLARATORY RELIEF

109. Plaintiff incorporates the allegations of the preceding paragraphs by reference.

110. An actual controversy between California and Defendants exists as to whether the State of California and its localities comply with the access and notification conditions on the basis of the TRUST and TRUTH Acts. Although California law actually complies with an interpretation of the conditions, Defendants' statements indicate that they will determine that California does not comply with the conditions.

111. Plaintiff is entitled to a declaration that the TRUST and TRUTH Acts do not violate the access and notification conditions, and thus, should not be a basis for withholding, terminating, disbarring, or making ineligible federal funding from the State and its political subdivisions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, including the State of California, respectfully that this Court enter judgment in its favor, and grant the following relief:

1. Issue a declaration that the access and notification conditions in the JAG Solicitations are unconstitutional and/or unlawful because (a) they exceed the Congressional authority conferred to the Executive Branch; (b) to the extent there is Congressional authorization, exceeds the Congress's spending powers under Article I of the Constitution; and (c) they violate the Administrative Procedures Act;

2. Permanently enjoin Defendants from using the access and notification conditions as restrictions for JAG funding;

3. Permanently enjoin Defendants from withholding, terminating, disbarring or making any state entity or local jurisdiction ineligible for JAG funding on account of the TRUTH Act or any law or policy that provides procedural protections to inmates about their rights;

4. Permanently enjoin Defendants from withholding, terminating, disbarring, or making any state entity or local jurisdiction ineligible for JAG funding on account of the TRUST Act or any law or policy that limits compliance with detainer requests;

5. In the alternative, declare that the State's TRUST and TRUTH Acts comply with the access and notification conditions in the JAG Solicitations; and

6. Award the State costs and grant such other relief as the Court may deem just and proper.

Dated: August 14, 2017

Respectfully submitted,

XAVIER BECERRA
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OK2017900935

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CITY OF PHILADELPHIA,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS III,
Attorney General of the United States,

Defendant.

Civil Action No._____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the City of Philadelphia, hereby alleges as follows:

INTRODUCTION

1. The City of Philadelphia ("Philadelphia" or "the City") brings this action to enjoin the Attorney General of the United States from imposing new and unprecedented requirements on the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG"). Philadelphia also seeks a declaratory judgment that the new conditions are contrary to law, unconstitutional, and arbitrary and capricious. Additionally, Philadelphia seeks a declaratory judgment confirming that its policies comply with 8 U.S.C. § 1373 ("Section 1373"), to the extent that statute is lawfully deemed applicable to the Byrne JAG program.

2. Philadelphia has a vibrant immigrant community. Immigrants are an integral part of Philadelphia's workforce, small business sector, school and college population, and civic associations; their success is vital to the City's success. To ensure that Philadelphia's immigrant

community continues to thrive, the City has adopted policies that seek to foster trust between the immigrant population and City officials and employees, and to encourage people of all backgrounds to take full advantage of the City's resources and opportunities. Several of those policies protect the confidentiality of individuals' immigration and citizenship status information, and prevent the unnecessary disclosure of that information to third parties. The rationale behind these policies is that if immigrants, including undocumented immigrants, do not fear adverse consequences to themselves or to their families from interacting with City officers, they are more likely to report crimes, apply for public benefits to which they are entitled, enroll their children in Philadelphia's public schools, request health services like vaccines, and all in all contribute more fully to the City's health and prosperity.

3. Philadelphia also practices community policing. And, like most major cities, it has determined that public safety is best promoted *without* the City's active involvement in the enforcement of federal immigration law. To the contrary, Philadelphia has long recognized that a resident's immigration status has no bearing on his or her contributions to the community or on his or her likelihood to commit crimes, and that when people with foreign backgrounds are afraid to cooperate with the police, public safety in Philadelphia is compromised. For this reason, the Philadelphia Police Department ("PPD") has for many years prohibited its officers from asking individuals with whom they interact about their immigration status. Police officers also do not stop or question people on account of their immigration status, do not in any way act as immigration enforcement agents, and are particularly protective of the confidential information of victims and witnesses to crimes. In Philadelphia's experience with property crimes currently at their lowest since 1971, robberies at their lowest since 1969, and violent crime the

lowest since 1979 these policies have promoted the City's safety by facilitating greater cooperation with the immigrant community writ large.

4. For over a decade, Philadelphia has pursued the above policies while also relying upon the funding supplied by the Byrne JAG program to support critical criminal justice programming in the City. Indeed, the Byrne JAG award has become a staple in Philadelphia's budget and is today an important source of funding for the PPD, District Attorney's Office, and local court system. Since the grant was created in 2005, Philadelphia has applied for and successfully been awarded its local allocation every year. Philadelphia has never had any conflicts with the federal government in obtaining Byrne JAG funds.

5. That is all changing. On July 25, 2017, the Department of Justice ("DOJ" or "the Department") notified Philadelphia that, as a condition to receiving any Byrne JAG funds in fiscal year 2017, Philadelphia must comply with three conditions. Philadelphia must: (1) certify, as part of its FY 2017 grant application, that the City complies with Section 1373, a statute which bars states and localities from adopting policies that restrict immigration-related communications between state and local officials and the federal government; (2) permit officials from the U.S. Department of Homeland Security ("DHS") (which includes U.S. Immigration and Customs Enforcement ("ICE")) to access "any detention facility" maintained by Philadelphia in order to meet with persons of interest to DHS; and (3) provide at least 48 hours' advance notice to DHS regarding the "scheduled release date and time" of an inmate for whom DHS requests such advance notice.[1]

6. The imposition of these conditions marks a radical departure from the Department of Justice's past grant-making practices. No statute permits the Attorney General to impose

[1] U.S. Dep't of Justice, *Backgrounder On Grant Requirements* (July 25, 2017), *available at* https://goo.gl/h5uxMX. A copy of this document is attached as Exhibit 1.

these conditions on the Byrne JAG program. Although Congress delegated certain authorities to the Attorney General to administer Byrne JAG awards, the Attorney General has far exceeded that delegation here. Moreover, even if Congress *had* intended to authorize the Attorney General to attach conditions of this nature to JAG grants (which it did not), that would have been unlawful: Demanding that localities certify compliance with Section 1373, allow ICE agents unrestrained access to their prisons, or provide ICE advance notification of inmates' scheduled release dates as conditions of receiving Byrne JAG funds, would flout the limits of Congress' Spending Clause powers under the United States Constitution.

7. Simply put, the Attorney General's imposition of these three conditions on the FY 2017 Byrne JAG grant is contrary to law, unconstitutional, and arbitrary and capricious. That action should be enjoined.

8. The Department of Justice's decision to impose its sweeping conditions upon Byrne JAG grantees represents the latest affront in the Administration's ever-escalating attempts to force localities to forsake their local discretion and act as agents of the federal government. Within the President's first week in office, he signed an Executive Order commanding federal agencies to withhold funds from so-called "sanctuary cities" *i.e.*, cities that have exercised their basic rights to self-government and have chosen to focus their resources on local priorities rather than on federal immigration enforcement.[2] After a federal court enjoined much of that Order,[3] the Department of Justice singled out Philadelphia along with eight other jurisdictions by demanding that these jurisdictions certify their compliance with Section 1373 by June 30, 2017. The Department warned the localities that their failure to certify compliance "could result in the

[2] Exec. Order No. 13768, "Enhancing Public Safety in the Interior of the United States," 82 Fed. Reg. 8799 (Jan. 25, 2017).
[3] *County of Santa Clara v. Trump*, --- F. Supp. 3d ----, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

withholding of [Byrne JAG] funds, suspension or termination of the [Byrne JAG] grant, ineligibility for future OJP grants or subgrants, or other action."[4] By this time in the grant funding schedule, Philadelphia had already appropriated and in most cases obligated the funds it received under the FY 2016 JAG award to a number of important programs to strengthen its criminal justice system.

9. Without any facts or support, the Attorney General claimed in April that "the lawless practices" of cities he characterized as "so-called 'sanctuary' jurisdictions . . . make our country less safe."[5] Philadelphia's experience is quite the opposite: Philadelphia has witnessed a reduction in crime of over 17 percent since the City formally adopted policies protecting the confidentiality of its constituents.

10. Philadelphia certified its compliance with Section 1373 on June 22, 2017. Fundamentally, Philadelphia explained that it complies with Section 1373 because its agents do not collect immigration status information in the first place, and, as a result, the City is in no position to share or restrict the sharing of information it simply does not have. At the same time, the City explained, if immigration status information does inadvertently come into the City's possession, Philadelphia's policies allow local law enforcement to cooperate with federal authorities and to share identifying information about criminal suspects in the City. For these reasons and others, Philadelphia certified that it complies with all of the obligations that Section 1373 can constitutionally be read to impose on localities.

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[4] Letter from Alan R. Hanson, Acting Assistant Attorney General, Office of Justice Programs, to Major Jim Kenney, City of Philadelphia (Apr. 21, 2017).

[5] Press Release, U.S. Dep't of Justice, *Attorney General Jeff Sessions Delivers Remarks on Violent Crime to Federal, State and Local Law Enforcement* (Apr. 28, 2017), *available at* https://goo.gl/sk37qN.

11. In response to the certifications filed in June 2017 by Philadelphia and other jurisdictions, the Attorney General issued a press release condemning those submissions. He did not offer his definition of compliance or any details on the aspects of any locality's policies he considered illegal; he said only that "[i]t is not enough to assert compliance" and that "jurisdictions must actually be in compliance."[6]

12. Against this backdrop, the Department of Justice announced in a July 25, 2017 press release that it would now be imposing two additional conditions on jurisdictions applying for FY 2017 Byrne JAG funding, along with another mandatory certification of compliance with Section 1373. The fiscal year 2017 application is due on September 5, 2017.

13. The Attorney General's action was an unlawful, *ultra vires* attempt to force Philadelphia to abandon its policies and accede to the Administration's political agenda. It is one thing for the Department of Justice to disagree with Philadelphia as a matter of policy; it is quite another thing for the Department to violate both a congressionally-defined program and the Constitution in seeking to compel Philadelphia to forfeit its autonomy.

14. In response, Philadelphia now seeks a declaration from this Court that the Department of Justice's imposition of the new conditions to Byrne JAG funding was unlawful. That agency action is contrary to federal statute, contrary to the Constitution's separation of powers, and arbitrary and capricious. Further, even if Congress had intended to permit the Attorney General's action, it would violate the Spending Clause. The City also seeks a declaration from this Court that, to the extent Section 1373 can be made an applicable condition to the receipt of Byrne JAG funds, Philadelphia is in full compliance with that provision.

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[6] Press Release, U.S. Dep't of Justice, *Department of Justice Reviewing Letters from Ten Potential Sanctuary Jurisdictions* (July 6, 2017), *available at* https://goo.gl/of8UhG. A copy of this press release is attached as Exhibit 2.

15. The City also seeks injunctive relief. It requests that this Court permanently enjoin the Department of Justice from imposing these three conditions in conjunction with the FY 2017 Byrne JAG application, and any future grants under the Byrne JAG program. Further, the City seeks any other injunctive relief the Court deems necessary and appropriate to allow Philadelphia to receive its FY 2017 JAG allocation as Philadelphia has since the inception of the JAG program, and as Congress intended.

PARTIES

16. Plaintiff Philadelphia is a municipal corporation, constituted in 1701 under the Proprietor's Charter. William Penn, its founder, was a Quaker and early advocate for religious freedom and freedom of thought, having experienced persecution firsthand in his native England. He fashioned Philadelphia as a place of tolerance and named it such. "Philadelphia," the City of Brotherly Love, derives from the Greek words "philos," meaning love or friendship, and "adelphos," meaning brother.

17. Philadelphia is now the sixth-largest city in the United States and is home to almost 1.6 million residents. About 200,000 Philadelphia residents, or 13 percent of the City's overall population, are foreign-born, which includes approximately 50,000 undocumented immigrants. The number of undocumented Philadelphia residents therefore account for roughly one of every four foreign-born Philadelphians.

18. Defendant Jefferson Beauregard Sessions III is the Attorney General of the United States. The Attorney General is sued in his official capacity. The Attorney General is the federal official in charge of the United States Department of Justice, which took and threatens imminently to take the governmental actions at issue in this lawsuit.

JURISDICTION AND VENUE

19. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1346. The Court is authorized to issue the relief sought here under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

20. Venue is proper in the Eastern District of Pennsylvania under 28 U.S.C. § 1391(e)(1) because substantial events giving rise to this action occurred therein and because Philadelphia resides therein and no real property is involved in this action.

FACTUAL ALLEGATIONS

I. PHILADELPHIA'S POLICIES

21. As the City of Brotherly Love, Philadelphia is recognized as a vital hub for immigrants from across the globe who seek good jobs and better futures for themselves and their children. A study by the Brookings Institute found "Philadelphia's current flow of immigrants [to be] sizable, varied, and . . . grow[ing] at a moderately fast clip."[7]

22. Philadelphia's policies developed over time to address the needs and concerns of its growing immigrant community. Today, Philadelphia has four sets of policies relevant to the present suit, as each concern the City's efforts to engender trust with the City's immigrant community and bring individuals from that community into the fold of City life. These policies work. They are discussed in turn below.

A. Philadelphia's Police Department Memorandum 01-06

23. Decades ago, the Philadelphia Police Department recognized that a resident's immigration status was irrelevant to effective policing and, if anything, that asking about an individual's immigration status hampers police investigations. For that reason, PPD officers

[7] Audrey Singer et al., *Recent Immigration to Philadelphia: Regional Change in a Re-Emerging Gateway*, Metropolitan Policy Program at Brookings (Nov. 2008), https://goo.gl/pZOnJx.

were trained to refrain from asking persons about their immigration status when investigating crimes or conducting routine patrols.

24. That practice was formalized into policy on May 17, 2001, when Philadelphia's then-Police Commissioner John F. Timoney issued Memorandum 01-06, entitled "Departmental Policy Regarding Immigrants" ("Memorandum 01-06").[8] The Memorandum states that one of its overarching goals is for "the Police Department [to] preserve the confidentiality of all information regarding law abiding immigrants to the maximum extent permitted by law." Memorandum 01-06 ¶ 2B.

25. Memorandum 01-06 generally prohibits police officers in Philadelphia from unnecessarily disclosing individuals' immigration status information to other entities. The Memorandum sets out this non-disclosure instruction, and three exceptions, as follows: "In order to safeguard the confidentiality of information regarding an immigrant, police personnel will transmit such information to federal immigration authorities only when: (1) required by law, or (2) the immigrant requests, in writing, that the information be provided, to verify his or her immigration status, or (3) the immigrant is suspected of engaging in criminal activity, including attempts to obtain public assistance benefits through the use of fraudulent documents." Memorandum 01-06 ¶¶ 3A-3B.

26. Notwithstanding the instruction to "safeguard the confidentiality of information regarding an immigrant," Memorandum 01-06 also directs police officers to continue adhering to typical law enforcement protocols for the reporting and investigating of crimes. Section 3B of the Memorandum provides that "[s]worn members of the Police Department who obtain information on immigrants suspected of criminal activity will comply with normal crime

[8] A copy of Memorandum 01-06 is attached hereto as Exhibit 3.

reporting and investigating procedures." *Id.* ¶ 3B. This mandate applies irrespective of the criminal suspect's identity or immigration status. Section 3C further instructs that "[t]he Philadelphia Police Department will continue to cooperate with federal authorities in investigating and apprehending immigrants suspected of criminal activities." *Id.* ¶ 3C. But as to "immigrants who are victims of crimes," the Memorandum provides a blanket assurance of confidentiality. Such persons "will not have their status as an immigrant transmitted in any manner." *Id.*

27. The Philadelphia Police Department's policy was motivated by the desire to encourage members of Philadelphia's immigrant community to make use of City services and to cooperate with the police without fear of negative repercussions. *See id.* ¶¶ 2B, 3C. Indeed, an essential tenet of modern policing is that police departments should engender trust from the communities they serve so that members of those communities will come forward with reports of criminal wrongdoing, regardless of their immigration status or that of their loved ones. Numerous police chiefs and criminal law enforcement experts have echoed that finding.[9]

28. Philadelphia has witnessed firsthand the positive effects that increased trust between communities, including immigrant communities, and the police, has on law and order. In part due to the tireless efforts of the PPD to forge that trust with the immigrant community, the City has seen a drop in its overall crime rate.

29. The success of Philadelphia's policies should come as no surprise. A systematic review of municipalities' "sanctuary city" policies, defined as "at least one law or formal

[9] *See* Hearing before the Comm. on Homeland Security & Gov't Affairs of the United States Senate, May 24, 2014 (statement of J. Thomas Manger, Chief of Police of Montgomery County, Maryland) (conveying that the "moment" immigrant "victims and witnesses begin to fear that their local police will deport them, cooperation with their police then ceases"); Chuck Wexler, *Police Chiefs Across the Country Support Sanctuary Cities Because They Keep Crime Down*, L.A. Times (Mar. 6, 2017), https://goo.gl/oQs9AT (similar).

resolution limiting local enforcement of immigration laws as of 2001," found that policies of this nature were *inversely correlated* with rates of robbery and homicide meaning that "sanctuary policies" made cities safer.[10] Indeed, cities with these policies saw lower rates of crime even among immigrant populations.[11] Social science research confirms that when there is a concern of deportation, immigrant communities are less likely to approach the police to report crime.[12]

30. Recent events also confirm the positive relationship between policies that forge community trust with immigrant populations and the overall reporting of crimes. Since President Trump was elected and announced plans to increase deportations and crack down on so-called sanctuary cities, overall crime reporting by Latinos in three major cities including in Philadelphia "markedly decline[d]" as compared to reporting by non-Latinos.[13]

B. Philadelphia's Confidentiality Order

31. Philadelphia's policies that engender confidence between its immigrant population and City officials extend beyond its police-related protocols. Indeed, the City's hallmark policy in building trust with all city service offerings is its "Confidentiality Order," signed by then-Mayor Michael A. Nutter on November 10, 2009. *See* Executive Order No. 8-09,

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[10] *See* Christopher Lyons, Maria B. Ve'lez, & Wayne A. Santoro, *Neighborhood Immigration, Violence, and City-Level Immigrant Political Opportunities*, 78 American Sociological Review, no. 4, pp. 9, 14-19 (June 17, 2013).

[11] *Id.* at 14, 18.

[12] Cecilia Menjiyar & Cynthia L. Bejarano, *Latino Immigrants' Perceptions of Crime and Police Authorities in the United States: A Case Study from the Phoenix Metropolitan Area*, 27 Ethnic and Racial Studies, no. 1, pp. 120-148 (Jan. 2004) ("As these cases illustrate, when there is a threat of immigration officials' intervention, immigrants (particularly those who fear any contacts with these officials due to their uncertain legal status, as is the case of the Mexicans and Central Americans in this study) are more reluctant to call the police because they are aware of the links between the two.").

[13] Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight (May 18, 2017), https://goo.gl/ft1fwW (surveying trends in Philadelphia, Dallas, and Denver).

"Policy Concerning Access of Immigrants to City Services" ("Confidentiality Order").[14] That policy recognizes that the City as a whole fares better if all residents, including undocumented immigrants, pursue health care services, enroll their children in public education, and report crimes.

32. The Confidentiality Order instructs City officials to protect the confidentiality of individuals' immigration status information in order to "promote the utilization of [City] services by all City residents and visitors who are entitled to and in need of them, including immigrants." *See* Confidentiality Order preamble. It intends that all immigrants, regardless of immigration status, equally come forward to access City services to which they are entitled, without having to fear "negative consequences to their personal lives." *Id.* The Order defines "confidential information" as "any information obtained and maintained by a City agency related to an individual's immigration status." *Id.* § 3A.

33. The Confidentiality Order directs City officers and employees to refrain from affirmatively collecting information about immigration status, unless that information is necessary to the officer or employee's specific task or the collection is otherwise required by law. The Order states: "No City officer or employee, other than law enforcement officers, shall inquire about a person's immigration status unless: (1) documentation of such person's immigration status is legally required for the determination of program, service or benefit eligibility . . . or (2) such officer or employee is required by law to inquire about such person's immigration status." *Id.* § 2A.

34. The Confidentiality Order has additional mandates for law enforcement officers. It directs that officers "shall not" stop, question, detain, or arrest an individual solely because of

[14] A copy of the Confidentiality Order is attached hereto as Exhibit 4.

his perceived immigration status; shall not "inquire about a person's immigration status, unless the status itself is a necessary predicate of a crime the officer is investigating or unless the status is relevant to identification of a person who is suspected of committing a crime"; and shall not "inquire regarding immigration status for the purpose of enforcing immigration laws." *Id.* §§ 2B(1), (2), (4). Witnesses and victims are afforded special protection: Law enforcement officers "shall not . . . inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking help." *Id.* § 2B(3).

35. The Confidentiality Order also requires City officers and employees to avoid making unnecessary disclosures of immigration status information that may inadvertently come into their possession. *Id.* § 3B ("No City officer or employee shall disclose confidential information[.]"). But the Order permits disclosure both by City "officer[s] or employee[s]," when "such disclosure is required by law," or when the subject individual "is suspected . . . of engaging in criminal activity." *Id.* § 3B(2)-(3).

36. Philadelphia's Confidentiality Order, like the PPD's Memorandum 01-06, is motivated by concerns among officials across local government from the City's health and social services departments to its law enforcement departments that members of Philadelphia's immigrant community, especially those who are undocumented, would otherwise not access the municipal services to which they and their families are entitled and would avoid reporting crimes to the police, for fear of exposing themselves or their family members to adverse immigration consequences. The City's Confidentiality Order and Memorandum 01-06 play a vital role in mitigating undesired outcomes like neighborhoods where crimes go unreported, where families suffer from preventable diseases, and where children do not go to school.

37. Indeed, notwithstanding the Attorney General's claim that "[t]he residents of Philadelphia have been victimized" because the City has "giv[en] sanctuary to criminals,"[15] Philadelphia's crime statistics tell a very different story. Since 2009, when the Confidentiality Order was enacted, Philadelphia has witnessed a decrease in crime of over 17 percent, including a 20 percent decrease in violent crime. Tellingly, the Administration offers not a single statistic or fact to support their allegations otherwise either publicly or as a part of the JAG solicitation announcing the requirement of the three new conditions. This is because the Administration has no support for its claims that sanctuary cities promote crime or lawlessness.

