IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.* Plaintiffs-Appellees, v. UNITED STATES, *et al.* Defendants-Appellants.	No. 15-40238

ATTACHMENTS TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

TABLE OF CONTENTS

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

STATE OF TEXAS, ET AL., Plaintiffs,	§	
V.	§	CIVIL NO. B-14-254
UNITED STATES OF AMERICA, ET AL., Defendants.	§	

ORDER OF TEMPORARY INJUNCTION

The Court having found that at least one Plaintiff has satisfied all the necessary elements to maintain a lawsuit and to obtain a Temporary Injunction hereby grants the Motion for Temporary Injunction [Doc. No. 5]. The United States of America, its departments, agencies, officers, agents and employees and Jeh Johnson, Secretary of the Department of Homeland Security; R. Gil Kerlikowske, Commissioner of United States Customs and Border Protection; Ronald D. Vitiello, Deputy Chief of United States Border Patrol, United States Customs and Border Protection; Thomas S. Winkowski, Acting Director of United States Immigration and Customs Enforcement; and Leon Rodriguez, Director of United States Citizenship and Immigration Services are hereby enjoined from implementing any and all aspects or phases of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program as set out in the Secretary of Homeland Security Jeh Johnson's memorandum dated November 20, 2014 ("DAPA Memorandum"), pending a final resolution of the merits of this case or until a further order of this Court, the United States Court of Appeals for the Fifth Circuit or the United States Supreme Court. The reasons for this injunction are set out in detail in the accompanying Memorandum Opinion and Order, but, to summarize, it is due to the failure of the Defendants to comply with the Administrative Procedure Act.

For similar reasons, the United States of America, its departments, agencies, officers, agents and employees and Jeh Johnson, Secretary of the Department of Homeland Security; R. Gil Kerlikowske, Commissioner of United States Customs and Border Protection; Ronald D. Vitiello, Deputy Chief of United States Border Patrol, United States Customs and Border Protection; Thomas S. Winkowski, Acting Director of United States Immigration and Customs Enforcement; and Leon Rodriguez, Director of United States Citizenship and Immigration Services are further enjoined from implementing any and all aspects or phases of the expansions (including any and all changes) to the Deferred Action for Childhood Arrivals ("DACA") program as outlined in the DAPA Memorandum pending a trial on the merits or until a further order of this Court, the Fifth Circuit Court of Appeals or the United States Supreme Court.

In addition to any other relief provided by law, the Defendants are given leave to reapproach this Court for relief from this Order, in the time period between the date of this Order and the trial on the merits, for good cause, including if Congress passes legislation that authorizes DAPA or at such a time as the Defendants have complied with the requirements of the Administrative Procedure Act. The parties are ordered to meet and confer and formulate and file with the Court by February 27, 2015 an agreed upon (to the extent possible) schedule for the resolution on the merits. The Court will hold a conference call among counsel after it reviews this submission.

The Court has considered the issue of security as per Rule 65(c) of the Federal Civil Rules of Procedure. It finds that the Defendants will not suffer any financial loss that warrants the need for the Plaintiffs to post security. The Fifth Circuit has held that a district court has the discretion to "require no security at all" and the Court hereby exercises that authority based upon the facts and circumstances of the case, the issues being decided and the parties involved.

Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996); s*ee also Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300 (5th Cir. 1978); Wright & Miller, *Federal Practice and Procedure*, § 2954.

Signed this 16th day of February, 2015.

Andrew S. Hanen
United States District Judge

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

STATE OF TEXAS, ET AL., *Plaintiffs*,	§ §	
v.	§	CIVIL NO. B-14-254
UNITED STATES OF AMERICA, ET AL., *Defendants*.	§ §	

MEMORANDUM OPINION AND ORDER

This is a case in which twenty-six states or their representatives are seeking injunctive relief against the United States and several officials of the Department of Homeland Security to prevent them from implementing a program entitled "Deferred Action for Parents of Americans and Lawful Permanent Residents." [1] This program is designed to provide legal presence to over four million individuals who are currently in the country illegally, and would enable these individuals to obtain a variety of both state and federal benefits.