C. Philadelphia's Policies on Responding to ICE Detainer and Notification Requests

38. On April 16, 2014, shortly after the United States Court of Appeals for the Third Circuit issued a decision concluding that "detainer" requests sent by ICE are voluntary upon localities, *see Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014), then-Mayor Nutter signed Executive Order No. 1-14, entitled "Policy Regarding U.S. Immigration and Customs Enforcement Agency Detainer Requests" ("Detainer Order I").[16]

39. Detainer Order I stated that under the "Secure Communities" program, the U.S. Immigration and Customs and Enforcement Agency had been "shift[ing] the burden of federal civil immigration enforcement onto local law enforcement, including shifting costs of detention of individuals in local custody who would otherwise be released." Detainer Order I preamble.

40. Accordingly, Detainer Order I announced a policy that "[n]o person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration detainer request . . . nor shall notice of his or her pending release be

[15] Rebecca R. Ruiz, *Sessions Presses Immigration Agenda in Philadelphia, a Sanctuary City*, N.Y. Times (July 21, 2017), https://goo.gl/4EDuuo.
[16] A copy of Detainer Order I is attached hereto as Exhibit 5.

provided, unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant." *Id.* § 1. The Order instructed the "Police Commissioner, the Superintendent of Prisons and all other relevant officials of the City" to "take appropriate action to implement this order." *Id.* § 2.

41. Detainer Order I was partly rescinded at the end of then-Mayor Nutter's term. After his election and upon taking office, on January 4, 2016, Mayor James F. Kenney signed a new order dealing with ICE detainer and notification requests. Its title was the same as Mayor Nutter's prior order and it was numbered Executive Order No. 5-16 ("Detainer Order II").[17]

42. Detainer Order II states that, although ICE had "recently discontinued its 'Secure Communities' program" and "the Department of Homeland Security and ICE have initiated the new Priority Enforcement Program (PEP) to replace Secure Communities[,] . . . it is incumbent upon the Federal government and its agencies to both listen to individuals concerned with this new program, and ensure that community members are both informed and invested in the program's success." Detainer Order II preamble. Until that occurs, Detainer Order II directs that Philadelphia officers "should not comply with detainer requests unless they are supported by a judicial warrant and they pertain to an individual being released after conviction for a first or second-degree felony involving violence." *Id.*

43. Detainer Order II therefore provides: "No person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration detainer request . . . nor shall notice of his or her pending release be provided, unless such person is being released after conviction for a first or second degree felony involving violence and the detainer is supported by a judicial warrant." *Id.* § 1. The Order instructs "the Police

[17] A copy of Detainer Order II is attached hereto as Exhibit 6.

Commissioner, the Prisons Commissioner and all other relevant officials of the City" to "take appropriate action to implement this order." *Id.* § 2.

44. As a result of Detainer Orders I and II, Philadelphia prison authorities stopped notifying ICE of the forthcoming release of inmates, unless ICE provided the authorities a notification request that was accompanied by a judicial warrant. This has been the practice in the prisons since the signing of Detainer Order I in April 2014 through the date of this filing. Because the vast majority of individuals in Philadelphia's prison facilities are pre-trial or pre-sentence detainees, however, the vast majority of detainer or notification requests that the City receives from ICE concern persons without scheduled release dates. Since January 2016, only three individuals for whom ICE sent Philadelphia detainer or notification requests and who were in City custody had been serving a sentence after being convicted of a crime. Every other individual for whom ICE sent a detainer or notification request during that time period was an individual in a pre-trial, pre-sentencing, or temporary detention posture, whose release could often be ordered with no advance notification to local authorities.

45. On March 22, 2017, the City's First Deputy Managing Director, Brian Abernathy, clarified by memorandum that, although Executive Order 5-16 (Detainer Order II) suggested that in order for the City to cooperate with an ICE notification request, there needed to be both a "judicial warrant" and a prior conviction by the inmate for a first or second degree felony, that text did not and does not reflect the practice of the City's prisons.[18] Mr. Abernathy explained that the historical practice of the Department of Prisons has been to "cooperat[e] with all federal criminal warrants, including criminal warrants obtained by Immigration and Customs Enforcement," and "[b]y signing Executive Order 5-16, Mayor Kenney did not intend to alter

[18] A copy of Mr. Abernathy's March 22, 2017 internal memorandum is attached hereto as Exhibit 7.

this cooperation." Accordingly, Mr. Abernathy's memorandum stated that "the Department is directed to continue to cooperate with all federal agencies, including ICE, when presented with a warrant to the same extent it cooperated before Executive Order 5-16." Philadelphia therefore continues to comply with ICE advance notification requests, regardless of the crime for which the individual was convicted, when ICE also presents a "judicial warrant."

46. Philadelphia's policies on detainer requests that is, of complying with ICE requests to detain an individual for a brief period of time or to provide advance notification of a person's release *only* if ICE presents a judicial warrant serve an important function in the City. Like Police Memorandum 01-06 and the Confidentiality Order, these policies forge trust with the immigrant community because they convey the message that Philadelphia's local law enforcement authorities are not federal immigration enforcement agents. They tell residents that if they find themselves in the City's custody and are ordered released, they *will* be released not turned over to ICE unless a judge has determined such action is warranted. For instance, if a member of the immigrant community is arrested for a petty infraction and is temporarily detained in a Philadelphia Prison facility, or if he or she is arrested and then released the next morning, the City will not voluntarily detain that individual at the request of ICE or alert ICE to their release unless, in the rare circumstance, ICE presents a judicial warrant. This message of assurance is important to community trust: Philadelphia's residents do not have to fear that each and every encounter with the local police is going to land them in an ICE detention center. After all, lawful immigrants and even citizens can be wrongfully caught up in alleged immigration enforcement actions.

47. Philadelphia's detainer policies also ensure fair treatment for all of Philadelphia's residents, immigrants and non-immigrants alike. Just as Philadelphia would not detain an

individual at the request of the FBI for 48 hours without a judicial warrant, Philadelphia will not do so at the request of ICE. The City believes that all persons should be treated with equal dignity and respect, whatever their national origin or immigration status.

D. Philadelphia's Policies on ICE Access to Prisons

48. The Philadelphia Prison System ("PPS") is managed by the Philadelphia Department of Prisons ("PDP"). PDP operates six facilities: (1) the Curran-Fromhold Correctional Facility, which is PPS' largest facility and contains 256 cells; (2) the Detention Center; (3) the House of Correction; (4) the Philadelphia Industrial Correctional Center ("PICC"); (5) the Riverside Correctional Facility; and (6) the Alternative & Special Detention facilities.

49. Across these six facilities, the inmate population is roughly 6,700. Approximately 17 percent of those inmates are serving time for criminal sentences imposed, and the remaining 83 percent inmates are all in a pre-trial posture (roughly 78 percent of inmates), a pre-sentencing posture (roughly 2 percent of inmates), or some other form of temporary detention (roughly 3 percent of inmates). Of the 17 percent serving sentences, none are serving sentences longer than 23 months, and approximately 30 percent are serving sentences of one year or less.

50. In May 2017, the Philadelphia Department of Prisons implemented a new protocol providing that ICE may only interview an inmate if the inmate consents in writing to that interview. To implement this protocol, the Department of Prisons created a new "consent form," to be provided to any inmate in a PPS facility whom ICE seeks to interview. The consent

form informs the individual that "Immigration and Customs Enforcement ("ICE") wants to interview you" and that "[y]ou have the right to agree or to refuse this interview."[19]

51. The new consent-based policy for ICE access to PPS facilities was put in place to help protect prisoners' constitutional rights to decline speaking with law enforcement authorities against their will or to speak only with such authorities in the presence of counsel if they so choose. The consent-based policy also ensures the orderly administration of Philadelphia's prisons, by avoiding the unnecessary expenditure of time and resources that would otherwise occur were inmates to be delivered to interviews with ICE only then to exercise their constitutional rights to remain silent or have counsel present.

E. Other Relevant Policies and Practices

52. In addition to the above policies, each of which are important for strengthening Philadelphia's relationship with its immigrant communities and fostering the health and welfare of the City, Philadelphia also believes that combatting crime is a leading and entirely consistent policy priority. To that effect, the Philadelphia Police Department routinely cooperates with federal law enforcement authorities in detecting, combatting, and holding people accountable for crimes committed in the City or by residents of the City, irrespective of the identity of the perpetrator or their immigration status. For instance, Philadelphia actively participates in a number of federal task forces, including the Violent Crimes Task Force; the Alcohol, Tobacco, Firearms and Explosive (ATF) Task Force; the FBI Terrorism Task Force; Joint Terrorism Task Force; the Human Trafficking Task Force; and the U.S. Marshals Service's Task Force.

[19] *See* Philadelphia Department of Prisons "Inmate Consent Form ICE Interview," attached hereto as Exhibit 8.

53. Philadelphia also uses a number of databases as part of its regular police work and law enforcement activities. Philadelphia's use of these databases provides the federal government notice about and identifying information for persons stopped, detained, arrested, or convicted of a crime in the City. In turn, federal authorities can use information derived from those databases to obtain knowledge about undocumented persons of interest in the City. The databases Philadelphia uses include:

a. The FBI's National Crime Information Center ("NCIC") database: The Philadelphia Police Department's protocol is for its officers to voluntarily and regularly use the NCIC database as they engage in criminal law enforcement. For instance, Philadelphia police officers are trained to run an NCIC "look-up" for all individuals who are subjected to "investigative detention" by the police, for the purpose of determining if an outstanding warrant has been issued for the individual whether in Philadelphia or another jurisdiction. If the officer is able to collect the person's date of birth or license plate information, NCIC protocols mandate that that information will also be entered into NCIC.

b. The Automated Fingerprint Identification System ("AFIS")[20]: As part of a routine and longstanding protocol, at the time a person in Philadelphia is arrested, his or her fingerprints are inputted into Philadelphia's AFIS platform, which feeds automatically into Pennsylvania's identification bureau and then to the FBI. The FBI in turn has the capacity to run

[20] Philadelphia recently transitioned to the Multimodal Biometric Identification System ("MBIS"), which is the next generation to AFIS. But because the FBI refers to the Integrated Automated Fingerprint Identification System ("IAFIS"), we use AFIS here.

fingerprints against the Integrated Automated Fingerprint Identification System ("IAFIS"), a national fingerprint and criminal history system maintained by the FBI, and the Automated Biometric Identification System ("IDENT"), a DHS-wide system for storing and processing biometric data for national security and border management purposes.

c. The Preliminary Arraignment System ("PARS"): PARS is a database maintained by the First Judicial District of Pennsylvania, the Philadelphia Police Department, and the Philadelphia District Attorney. The purpose of the database is to give information that the police collect upon an arrest directly to the District Attorney's Office. Based upon an end-user license agreement signed with ICE in 2008 and amended in 2010, ICE has access to criminal information in the PARS database, *i.e.*, to information about people suspected of criminal activity and entered into the system.

54. Philadelphia does not have visibility into how various federal agencies use or share information derived from the above databases with one another. But to Philadelphia's awareness and understanding, the federal government can use the NCIC, AFIS, and PARS databases to look up persons of interest to the federal government (including ICE) and determine whether they are in Philadelphia's custody or otherwise in the City.

II. THE BYRNE JAG PROGRAM AND 2017 GRANT CONDITIONS

A. Overview of the Byrne JAG Program

55. Congress created the modern-day Byrne JAG program in 2005 as part of the Violence Against Women and Department of Justice Reauthorization Act. *See* Pub. L. No. 109-162 (codified at 42 U.S.C. § 3751 *et seq.*). In fashioning the present-day Byrne JAG grant,

Congress merged two prior grant programs that had also provided criminal justice assistance funding to states and localities. These two predecessor grant programs were the Edward Byrne Memorial Formula Grant Program, created in 1988, and the Local Law Enforcement Block Grant Program.[21]

56. Today, grants under the Byrne JAG program are the primary source of federal criminal justice funding for states and localities. As stated in a 2005 House Report accompanying the bill, the program's goal is to provide State and local governments the "flexibility to spend money for programs that work for them rather than to impose a 'one size fits all' solution" for local policing. *See* H.R. Rep. No. 109-233, at 89 (2005).

57. The authorizing statute for the Byrne JAG program provides that localities can apply for funds to support a range of local programming to strengthen their criminal justice systems. For instance, localities can apply for funds to support "law enforcement programs, prosecution and court programs, prevention and education programs, corrections and community corrections programs, drug treatment and enforcement programs," and "crime victim and witness programs." 42 U.S.C. § 3751(a)(1).

58. Byrne JAG funding is structured as a formula grant, awarding funds to all eligible grantees according to a prescribed formula. *See* 42 U.S.C. § 3755(d)(2)(A). The formula for states is a function of population and violent crime, *see id.* § 3755(a), while the formula for local governments is a function of the state's allocation and of the ratio of violent crime in that locality to violent crime in the state as a whole, *see id.* § 3755(d).

59. Unlike discretionary grants, which agencies award on a competitive basis, "formula grants . . . are not awarded at the discretion of a state or federal agency, but are

[21] *See* Nathan James, *Edward Byrne Memorial Justice Assistance Grant ("JAG") Program*, Congressional Research Service (Jan. 3, 2013), https://goo.gl/q8Tr6z.

awarded pursuant to a statutory formula." *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989). States and local governments are entitled to their share of the Byrne JAG formula allocation as long as their proposed programs fall within at least one of eight broadly-defined goals, *see* 42 U.S.C. § 3751(a)(1)(A)-(H), and their applications contain a series of statutorily prescribed certifications and attestations, *see id.* § 3752(a).

60. Philadelphia has filed direct applications for Byrne JAG funding every year since the program's inception in 2005. All of its applications have been granted; the City has never been denied Byrne JAG funds for which it applied. For instance, in FY 2016, Philadelphia received $1.67 million in its direct Byrne JAG award. That award was dated August 23, 2016. In FY 2015, the City received $1.6 million in its direct Byrne JAG award. Over the past eleven years, excluding funds received as part of the 2009 Recovery Act, Philadelphia's annual Byrne JAG award has averaged $2.17 million and has ranged between $925,591 (in 2008) to $3.13 million (in 2005).

61. The City is also eligible for, and has previously been awarded, competitive subgrants from the annual Byrne JAG award to the State of Pennsylvania.

62. Philadelphia uses the federal funding provided by the Byrne JAG program to support a number of priorities within and improvements to its criminal justice system. In recent years, a significant portion of Philadelphia's Byrne JAG funding has gone towards Philadelphia Police Department technology and equipment enhancements, training, and over-time payments to police officers. Philadelphia has also drawn upon Byrne JAG funds to finance upgrades to courtroom technology in the City; to enable the District Attorney's Office to purchase new technology and invest in training programs for Assistant District Attorneys; to support juvenile delinquency programs for the City's youth; to bolster reentry programs for formerly incarcerated

individuals seeking to reenter the community; to operate alternative rehabilitation programs for low-level offenders with substance use disorders; to make physical improvements to blighted communities with Clean and Seal teams; and to improve indigent criminal defense services. It is clear, then, that the funds that the City receives from the Byrne JAG program play a vital role in many facets of the City's criminal justice programming.

B. Conditions for Byrne JAG Funding

63. The statute creating the Byrne JAG program authorizes the Attorney General to impose a limited set of conditions on applicants. First, the statute authorizes the Attorney General to require that applicants supply information about their intended use of the grant funding, and to demonstrate that they will spend the money on purposes envisioned by the statute. *See* 42 U.S.C. § 3752(a)(2) & (5) (the Attorney General can insist upon assurances by applicants that "the programs to be funded by the grant meet all the requirements of this part" and "that Federal funds . . . will not be used to supplant State or local funds"). Second, the statute allows the Attorney General to require that applicants provide information about their budget protocols; for instance, he can insist that a recipient of a Byrne JAG "maintain and report such data, records, and information (programmatic and financial) as [he] may reasonably require." *Id.* § 3752(a)(4). Third, the Attorney General can demand that localities "certif[y]," in conjunction with their applications for funding, that they "will comply with all provisions of this part and all other applicable Federal laws." *Id.* § 3752(a)(5)(D). Finally, the statute authorizes the Attorney General to "issue Rules to carry out this part." *Id.* § 3754.

64. That is all. The above delegations of authority do not include a general grant of authority to the Attorney General to impose new obligations the Attorney General himself creates and that are neither traceable to existing "applicable Federal law[]" nor reflected in

"provisions of this part" (*i.e.*, the JAG statute itself). *See id.* § 3752(a)(5)(D). Congress' decision *not* to delegate to the Attorney General such a broad scope of authority was intentional and clear.

65. Time and time again, Congress has demonstrated that it knows how to confer agency discretion to add substantive conditions to federal grants when it wants to. *See, e.g.*, 42 U.S.C. § 3796gg-1(e)(3) (authorizing the Attorney General to "impose reasonable conditions on grant awards" in a different program created by the Omnibus Control and Safe Streets Act); 42 U.S.C. § 14135(c)(1) (providing that the Attorney General shall "distribute grant amounts, and establish grant conditions . . ."); *see also Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions," its "omission" of a different exception means "only one inference can be drawn: Congress meant to" exclude that provision).

66. Furthermore, the Attorney General has never imposed conditions on Byrne JAG applicants beyond the bounds of his statutory authority, *i.e.*, conditions that neither reflect "applicable Federal laws" nor that relate to the disbursement of the grants themselves. For instance, the FY 2016 JAG funds awarded to Philadelphia on August 23, 2016 included many "special conditions." Philadelphia had to certify, among other things, that it:

a. complies with the Department of Justice's "Part 200" Uniform Administrative Requirements, Cost Principles, and Audit Requirements;

b. adheres to the "DOJ Grants Financial Guide";

c. will "collect and maintain data that measure the performance and effectiveness of activities under this award";

d. recognizes that federal funds "may not be used by the recipient, or any subrecipient" on "lobbying" activities;

e. "agrees to assist BJA in complying with the National Environmental Policy Act (NEPA) . . . in the use of these grant funds";

f. will ensure any recipients, subrecipients, or employees of recipients do not engage in any "conduct related to trafficking in persons";

g. will ensure that any recipient or subrecipient will "comply with all applicable requirements of 28 C.F.R. Part 42" (pertaining to civil rights and non-discrimination).[22]

67. These conditions almost all relate to the administration and expenditure of the grant itself. The few conditions that apply to the general conduct of the recipient or subrecipient are expressly made applicable to federal grantees by statute. The Department of Justice's new conditions do not apply to the expenditure of the grant funding, and neither the jail access nor advance notification conditions discussed below invoke any existing federal law or statute. Meanwhile, the Section 1373 condition refers to a federal law that is wholly inapplicable to the JAG grant. The Department offered no statistics, studies, or legal authority to support its imposition of these 2017 conditions as promoting public safety and the law enforcement purposes of the JAG program.

68. Had Congress authorized the Attorney General to create new substantive conditions for Byrne JAG funds at his choosing, that would have upended Congress' formula approach for distributing funds under the program based on population and violent crime. That in turn would have resulted in the allocating of grants according to criteria invented by the Department of Justice. That is not the program Congress created. *See Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) ("Where Congress prescribes the form

[22] All of these conditions appear in Philadelphia's FY 2016 JAG award, attached as Exhibit 9.

in which an agency may exercise its authority, . . . we cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.").

C. Section 1373 Condition

69. On February 26, 2016, Congressman John Culberson, Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, sent a letter to then-Attorney General Loretta Lynch, inquiring whether recipients of Department of Justice grants were complying with Section 1373.[23]

70. The Culberson letter spurred the Office of Justice Programs ("OJP") at the Department of Justice to ask that the Department's Office of Inspector General ("OIG") investigate local jurisdictions' compliance with Section 1373. In an email sent from OJP to Inspector General Michael Horowitz on April 8, 2016, OJP indicated that it had "received information" indicating that several jurisdictions who receive OJP funding may be in violation of Section 1373 and attached a spreadsheet of over 140 state and local jurisdictions that it wanted OIG to investigate.[24]

71. On May 31, 2016, Inspector General Horowitz transmitted a report to Department of Justice Assistant Attorney General Karol Mason, reviewing the policies of ten state and local jurisdictions, including Philadelphia, and whether they comply with Section

[23] *See* Letter from Cong. Culberson to Attorney General Lynch (Feb. 26, 2016), *available at* https://goo.gl/Cytb3B. Congressman Culberson's letter was accompanied by analysis from the Center for Immigration Studies, a non-profit institute that describes itself as "animated by a 'low-immigration, pro-immigrant' vision of America that admits fewer immigrants but affords a warmer welcome for those who are admitted." *About the Center for Immigration Studies*, Center for Immigration Studies (last visited August 29, 2017 2:42 PM EDT), https://goo.gl/GrsfoQ.

[24] *See* Memorandum from Department of Justice Inspector General Michael Horowitz to Assistant Attorney General Karol Mason (May 31, 2016) (describing OJP's earlier email to OIG). A copy of this memorandum is attached as Exhibit 10.

1373.[25] The other jurisdictions analyzed were: Connecticut, California, City of Chicago (Illinois), Clark County (Nevada), Cook County (Illinois), Miami-Dade (Florida), Milwaukee County (Wisconsin), Orleans Parish (Louisiana), and New York City. The report expressed "concerns" with several of the localities' laws and policies. The report did not analyze the effects of any of the ten local jurisdictions' policies on crime rates or public safety.

72. On July 7, 2016, Assistant Attorney General Mason, who then oversaw the Office of Justice Programs, sent a Memorandum to Inspector General Horowitz conveying that, in response to OIG's report, "the Office of Justice Programs has determined that Section 1373 is an applicable federal law for the purposes of the Edward Byrne Memorial Justice Assistant Grant (JAG) program and the State Criminal Alien Assistance Program (SCAAP)."[26] There was no analysis supporting this conclusion whatsoever, nor any explanation for why OJP had not reached that conclusion during the prior ten years that it administered the JAG program.

73. Also on July 7, 2016, the Office of Justice Programs released a Question and Answer "Guidance" document, entitled "Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373."[27] The Q&A Guidance document stated that under the Department's new policy, "[a] JAG grantee is required to assure and certify compliance with all applicable federal statutes, including Section 1373." The document explained that Section 1373 "prevents federal, state, and local government entities and officials from 'prohibit[ing] or in any way restrict[ing]' government officials or entities from sending to, or receiving from, federal immigration officers information concerning an individual's citizenship or immigration status." But it further stated that "Section 1373 does not impose on states and localities the affirmative

[25] *Id.*
[26] Memorandum from Assistant Attorney General Karol Mason to Inspector General Michael Horowitz (July 7, 2016). A copy of this memorandum is attached as Exhibit 11.
[27] A copy of this guidance document is attached as Exhibit 12.

obligation to collect information from private individuals regarding their immigration status, nor does it require that statutes and localities take specific actions upon obtaining such information."

74. On October 6, 2016, OJP released a document entitled "Additional Guidance Regarding Compliance with 8 U.S.C. § 1373."[28] That document addressed the question, "Does OJP's guidance on 8 U.S.C. § 1373 impact FY 2016 funding?" And it answered: "No FY 2016 or prior year Byrne/JAG or SCAAP funding will be impacted. However, OJP expects that JAG and SCAAP recipients will use this time to examine their policies and procedures to ensure they will be able to submit the required assurances when applying for JAG and SCAAP funding in FY 2017."

75. As DOJ has conceded, Section 1373 imposes no affirmative obligation on state or local entities to collect immigration status information or take any specific actions upon receiving immigration status information. Nor does the statutory provision address ICE detainer requests or release-date notification requests.

76. Within a week of taking office, on January 25, 2017, President Trump issued Executive Order 13768, a sweeping order aimed at punishing "sanctuary" jurisdictions. Entitled "Enhancing Public Safety in the Interior of the United States," the order announced that it is the policy of the Executive Branch to withhold "Federal funds" from "jurisdictions that fail to comply with applicable Federal law" by acting as "sanctuary jurisdictions." Exec. Order 13768 §§ 1, 2(c). The Order directed the Attorney General and the Secretary of Homeland Security to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants," and authorized the Secretary of DHS to "designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary

[28] A copy of this guidance document is attached as Exhibit 13.

jurisdiction." *Id.* § 8(a). The Order was ultimately enjoined in large part by the United States District Court for the Northern District of California because the court found that it violated multiple constitutional provisions. *County of Santa Clara v. Trump*, --- F. Supp. 3d ----, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

77. As the *Santa Clara* case unfolded, the Trump Administration sharpened its focus both within the context of that lawsuit and more broadly on denying local jurisdictions grants disbursed by the Departments of Justice and Homeland Security *in particular*, as the mechanism for carrying out the Administration's efforts to crack down on so-called sanctuary cities. At the preliminary injunction hearing in March in the *Santa Clara* case, the lawyer for the government represented that the Executive Order only applied to three federal grants administered by the Departments of Justice and Homeland Security. *Id.* at *1.

78. On April 21, 2017, the Department of Justice sent letters to Philadelphia and eight other jurisdictions "alert[ing]" the recipients that "under the terms of your FY 2016 Byrne JAG grant, award 2016 DJ-BX-0949 from the Office of Justice Programs ('OJP'), your jurisdiction is required to submit documentation to OJP that validates your jurisdiction is in compliance with 8 U.S.C. § 1373."[29] The letter went on that "this documentation must be accompanied by an official legal opinion from counsel . . . [and] must be submitted to OJP no later than June 30, 2017." It provided that "[f]ailure to comply with this condition could result in the withholding of grant funds, suspension, or termination of the grant, ineligibility for future OJP grants or subgrants, or other action, as appropriate."

[29] Letter from Alan R. Hanson to Mayor Jim Kenney, *supra* note 4. Connecticut does not appear to have received such a letter, but the other nine jurisdictions in the OIG report did. *See* https://goo.gl/r16Gmb (collecting letters from Alan R. Hanson dated April 21, 2017).

79. On June 22, 2017, Philadelphia City Solicitor Sozi Pedro Tulante signed a formal "certification" memorandum declaring that the City determined it is in compliance with Section 1373 and explaining why.[30] The letter was addressed to Tracey Trautman, Acting Director of the Bureau of Justice Assistance at the Department of Justice and submitted to DOJ that day.

80. Philadelphia certified that, as a general matter, it does not collect immigration status information from its residents. Both Memorandum 01-06 and the Confidentiality Order bar City officials and employees from asking residents or other persons within the City for such information, subject to discrete exceptions. Philadelphia certified that it neither restricts nor prohibits its officials and employees from sharing immigration-status information with the federal government in contravention of Section 1373, because as a result of the City's aforementioned policies, the City is rarely in possession of that type of information.

81. Philadelphia also certified that it complies with Section 1373 because its policies allow for the sharing of immigration-status and other identifying information with federal authorities in the case of criminals or persons suspected of crime. Both the Confidentiality Order and Memorandum 06-01 mandate the continued cooperation between local officers and federal authorities in combating crime. Further, those policies allow for the disclosure and "transmi[ssion] . . . to federal authorities" of confidential information (i.e., immigration status information) by Philadelphia police officers when the individual is suspected of engaging in criminal activity.[31] The Confidentiality Order and Memorandum 01-06 also contain "savings clauses," which permit inquiry into or disclosure of immigration status information if "required by law."

[30] A copy of the City's certification memorandum is attached hereto as Exhibit 14.
[31] *See* Exhibit 14, at 7 (citing Sections 2B and 2C of the Confidentiality Order and Parts 3B and 3C of Memorandum 06-01).

82. Philadelphia also explained how its everyday law enforcement practices comply with Section 1373. Specifically, Philadelphia's use of the FBI's National Crime Information Center ("NCIC") database, its sharing access with ICE to certain information in the City's Preliminary Arraignment System ("PARS") database, and its use of the Automated Fingerprint Identification System ("AFIS"), all enable federal immigration authorities to access identifying information about any persons stopped, detained, arrested, or convicted of a crime in the City.

83. Philadelphia acknowledged that for witnesses of crimes, victims of crimes, and law-abiding persons seeking City services, its policies do mean that immigration status information, to the extent it inadvertently comes into the City's possession, is ordinarily not disclosed to the federal government. But Philadelphia contended that Section 1373 cannot be construed to require the City to disclose confidential information about those persons because reading the statute in such a manner would raise constitutional problems. Specifically, construing Section 1373 to impose that type of mandate on the City would undermine its core police powers under the U.S. Constitution and its critical interests in protecting the safety and welfare of its residents.

84. Philadelphia reserved the right to challenge the Section 1373 certification requirement on several grounds in its June 22, 2017 submission. Notably, it reserved the argument that the DOJ's insistence that localities certify compliance with Section 1373 as a condition of receiving Byrne JAG grants is itself unlawful and beyond the authority that Congress delegated to the Attorney General. It also argued that making JAG grants contingent on compliance with Section 1373 violates the Spending Clause.

85. Days after receiving certifications from Philadelphia and other jurisdictions, the Department of Justice expressed non-specific concerns with those submissions. It issued a press

release saying that "some of these jurisdictions have boldly asserted that they will not comply with requests from federal immigration authorities," and that "[i]t is not enough to assert compliance, the jurisdictions must actually be in compliance."[32] Although the press release noted that the DOJ was "in the process of reviewing" the certifications and planned to "examine these claims carefully," it has since provided no further guidance on the matter, has not indicated which certifications it finds problematic, and has not responded to Philadelphia's certification specifically.[33]

D. July 2017 Announcement Regarding Advance Notification and Jail Access Conditions

86. On July 25, 2017, the Department of Justice announced two *more* significant changes that it would be unilaterally making without authority to the Byrne JAG application process. In a two-paragraph press release and accompanying press "backgrounder," the Department announced that in addition to requiring applicants for the FY 2017 Byrne JAG award to again certify their compliance with Section 1373, applicants would be required to adhere to two additional conditions.[34] These conditions are (1) the "advance notification" condition and (2) the "jail access" condition.

87. Under the advance notification condition, the Department of Justice will now require Byrne JAG grantees to "provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act."[35]

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[32] *See* Exhibit 2.
[33] *Id.*
[34] Press Release, U.S. Dep't of Justice, *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs* (July 25, 2017), *available at* https://goo.gl/KBwVNP.
[35] *See* Exhibit 1.

88. The Department did not define the term "scheduled release date" as a part of the advance notification condition. The Federal Bureau of Prisons defines "date of release" as the "date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence . . . ." 18 U.S.C. § 3624. Similarly, within the Philadelphia Department of Prisons, only inmates serving sentences would have "scheduled release dates." Accordingly, the advance notification condition appears to apply only to those inmates in Philadelphia's prisons who have been convicted of crimes and are serving sentences not to the roughly 83% of inmates in PPS facilities who are in a pre-trial, pre-sentence, or other temporary detention posture, many of whom may be ordered released with less than 48 hours' notice (i.e., because they post bond or the charges against them are dropped). But this is far from clear.

89. Under the jail access condition, the Department of Justice will now require Byrne JAG grantees to "permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States."[36] Like the advance notification condition, the jail access condition is vague and ambiguous; it gives no indication of what "access" means, and whether jurisdictions will be deemed compliant as long as they permit ICE personnel to access their facilities in order to meet with inmates who have in turn consented to such meetings. By its broadest construction, this requirement appears to mandate that federal immigration agents be given unprecedented and unfettered access to local correctional or detention facilities, including to meet with and to question inmates on a non-consensual basis and/or without notice of their right to have counsel present.

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[36] *See id.*; *see also* U.S. Dep't of Justice, Office of Justice Programs, *Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards* (last visited Aug. 29, 2017, 2:42 PM EDT), https://goo.gl/PcnsXV. A printed copy of this webpage is attached as Exhibit 15.

90. The application deadline for local FY 2017 Byrne JAG funding the grant for which cities, such as Philadelphia, apply is September 5, 2017.[37]

91. The Department of Justice's July 25, 2017 announcement was accompanied by virtually no explanation for the change in policy and no opportunity for public notice and comment. The Department did not explain how it arrived at these conditions or what alternatives it considered. The press release is also noticeably silent as to the purpose of the Byrne JAG program and the ways in which the newly-imposed conditions or even complying with Section 1373 relate to, let alone serve to advance, the interests of the Byrne JAG program. The Department also failed to provide law enforcement with any guidance as to how the conditions will operate in practice.

92. As a result of the Department of Justice's actions, for Philadelphia to apply for the FY 2017 Byrne JAG grant on September 5, 2017 and receive the award, the City will have to (1) certify again its compliance with Section 1373, (2) be prepared to adhere to the advance notification condition, and (3) be prepared to comply with the jail access condition, despite the ambiguity about what each condition will entail.

93. Although Philadelphia is confident that it complies with Section 1373 and has certified as much, the Department of Justice has not responded to Philadelphia's June 22, 2017 certification nor provided the City any guidance on the matter. All the while, the Administration has made confusing and threatening public statements that leave the City uncertain as to whether its certification in the FY 2017 application will be accepted. Likewise, Philadelphia believes that its jail access policy may comply with the new jail access condition, because Philadelphia

[37] U.S. Dep't of Justice, Office of Justice Programs, *Edward Byrne Memorial Justice Assistance Grant Program: FY 2017 Local Solicitation* (Aug. 3, 2017), https://goo.gl/SfiKMM. A copy of the FY 2017 JAG Local Solicitation is attached as Exhibit 16.

allows ICE agents to enter PPS facilities to meet with individuals who have consented to such meetings; and Philadelphia believes its detainer and notification policies do not meaningfully interfere with the Department of Justice's prerogatives, because while Philadelphia does not provide advance notification of release without a judicial warrant, it rarely if ever gets notification requests from ICE for inmates who have scheduled release dates. However, Philadelphia is left only to wonder whether the Department of Justice will accept these contentions because the jail access and advance notification conditions are inscrutably vague.

III. IMPACT OF THE NEW JAG CONDITIONS ON PHILADELPHIA

94. None of the three new conditions imposed by the Department of Justice upon applicants for FY 2017 Byrne JAG funding can withstand legal scrutiny.

95. The authorizing statute creating the Byrne JAG grant program does not delegate authority to the Attorney General to impose these conditions. Rather, the authorizing statute allows the Attorney General to insist that applicants "comply with all … applicable Federal laws." 42 U.S.C. § 3752(a)(5)(D). None of the three conditions constitutes "applicable" federal requirements. Each deals with civil immigration enforcement something wholly *inapplicable* to criminal justice grants. And the last two conditions are not reflected in any existing federal law whatsoever: There is no federal law requiring local jurisdictions to provide ICE "at least 48 hours' advance notice" before they release alleged aliens in their custody, and there is no federal law requiring jurisdictions to grant access to DHS officials to their detention facilities.

96. In fact, Congress has considered and failed to enact legislation that would have stripped federal funding from states and localities that do not provide ICE advance notification of the release of persons for whom detainer requests have been sent. *See, e.g.*, Stop Dangerous Sanctuary Cities Act §3(a)(2), S. 1300, 114th Cong. (rejected by Senate July 6, 2016)

(entities that do not "comply with a detainer for, or notify about the release of, an individual" in response to requests made by ICE shall be ineligible for public works and economic development grants and community development block grants). The fact that Congress failed to pass bills of this type demonstrates that Congress considered and then chose not to link federal spending to advance notification.

97. The Department of Justice's new conditions also represent a sharp break with past agency practice. The agency has never before attached any conditions of this nature to Byrne JAG funds.

98. The Department of Justice's imposition of the conditions violates several bedrock constitutional principles. The Department's actions violate the Separation of Powers between Congress and the Executive. They also exceed limits on the federal government's ability to place conditions on federal funds under the Spending Clause. In particular, although conditions on federal funds must be germane to the purpose of the federal program, the Department's new conditions bear no relation to the purpose of the Byrne JAG program. Moreover, the conditions are woefully ambiguous, leaving cities like Philadelphia guessing as to how to comply. At its worst, this ambiguity threatens to induce unconstitutional action, as the conditions could potentially be construed to require localities to detain individuals of interest to ICE even after they have been ordered released.

99. If the City is forced to comply with the Department's new conditions in order to receive its FY 2017 JAG award, and if those conditions are not construed in accordance with constitutional and reasonable limits, the result would be that Philadelphia would be forced to significantly change several of its policies. In turn, such changes would compromise the City's criminal enforcement, public safety, and health and welfare.

100. Philadelphia believes that it does already comply with Section 1373 when read in light of the U.S. Constitution. But if Section 1373 is interpreted to extend to victims, witnesses, and law-abiding persons in the City and to require that Philadelphia allow for the unfettered disclosure to federal authorities of those persons' immigration status information that would require Philadelphia to overhaul several of its policies, including Memorandum 01-06 and the Confidentiality Order. The trust that Philadelphia has worked so hard to build with its immigrant population would be broken, and the City's efforts to prosecute crimes to completion, provide redress to victims, and ensure full access to City services, would be hindered.

101. Philadelphia also believes that it may already comply with the jail access condition. The Department of Justice did not define the term "access" or explicitly state that jurisdictions must permit entry to ICE even when an inmate refuses to speak with ICE; Philadelphia, meanwhile, allows for meetings to which inmates consent. However, the condition as written is exceedingly vague, and in its most unreasonable light could be read to insist that jurisdictions provide federal agents unrestrained entry to their detention facilities. Requiring Philadelphia to apply for the FY 2017 grant amidst this uncertainty is harmful in itself, and if the Department takes an extreme reading, it could result in forcing Philadelphia to sacrifice an important local prerogative. Philadelphia should not be compelled to abandon its efforts to protect the constitutional rights of its inmates, nor to take actions that will sow the very fear and mistrust among the immigrant population that the City has worked so hard to overcome.

102. Philadelphia further believes that its notification and detainer policies do not meaningfully conflict with the Department of Justice's policy concerns that underlie the advance notification condition. Although Philadelphia only provides advance notification of an inmate's release when ICE presents a judicial warrant, ICE rarely sends advance notification requests for

inmates who have scheduled release dates. Given the ambiguity and lack of explanation for the condition, however, Philadelphia cannot be sure that the Department will accept the City's position. Requiring Philadelphia to apply for the FY 2017 grant amidst this uncertainty is harmful in itself, and if the Department seeks to apply the condition in its most extreme and unreasonable light, it could result in forcing Philadelphia to sacrifice an important local prerogative.

103. If the City's application for the FY 2017 Byrne JAG award is rejected or withheld, or if its award is clawed back, either because the Department of Justice rejects the City's Section 1373 certification, or because the Department insists on certain activities pursuant to the advance notification and jail access conditions and the City refuses to comply, the vitality of Philadelphia's criminal justice programs would be placed in jeopardy.

104. As a result of the injuries Philadelphia will suffer in all of the above circumstances, Philadelphia faces a significant danger of harm due to the Department of Justice's imposition of the new conditions for the FY 2017 grant.

CAUSES OF ACTION

COUNT I
(Violation of the Administrative Procedure Act through *Ultra Vires* Conduct Not Authorized by Congress in the Underlying Statute)

105. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

106. The Department of Justice may only exercise authority conferred by statute. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013).

107. The Byrne JAG statute provides no authority to the Attorney General to impose conditions on the receipt of Byrne JAG funds that are neither reflected in "applicable Federal laws" nor concern the administration of the JAG program itself.

108. The three conditions added to the FY 2017 grant by the Department of Justice are neither "applicable Federal laws" nor conditions that deal with the administration and spending of the Byrne JAG funds.

109. The Attorney General's imposition of the new conditions is unauthorized by statute.

110. The Attorney General's imposition of the new conditions also contradicts the formula-grant structure of the Byrne JAG program. *See* 42 U.S.C. § 3755(d)(2)(A).

111. The APA requires courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdictions, authority, or limitations[.]" 5 U.S.C. § 706(2)(A)-(C).

112. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the Attorney General is without the statutory authority to impose the Section 1373, advance notification, and jail access conditions on FY 2017 Byrne JAG funds, and in doing so, has acted contrary to law under the APA. Plaintiff is also entitled to a permanent injunction preventing the Attorney General from putting those conditions into effect.

COUNT II
(Violation of the Administrative Procedure Act through Violation of the Constitution's Separation-of-Powers)

113. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

114. The Constitution vests Congress, not the President or officials in the Executive Branch, with the power to appropriate funding to "provide for the . . . general Welfare of the United States." U.S. Const. art I, § 8, cl. 1.

115. The President's constitutional duty and that of his appointees in the Executive Branch is to "take Care that the Law be faithfully executed." U.S. Const. art. II, § 3, cl. 5.

116. The President "does not have unilateral authority to refuse to spend . . . funds" that have already been appropriate by Congress "for a particular project or program." *In re Aiken Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013); *see also Train v. City of New York*, 420 U.S. 35, 44 (1975).

117. The President also cannot amend or cancel appropriations that Congress has duly enacted because doing such violates the Presentment Clause of the Constitution and results in the President purporting to wield a constitutional power not vested within his office. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

118. Imposing a new condition on a federal grant program amounts to refusing to spend money appropriated by Congress unless that condition is satisfied.

119. The Section 1373 condition was not imposed by Congress, but rather by the Department of Justice in issuing its Office of Justice Program Guidance for FY 2016 Byrne JAG awards and its FY 2017 Byrne JAG application. Therefore, the Section 1373 condition amounts to an improper usurpation of Congress's spending power by the Executive Branch.

120. The advance notification and jail access conditions were not imposed by Congress, but rather by the Department in issuing the FY 2017 Byrne JAG application. Therefore, the imposition of the advance notification and jail access conditions amounts to an improper usurpation of Congress's spending power by the Executive Branch.

121. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the Attorney General's imposition of the Section 1373, advance notification, and jail access conditions violates the constitutional principle of separation of powers and impermissibly

arrogates to the Executive Branch power that which is reserved for the Legislative Branch. Plaintiff is also entitled to a permanent injunction preventing the Attorney General from putting those conditions into effect.

COUNT III
(Violation of the Administrative Procedure Act through Arbitrary and Capricious Agency Action)

122. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

123. The Department of Justice's decision to impose the Section 1373, advance notification, and jail access conditions on the receipt of FY 2017 Byrne JAG funds deviates from past agency practice without reasoned explanation or justification.

124. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the Attorney General's imposition of the Section 1373, advance notification, and jail access conditions is arbitrary and capricious. Plaintiff is also entitled to a permanent injunction preventing the Attorney General from putting those conditions into effect.

COUNT IV
(Spending Clause)

125. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

126. Congress could not have authorized the immigration-related conditions attached the Byrne JAG award here because they do not satisfy the requirements of the Spending Clause of the Constitution.

127. None of the three conditions is "reasonably related" or "germane[]" to the federal interest that underlies the Byrne JAG grant program. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 & n.3 (1987) (conditions must be "reasonably related," or "germane[]," to the particular program); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (the attached "conditions must . . . bear some relationship to the purpose of the federal spending"). The three

conditions all deal with federal civil immigration enforcement, not localities' enforcement of state or local criminal law.

128. The three conditions threaten the federal interest that underlies the Byrne JAG program. They undermine Congress's goals of dispersing funds across the country, targeting funds to combat violent crime, and respecting local judgment in setting law enforcement strategy.

129. The Department's imposition of the conditions also violates the requirement that Spending Clause legislation "impose unambiguous conditions on states, so they can exercise choices knowingly and with awareness of the consequences." *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 175 (3d Cir. 2002).

130. Moreover, because the conditions are ambiguous, they arguably require cities to infringe on individuals' Fourth and Fifth Amendment rights, violating the prohibition on Spending Clause conditions that "induce unconstitutional action." *Koslow*, 302 F.3d at 175.

131. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that the imposition of the three immigration-related conditions for the FY 2017 Byrne JAG violates the Constitution's Spending Clause as well as an injunction preventing those conditions from going into effect.

COUNT V
(Tenth Amendment: Commandeering)

132. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

133. The Tenth Amendment prohibits the federal government from "requir[ing]" states and localities "to govern according to Congress's instructions," *New York*, 505 U.S. at 162, and from "command[ing] the States' officers . . . to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997).

134. Where the "whole object" of a provision of a federal statute is to "direct the functioning" of state and local governments, that provision is unconstitutional, *Printz*, 521 U.S. at 932, and must be enjoined, *id*. at 935; *New York*, 505 U.S. at 186-187. That description precisely fits each of the three immigration-related conditions.