The genesis of the problems presented by illegal immigration in this matter was described by the United States Supreme Court decades ago:

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders.

[1] The Plaintiffs include: the State of Texas; State of Alabama; State of Arizona; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Attorney General Bill Schuette, People of Michigan; Governor Phil Bryant, State of Mississippi; Governor Paul R. LePage, State of Maine; Governor Patrick L. McCrory, State of North Carolina; and Governor C. L. "Butch" Otter, State of Idaho. The States of Tennessee and Nevada were added in the latest Amended Complaint. All of these plaintiffs, both individuals and states, will be referred to collectively as "States" or "Plaintiffs" unless there is a particular need for specificity.

> The Attorney General recently estimated the number of illegal aliens within the United States at between 3 and 6 million. In presenting to both the Senate and House of Representatives several Presidential proposals for reform of the immigration laws—including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special statute under the immigration laws—the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the Nation, and that they are unlikely to be displaced from our territory.
>
> > "We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals." Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General).
>
> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

Plyler v. Doe, 457 U.S. 202, 218-19 & n.17 (1982). Thus, even in 1982, the Supreme Court noted in *Plyler* that the United States' problems with illegal immigration had existed for decades. Obviously, these issues are still far from a final resolution.

Since 1982, the population of illegal aliens in this country has more than tripled, but today's situation is clearly exacerbated by the specter of terrorism and the increased need for

security.[2] Nevertheless, the Executive Branch's position is the same as it was then. It is still voicing concerns regarding its inability to enforce all immigration laws due to a lack of resources. While Congress has not been idle, having passed a number of ever-increasing appropriation bills and various acts that affect immigration over the last four decades (especially in the wake of the terrorist attacks in 2001), it has not passed nor funded a long term, comprehensive system that resolves this country's issues regarding border security and immigration. To be sure, Congress' and the Executive Branch's focus on matters directly affecting national security is understandable. This overriding focus, however, does not necessarily comport with the interests of the states. While the States are obviously concerned about national security, they are also concerned about their own resources being drained by the constant influx of illegal immigrants into their respective territories, and that this continual flow of illegal immigration has led and will lead to serious domestic security issues directly affecting their citizenry. This influx, for example, is causing the States to experience severe law enforcement problems.[3] Regardless of the reasons behind the actions or inaction of the Executive and Legislative Branches of the federal government, the result is that many states ultimately bear the brunt of illegal immigration.

[2] The Court uses the phrases "illegal immigrant" and "illegal alien" interchangeably. The word "immigrant" is not used in the manner in which it is defined in Title 8 of the United States Code unless it is so designated. The Court also understands that there is a certain segment of the population that finds the phrase "illegal alien" offensive. The Court uses this term because it is the term used by the Supreme Court in its latest pronouncement pertaining to this area of the law. *See Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

[3] *See Arizona v. United* States, as quoted on p. 58 of this opinion. For example, as the Court writes this opinion, Brownsville police have been investigating the kidnapping of a local university student. The student was reportedly kidnapped at gunpoint by a human trafficker a few miles from this Courthouse and forced to transport the trafficker and an alien who had just crossed the border (the Rio Grande River) from the university campus to their destination. *See* Tiffany Huertas, *UT-Brownsville Students on Alert Following Reported Gunpoint Kidnapping*, Action 4 News, Feb. 4, 2015, http://www.valleycentral.com/news/story.aspx?id=1159456#.VNfHn-bF-wE.

This case examines complex issues relating to immigration which necessarily involve questions of federalism, separation of powers, and the ability and advisability, if any, of the Judiciary to hear and resolve such a dispute.

Chief Justice Roberts wrote in *National Federation of Independent Business v. Sebelius*:

> We [the judiciary] do not consider whether the [Patient Protection and Affordable Care] Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.
>
> * * *
>
> Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." In this case, we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess.