135. If Section 1373 is interpreted to extend to information sharing about witnesses, victims, and law-abiding persons in the City, and to require that Philadelphia provide federal authorities unfettered access to immigration status information about such persons, that would hamper Philadelphia's ability to ensure law and order. As a result, Philadelphia's personnel would be "commandeered" to perform federal functions rather than to pursue local priorities, in violation of the Tenth Amendment.

136. The advance notification and jail access conditions, in their most extreme and unreasonable lights, could be construed to require that Philadelphia change its policies concerning the administration of its detention facilities and the providing of advance notification of release to ICE only pursuant to a judicial warrant. That federalization of bedrock local police power functions would violate the Tenth Amendment's anti-commandeering principle.

137. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that if Section 1373 or the other two grant conditions are construed by the Department to conflict with Philadelphia's local policies, that would result in a violation of the Tenth Amendment. Plaintiff is entitled to a permanent injunction preventing the Department from taking such an interpretation.

COUNT VI
(Declaratory Judgment Act: Philadelphia Complies with 8 U.S.C. § 1373)

138. Plaintiff incorporates by reference the allegations of the preceding paragraphs.

139. Philadelphia certified its compliance with Section 1373 to the Department of Justice in a June 22, 2017 legal opinion signed by the City's Solicitor and describing the basis for the City's certification.

140. Philadelphia complies with Section 1373 to the extent it can be constitutionally enforced vis-a-vis the City.

141. Philadelphia's policies, namely Memorandum 01-06 and the Confidentiality Order, direct City officials and employees not to collect immigration status information unless such collection is required by state or federal law. Because Philadelphia cannot restrict the sharing of information it does not collect, the City's policy of non-collection renders it necessarily compliant with Section 1373 for all cases covered by the non-collection policy.

142. Where City officials or agents do incidentally come to possess immigration status information, the City has no policy prohibiting or restricting the sharing of such information contrary to Section 1373. Both Memorandum 06-01 and the Confidentiality Order contains "saving clauses" that limits the disclosure of an individual's citizenship or immigration status information "unless such disclosure is required by law." Both policies also direct City police officers to cooperate with federal authorities in the enforcement of the criminal law, and to provide identifying information to federal authorities, when requested, about criminals or criminal suspects within the City.

143. Any non-disclosure about immigration status information that the City's policies directs in the case of witnesses of crimes, victims of crimes, and law-abiding individuals seeking City services, is consistent with Section 1373 when read in light of the Constitution.

144. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaration that it complies with Section 1373 as properly construed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court:

a. Declare that all three immigration-related conditions for the FY 2017 Byrne JAG are unlawful;

b. Declare that Philadelphia complies with 8 U.S.C. § 1373 as properly construed;

c. Permanently enjoin the Department of Justice from enforcing the advance notification, jail access, or Section 1373 conditions for the FY 2017 Byrne JAG and retain jurisdiction to monitor the Department's compliance with this Court's judgment;

d. Grant such other relief as this Court may deem proper; and

e. Award Philadelphia reasonable costs and attorneys' fees.

DATED: August 30, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC., Plaintiffs, vs. DONALD J. TRUMP, *et al*., Defendants.	Civil No. 17-00050 DKW-KSC **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Professional athletes mirror the federal government in this respect: they operate within a set of rules, and when one among them forsakes those rules in favor of his own, problems ensue. And so it goes with EO-3.

On June 12, 2017, the Ninth Circuit affirmed this Court's injunction of Sections 2 and 6 of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("EO-2"). *Hawaii v. Trump,* 859 F.3d 741 (9th Cir. 2017). The Ninth Circuit did so because "the President, in issuing the Executive Order, exceeded the scope of the

authority delegated to him by Congress" in 8 U.S.C. § 1182(f). *Hawaii,* 859 F.3d at 755. It further did so because EO-2 "runs afoul of other provisions of the [Immigration and Nationality Act ('INA'), specifically 8 U.S.C. § 1152,] that prohibit nationality-based discrimination." *Hawaii,* 859 F.3d at 756.

Enter EO-3.[1] Ignoring the guidance afforded by the Ninth Circuit that at least this Court is obligated to follow, EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries[2] would be "detrimental to the interests of the United States," a precondition that the Ninth Circuit determined must be satisfied before the Executive may properly invoke Section 1182(f). *Hawaii,* 859 F.3d at 774. And EO-3 plainly discriminates based on nationality in the manner that the Ninth Circuit has found antithetical to both Section 1152(a) and the founding principles of this Nation. *Hawaii*, 859 F.3d at 776 79.

Accordingly, based on the record before it, the Court concludes that Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their statutory claims, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of

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[1]Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter EO-3].
[2]EO-3 § 2 actually bars the nationals of *more than* six countries, and does so indefinitely, but only the nationals from six of these countries are at issue here.

granting the requested relief. Plaintiffs' Motion for a Temporary Restraining Order (ECF No. 368) is GRANTED.

BACKGROUND

I. The President's Executive Orders

On September 24, 2017, the President signed Proclamation No. 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." Like its two previously enjoined predecessors, EO-3 restricts the entry of foreign nationals from specified countries, but this time, it does so indefinitely. Plaintiffs State of Hawai'i ("State"), Ismail Elshikh, Ph.D., John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc., seek a nationwide temporary restraining order ("TRO") that would prohibit Defendants[3] from enforcing and implementing Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect. Pls.' Mot. for TRO 1, ECF No. 368.[4] The Court briefly recounts the history of the Executive Orders and related litigation.

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[3]Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the United States Department of Homeland Security ("DHS"); Elaine Duke, in her official capacity as Acting Secretary of DHS; the United States Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

[4]On October 14, 2017, the Court granted Plaintiffs' unopposed Motion for Leave to File Third Amended Complaint (ECF. No. 367), and, on October 15, 2017, Plaintiffs filed their Third Amended Complaint ("TAC"; ECF No. 381).

A. The Executive Orders and Related Litigation

On January 27, 2017, the President signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter EO-1]. EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO-1 took immediate effect and was challenged in several venues shortly after it issued. On February 3, 2017, a federal district court granted a nationwide TRO enjoining EO-1. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, 2017, the Ninth Circuit denied the Government's emergency motion for a stay of that injunction. *Washington v. Trump*, 847 F.3d 1151, 1161 64 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017). As described by a subsequent Ninth Circuit panel, "[r]ather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal [of EO-1] after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1." *Hawaii*, 859 F.3d at 757.

On March 6, 2017, the President issued EO-2, which was designed to take effect on March 16, 2017. 82 Fed. Reg. 13209 (Mar. 6, 2017). Among other

things, EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 directed the Secretary to report those findings to the President, after which nations identified as "deficient" would have an opportunity to alter their practices, prior to the Secretary recommending entry restrictions. *Id.* §§ 2(d) (f).

During this global review, EO-2 contemplated a temporary, 90-day suspension on the entry of certain foreign nationals from six countries Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by this Court and by a federal district court in Maryland. *See Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017)[5]; *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed in relevant part by the respective courts of appeals. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted certiorari in both cases and left the injunctions in place pending its review, except as to persons who lacked a "credible

[5]This Court also enjoined the 120-day suspension on refugee entry under Section 6. *Hawaii v. Trump*, 245 F. Supp. 3d at 1238.

claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017).[6]

B. EO-3

The President signed EO-3 on September 24, 2017. EO-3's stated policy is to protect United States "citizens from terrorist attacks and other public-safety threats," by preventing "foreign nationals who may . . . pose a safety threat . . . from entering the United States."[7] EO-3 pmbl. EO-3 declares that "[s]creening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy." EO-3 § 1(a). Further, because "[g]overnments manage the identity and travel documents of their nationals and residents," it is "the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems." *Id.* § 1(b).

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[6]After EO-2's 90-day entry suspension expired, the Supreme Court vacated the *IRAP* injunction as moot. *See Trump v. IRAP*, No. 16-1436, --- S. Ct. ---, 2017 WL 4518553 (Oct. 10, 2017).
[7]EO-3 is founded in Section 2 of EO-2. *See* EO-2 § 2(e) (directing that the Secretary of Homeland Security "shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of [specified] countries").

As a result of the global reviews undertaken by the Secretary of Homeland Security in consultation with the Secretary of State and the Director of National Intelligence, and following a 50-day "engagement period" conducted by the Department of State, the Acting Secretary of Homeland Security submitted a September 15, 2017 report to the President recommending restrictions on the entry of nationals from specified countries. *Id.* § 1(c) (h). The President found that, "absent the measures set forth in [EO-3], the immigrant and nonimmigrant entry in the United States of persons described in section 2 of [EO-3] would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions." EO-3 pmbl.

Section 2 of EO-3 indefinitely bans immigration into the United States by nationals of seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea. EO-3 also imposes restrictions on the issuance of certain nonimmigrant visas to nationals of six of those countries. It bans the issuance of all nonimmigrant visas except student (F and M) and exchange (J) visas to nationals of Iran, and it bans the issuance of business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas to nationals of Chad, Libya, and Yemen. EO-3 §§ 2(a)(ii), (c)(ii), (g)(ii). EO-3 suspends the issuance of business, tourist, and business-tourist visas to specific Venezuelan government officials and their families, and bars the receipt of

nonimmigrant visas by nationals of North Korea and Syria. *Id.* §§ 2(d)(ii), (e)(ii), (f)(ii).

EO-3, like its predecessor, provides for discretionary case-by-case waivers. *Id.* § 3(c). The restrictions on entry became effective immediately for foreign nationals previously restricted under EO-2 and the Supreme Court's stay order, but for all other covered persons, the restrictions become effective on October 18, 2017 at 12:01 a.m. eastern daylight time. EO-3 §§ 7(a), (b).

II. Plaintiffs' Motion For TRO

Plaintiffs' Third Amended Complaint (ECF No. 381) and Motion for TRO (ECF No. 368) contend that portions of the newest entry ban suffer from the same infirmities as the enjoined provisions of EO-2 § 2.[8] They note that the President "has never renounced or repudiated his calls for a ban on Muslim immigration." TAC ¶ 88. Plaintiffs observe that, in the time since this Court examined EO-2, the

[8]Plaintiffs assert the following causes of action in the TAC: (1) violation of 8 U.S.C. § 1152(a)(1)(a) (Count I); (2) violation of 8 U.S.C. §§ 1182(f) and 1185(a) (Count II); (3) violation of 8 U.S.C. § 1157(a) (Count III); (4) violation of the Establishment Clause of the First Amendment (Count IV); (5) violation of the Free Exercise Clause of the First Amendment (Count V); (6) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count VI); (7) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a) (Count VII); (8) substantive violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A) (C), through violations of the Constitution, INA, and RFRA (Count VIII); and (9) procedural violation of the APA, 5 U.S.C. § 706(2)(D) (Count IX).

record has only gotten worse. *See* Pls.' Mem. in Supp. 31, ECF. No. 368-1; TAC ¶¶ 84 88.[9]

The State asserts that EO-3 inflicts statutory and constitutional injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. TAC ¶¶ 14 32. Additional Plaintiffs John Doe 1 and John Doe 2 have family members who will not be able to travel to the United States. TAC ¶¶ 33 41. The Muslim Association of Hawaii is a non-profit entity that operates mosques on three islands in the State of Hawai'i and includes members from Syria, Somalia, Iran, Yemen, and Libya who are naturalized United States citizens or lawful permanent residents. TAC ¶¶ 42 45.

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[9]For example, on June 5, 2017, "the President endorsed the 'original Travel Ban' in a series of tweets in which he complained about how the Justice Department had submitted a 'watered down, politically correct version'" to the Supreme Court. TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:29 AM EDT) https://goo.gl/dPiDBu). He further tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM EDT), https://goo.gl/9fsD9K). He later added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM EDT), https://goo.gl/VGaJ7z). Plaintiffs also point to "remarks made on the day that EO-3 was released, [in which] the President stated: 'The travel ban: The tougher, the better.'" TAC ¶ 94 (quoting The White House, Office of the Press Sec'y, *Press Gaggle by President Trump, Morristown Municipal Airport, 9/24/2017* (Sept. 24, 2017), https://goo.gl/R8DnJq).

Plaintiffs ask the Court to temporarily enjoin on a nationwide basis the implementation and enforcement of EO-3 Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect.[10] For the reasons that follow, the Court orders exactly that.

DISCUSSION

I. Plaintiffs Satisfy Standing and Justiciability

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180 81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in

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[10]Plaintiffs do not seek to enjoin the entry ban with respect to North Korean or Venezuelan nationals. *See* Mem. in Supp. 10 n.4; ECF. No. 368-1.

support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561).

1. The State Has Standing

The State alleges standing based upon injuries to its proprietary and quasi-sovereign interests, *i.e.*, in its role as *parens patriae*. Just as the Ninth Circuit previously concluded in reviewing this Court's order enjoining EO-2, 859 F.3d 741, and a different Ninth Circuit panel found on a similar record in *Washington*, 847 F.3d 1151, the Court finds that the alleged harms to the State's proprietary interests are sufficient to support standing.[11]

The State, as the operator of the University of Hawai'i system, will suffer proprietary injuries stemming from EO-3.[12] The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. Plaintiffs allege that EO-3 will hinder the University from recruiting and retaining a

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[11]The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

[12]The State has asserted other proprietary interests including the loss of tourism revenue, a leading economic driver in the State. The Court does not reach this alternative argument because it concludes that the State's proprietary interests, as an operator of the University of Hawai'i, are sufficient to confer standing. *See Hawaii*, 859 F.3d at 766 n.6 (concluding that the interests, as an operator of the University of Hawai'i, and its sovereign interests in carrying out its refugee programs and policies, are sufficient to confer standing (citing *Washington*, 847 F.3d at 1161 n.5)).

world-class faculty and student body. TAC ¶¶ 99 102; Decl. of Donald O. Straney ¶¶ 8 15, ECF. No. 370-6. The University has 20 students from the eight countries designated in EO-3, and has already received five new graduate applications from students in those countries for the Spring 2018 Term. Straney Decl. ¶ 13. It also has multiple faculty members and scholars from the designated countries and uncertainty regarding the entry ban "threatens the University's recruitment, educational programming, and educational mission." Straney Decl. ¶ 8. Indeed, in September 2017, a Syrian journalist scheduled to speak at the University was denied a visa and did not attend a planned lecture, another lecture series planned for November 2017 involving a Syrian national can no longer go forward, and another Syrian journalist offered a scholarship will not likely be able to attend the University if EO-3 is implemented. Decl. of Nandita Sharma ¶¶ 4 9, ECF No. 370-8.

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's controlling decisions in *Hawaii* and *Washington*. *See Hawaii*, 859 F.3d at 765 ("The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student

body."); *Washington*, 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave.").

As before, the Court "ha[s] no difficulty concluding that the [Plaintiffs'] injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the [law] and an injunction barring its enforcement." *Washington*, 847 F.3d at 1161. For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) such harms can be sufficiently linked to EO-3; and (3) the State would not suffer the harms to its proprietary interests in the absence of implementation of EO-3. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

2. <u>The Individual Plaintiffs Have Standing</u>

The Court next turns to the three individual Plaintiffs and concludes that they too have standing with respect to the INA-based statutory claims.

a. Dr. Elshikh

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai‘i for over a decade. Decl. of Ismail Elshikh ¶ 1, ECF No. 370-9. He is the Imam of the Muslim Association of Hawaii and a leader within the State's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His Syrian mother-in-law recently received an immigrant visa and, in August 2017, came to Hawai‘i to live with his family. Elshikh Decl. ¶ 5. His wife's four brothers are Syrian nationals, currently living in Syria, with plans to visit his family in Hawai‘i in March 2018 to celebrate the birthdays of Dr. Elshikh's three sons. Elshikh Decl. ¶ 6. On October 5, 2017, one of his brothers-in-law filed an application for a nonimmigrant visitor visa. Elshikh Decl. ¶ 6. Dr. Elshikh attests that as a result of EO-3, his family will be denied the company of close relatives solely because of their nationality and religion, which denigrates their faith and makes them feel they are second-class citizens in their own country. Elshikh Decl. ¶ 7.

Dr. Elshikh seeks to reunite his family members.

> By suspending the entry of nationals from the [eight] designated countries, including Syria, [EO-3] operates to delay or prevent the issuance of visas to nationals from those countries, including Dr. Elshikh's [brother]-in-law. Dr. Elshikh has alleged a

> concrete harm because [EO-3] . . . is a barrier to reunification with his [brother]-in-law.

Hawaii, 859 F.3d at 763. It is also clear that Dr. Elshikh has established causation and redressability. His injuries are fairly traceable to EO-3, satisfying causation, and enjoining EO-3 will remove a barrier to reunification, satisfying redressability. Dr. Elshikh has standing to assert his claims, including statutory INA violations.

b. <u>John Doe 1</u>

John Doe 1 is a naturalized United States citizen who was born in Yemen and has lived in Hawai‘i for almost 30 years. Decl. of John Doe 1 ¶ 1, ECF No. 370-1. His wife and four children, also United States citizens, are Muslim and members of Dr. Elshikh's mosque. Doe 1 Decl. ¶¶ 2 3. One of his daughters, who presently lives in Hawai‘i along with her own child, is married to a Yemeni national who fled the civil war in Yemen and is currently living in Malaysia. Doe 1 Decl. ¶¶ 4-6. In September 2015, his daughter filed a petition to allow Doe 1's son-in-law to immigrate to the United States as the spouse of a United States citizen, and in late June 2017, she learned that her petition had successfully passed through the clearance stage. Doe 1 Decl. ¶¶ 7 9. She has filed a visa application with the National Visa Center and estimates that, under normal visa processing procedures, he would receive a visa within the next three to twelve months. However, in light of EO-3, the issuance of immigrant visas to nationals of Yemen will be effectively

barred, which creates uncertainty for the family. Doe 1 Decl. ¶¶ 9 10. Doe 1's family misses the son-in law and wants him to be able to live in Hawai'i with Doe 1's daughter and grandchild. Doe 1 Decl. ¶¶ 11, 12 ("By singling our family out for special burdens, [EO-3] denigrates us because of our faith and sends a message that Muslims are outsiders and are not welcome in this country.").

Doe 1 alleges a sufficient injury-in-fact. He and his family seek to reunite with his son-in-law and avoid a prolonged separation from him. *See Hawaii*, 859 F.3d at 763 (finding standing sufficient where "Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her"); *see also id.* ("This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." (collecting authority)). Likewise, Doe 1 satisfies the requirements of causation and redressability. His injuries are fairly traceable to EO-3, and enjoining its implementation will remove a barrier to reunification and redress that injury.

c. <u>John Doe 2</u>

John Doe 2 is a lawful permanent resident of the United States, born in Iran, currently living in Hawai'i and working as a professor at the University of Hawai'i. Decl. of John Doe 2 ¶¶ 1 3, ECF. No. 370-2. His mother is an Iranian national with a pending application for a tourist visa, filed several months ago. Doe 2 Decl. ¶ 4.

Several other close relatives also Iranian nationals living in Iran similarly submitted applications for tourist visas a few months ago and recently had interviews in connection with their applications. They intend to visit Doe 2 in Hawai‘i as soon as their applications are approved. Doe 2 Decl. ¶ 5. If implemented, EO-3 will block the issuance of tourist visas from Iran and separate Doe 2 from his close relatives. If EO-3 persists, Doe 2 is less likely to remain in the United States because he will be indefinitely deprived of the company of his family. Doe 2 Decl. ¶ 8. Because his family cannot visit him in the United States, Doe 2's life has been more difficult, and he feels like an outcast in his own country. Doe 2 Decl. ¶ 8.

Like Dr. Elshikh and Doe 1, Doe 2 sufficiently alleges a concrete harm because EO-3 is a barrier to visitation or reunification with his mother and other close relatives. It prolongs his separation from his family members due to their nationality. The final two aspects of Article III standing causation and redressability are also satisfied. Doe 2's injuries are traceable to EO-3, and if Plaintiffs prevail, a decision enjoining portions of EO-3 would redress that injury.

3. The Muslim Association of Hawaii Has Standing

The Muslim Association of Hawaii is the only formal Muslim organization in Hawai‘i and serves 5,000 Muslims statewide. Decl. of Hakim Ouansafi ¶¶ 4 5,

ECF. No. 370-1. The Association draws upon new arrivals to Hawai‘i to add to its membership and "community of worshippers, including persons immigrating as lawful permanent residents and shorter-term visitors coming to Hawaii for business, professional training, university studies, and tourism." Ouansafi Decl. ¶ 11. Current members of the Association include "foreign-born individuals from Syria, Somalia, Iran, Yemen, and Libya who are now naturalized U.S. citizens or lawful permanent residents." Ouansafi Decl. ¶ 12. EO-3 will decrease the Association's future membership from the affected countries and deter current members from remaining in Hawai‘i. Ouansafi Decl. ¶¶ 13, 18; *see also id.* at ¶ 14 ("EO-3 will deter our current members from remaining . . . because they cannot receive visits from their family members and friends from the affected countries if they do. I personally know of at least one family who made that difficult choice and left Hawaii and I know others who have talked about doing the same.").

According to the Association's Chairman, EO-3 will likely result in a decrease in the Association's membership and in visitors to its mosques, which in turn, will directly harm the Association's finances. Ouansafi Decl. ¶¶ 18 19. Members of the Association have experienced fear and feelings of national-origin discrimination because of the prior and current entry bans. Ouansafi Decl. ¶¶ 21 22 ("That fear has led to, by way of example, children wanting to change their

Muslim names and parents wanting their children not to wear head coverings to avoid being victims of violence. Some of our young people have said they want to change their names because they are afraid to be Muslims. There is real fear within our community especially among our children and American Muslims who were born outside the United States."); *id.* ¶ 23 ("Especially because it is permanent, EO-3 has even more so than its predecessor bans caused tremendous fear, anxiety, and grief for our members.").

The Association, by its Chairman Hakim Oaunsafi, has sufficiently demonstrated standing in its own right, at this stage. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[A]n association may have standing [to sue] "in its own right . . . to vindicate whatever rights and immunities the association itself may enjoy[, and in doing so,] [m]ay assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." (citations omitted)). In order to establish organizational standing, the Association must "meet the same standing test that applies to individuals." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 813 (N.D. Cal. 2007) (citation omitted). The Association satisfies the injury-in-fact requirement. It alleges a "concrete and demonstrable injury to the organization's activities with a consequent drain on the organization's resources constituting more than simply a setback to the

organization's abstract social interests." *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 813 (quoting *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997)). The Association further satisfies the causation and redressability prongs. *See* Ouansafi Decl. ¶¶ 18 22.

Having determined that Plaintiffs each satisfy Article III's standing requirements, the Court turns to whether Plaintiffs are within the "zone of interests" protected by the INA.

B. Statutory Standing

Because Plaintiffs allege statutory claims based on the INA, the Court examines whether they meet the requirement of having stakes that "fall within the zone of interests protected by the law invoked." *Hawaii*, 859 F.3d at 766 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)). Like the Ninth Circuit, this Court has little trouble determining that Dr. Elshikh, Doe 1 and Doe 2 do so. *Hawaii*, 859 F.3d at 766. Each sufficiently asserts that EO-3 prevents them from reuniting with close family members. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 72 (D.C. Cir. 1995) ("In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the

statute, the resident appellants fall well within the zone of interest Congress intended to protect." (citations, alterations, and internal quotation marks omitted)), *vacated on other grounds*, 519 U.S. 1 (1996). Similarly, the Association and its members are "at least *arguably* with in the zone of interests that the INA protects." *See Hawaii*, 859 F.3d at 767 (quoting *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017)). The Association's interest in facilitating the religious practices of its members "to visit each other to connect [and] for the upholding of kinship ties," which are negatively impacted by EO-3, Ouansafi Decl. ¶ 10, and its interest in preventing harm to members who "cannot receive visits from family members from the affected countries," Ouansafi Decl. ¶ 15, fall within the same zone of interests.

Equally important, "the State's efforts to enroll students and hire faculty members who are nationals from [the list of] designated countries fall within the zone of interests of the INA." *Hawaii*, 859 F.3d at 766 (citing relevant INA provisions relating to nonimmigrant students, teachers, scholars, and aliens with extraordinary abilities). Thus, the "INA leaves no doubt that the State's interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawaii*, 859 F.3d at 766.

In sum, Plaintiffs fall within the zone of interests and have standing to challenge EO-3 based on their INA claims.

C. Ripeness

Plaintiffs' claims are also ripe for review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 580 81 (1985)). The Government advances that assertion here because none of the aliens abroad identified by Plaintiffs has yet been refused a visa based on EO-3. Mem. in Opp'n 14 15, ECF No. 378.

The Government's premise is not true. Plaintiffs allege current, concrete injuries to themselves and their close family members, injuries that have already occurred and that will continue to occur once EO-3 is fully implemented and enforced.[13] Moreover, the Ninth Circuit has previously rejected materially identical ripeness contentions asserted by the Government. *Hawaii*, 859 F.3d at 767 68 ("declin[ing] the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver," and instead, "conclud[ing] that the claim is ripe for review").

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[13] *See, e.g.*, Sharma Decl. ¶¶ 4 9, ECF No. 370-8 (describing denial of visa to Syrian journalist and cancellation of University lecture since signing of EO-3)

Plaintiffs' INA-based statutory claims are therefore ripe for review on the merits.

D. Justiciability

Notwithstanding the Ninth Circuit's recent rulings to the contrary, the Government persists in its contention that Plaintiffs' statutory claims are not reviewable. "[C]ourts may not second-guess the political branches' decisions to exclude aliens abroad where Congress has not authorized review, which it has not done here." Mem. in Opp'n 4. In doing so, the Government again invokes the doctrine of consular nonreviewability in an effort to circumvent judicial review of seemingly any Executive action denying entry to an alien abroad. *See* Mem. in Opp'n 12 13 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)).

The Government's contentions are troubling. Not only do they ask this Court to overlook binding precedent issued in the specific context of the various executive immigration orders authored since the beginning of 2017, but they ask this Court to ignore its fundamental responsibility to ensure the legality and constitutionality of EO-3. Following the Ninth Circuit's lead, this Court declined such an invitation before and does so again. *See Washington*, 847 F.3d at 1163 (explaining that courts are empowered to review statutory and constitutional

"challenges to the substance and implementation of immigration policy" (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005)); *Hawaii*, 859 F.3d 768 69 ("We reject the Government's argument that [EO-2] is not subject to judicial review. Although '[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.'" (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

Because Plaintiffs have standing and present a justiciable controversy, the Court turns to the merits of the Motion for TRO.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A

"plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008) (citation omitted).

For the reasons that follow, Plaintiffs have met this burden here.

III. Analysis of TRO Factors: Likelihood of Success on the Merits

Following the Ninth Circuit's direction, the Court begins with Plaintiffs' statutory claims. *Hawaii*, 859 F.3d at 761. Finding that Plaintiffs are likely to prevail on the merits because EO-3 violates multiple provisions of the INA, the Court declines to reach the constitutional claims alternatively relied on by Plaintiffs.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1182(f) and 1185(a) Claims

EO-3 indefinitely suspends the entry of nationals from countries the President and Acting Secretary of Homeland Security identified as having "inadequate identity-management protocols, information sharing practices, and risk factors." EO-3 § 1(g). As discussed herein, because EO-3's findings are inconsistent with and do not fit the restrictions that the order actually imposes, and because EO-3 improperly uses nationality as a proxy for risk, Plaintiffs are likely to prevail on the merits of their statutory claims.

Section 1182(f) provides, in relevant part

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). Section 1185(a)(1) similarly provides that "[u]nless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1).

Under the law of this Circuit, these provisions do not afford the President unbridled discretion to do as he pleases. An Executive Order promulgated pursuant to INA Sections 1182(f) and 1185(a) "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." *Hawaii*, 859 F.3d at 770. Further, the INA "*requires* that the President's *findings support the conclusion* that entry of all nationals from the [list of] designated countries . . . would be harmful to the national interest."[14] *Id.*

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[14]The Government insists that, consistent with historical practice, the President may "restrict[] entry pursuant to §§ 1182(f) and 1185(a)(1) without detailed public justifications or findings," citing to prior Executive Orders that "have discussed the President's rationale in one or two

(emphasis added) (footnote omitted); *see also id.* at 783 ("the President must exercise his authority under § 1182(f) lawfully by making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest"); *id.* at 770 n.11 (defining "detrimental" as "causing loss or damage, harmful, injurious, hurtful"). While EO-3 certainly contains findings, they fall short of the Ninth Circuit's articulated standards for several reasons.

First, EO-3, like its predecessor, makes "no finding that nationality *alone* renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772 (emphasis added) (citation omitted). EO-3 "does not tie these nationals in any way to terrorist organizations within the six designated countries," find them "responsible for insecure country conditions," or provide "any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness."[15] *Id.* at 772.

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sentences." Mem. in Opp'n 20 21 (citing Exec. Order No. 12,807, pmbl. pt. 4, 57 Fed. Reg. 23133 (May 24, 1992); Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67947 (Nov. 26, 1979)). Its argument is misplaced. The Government both ignores the plain language of Section 1182 and infers the absence of a prerequisite from historical orders that were not evidently challenged on that basis. Its examples therefore have little force. By contrast, plainly aware of these historical orders, *see Hawaii*, 859 F.3d at 779, the Ninth Circuit has held otherwise, *e.g.*, *id.* at 772 73 (explaining that Section 1182(f) requires the President to "provide a rationale explaining why permitting entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States").

[15]In fact, "the only concrete evidence to emerge from the Administration on this point to date has shown just the opposite that country-based bans are ineffective. A leaked DHS Office of Intelligence and Analysis memorandum analyzing the ban in EO-1 found that 'country of

The generalized findings regarding each country's performance, *see* EO-3 §§ 1(d) (f), do not support the vast scope of EO-3 in other words, the categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of "public-safety and terrorism-related information" that the President identifies. *See* EO-3 §§ 2(a)(i), (c)(i), (e)(i), (g)(i). Indeed, as the Ninth Circuit already explained with respect to EO-2 in words that are no less applicable here, the Government's "use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone," are suspended from entry. *Hawaii*, 859 F.3d at 773. "Yet, nationals of *other* countries who do have meaningful ties to the six designated countries [and whom the designated countries may or may not have useful threat information about] fall outside the scope of [the entry restrictions]." *Id*. (emphasis added). This leads to absurd results. EO-3 is simultaneously overbroad *and* underinclusive. *See id.*

Second, EO-3 does not reveal why existing law is insufficient to address the President's described concerns. As the Ninth Circuit previously explained with

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citizenship is unlikely to be a reliable indicator of potential terrorist activity.'" Joint Decl. of Former Nat'l Sec. Officials ¶ 10, ECF. 383-1 (quoting *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, *available at* https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf).

respect to EO-2, "[a]s the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa . . . and is not inadmissible." *Hawaii,* 859 F.3d at 773 (citing 8 U.S.C. § 1361). "The Government already can exclude individuals who do not meet that burden" on the basis of many criteria, including safety and security. Because EO-2 did not find that such "current screening processes are inadequate," the Ninth Circuit determined that the President's findings offered an insufficient basis to conclude that the "individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States." *Id.* at 773. The Ninth Circuit's analysis applies no less to EO-3, where the "findings" cited in Section 1(h) and (i) similarly omit any explanation of the inadequacy of individual vetting sufficient to justify the categorical, nationality-based ban chosen by the Executive.

Third, EO-3 contains internal incoherencies that markedly undermine its stated "national security" rationale.[16] Numerous countries fail to meet one or more of the global baseline criteria described in EO-3, yet are not included in the ban.

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[16]As an initial matter, the explanation for how the Administration settled on the list of eight countries is obscured. For example, Section 1 describes 47 countries that Administration officials identified as having an "inadequate" or "at risk" baseline performance, EO-3 §§ 1(e) (f), but does not detail how the President settled on the eight countries actually subject to the ban in Section 2 the majority of which carried over from EO-2. While the September 15, 2017 DHS report cited in EO-3 might offer some insight, the Government objected (ECF. No. 376) to the Court's consideration or even viewing of that classified report, making it impossible to know.

For example, the President finds that Iraq fails the "baseline" security assessment but then omits Iraq from the ban for policy reasons. EO-3 § 1(g) (subjecting Iraq to "additional scrutiny" in lieu of the ban, citing diplomatic ties, positive working relationship, and "Iraq's commitment to combating the Islamic State"). Similarly, after failing to meet the information-sharing baseline, Venezuela also received a pass, other than with respect to certain Venezuelan government officials. EO-3 § 2(f). On the other end, despite meeting the information-sharing baseline that Venezuela failed, Somalia and its nationals were rewarded by being included in the ban. EO-3 § 2(h).

Moreover, EO-3's individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not. *See, e.g.*, EO-3 §§ 2(c) (describing Libya as having "significant inadequacies in its identity-management protocols" and therefore deserving of a ban on all tourist and business visitors, but without discussing why student visitors did not meet the same fate); *id.* § 2(g) (describing the same for Yemen); *cf. id.* § 2(b) (describing Iran as "a state sponsor of terrorism," which "regularly fails to cooperate with the United States Government in identifying security risks [and] is the source of significant terrorist threats," yet allowing "entry by [Iranian] nationals under valid student (F

and M) and exchange visitor (J) visas").[17] The nature and scope of these types of inconsistencies and unexplained findings cannot lawfully justify an exercise of Section 1182(f) authority, particularly one of indefinite duration. *See Hawaii*, 859 F.3d at 772 73 (proper exercise of Section 1182(f) authority must "provide a rationale" and "bridge the gap" between the findings and ultimate restrictions).

EO-3's scope and provisions also contradict its stated rationale. As noted above, many of EO-3's structural provisions are unsupported by verifiable evidence, undermining any claim that its findings "support the conclusion" to categorically ban the entry of millions.[18] *Cf. Hawaii*, 859 F.3d at 770. EO-3's aspirational justifications *e.g.*, fostering a "willingness to cooperate and play a substantial role in combatting terrorism" and encouraging additional information-sharing are no more satisfying. EO-3 § 1(h)(3); *see also* Mem. in Opp'n 22 23 ("The utility of entry restrictions as a foreign-policy tool is confirmed by the results of the diplomatic engagement period described in [EO-3] . . . These foreign-relations efforts independently justify [EO-3] and yet they are almost wholly ignored by

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[17] *See also* Joint Decl. of Former Nat'l Sec. Officials ¶ 12 ("[A]lthough for some of the countries, the Ban applies only to certain non-immigrant visas, together those visas are far and away the most frequently used non-immigrant visas from these nations.").

[18] For example, although the order claims a purpose "to protect [United States] citizens from terrorist attacks," EO-3 § 1(a), "the Ban targets a list of countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last forty years." Joint Decl. of Former Nat'l Sec. Officials ¶ 11 (citing Alex Nowrasteh, *President Trump's New Travel Executive Order Has Little National Security Justification*, Cato Institute: Cato at Liberty, September 25, 2017).

Plaintiffs."). However laudatory they may be, these foreign policy goals do not satisfy Section 1182(f)'s requirement that the President actually "find" that the "entry of any aliens" into the United States "*would be detrimental*" to the interests of the United States, and are thus an insufficient basis on which to invoke his Section 1182(f) authority.

The Government reads in Sections 1182(f) and 1185(a) a grant of limitless power and absolute discretion to the President, and cautions that it would "be inappropriate for this Court to second-guess" the "Executive Branch's national-security judgements," Mem. in Opp'n 22, or to engage in "unwarranted judicial interference in the conduct of foreign policy," Mem. in Opp'n 23 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 16 (2013)). The Government counsels that deference is historically afforded the President in the core areas of national security and foreign relations, "which involve delicate balancing in the face of ever-changing circumstances, such that the Executive must be permitted to act quickly and flexibly." Mem. in Opp'n 28 (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005)).

These concerns are not insignificant. There is no dispute that national security is an important objective and that errors could have serious consequences. Yet, "[n]ational security is not a 'talismanic incantation' that, once invoked, can

support any and all exercise of executive power under § 1182(f)." *Hawaii*, 859 F.3d at 774 (citation omitted). The Ninth Circuit itself rejected the Government's arguments that it is somehow injured "by nature of the judiciary limiting the President's authority." *Id.* at 783 n.22 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.")).

The actions taken by the President in the challenged sections of EO-3 require him to "first [] make sufficient findings that the entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States." *Hawaii*, 859 F.3d at 776. Because the President has not satisfied this precondition in the manner described by the Ninth Circuit before exercising his delegated authority, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that the President exceeded his authority under Sections 1182(f) and 1185(a).

B. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1152(a) Claim

It is equally clear that Plaintiffs are likely to prevail on their claim that EO-3 violates the INA's prohibition on nationality-based discrimination with respect to the issuance of immigrant visas. Section 1152(a)(1)(A) provides that "[e]xcept as

specifically provided" in certain subsections not applicable here, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

By indefinitely and categorically suspending immigration from the six countries challenged by Plaintiffs,[19] EO-3 attempts to do exactly what Section 1152 prohibits. EO-3, like its predecessor, thus "runs afoul" of the INA provision "that prohibit[s] nationality-based discrimination" in the issuance of immigrant visas. *Hawaii*, 859 F.3d at 756.

For its part, the Government contends that Section 1152 cannot restrict the President's Section 1182(f) authority because "the statutes operate in two different spheres." "Sections 1182(f) and 1185(a)(1), along with other grounds in Section 1182(a), limit the universe of individuals eligible to receive visas, and then §1152(a)(1)(A) prohibits discrimination on the basis of nationality *within* that universe of eligible individuals." Mem. in Opp'n 29.

In making this argument, however, the Government completely ignores *Hawaii*. *See* Mem. in Opp'n 29 32. In *Hawaii*, the Ninth Circuit reached the

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[19]EO-3 § 2(a)(ii) ("The entry into the United States of nationals of Chad, as immigrants . . . is hereby suspended."); *id.* §§ 2(b)(ii) (dictating the same for Iran), (c)(ii) (Libya), (e)(ii) (Syria), (g)(ii) (Yemen), (h)(ii) (Somalia).

opposite conclusion: Section "1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under § 1182(f) [based on several] canons of statutory construction" and that "in suspending the issuance of immigrant visas and denying entry based on nationality, [EO-2] exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress." *Hawaii*, 859 F.3d at 778 79. Although asserted now with respect to EO-3, the Government's position untenably contradicts the Ninth's Circuit's holding.

In short, EO-3 plainly violates Section 1152(a) by singling out immigrant visa applicants seeking entry to the United States on the basis of nationality. Having considered the scope of the President's authority under Section 1182(f) and the non-discrimination requirement of Section 1152(a)(1)(A), the Court determines that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 "exceeds the restriction of Section 1152(a)(1)(A) and the overall statutory scheme intended by Congress."[20] *Hawaii*, 859 F.3d at 779.

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[20]The Court finds that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 violates Section 1152(a), *but only as to the issuance of immigrant visas*. To the extent Plaintiffs ask the Court to enjoin EO-3's "nationality-based restrictions . . . in their entirety," as violative of Section 1152(a)(1)(A), Mem. in Supp. 16 17, the Court declines to do so. *See* Mem. in Supp. 16 17; *see also Hawaii*, 859 F.3d 779 (applying holding to immigrant visas). Such an extension is not consistent with the face of Section 1152. Moreover, the primary case relied upon by Plaintiffs, *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), does not support extending the plain text of the statute to encompass nonimmigrant visas. First, *Olsen*'s statutory analysis is thin beyond reciting the text of Section 1152(a), which specifically references only "immigrant visas" the order does not parse the text of Section 1152(a)(1)(A) or acknowledge the distinction

IV. Analysis of TRO Factors: Irreparable Harm

Plaintiffs identify a multitude of harms that are not compensable with monetary damages and that are irreparable among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association, which impacts the vibrancy of its religious practices and instills fear among its members. *See, e.g.*, *Hawaii*, 859 F.3d at 782 83 (characterizing similar harms to many of the same actors); *Washington*, 847 F.3d at 1169 (identifying harms such as those to public university employees and students, separated families, and stranded residents abroad); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"). The Court finds that Plaintiffs have made a sufficient showing of such irreparable harm in the absence of preliminary relief.

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between immigrant and nonimmigrant visas. 990 F. Supp. at 37 39. Second, *Olsen* is factually distinct, involving review of a grievance board's decision to uphold a foreign service officer's termination because he refused to strictly adhere to a local consular-level policy of determining which visa applicants received interviews based upon "fraud profiles" and to "adjudicate [nonimmigrant] visas on the basis of the applicant's race, ethnicity, national origin, economic class, and physical appearance." *Id.* at 33. The district court in *Olsen* found that the grievance board erred by failing to "address the question of the Consulate's visa policies when it reviewed Plaintiff's termination," and remanded the matter for reconsideration of its decision. *Id.* Thus, the Court does not find its analysis to be particularly relevant or persuasive.

Defendants, on the other hand, are not likely harmed by having to adhere to immigration procedures that have been in place for years that is, by maintaining the status quo. *See Washington*, 847 F.3d at 1168.

V. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessors, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. The Ninth Circuit has recognized that Plaintiffs and the public have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169 70.

National security and the protection of our borders is unquestionably also of significant public interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). Although national security interests are legitimate objectives of the highest order, they cannot justify the public's harms when the President has wielded his authority unlawfully. *See Hawaii*, 859 F.3d at 783.

In carefully weighing the harms, the equities tip in Plaintiffs' favor. "The public interest is served by 'curtailing unlawful executive action.'" *Hawaii*, 859

F.3d at 784 (quoting *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)). When considered alongside the statutory injuries and harms discussed above, the balance of equities and public interests justify granting the Plaintiffs' TRO.

Nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' INA claims. *See Washington*, 847 F.3d at 1166 67 (citing *Texas*, 809 F.3d at 187 88); *see also Hawaii*, 859 F.3d at 788 (finding no abuse of discretion in enjoining on a nationwide basis Sections 2(c) and 6 of EO-2, "which in all applications would violate provisions of the INA").

CONCLUSION

Plaintiffs have satisfied all four *Winter* factors, warranting entry of preliminary injunctive relief. Based on the foregoing, Plaintiffs' Motion for TRO (ECF No. 368) is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendant ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of

this Order, hereby are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of the Proclamation issued on September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith, or promptly indicate whether they jointly consent to the conversion of this Temporary Restraining Order to a Preliminary Injunction without the need for additional briefing or a hearing.

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

IT IS SO ORDERED.

Dated: October 17, 2017 at Honolulu, Hawai‘i.

Derrick K. Watson
United States District Judge

General Assembly

Distr.: General
3 October 2016

Seventy-first session
Agenda items 13 and 117

Resolution adopted by the General Assembly on 19 September 2016

[*without reference to a Main Committee (A/71/L.1)*]

71/1. New York Declaration for Refugees and Migrants

The General Assembly

Adopts the following outcome document of the high level plenary meeting on addressing large movements of refugees and migrants:

New York Declaration for Refugees and Migrants

We, the Heads of State and Government and High Representatives, meeting at United Nations Headquarters in New York on 19 September 2016 to address the question of large movements of refugees and migrants, have adopted the following political declaration.

I. Introduction

1. Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons.

2. We have considered today how the international community should best respond to the growing global phenomenon of large movements of refugees and migrants.

3. We are witnessing in today's world an unprecedented level of human mobility. More people than ever before live in a country other than the one in which they were born. Migrants are present in all countries in the world. Most of them move without incident. In 2015, their number surpassed 244 million, growing at a rate faster than the world's population. However, there are roughly 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.

4. In adopting the 2030 Agenda for Sustainable Development[1] one year ago, we recognized clearly the positive contribution made by migrants for inclusive growth

[1] Resolution 70/1.

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and sustainable development. Our world is a better place for that contribution. The benefits and opportunities of safe, orderly and regular migration are substantial and are often underestimated. Forced displacement and irregular migration in large movements, on the other hand, often present complex challenges.

5. We reaffirm the purposes and principles of the Charter of the United Nations. We reaffirm also the Universal Declaration of Human Rights[2] and recall the core international human rights treaties. We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.

6. Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities, including in the context of large movements. "Large movements" may be understood to reflect a number of considerations, including: the number of people arriving, the economic, social and geographical context, the capacity of a receiving State to respond and the impact of a movement that is sudden or prolonged. The term does not, for example, cover regular flows of migrants from one country to another. "Large movements" may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes.

7. Large movements of refugees and migrants have political, economic, social, developmental, humanitarian and human rights ramifications, which cross all borders. These are global phenomena that call for global approaches and global solutions. No one State can manage such movements on its own. Neighbouring or transit countries, mostly developing countries, are disproportionately affected. Their capacities have been severely stretched in many cases, affecting their own social and economic cohesion and development. In addition, protracted refugee crises are now commonplace, with long term repercussions for those involved and for their host countries and communities. Greater international cooperation is needed to assist host countries and communities.

8. We declare our profound solidarity with, and support for, the millions of people in different parts of the world who, for reasons beyond their control, are forced to uproot themselves and their families from their homes.

9. Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys, which many may not survive. Some feel compelled to employ the services of criminal groups, including smugglers, and others may fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future.

10. We are determined to save lives. Our challenge is above all moral and humanitarian. Equally, we are determined to find long term and sustainable solutions. We will combat with all the means at our disposal the abuses and exploitation suffered by countless refugees and migrants in vulnerable situations.

11. We acknowledge a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people centred

[2] Resolution 217 A (III).

manner. We will do so through international cooperation, while recognizing that there are varying capacities and resources to respond to these movements. International cooperation and, in particular, cooperation among countries of origin or nationality, transit and destination, has never been more important; "win win" cooperation in this area has profound benefits for humanity. Large movements of refugees and migrants must have comprehensive policy support, assistance and protection, consistent with States' obligations under international law. We also recall our obligations to fully respect their human rights and fundamental freedoms, and we stress their need to live their lives in safety and dignity. We pledge our support to those affected today as well as to those who will be part of future large movements.

12. We are determined to address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy. We will address them also through the prevention and peaceful resolution of conflict, greater coordination of humanitarian, development and peacebuilding efforts, the promotion of the rule of law at the national and international levels and the protection of human rights. Equally, we will address movements caused by poverty, instability, marginalization and exclusion and the lack of development and economic opportunities, with particular reference to the most vulnerable populations. We will work with countries of origin to strengthen their capacities.

13. All human beings are born free and equal in dignity and rights. Everyone has the right to recognition everywhere as a person before the law. We recall that our obligations under international law prohibit discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Yet in many parts of the world we are witnessing, with great concern, increasingly xenophobic and racist responses to refugees and migrants.

14. We strongly condemn acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief. Diversity enriches every society and contributes to social cohesion. Demonizing refugees or migrants offends profoundly against the values of dignity and equality for every human being, to which we have committed ourselves. Gathered today at the United Nations, the birthplace and custodian of these universal values, we deplore all manifestations of xenophobia, racial discrimination and intolerance. We will take a range of steps to counter such attitudes and behaviour, in particular with regard to hate crimes, hate speech and racial violence. We welcome the global campaign proposed by the Secretary General to counter xenophobia and we will implement it in cooperation with the United Nations and all relevant stakeholders, in accordance with international law. The campaign will emphasize, inter alia, direct personal contact between host communities and refugees and migrants and will highlight the positive contributions made by the latter, as well as our common humanity.

15. We invite the private sector and civil society, including refugee and migrant organizations, to participate in multi stakeholder alliances to support efforts to implement the commitments we are making today.

16. In the 2030 Agenda for Sustainable Development, we pledged that no one would be left behind. We declared that we wished to see the Sustainable Development Goals and their targets met for all nations and peoples and for all segments of society. We said also that we would endeavour to reach the furthest

behind first. We reaffirm today our commitments that relate to the specific needs of migrants or refugees. The 2030 Agenda makes clear, inter alia, that we will facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies. The needs of refugees, internally displaced persons and migrants are explicitly recognized.

17. The implementation of all relevant provisions of the 2030 Agenda for Sustainable Development will enable the positive contribution that migrants are making to sustainable development to be reinforced. At the same time, it will address many of the root causes of forced displacement, helping to create more favourable conditions in countries of origin. Meeting today, a year after our adoption of the 2030 Agenda, we are determined to realize the full potential of that Agenda for refugees and migrants.

18. We recall the Sendai Framework for Disaster Risk Reduction 2015–2030[3] and its recommendations concerning measures to mitigate risks associated with disasters. States that have signed and ratified the Paris Agreement on climate change[4] welcome that agreement and are committed to its implementation. We reaffirm the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[5] including its provisions that are applicable to refugees and migrants.

19. We take note of the report of the Secretary General, entitled "In safety and dignity: addressing large movements of refugees and migrants",[6] prepared pursuant to General Assembly decision 70/539 of 22 December 2015, in preparation for this high level meeting. While recognizing that the following conferences either did not have an intergovernmentally agreed outcome or were regional in scope, we take note of the World Humanitarian Summit, held in Istanbul, Turkey, on 23 and 24 May 2016, the high level meeting on global responsibility sharing through pathways for admission of Syrian refugees, convened by the Office of the United Nations High Commissioner for Refugees on 30 March 2016, the conference on "Supporting Syria and the Region", held in London on 4 February 2016, and the pledging conference on Somali refugees, held in Brussels on 21 October 2015. While recognizing that the following initiatives are regional in nature and apply only to those countries participating in them, we take note of regional initiatives such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, the European Union Horn of Africa Migration Route Initiative and the African Union–Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants (the Khartoum Process), the Rabat Process, the Valletta Action Plan and the Brazil Declaration and Plan of Action.

20. We recognize the very large number of people who are displaced within national borders and the possibility that such persons might seek protection and assistance in other countries as refugees or migrants. We note the need for reflection on effective strategies to ensure adequate protection and assistance for internally displaced persons and to prevent and reduce such displacement.

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[3] Resolution 69/283, annex II.

[4] See FCCC/CP/2015/10/Add.1, decision 1/CP.21, annex.

[5] Resolution 69/313, annex.

[6] A/70/59.

Commitments

21. We have endorsed today a set of commitments that apply to both refugees and migrants, as well as separate sets of commitments for refugees and migrants. We do so taking into account different national realities, capacities and levels of development and respecting national policies and priorities. We reaffirm our commitment to international law and emphasize that the present declaration and its annexes are to be implemented in a manner that is consistent with the rights and obligations of States under international law. While some commitments are mainly applicable to one group, they may also be applicable to the other. Furthermore, while they are all framed in the context of the large movements we are considering today, many may be applicable also to regular migration. Annex I to the present declaration contains a comprehensive refugee response framework and outlines steps towards the achievement of a global compact on refugees in 2018, while annex II sets out steps towards the achievement of a global compact for safe, orderly and regular migration in 2018.

II. Commitments that apply to both refugees and migrants

22. Underlining the importance of a comprehensive approach to the issues involved, we will ensure a people centred, sensitive, humane, dignified, gender responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, whether refugees or migrants. We will also ensure full respect and protection for their human rights and fundamental freedoms.

23. We recognize and will address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.

24. Recognizing that States have rights and responsibilities to manage and control their borders, we will implement border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law. We will promote international cooperation on border control and management as an important element of security for States, including issues relating to battling transnational organized crime, terrorism and illicit trade. We will ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders. We will strengthen international border management cooperation, including in relation to training and the exchange of best practices. We will intensify support in this area and help to build capacity as appropriate. We reaffirm that, in line with the principle of non refoulement, individuals must not be returned at borders. We acknowledge also that, while upholding these obligations and principles, States are entitled to take measures to prevent irregular border crossings.

25. We will make efforts to collect accurate information regarding large movements of refugees and migrants. We will also take measures to identify correctly their nationalities, as well as their reasons for movement. We will take measures to identify those who are seeking international protection as refugees.

26. We will continue to protect the human rights and fundamental freedoms of all persons, in transit and after arrival. We stress the importance of addressing the immediate needs of persons who have been exposed to physical or psychological abuse while in transit upon their arrival, without discrimination and without regard to legal or migratory status or means of transportation. For this purpose, we will consider appropriate support to strengthen, at their request, capacity building for countries that receive large movements of refugees and migrants.

27. We are determined to address unsafe movements of refugees and migrants, with particular reference to irregular movements of refugees and migrants. We will do so without prejudice to the right to seek asylum. We will combat the exploitation, abuse and discrimination suffered by many refugees and migrants.

28. We express our profound concern at the large number of people who have lost their lives in transit. We commend the efforts already made to rescue people in distress at sea. We commit to intensifying international cooperation on the strengthening of search and rescue mechanisms. We will also work to improve the availability of accurate data on the whereabouts of people and vessels stranded at sea. In addition, we will strengthen support for rescue efforts over land along dangerous or isolated routes. We will draw attention to the risks involved in the use of such routes in the first instance.

29. We recognize and will take steps to address the particular vulnerabilities of women and children during the journey from country of origin to country of arrival. This includes their potential exposure to discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery.

30. We encourage States to address the vulnerabilities to HIV and the specific health care needs experienced by migrant and mobile populations, as well as by refugees and crisis affected populations, and to take steps to reduce stigma, discrimination and violence, as well as to review policies related to restrictions on entry based on HIV status, with a view to eliminating such restrictions and the return of people on the basis of their HIV status, and to support their access to HIV prevention, treatment, care and support.

31. We will ensure that our responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls and fully respect and protect the human rights of women and girls. We will combat sexual and gender based violence to the greatest extent possible. We will provide access to sexual and reproductive health care services. We will tackle the multiple and intersecting forms of discrimination against refugee and migrant women and girls. At the same time, recognizing the significant contribution and leadership of women in refugee and migrant communities, we will work to ensure their full, equal and meaningful participation in the development of local solutions and opportunities. We will take into consideration the different needs, vulnerabilities and capacities of women, girls, boys and men.

32. We will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant

authorities. We will comply with our obligations under the Convention on the Rights of the Child.[7] We will work to provide for basic health, education and psychosocial development and for the registration of all births on our territories. We are determined to ensure that all children are receiving education within a few months of arrival, and we will prioritize budgetary provision to facilitate this, including support for host countries as required. We will strive to provide refugee and migrant children with a nurturing environment for the full realization of their rights and capabilities.

33. Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross border movements. We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.

34. Reaffirming the importance of the United Nations Convention against Transnational Organized Crime and the two relevant Protocols thereto,[8] we encourage the ratification of, accession to and implementation of relevant international instruments on preventing and combating trafficking in persons and the smuggling of migrants.

35. We recognize that refugees and migrants in large movements are at greater risk of being trafficked and of being subjected to forced labour. We will, with full respect for our obligations under international law, vigorously combat human trafficking and migrant smuggling with a view to their elimination, including through targeted measures to identify victims of human trafficking or those at risk of trafficking. We will provide support for the victims of human trafficking. We will work to prevent human trafficking among those affected by displacement.

36. With a view to disrupting and eliminating the criminal networks involved, we will review our national legislation to ensure conformity with our obligations under international law on migrant smuggling, human trafficking and maritime safety. We will implement the United Nations Global Plan of Action to Combat Trafficking in Persons.[9] We will establish or upgrade, as appropriate, national and regional anti human trafficking policies. We note regional initiatives such as the African Union Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants, the Plan of Action Against Trafficking in Persons, Especially Women and Children, of the Association of Southeast Asian Nations, the European Union Strategy towards the Eradication of Trafficking in Human Beings 2012 2016, and the Work Plans against Trafficking in Persons in the Western Hemisphere. We welcome reinforced technical cooperation, on a regional and bilateral basis, between countries of origin, transit and destination on the prevention of human trafficking and migrant smuggling and the prosecution of traffickers and smugglers.

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[7] United Nations, *Treaty Series*, vol. 1577, No. 27531.

[8] Ibid., vols. 2225, 2237 and 2241, No. 39574.

[9] Resolution 64/293.

37. We favour an approach to addressing the drivers and root causes of large movements of refugees and migrants, including forced displacement and protracted crises, which would, inter alia, reduce vulnerability, combat poverty, improve self reliance and resilience, ensure a strengthened humanitarian development nexus, and improve coordination with peacebuilding efforts. This will involve coordinated prioritized responses based on joint and impartial needs assessments and facilitating cooperation across institutional mandates.

38. We will take measures to provide, on the basis of bilateral, regional and international cooperation, humanitarian financing that is adequate, flexible, predictable and consistent, to enable host countries and communities to respond both to the immediate humanitarian needs and to their longer term development needs. There is a need to address gaps in humanitarian funding, considering additional resources as appropriate. We look forward to close cooperation in this regard among Member States, United Nations entities and other actors and between the United Nations and international financial institutions such as the World Bank, where appropriate. We envisage innovative financing responses, risk financing for affected communities and the implementation of other efficiencies such as reducing management costs, improving transparency, increasing the use of national responders, expanding the use of cash assistance, reducing duplication, increasing engagement with beneficiaries, diminishing earmarked funding and harmonizing reporting, so as to ensure a more effective use of existing resources.

39. We commit to combating xenophobia, racism and discrimination in our societies against refugees and migrants. We will take measures to improve their integration and inclusion, as appropriate, and with particular reference to access to education, health care, justice and language training. We recognize that these measures will reduce the risks of marginalization and radicalization. National policies relating to integration and inclusion will be developed, as appropriate, in conjunction with relevant civil society organizations, including faith based organizations, the private sector, employers' and workers' organizations and other stakeholders. We also note the obligation for refugees and migrants to observe the laws and regulations of their host countries.

40. We recognize the importance of improved data collection, particularly by national authorities, and will enhance international cooperation to this end, including through capacity building, financial support and technical assistance. Such data should be disaggregated by sex and age and include information on regular and irregular flows, the economic impacts of migration and refugee movements, human trafficking, the needs of refugees, migrants and host communities and other issues. We will do so consistent with our national legislation on data protection, if applicable, and our international obligations related to privacy, as applicable.

III. Commitments for migrants

41. We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times. We will cooperate closely to facilitate and ensure safe, orderly and regular migration, including return and readmission, taking into account national legislation.

42. We commit to safeguarding the rights of, protecting the interests of and assisting our migrant communities abroad, including through consular protection, assistance and cooperation, in accordance with relevant international law. We

reaffirm that everyone has the right to leave any country, including his or her own, and to return to his or her country. We recall at the same time that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations. We recall also that States must readmit their returning nationals and ensure that they are duly received without undue delay, following confirmation of their nationalities in accordance with national legislation. We will take measures to inform migrants about the various processes relating to their arrival and stay in countries of transit, destination and return.

43. We commit to addressing the drivers that create or exacerbate large movements. We will analyse and respond to the factors, including in countries of origin, which lead or contribute to large movements. We will cooperate to create conditions that allow communities and individuals to live in peace and prosperity in their homelands. Migration should be a choice, not a necessity. We will take measures, inter alia, to implement the 2030 Agenda for Sustainable Development, whose objectives include eradicating extreme poverty and inequality, revitalizing the Global Partnership for Sustainable Development, promoting peaceful and inclusive societies based on international human rights and the rule of law, creating conditions for balanced, sustainable and inclusive economic growth and employment, combating environmental degradation and ensuring effective responses to natural disasters and the adverse impacts of climate change.

44. Recognizing that the lack of educational opportunities is often a push factor for migration, particularly for young people, we commit to strengthening capacities in countries of origin, including in educational institutions. We commit also to enhancing employment opportunities, particularly for young people, in countries of origin. We acknowledge also the impact of migration on human capital in countries of origin.

45. We will consider reviewing our migration policies with a view to examining their possible unintended negative consequences.

46. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migrants can make positive and profound contributions to economic and social development in their host societies and to global wealth creation. They can help to respond to demographic trends, labour shortages and other challenges in host societies, and add fresh skills and dynamism to the latter's economies. We recognize the development benefits of migration to countries of origin, including through the involvement of diasporas in economic development and reconstruction. We will commit to reducing the costs of labour migration and promote ethical recruitment policies and practices between sending and receiving countries. We will promote faster, cheaper and safer transfers of migrant remittances in both source and recipient countries, including through a reduction in transaction costs, as well as the facilitation of interaction between diasporas and their countries of origin. We would like these contributions to be more widely recognized and indeed, strengthened in the context of implementation of the 2030 Agenda for Sustainable Development.

47. We will ensure that all aspects of migration are integrated into global, regional and national sustainable development plans and into humanitarian, peacebuilding and human rights policies and programmes.

48. We call upon States that have not done so to consider ratifying, or acceding to, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[10] We call also upon States that have not done so to consider acceding to relevant International Labour Organization conventions, as appropriate. We note, in addition, that migrants enjoy rights and protection under various provisions of international law.

49. We commit to strengthening global governance of migration. We therefore warmly support and welcome the agreement to bring the International Organization for Migration, an organization regarded by its Member States as the global lead agency on migration, into a closer legal and working relationship with the United Nations as a related organization.[11] We look forward to the implementation of this agreement, which will assist and protect migrants more comprehensively, help States to address migration issues and promote better coherence between migration and related policy domains.

50. We will assist, impartially and on the basis of needs, migrants in countries that are experiencing conflicts or natural disasters, working, as applicable, in coordination with the relevant national authorities. While recognizing that not all States are participating in them, we note in this regard the Migrants in Countries in Crisis initiative and the Agenda for the Protection of Cross Border Displaced Persons in the Context of Disasters and Climate Change resulting from the Nansen Initiative.

51. We take note of the work done by the Global Migration Group to develop principles and practical guidance on the protection of the human rights of migrants in vulnerable situations.

52. We will consider developing non binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance. The guiding principles and guidelines will be developed using a State led process with the involvement of all relevant stakeholders and with input from the Special Representative of the Secretary General on International Migration and Development, the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees and other relevant United Nations system entities. They would complement national efforts to protect and assist migrants.

53. We welcome the willingness of some States to provide temporary protection against return to migrants who do not qualify for refugee status and who are unable to return home owing to conditions in their countries.

54. We will build on existing bilateral, regional and global cooperation and partnership mechanisms, in accordance with international law, for facilitating migration in line with the 2030 Agenda for Sustainable Development. We will strengthen cooperation to this end among countries of origin, transit and destination, including through regional consultative processes, international organizations, the International Red Cross and Red Crescent Movement, regional economic organizations and local government authorities, as well as with relevant private

[10] United Nations, *Treaty Series*, vol. 2220, No. 39481.

[11] Resolution 70/296, annex.

sector recruiters and employers, labour unions, civil society and migrant and diaspora groups. We recognize the particular needs of local authorities, who are the first receivers of migrants.

55. We recognize the progress made on international migration and development issues within the United Nations system, including the first and second High level Dialogues on International Migration and Development. We will support enhanced global and regional dialogue and deepened collaboration on migration, particularly through exchanges of best practice and mutual learning and the development of national or regional initiatives. We note in this regard the valuable contribution of the Global Forum on Migration and Development and acknowledge the importance of multi stakeholder dialogues on migration and development.

56. We affirm that children should not be criminalized or subject to punitive measures because of their migration status or that of their parents.

57. We will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education related opportunities. We will pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.

58. We strongly encourage cooperation among countries of origin or nationality, countries of transit, countries of destination and other relevant countries in ensuring that migrants who do not have permission to stay in the country of destination can return, in accordance with international obligations of all States, to their country of origin or nationality in a safe, orderly and dignified manner, preferably on a voluntary basis, taking into account national legislation in line with international law. We note that cooperation on return and readmission forms an important element of international cooperation on migration. Such cooperation would include ensuring proper identification and the provision of relevant travel documents. Any type of return, whether voluntary or otherwise, must be consistent with our obligations under international human rights law and in compliance with the principle of non refoulement. It should also respect the rules of international law and must in addition be conducted in keeping with the best interests of children and with due process. While recognizing that they apply only to States that have entered into them, we acknowledge that existing readmission agreements should be fully implemented. We support enhanced reception and reintegration assistance for those who are returned. Particular attention should be paid to the needs of migrants in vulnerable situations who return, such as children, older persons, persons with disabilities and victims of trafficking.

59. We reaffirm our commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychosocial services, ensuring that the best interests of the child is a primary consideration in all relevant policies.

60. We recognize the need to address the special situation and vulnerability of migrant women and girls by, inter alia, incorporating a gender perspective into migration policies and strengthening national laws, institutions and programmes to combat gender based violence, including trafficking in persons and discrimination against women and girls.

61. While recognizing the contribution of civil society, including non governmental organizations, to promoting the well being of migrants and their integration into societies, especially at times of extremely vulnerable conditions, and the support of the international community to the efforts of such organizations, we encourage deeper interaction between Governments and civil society to find responses to the challenges and the opportunities posed by international migration.

62. We note that the Special Representative of the Secretary General on International Migration and Development, Mr. Peter Sutherland, will be providing, before the end of 2016, a report that will propose ways of strengthening international cooperation and the engagement of the United Nations on migration.

63. We commit to launching, in 2016, a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration at an intergovernmental conference to be held in 2018. We invite the President of the General Assembly to make arrangements for the determination of the modalities, timeline and other practicalities relating to the negotiation process. Further details regarding the process are set out in annex II to the present declaration.

IV. Commitments for refugees

64. Recognizing that armed conflict, persecution and violence, including terrorism, are among the factors which give rise to large refugee movements, we will work to address the root causes of such crisis situations and to prevent or resolve conflict by peaceful means. We will work in every way possible for the peaceful settlement of disputes, the prevention of conflict and the achievement of the long term political solutions required. Preventive diplomacy and early response to conflict on the part of States and the United Nations are critical. The promotion of human rights is also critical. In addition, we will promote good governance, the rule of law, effective, accountable and inclusive institutions, and sustainable development at the international, regional, national and local levels. Recognizing that displacement could be reduced if international humanitarian law were respected by all parties to armed conflict, we renew our commitment to uphold humanitarian principles and international humanitarian law. We confirm also our respect for the rules that safeguard civilians in conflict.

65. We reaffirm the 1951 Convention relating to the Status of Refugees[12] and the 1967 Protocol thereto[13] as the foundation of the international refugee protection regime. We recognize the importance of their full and effective application by States parties and the values they embody. We note with satisfaction that 148 States are now parties to one or both instruments. We encourage States not parties to consider acceding to those instruments and States parties with reservations to give consideration to withdrawing them. We recognize also that a number of States not parties to the international refugee instruments have shown a generous approach to hosting refugees.

66. We reaffirm that international refugee law, international human rights law and international humanitarian law provide the legal framework to strengthen the protection of refugees. We will ensure, in this context, protection for all who need it. We take note of regional refugee instruments, such as the Organization of African

[12] United Nations, *Treaty Series*, vol. 189, No. 2545.

[13] Ibid., vol. 606, No. 8791.

Unity Convention governing the specific aspects of refugee problems in Africa[14] and the Cartagena Declaration on Refugees.

67. We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non refoulement in accordance with international refugee law.

68. We underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States.

69. We believe that a comprehensive refugee response should be developed and initiated by the Office of the United Nations High Commissioner for Refugees, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities, for each situation involving large movements of refugees. This should involve a multi stakeholder approach that includes national and local authorities, international organizations, international financial institutions, civil society partners (including faith based organizations, diaspora organizations and academia), the private sector, the media and refugees themselves. A comprehensive framework of this kind is annexed to the present declaration.

70. We will ensure that refugee admission policies or arrangements are in line with our obligations under international law. We wish to see administrative barriers eased, with a view to accelerating refugee admission procedures to the extent possible. We will, where appropriate, assist States to conduct early and effective registration and documentation of refugees. We will also promote access for children to child appropriate procedures. At the same time, we recognize that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, protection elsewhere.

71. We encourage the adoption of measures to facilitate access to civil registration and documentation for refugees. We recognize in this regard the importance of early and effective registration and documentation, as a protection tool and to facilitate the provision of humanitarian assistance.

72. We recognize that statelessness can be a root cause of forced displacement and that forced displacement, in turn, can lead to statelessness. We take note of the campaign of the Office of the United Nations High Commissioner for Refugees to end statelessness within a decade and we encourage States to consider actions they could take to reduce the incidence of statelessness. We encourage those States that have not yet acceded to the 1954 Convention relating to the Status of Stateless Persons[15] and the 1961 Convention on the Reduction of Statelessness[16] to consider doing so.

73. We recognize that refugee camps should be the exception and, to the extent possible, a temporary measure in response to an emergency. We note that 60 per cent

[14] Ibid., vol. 1001, No. 14691.

[15] Ibid., vol. 360, No. 5158.

[16] Ibid., vol. 989, No. 14458.

of refugees worldwide are in urban settings and only a minority are in camps. We will ensure that the delivery of assistance to refugees and host communities is adapted to the relevant context. We underline that host States have the primary responsibility to ensure the civilian and humanitarian character of refugee camps and settlements. We will work to ensure that this character is not compromised by the presence or activities of armed elements and to ensure that camps are not used for purposes that are incompatible with their civilian character. We will work to strengthen security in refugee camps and surrounding local communities, at the request and with the consent of the host country.

74. We welcome the extraordinarily generous contribution made to date by countries that host large refugee populations and will work to increase the support for those countries. We call for pledges made at relevant conferences to be disbursed promptly.

75. We commit to working towards solutions from the outset of a refugee situation. We will actively promote durable solutions, particularly in protracted refugee situations, with a focus on sustainable and timely return in safety and dignity. This will encompass repatriation, reintegration, rehabilitation and reconstruction activities. We encourage States and other relevant actors to provide support through, inter alia, the allocation of funds.

76. We reaffirm that voluntary repatriation should not necessarily be conditioned on the accomplishment of political solutions in the country of origin.

77. We intend to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries. In addition to easing the plight of refugees, this has benefits for countries that host large refugee populations and for third countries that receive refugees.

78. We urge States that have not yet established resettlement programmes to consider doing so at the earliest opportunity. Those which have already done so are encouraged to consider increasing the size of their programmes. It is our aim to provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met.

79. We will consider the expansion of existing humanitarian admission programmes, possible temporary evacuation programmes, including evacuation for medical reasons, flexible arrangements to assist family reunification, private sponsorship for individual refugees and opportunities for labour mobility for refugees, including through private sector partnerships, and for education, such as scholarships and student visas.

80. We are committed to providing humanitarian assistance to refugees so as to ensure essential support in key life saving sectors, such as health care, shelter, food, water and sanitation. We commit to supporting host countries and communities in this regard, including by using locally available knowledge and capacities. We will support community based development programmes that benefit both refugees and host communities.

81. We are determined to provide quality primary and secondary education in safe learning environments for all refugee children, and to do so within a few months of the initial displacement. We commit to providing host countries with support in this regard. Access to quality education, including for host communities, gives fundamental protection to children and youth in displacement contexts, particularly in situations of conflict and crisis.

82. We will support early childhood education for refugee children. We will also promote tertiary education, skills training and vocational education. In conflict and crisis situations, higher education serves as a powerful driver for change, shelters and protects a critical group of young men and women by maintaining their hopes for the future, fosters inclusion and non discrimination and acts as a catalyst for the recovery and rebuilding of post conflict countries.

83. We will work to ensure that the basic health needs of refugee communities are met and that women and girls have access to essential health care services. We commit to providing host countries with support in this regard. We will also develop national strategies for the protection of refugees within the framework of national social protection systems, as appropriate.

84. Welcoming the positive steps taken by individual States, we encourage host Governments to consider opening their labour markets to refugees. We will work to strengthen host countries' and communities' resilience, assisting them, for example, with employment creation and income generation schemes. In this regard, we recognize the potential of young people and will work to create the conditions for growth, employment and education that will allow them to be the drivers of development.

85. In order to meet the challenges posed by large movements of refugees, close coordination will be required among a range of humanitarian and development actors. We commit to putting those most affected at the centre of planning and action. Host Governments and communities may need support from relevant United Nations entities, local authorities, international financial institutions, regional development banks, bilateral donors, the private sector and civil society. We strongly encourage joint responses involving all such actors in order to strengthen the nexus between humanitarian and development actors, facilitate cooperation across institutional mandates and, by helping to build self reliance and resilience, lay a basis for sustainable solutions. In addition to meeting direct humanitarian and development needs, we will work to support environmental, social and infrastructural rehabilitation in areas affected by large movements of refugees.

86. We note with concern a significant gap between the needs of refugees and the available resources. We encourage support from a broader range of donors and will take measures to make humanitarian financing more flexible and predictable, with diminished earmarking and increased multi year funding, in order to close this gap. United Nations entities such as the Office of the United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near East and other relevant organizations require sufficient funding to be able to carry out their activities effectively and in a predictable manner. We welcome the increasing engagement of the World Bank and multilateral development banks and improvements in access to concessional development financing for affected communities. It is clear, furthermore, that private sector investment in support of refugee communities and host countries will be of critical importance over the coming years. Civil society is also a key partner in every region of the world in responding to the needs of refugees.

87. We note that the United States of America, Canada, Ethiopia, Germany, Jordan, Mexico, Sweden and the Secretary General will host a high level meeting on refugees on 20 September 2016.

V. Follow-up to and review of our commitments

88. We recognize that arrangements are needed to ensure systematic follow up to and review of all of the commitments we are making today. Accordingly, we request the Secretary General to ensure that the progress made by Member States and the United Nations in implementing the commitments made at today's high level meeting will be the subject of periodic assessments provided to the General Assembly with reference, as appropriate, to the 2030 Agenda for Sustainable Development.

89. In addition, a role in reviewing relevant aspects of the present declaration should be envisaged for the periodic High level Dialogues on International Migration and Development and for the annual report of the United Nations High Commissioner for Refugees to the General Assembly.

90. In recognition of the need for significant financial and programme support to host countries and communities affected by large movements of refugees and migrants, we request the Secretary General to report to the General Assembly at its seventy first session on ways of achieving greater efficiency, operational effectiveness and system wide coherence, as well as ways of strengthening the engagement of the United Nations with international financial institutions and the private sector, with a view to fully implementing the commitments outlined in the present declaration.

3rd plenary meeting
19 September 2016

Annex I

Comprehensive refugee response framework

1. The scale and nature of refugee displacement today requires us to act in a comprehensive and predictable manner in large scale refugee movements. Through a comprehensive refugee response based on the principles of international cooperation and on burden and responsibility sharing, we are better able to protect and assist refugees and to support the host States and communities involved.

2. The comprehensive refugee response framework will be developed and initiated by the Office of the United Nations High Commissioner for Refugees, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities, for each situation involving large movements of refugees. A comprehensive refugee response should involve a multi stakeholder approach, including national and local authorities, international organizations, international financial institutions, regional organizations, regional coordination and partnership mechanisms, civil society partners, including faith based organizations and academia, the private sector, media and the refugees themselves.

3. While each large movement of refugees will differ in nature, the elements noted below provide a framework for a comprehensive and people centred refugee response, which is in accordance with international law and best international practice and adapted to the specific context.

4. We envisage a comprehensive refugee response framework for each situation involving large movements of refugees, including in protracted situations, as an integral and distinct part of an overall humanitarian response, where it exists, and which would normally contain the elements set out below.

Reception and admission

5. At the outset of a large movement of refugees, receiving States, bearing in mind their national capacities and international legal obligations, in cooperation, as appropriate, with the Office of the United Nations High Commissioner for Refugees, international organizations and other partners and with the support of other States as requested, in conformity with international obligations, would:

(*a*) Ensure, to the extent possible, that measures are in place to identify persons in need of international protection as refugees, provide for adequate, safe and dignified reception conditions, with a particular emphasis on persons with specific needs, victims of human trafficking, child protection, family unity, and prevention of and response to sexual and gender based violence, and support the critical contribution of receiving communities and societies in this regard;

(*b*) Take account of the rights, specific needs, contributions and voices of women and girl refugees;

(*c*) Assess and meet the essential needs of refugees, including by providing access to adequate safe drinking water, sanitation, food, nutrition, shelter, psychosocial support and health care, including sexual and reproductive health, and providing assistance to host countries and communities in this regard, as required;

(*d*) Register individually and document those seeking protection as refugees, including in the first country where they seek asylum, as quickly as possible upon their arrival. To achieve this, assistance may be needed, in areas such as biometric technology and other technical and financial support, to be coordinated by the Office of the United Nations High Commissioner for Refugees with relevant actors and partners, where necessary;

(*e*) Use the registration process to identify specific assistance needs and protection arrangements, where possible, including but not exclusively for refugees with special protection concerns, such as women at risk, children, especially unaccompanied children and children separated from their families, child headed and single parent households, victims of trafficking, victims of trauma and survivors of sexual violence, as well as refugees with disabilities and older persons;

(*f*) Work to ensure the immediate birth registration for all refugee children born on their territory and provide adequate assistance at the earliest opportunity with obtaining other necessary documents, as appropriate, relating to civil status, such as marriage, divorce and death certificates;

(*g*) Put in place measures, with appropriate legal safeguards, which uphold refugees' human rights, with a view to ensuring the security of refugees, as well as measures to respond to host countries' legitimate security concerns;

(*h*) Take measures to maintain the civilian and humanitarian nature of refugee camps and settlements;

(*i*) Take steps to ensure the credibility of asylum systems, including through collaboration among the countries of origin, transit and destination and to facilitate the return and readmission of those who do not qualify for refugee status.

Support for immediate and ongoing needs

6. States, in cooperation with multilateral donors and private sector partners, as appropriate, would, in coordination with receiving States:

(*a*) Mobilize adequate financial and other resources to cover the humanitarian needs identified within the comprehensive refugee response framework;

(*b*) Provide resources in a prompt, predictable, consistent and flexible manner, including through wider partnerships involving State, civil society, faith based and private sector partners;

(*c*) Take measures to extend the finance lending schemes that exist for developing countries to middle income countries hosting large numbers of refugees, bearing in mind the economic and social costs to those countries;

(*d*) Consider establishing development funding mechanisms for such countries;

(*e*) Provide assistance to host countries to protect the environment and strengthen infrastructure affected by large movements of refugees;

(*f*) Increase support for cash based delivery mechanisms and other innovative means for the efficient provision of humanitarian assistance, where appropriate, while increasing accountability to ensure that humanitarian assistance reaches its beneficiaries.

7. Host States, in cooperation with the Office of the United Nations High Commissioner for Refugees and other United Nations entities, financial institutions and other relevant partners, would, as appropriate:

(*a*) Provide prompt, safe and unhindered access to humanitarian assistance for refugees in accordance with existing humanitarian principles;

(*b*) Deliver assistance, to the extent possible, through appropriate national and local service providers, such as public authorities for health, education, social services and child protection;

(*c*) Encourage and empower refugees, at the outset of an emergency phase, to establish supportive systems and networks that involve refugees and host communities and are age and gender sensitive, with a particular emphasis on the protection and empowerment of women and children and other persons with specific needs;

(*d*) Support local civil society partners that contribute to humanitarian responses, in recognition of their complementary contribution;

(*e*) Ensure close cooperation and encourage joint planning, as appropriate, between humanitarian and development actors and other relevant actors.

Support for host countries and communities

8. States, the Office of the United Nations High Commissioner for Refugees and relevant partners would:

(*a*) Implement a joint, impartial and rapid risk and/or impact assessment, in anticipation or after the onset of a large refugee movement, in order to identify and prioritize the assistance required for refugees, national and local authorities, and communities affected by a refugee presence;

(*b*) Incorporate, where appropriate, the comprehensive refugee response framework in national development planning, in order to strengthen the delivery of essential services and infrastructure for the benefit of host communities and refugees;

(*c*) Work to provide adequate resources, without prejudice to official development assistance, for national and local government authorities and other service providers in view of the increased needs and pressures on social services. Programmes should benefit refugees and the host country and communities.

Durable solutions

9. We recognize that millions of refugees around the world at present have no access to timely and durable solutions, the securing of which is one of the principal goals of international protection. The success of the search for solutions depends in large measure on resolute and sustained international cooperation and support.

10. We believe that actions should be taken in pursuit of the following durable solutions: voluntary repatriation, local solutions and resettlement and complementary pathways for admission. These actions should include the elements set out below.

11. We reaffirm the primary goal of bringing about conditions that would help refugees return in safety and dignity to their countries and emphasize the need to tackle the root causes of violence and armed conflict and to achieve necessary political solutions and the peaceful settlement of disputes, as well as to assist in reconstruction efforts. In this context, States of origin/nationality would:

(*a*) Acknowledge that everyone has the right to leave any country, including his or her own, and to return to his or her country;

(*b*) Respect this right and also respect the obligation to receive back their nationals, which should occur in a safe, dignified and humane manner and with full respect for human rights in accordance with obligations under international law;

(*c*) Provide necessary identification and travel documents;

(*d*) Facilitate the socioeconomic reintegration of returnees;

(*e*) Consider measures to enable the restitution of property.

12. To ensure sustainable return and reintegration, States, United Nations organizations and relevant partners would:

(*a*) Recognize that the voluntary nature of repatriation is necessary as long as refugees continue to require international protection, that is, as long as they cannot regain fully the protection of their own country;

(*b*) Plan for and support measures to encourage voluntary and informed repatriation, reintegration and reconciliation;

(*c*) Support countries of origin/nationality, where appropriate, including through funding for rehabilitation, reconstruction and development, and with the necessary legal safeguards to enable refugees to access legal, physical and other support mechanisms needed for the restoration of national protection and their reintegration;

(*d*) Support efforts to foster reconciliation and dialogue, particularly with refugee communities and with the equal participation of women and youth, and to ensure respect for the rule of law at the national and local levels;

(*e*) Facilitate the participation of refugees, including women, in peace and reconciliation processes, and ensure that the outcomes of such processes duly support their return in safety and dignity;

(*f*) Ensure that national development planning incorporates the specific needs of returnees and promotes sustainable and inclusive reintegration, as a measure to prevent future displacement.

13. Host States, bearing in mind their capacities and international legal obligations, in cooperation with the Office of the United Nations High Commissioner for Refugees, the United Nations Relief and Works Agency for

Palestine Refugees in the Near East, where appropriate, and other United Nations entities, financial institutions and other relevant partners, would:

(*a*) Provide legal stay to those seeking and in need of international protection as refugees, recognizing that any decision regarding permanent settlement in any form, including possible naturalization, rests with the host country;

(*b*) Take measures to foster self reliance by pledging to expand opportunities for refugees to access, as appropriate, education, health care and services, livelihood opportunities and labour markets, without discriminating among refugees and in a manner which also supports host communities;

(*c*) Take measures to enable refugees, including in particular women and youth, to make the best use of their skills and capacities, recognizing that empowered refugees are better able to contribute to their own and their communities' well being;

(*d*) Invest in building human capital, self reliance and transferable skills as an essential step towards enabling long term solutions.

14. Third countries would:

(*a*) Consider making available or expanding, including by encouraging private sector engagement and action as a supplementary measure, resettlement opportunities and complementary pathways for admission of refugees through such means as medical evacuation and humanitarian admission programmes, family reunification and opportunities for skilled migration, labour mobility and education;

(*b*) Commit to sharing best practices, providing refugees with sufficient information to make informed decisions and safeguarding protection standards;

(*c*) Consider broadening the criteria for resettlement and humanitarian admission programmes in mass displacement and protracted situations, coupled with, as appropriate, temporary humanitarian evacuation programmes and other forms of admission.

15. States that have not yet established resettlement programmes are encouraged to do so at the earliest opportunity. Those that have already done so are encouraged to consider increasing the size of their programmes. Such programmes should incorporate a non discriminatory approach and a gender perspective throughout.

16. States aim to provide resettlement places and other legal pathways on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met.

The way forward

17. We commit to implementing this comprehensive refugee response framework.

18. We invite the Office of the United Nations High Commissioner for Refugees to engage with States and consult with all relevant stakeholders over the coming two years, with a view to evaluating the detailed practical application of the comprehensive refugee response framework and assessing the scope for refinement and further development. This process should be informed by practical experience with the implementation of the framework in a range of specific situations. The objective would be to ease pressures on the host countries involved, to enhance refugee self reliance, to expand access to third country solutions and to support conditions in countries of origin for return in safety and dignity.

19. We will work towards the adoption in 2018 of a global compact on refugees, based on the comprehensive refugee response framework and on the outcomes of the process described above. We invite the United Nations High Commissioner for Refugees to include such a proposed global compact on refugees in his annual report to the General Assembly in 2018, for consideration by the Assembly at its seventy third session in conjunction with its annual resolution on the Office of the United Nations High Commissioner for Refugees.

Annex II

Towards a global compact for safe, orderly and regular migration

I. Introduction

1. This year, we will launch a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration.

2. The global compact would set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. It would make an important contribution to global governance and enhance coordination on international migration. It would present a framework for comprehensive international cooperation on migrants and human mobility. It would deal with all aspects of international migration, including the humanitarian, developmental, human rights related and other aspects of migration. It would be guided by the 2030 Agenda for Sustainable Development[17] and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[18] and informed by the Declaration of the High level Dialogue on International Migration and Development adopted in October 2013.[19]

II. Context

3. We acknowledge the important contribution made by migrants and migration to development in countries of origin, transit and destination, as well as the complex interrelationship between migration and development.

4. We recognize the positive contribution of migrants to sustainable and inclusive development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses.

5. We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants, regardless of migration status. We underline the need to ensure respect for the dignity of migrants and the protection of their rights under applicable international law, including the principle of non discrimination under international law.

6. We emphasize the multidimensional character of international migration, the importance of international, regional and bilateral cooperation and dialogue in this regard, and the need to protect the human rights of all migrants, regardless of status, particularly at a time when migration flows have increased.

[17] Resolution 70/1.

[18] Resolution 69/313, annex.

[19] Resolution 68/4.

7. We bear in mind that policies and initiatives on the issue of migration should promote holistic approaches that take into account the causes and consequences of the phenomenon. We acknowledge that poverty, underdevelopment, lack of opportunities, poor governance and environmental factors are among the drivers of migration. In turn, pro poor policies relating to trade, employment and productive investments can stimulate growth and create enormous development potential. We note that international economic imbalances, poverty and environmental degradation, combined with the absence of peace and security and lack of respect for human rights, are all factors affecting international migration.

III. Content

8. The global compact could include, but would not be limited to, the following elements:

(*a*) International migration as a multidimensional reality of major relevance for the development of countries of origin, transit and destination, as recognized in the 2030 Agenda for Sustainable Development;

(*b*) International migration as a potential opportunity for migrants and their families;

(*c*) The need to address the drivers of migration, including through strengthened efforts in development, poverty eradication and conflict prevention and resolution;

(*d*) The contribution made by migrants to sustainable development and the complex interrelationship between migration and development;

(*e*) The facilitation of safe, orderly, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies; this may include the creation and expansion of safe, regular pathways for migration;

(*f*) The scope for greater international cooperation, with a view to improving migration governance;

(*g*) The impact of migration on human capital in countries of origin;

(*h*) Remittances as an important source of private capital and their contribution to development and promotion of faster, cheaper and safer transfers of remittances through legal channels, in both source and recipient countries, including through a reduction in transaction costs;

(*i*) Effective protection of the human rights and fundamental freedoms of migrants, including women and children, regardless of their migratory status, and the specific needs of migrants in vulnerable situations;

(*j*) International cooperation for border control, with full respect for the human rights of migrants;

(*k*) Combating trafficking in persons, smuggling of migrants and contemporary forms of slavery;

(*l*) Identifying those who have been trafficked and considering providing assistance, including temporary or permanent residency, and work permits, as appropriate;

(*m*) Reduction of the incidence and impact of irregular migration;

(*n*) Addressing the situations of migrants in countries in crisis;

(*o*) Promotion, as appropriate, of the inclusion of migrants in host societies, access to basic services for migrants and gender responsive services;

(*p*) Consideration of policies to regularize the status of migrants;

(*q*) Protection of labour rights and a safe environment for migrant workers and those in precarious employment, protection of women migrant workers in all sectors and promotion of labour mobility, including circular migration;

(*r*) The responsibilities and obligations of migrants towards host countries;

(*s*) Return and readmission, and improving cooperation in this regard between countries of origin and destination;

(*t*) Harnessing the contribution of diasporas and strengthening links with countries of origin;

(*u*) Combating racism, xenophobia, discrimination and intolerance towards all migrants;

(*v*) Disaggregated data on international migration;

(*w*) Recognition of foreign qualifications, education and skills and cooperation in access to and portability of earned benefits;

(*x*) Cooperation at the national, regional and international levels on all aspects of migration.

IV. The way forward

9. The global compact would be elaborated through a process of intergovernmental negotiations, for which preparations will begin immediately. The negotiations, which will begin in early 2017, are to culminate in an intergovernmental conference on international migration in 2018 at which the global compact will be presented for adoption.

10. As the Third High level Dialogue on International Migration and Development is to be held in New York no later than 2019,[20] a role should be envisaged for the High level Dialogue in the process.

11. The President of the General Assembly is invited to make early arrangements for the appointment of two co facilitators to lead open, transparent and inclusive consultations with States, with a view to the determination of modalities, a timeline, the possible holding of preparatory conferences and other practicalities relating to the intergovernmental negotiations, including the integration of Geneva based migration expertise.

12. The Secretary General is requested to provide appropriate support for the negotiations. We envisage that the Secretariat of the United Nations and the International Organization for Migration would jointly service the negotiations, the former providing capacity and support and the latter extending the technical and policy expertise required.

13. We envisage also that the Special Representative of the Secretary General for International Migration and Development, Mr. Peter Sutherland, would coordinate

[20] See resolution 69/229, para. 32.

the contributions to be made to the negotiation process by the Global Forum on Migration and Development and the Global Migration Group. We envisage that the International Labour Organization, the United Nations Office on Drugs and Crime, the Office of the United Nations High Commissioner for Refugees, the United Nations Development Programme, the Office of the United Nations High Commissioner for Human Rights and other entities with significant mandates and expertise related to migration would contribute to the process.

14. Regional consultations in support of the negotiations would be desirable, including through existing consultative processes and mechanisms, where appropriate.

15. Civil society, the private sector, diaspora communities and migrant organizations would be invited to contribute to the process for the preparation of the global compact.

EXHIBIT 3

MEMORANDUM TO THE PRESIDENT

OCT 23 2017

FROM: Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of Homeland Security

Daniel Coats
Director
Office of the Director of National Intelligence

RESUMING THE UNITED STATES REFUGEE ADMISSIONS PROGRAM WITH ENHANCED VETTING CAPABILITIES

In section 6(a) of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), you directed a review to strengthen the vetting process for the U.S. Refugee Admissions Program (USRAP). You instructed the Secretary of State to suspend the travel of refugees into the United States under that program, and the Secretary of Homeland Security to suspend decisions on applications for refugee status, for a temporary, 120-day period, subject to certain exceptions. During the 120-day suspension period, Section 6(a) required the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and to implement such additional procedures.

The Secretary of State convened a working group to implement the review process under section 6(a) of Executive Order 13780, which proceeded in parallel with the development of the uniform baseline of screening and vetting standards and procedures for all travelers under section 5 of that Executive Order. The section 6(a) working group then compared the refugee screening and vetting process with the uniform baseline standards and procedures established by the section 5 working group. This helped to inform the section 6(a) working group's identification of a number of additional ways to enhance the refugee screening and vetting processes. The Secretary of State and the Secretary of Homeland Security have begun implementing those improvements.

Pursuant to section 6(a), this memorandum reflects our joint determination that the improvements to the USRAP vetting process identified by the 6(a) working group are generally adequate to ensure the security and welfare of the United States, and therefore that the Secretary

of State may resume travel of refugees into the United States and that the Secretary of Homeland Security may resume making decisions on applications for refugee status for stateless persons and foreign nationals, subject to the conditions described below.

Notwithstanding the additional procedures identified or implemented during the last 120 days, we continue to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015. To address these concerns, we will conduct a detailed threat analysis and review for nationals of these high risk countries and stateless persons who last habitually resided in those countries, including a threat assessment of each country, pursuant to section 207(c) and applicable portions of section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1157(c) and 1182(a), section 402(4) of the Homeland Security Act of 2002, 6 U.S.C. 202(4), and other applicable authorities. During this review, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive.

While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of countries on the SAO list, or of stateless persons who last habitually resided in those countries, and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security will admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States. We will direct our staff to work jointly and with law enforcement agencies to complete the additional review of the SAO countries no later than 90 days from the date of this memorandum, and to determine what additional safeguards, if any, are necessary to ensure that the admission of refugees from these countries of concern does not pose a threat to the security and welfare of the United States.

Further, it is our joint determination that additional security measures must be implemented promptly for derivative refugees—those who are "following-to-join" principal refugees that have already been resettled in the United States—regardless of nationality.[1] At present, the majority of following-to-join refugees, unlike principal refugees, do not undergo enhanced DHS review, which includes soliciting information from the refugee applicant earlier

[1] When a refugee is processed for admission to the United States, eligible family members located in the same place as the refugee (spouses and/or unmarried children under 21 years of age) typically are also processed at the same time, and they receive the same screening as the principal refugee. Each year, however, resettled principal refugees also petition, through a separate process, for approximately 2,500 family members to be admitted to the United States as following-to-join refugees. The family member may be residing and processed in a different country than where the principal refugee was processed, and while most following-to-join refugees share the nationality of the principal, some may be of a different nationality.

in the process to provide for a more thorough screening process, as well as vetting certain nationals or stateless persons against classified databases. We have jointly determined that additional security measures must be implemented before admission of following-to-join refugees can resume. Based on an assessment of current systems checks, as well as requirements for uniformity identified by Section 5, we will direct our staffs to work jointly to implement adequate screening mechanisms for following-to-join refugees that are similar to the processes employed for principal refugees, in order to ensure the security and welfare of the United States. We will resume admission of following-to-join refugees once those enhancements have been implemented.

Rex W. Tillerson
Secretary
Department of State

Elaine Duke
Acting Secretary
Department of
Homeland Security

Dan Coats
Director
National Intelligence

UNCLASSIFIED

Addendum to Section 6(a) Memorandum

Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*

Section 6(a) of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), required a review of the United States Refugee Admissions Program (USRAP) application and adjudication process during a 120-day period to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States. The Secretary of State (State), in conjunction with the Secretary of Homeland Security (DHS) and in consultation with the Director of National Intelligence (ODNI) established an interagency working group (the Section 6(a) Working Group) to undertake this review.

This addendum provides a summary of the additional procedures that have been and will be implemented. A classified report provides further detail of this review and enhancements. The interagency working group has recommended and implemented enhanced vetting procedures in three areas: ***application, interviews and adjudications, and system checks.***

Interagency Approach to the Review

To conduct the review, the Section 6(a) Working Group conducted a baseline assessment of USRAP application and adjudication processes and developed additional procedures to further enhance the security and welfare of the United States. The Section 6(a) Working Group ensured alignment with other concurrent and relevant reviews undertaken under the Executive Order, such as the review under Section 5, which established uniform baseline screening standards for all travelers to the United States.

All individuals admitted through the USRAP already receive a baseline of extensive security checks. The USRAP also requires additional screening and procedures for certain individuals from 11 specific countries that have been assessed by the U.S. government to pose elevated potential risks to national security; these individuals are subject to additional vetting through Security Advisory Opinions (SAOs)[1]. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The most recent list was updated in 2015. The Section 6(a) Working Group agreed to continue to follow this tiered approach to assessing risk and agreed that these nationalities continued to require additional vetting based on current elevated potential for risk. Each additional procedure identified during the 120-day review was evaluated to determine whether it should apply to stateless persons and refugees of all nationalities or only certain nationalities.[2]

[1] The SAO is a DOS-initiated biographic check conducted by the Federal Bureau of Investigation and intelligence community partners. SAO name checks are initiated for the groups and nationalities designated by the U.S. government as requiring this higher level check.

[2] Stateless persons in this regard means persons without nationality who last habitually resided in one of these countries.

Additional Procedures for Refugee Applicants Seeking Resettlement in the United States

Application Process:

- **Increased Data Collection:** Additional data are being collected from all applicants in order to enhance the effectiveness of biographic security checks. These changes will improve the ability to determine whether an applicant is being truthful about his or her claims, has engaged in criminal or terrorist activity, has terrorist ties, or is otherwise connected to nefarious actors.

- **Enhanced Identity Management:** The electronic refugee case management system has been improved to better detect potential fraud by strengthening the ability to identify duplicate identities or identity documents. Any such matches are subject to further investigation prior to an applicant being allowed to travel. These changes will make it harder for applicants to use deceptive tactics to enter our country.

Interview and Adjudication Process:

- **Fraud Detection and National Security:** DHS's U.S. Citizenship and Immigration Services (USCIS) will forward-deploy specially trained Fraud Detection and National Security (FDNS) officers at refugee processing locations to help identify potential fraud, national security, and public safety issues on certain circuit rides to advise and assist interviewing officers. With FDNS officers on the ground, the United States will be better positioned to detect and disrupt fraud and identify potential national security and public safety threats.

- **New Guidance and Training:** USCIS is strengthening its guidance on how to assess the credibility and admissibility of refugee applicants. This new guidance clarifies how officers should identify and analyze grounds of inadmissibility related to drug offenses, drug trafficking, prostitution, alien smuggling, torture, membership in totalitarian parties, fraud and misrepresentation, certain immigration violations, and other criminal activity. USCIS has also updated guidance for refugee adjudicators to give them greater flexibility in assessing the credibility of refugee applicants, including expanding factors that may be considered in making a credibility determination consistent with the REAL ID Act. This enhanced guidance supplements the robust credibility guidance and training USCIS officers already receive prior to adjudicating refugee cases. Additionally, the updated guidance equips officers with tactics to identify inadequate or improper interpretation.

- **Expanded Information-Sharing:** State and USCIS are exchanging more in-depth information to link related cases so that interviewing officers are able to develop more tailored lines of questioning that will help catch potential fraud, national security threats, or public safety concerns.

System Checks:

- **Updating Security Checks:** Measures have been put in place to ensure that if applicants change or update key data points, including new or altered biographic information, that such data is then subject to renewed scrutiny and security checks. This will add an additional layer of protection to identify fraud and national security issues.

- **Security Advisory Opinions (SAOs):** Departments and agencies have agreed to expand the classes of refugee applicants that are subject to SAOs, thereby ensuring that more refugees receive deeper vetting.

  - USCIS' Fraud Detection and National Security Directorate is also expanding its "enhanced review" process for applicants who meet SAO criteria. This includes checks against certain social media and classified databases.

Additional Review Process for Certain Categories of Refugee Applicants

The Department of Homeland Security continues to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the SAO list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015.

As such, for countries subject to SAOs, the Secretary of State and the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Attorney General, will coordinate a review and analysis of each country, pursuant to existing USRAP authorities. This review will include an in-depth threat assessment of each country, to be completed within 90 days. Moreover, it will include input and analysis from the intelligence and law enforcement communities, as well as all relevant information related to ongoing or completed investigations and national security risks and mitigation strategies.

This review will be tailored to each SAO country, and decisions may be made for each country independently. While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of, and stateless persons who last habitually resided in, countries on the SAO list and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security may admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States.

In addition, during this review period, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary

review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive. This means that refugee admissions for nationals of, and stateless persons who last habitually resided in, SAO countries will occur at a slower pace, at least during the temporary review period and likely further into the fiscal year, as the deployment of additional screening and integrity measures have historically led to lengthier processing times. While DHS prioritizes its resources in this manner until the additional analysis is completed, DHS will interview refugee applicants as appropriate from SAO countries on a discretionary basis.

Form I-730 Refugee Following-to-Join Processing

A principal refugee applicant may include his or her spouse and unmarried children under 21 years of age as derivative refugee applicants on his or her Form I-590, Registration for Classification as a Refugee. When these family members are co-located with the principal, the derivative applicants generally are processed through the USRAP and, if approved, travel to the United States with the principal refugee applicant. These family members receive the same baseline security checks as the principal refugee and, if found eligible, are admitted as refugees. Alternatively, a principal refugee admitted to the United States may file a Form I-730, Refugee/Asylee Relative Petition, for his or her spouse and unmarried children under 21 years of age, to follow-to-join the principal refugee in the United States. If DHS grants the petition after interview and vetting, the approved spouse or unmarried child is admitted as a refugee and counted toward the annual refugee ceiling. While the vast majority of eligible refugee family members admitted to the United States each year accompany, and are screened with, the principal refugee, principal refugees admitted to the United States file petitions for approximately 2,500 family members to join them in the United States through the following-to-join process. Following-to-join family members may be residing and processed in a different country than where the principal refugee was processed, and while most share the nationality of the principal refugee, some may be of a different nationality. In any given year, DHS receives petitions for beneficiaries representing over 60 different nationalities. In recent years, the nationalities most represented were Iraqi, Somali, Burmese, Congolese, Ethiopian and Eritrean.

The majority of following-to-join refugees do not receive the same, full baseline interagency checks that principal refugees receive. Nor do following-to-join refugees currently undergo enhanced DHS review, which includes soliciting information from the refugee earlier in the process to provide for more thorough screening and vetting of certain nationals or stateless persons against classified databases. DHS and State are expeditiously taking measures to better align the vetting regime for following-to-join refugees with that for principal refugees by 1) ensuring that all following-to-join refugees receive the full baseline interagency checks that principal refugees receive; 2) requesting submission of the beneficiary's I-590 application in support of the Form I-730 petition earlier in the process to provide for more thorough screening; 3) vetting certain nationals or stateless persons against classified databases; and 4) expanding SAO requirements for this population in keeping with the agreed-to expansion for I-590 refugee applicants. These additional security measures must be implemented before admission of following-to-join refugees—regardless of nationality—can resume. Once the security enhancements are in place, admission of following-to-join refugees can resume.

TRANSCRIPT

SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

OCTOBER 18, 2017

10:00 AM ET

HART SENATE OFFICE BUILDING ROOM 216

WITNESS: ATTORNEY GENERAL JEFF SESSIONS

I'm sorry. I was hoping that no republican would come back.

(LAUGHTER)

KLOBUCHAR:

Well, no. , I would like to note for the record that you said that, Mr. Chairman and not me. I'm just trying to be polite.

FLAKE:

Gee, I guess I know where I stand.

GRASSLEY:

Only from the standpoint of this meeting being four or five hours.

FLAKE:

I got you. Got you. I appreciate it. Thank you for enduring here today. I recently filed an amicus brief regarding the 9th Circuit decision in the Sanchez-Gomez case that ended the long standing safety protocols for restraining detainees in a courtroom during pretrial arrangements and hearings.

It's obviously very important for Arizona. We have a very busy docket, particularly as it pertains to immigration.

This amicus brief I filed had the support of the National Sheriffs Association, Western Sheriffs -- State Sheriffs Association and the Arizona Sheriffs Association. As you know, we have a lot of historic courthouses in Arizona that

don't lend themselves well to separation between detainees and the public, often having to share hallways or doorways. And without the longstanding restraint protocols that existed, it makes it impossible to actually bring a number of people through the system and it will really hobble law enforcement in Arizona. Have you looked at this? And how do you believe that this decision, in the 9th circuit, will impact the courtroom?

SESSIONS:
I will be glad to look at it. I'm not that familiar with -- I'm not familiar with it, although the issue's been one out there for a long time. And my experience is that judges decide that fairly day after day. Some people just need to be shackled, I've always thought. But they don't do it unless they feel like it's really necessary. I would think -- is it the 9th circuit -- the case would reverse that...

FLAKE:
Yeah.

SESSIONS:
...longstanding policy?

FLAKE:

That's correct. And it would -- basically, I mean, obviously we have protocols and court decisions with regard to jury trials and the appearance of somebody who is restrained. But this is just arraignments and not before a judge. And it really puts our court officials, security officials, the public at risk in many circumstances, or it ties up our sheriffs and other law enforcement officials from actually going out on the beat and doing what they should do, to actually having to be in the courtroom at all times.

So it's really a problem, particularly with regard to implementation of something like Operation Streamline, which we've spoken about many times. It -- it really inhibits the ability to move the number of people through the system quickly enough because, where we used to be able to have 30 or 40 individuals there arraigned at the same time, now they can only do 6 or 7. And so it simply makes it impossible to move through the docket.

So I appreciate the DOJ's position on this and I hope that U.S. Supreme Court grants cert there.

SESSIONS:

We will review it.

FLAKE:

With regard to sex and human trafficking, earlier this year, the Permanent Subcommittee on Investigations concluded a two-

year investigation on backpage.com, which revealed that the company knowingly facilitated online sex trafficking. In July, the subcommittee, under Senator Portman's leadership, referred the case to your office for criminal investigation. Can you tell us, to the extent that you're able, what the status of that investigation is?

SESSIONS:
I don't believe I can. (OFF-MIKE). I'm not able to now, it would be review as to whether or not I can comment on it and what the status may be.

FLAKE:
OK, well, we'll check back with you on that...

SESSIONS:
Thank you.

FLAKE:
Mr. Chairman, I have letters of support from the Stop Enabling Sex Traffickers Act bill I cosponsored with Senator Portman and several of my colleagues. It would prevent companies like backpage.com from committing online sex trafficking crimes. And there -- these are letters from the National Center for Missing & Exploited Children and other anti-trafficking advocates that I'd like to submit for the record.

GRASSLEY:
Without objection, your letters will be received.

SESSIONS:
Thank you, Senator Flake.
And it is -- this human trafficking is a priority of ours. My deputy attorney general feels strongly about it. The associate attorney general, Rachel Bran, has made that one of her interests and made a couple of speeches on that recently. We can do more and we will do more.

FLAKE:
OK, thank you. One other item. You mentioned in your opening remarks with regard to civil forfeiture, that you'd put some protocols in place in terms of more speedy notification of those whose assets were seized. What other protocols and what are we doing to ensure that we have a better system than we've had in the past? I'm convinced that this has been abused at just about every level of law enforcement, state and -- and federal.

SESSIONS:
Well, we intend to respond to any problems that are out there that we identify in the future. When you make -- when the government has probable cause, and feels able to seize --

money usually -- drug trafficking money, usually. The -- they have a certain period of time to respond. We cut that by at least half -- if not, I believe, a little more than half.

And we have -- we've directed our assistant United States attorneys to monitor the state authorities and the DEA to make sure the systems are working well. We have required that before we adopt a case from the states, that they be trained in proper procedures for a Federal Court system and not just any police officer. So they know what they're supposed to do and I think that will be a big help.

And I believe there's some other things. And then, I don't know if you were here, but I did announce -- send out, Monday, a directive to establish an asset forfeiture accountability officer, who will be in the deputy's office, and who will be monitoring all these cases, complaints that may occur, so that we can respond promptly.

We want this -- this system is really important, Senator Flake. It's a top priority of our -- every law enforcement agency in America, but it's got to be run right. And that's going to be our goal.

FLAKE:

Well, cutting the time in half for notification is cold comfort for some who -- who have this stretch on for months and years. So I -- I hope that we do more than cut the time in half for some of these.

SESSIONS:
The -- that's just one of the things that would happen. We want to take nothing but good cases. And we're winning at the 90 percent level. And most of these cases are pretty open and shut. So -- and I hear what you're saying and I know your concerns. And that's why I am not taking it lightly. We're going to monitor this program.

FLAKE:
Thank you.
Thank you, Mr. Chairman.

GRASSLEY:
Thank you. Senator Flake had seven minutes because he was on his first round.
Now, Senator Klobuchar, five minutes.

KLOBUCHAR:
Thank you.
Attorney General, I'll start where I ended with the election issues and turn to election cybersecurity. As you know, there have been -- now been established by our agencies, 21 states where there was some attempt to hack into their election equipment.

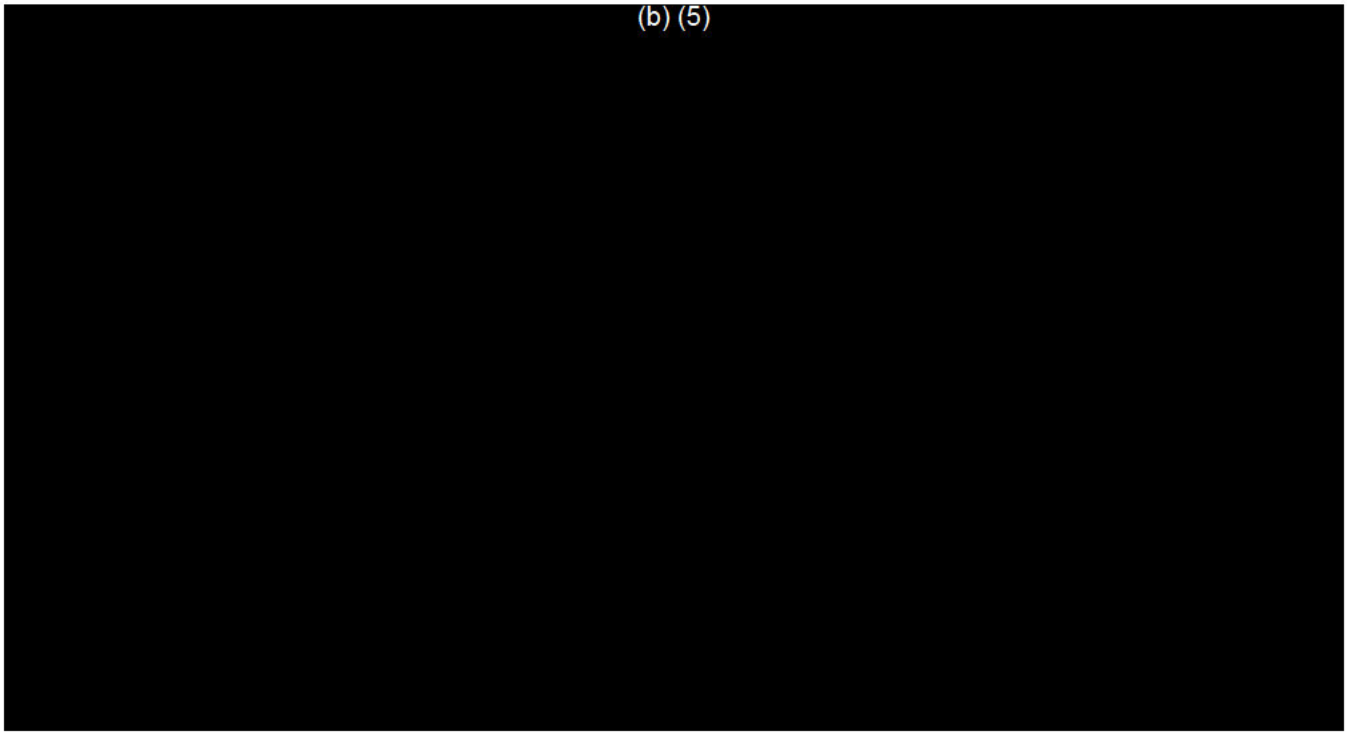
Tucker, Rachael (OAG)

From: Tucker, Rachael (OAG)
Sent: Friday, November 3, 2017 1:52 PM
To: Cutrona, Danielle (OAG)
Subject: Fwd: (b) (5) [redacted]

Has OPA been in touch with you about this?

Begin forwarded message:

(b) (5) [redacted]


(b) (5)