132 S. Ct. 2566, 2577 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 404 (1819)).

I. THE ISSUES BEFORE AND NOT BEFORE THE COURT

Although this Court is not faced with either a Congressional Act or an Executive Order, the sentiment expressed by these Chief Justices is nonetheless applicable. The ultimate question before the Court is: Do the laws of the United States, including the Constitution, give the Secretary of Homeland Security the power to take the action at issue in this case? Nevertheless, before the Court begins to address the issues raised in this injunctive action, it finds that the issues can best be framed by emphasizing what is not involved in this case.

First, this case does not involve the wisdom, or the lack thereof, underlying the decision by Department of Homeland Security ("DHS") Secretary Jeh Johnson to award legal presence status to over four million illegal aliens through the Deferred Action for Parents of Americans

and Lawful Permanent Residents ("DAPA," also referred to interchangeably as the "DHS Directive" and the "DAPA Memorandum") program. Although the Court will necessarily be forced to address many factors surrounding this decision and review the relationship between the Legislative and Executive Branches as it pertains to the DHS Secretary's discretion to act in this area, the actual merits of this program are not at issue.

Second, with three minor exceptions, this case does not involve the Deferred Action for Childhood Arrivals ("DACA") program. In 2012, DACA was implemented by then DHS Secretary Janet Napolitano. The program permits teenagers and young adults, who were born outside the United States, but raised in this country, to apply for deferred action status and employment authorizations. The Complaint in this matter does not include the actions taken by Secretary Napolitano, which have to date formalized the status of approximately 700,000 teenagers and young adults. Therefore, those actions are not before the Court and will not be addressed by this opinion. Having said that, DACA will necessarily be discussed in this opinion as it is relevant to many legal issues in the present case. For example, the States maintain that the DAPA applications will undergo a process identical to that used for DACA applications and, therefore, DACA's policies and procedures will be instructive for the Court as to DAPA's implementation.

Third, several of the briefs have expressed a general public perception that the President has issued an executive order implementing a blanket amnesty program, and that it is this amnesty program that is before the Court in this suit. Although what constitutes an amnesty program is obviously a matter of opinion, these opinions do not impact the Court's decision. Amnesty or not, the issues before the Court do not require the Court to consider the public

popularity, public acceptance, public acquiescence, or public disdain for the DAPA program. As Chief Justice Roberts alluded to above, public opinions and perceptions about the country's policies have no place in the resolution of a judicial matter.

Finally, both sides agree that the President in his official capacity has not directly instituted any program at issue in this case. Regardless of the fact that the Executive Branch has made public statements to the contrary, there are no executive orders or other presidential proclamations or communique that exist regarding DAPA. The DAPA Memorandum issued by Secretary Johnson is the focus in this suit.

That being said, the Court is presented with the following principle issues: (1) whether the States have standing to bring this case; (2) whether the DHS has the necessary discretion to institute the DAPA program; and (3) whether the DAPA program is constitutional, comports with existing laws, and was legally adopted. A negative answer to the first question will negate the need for the Court to address the latter two. The factual statements made hereinafter (except where the Court is discussing a factual dispute) should be considered as findings of fact regardless of any heading or lack thereof. Similarly, the legal conclusions, except where the Court discusses the various competing legal theories and positions, should be taken as conclusions of law regardless of any label or lack thereof. Furthermore, due to the overlap between the standing issues and the merits, there is by necessity the need for a certain amount of repetition.

II. HISTORY OF THIS LITIGATION

On November 20, 2014, Jeh Johnson, in his position as Secretary of the DHS, issued multiple memoranda to Leon Rodriguez, Director of the United States Citizenship and

Immigration Services ("USCIS"), Thomas S. Winkowski, Acting Director of the United States Immigration and Customs Enforcement ("ICE"), and R. Gil Kerlikowske, Commissioner of the United States Customs and Border Protection ("CBP"). One of these memoranda contained an order establishing a new program utilizing deferred action to stay deportation proceedings and award certain benefits to approximately four to five million individuals residing illegally in the United States. The present case, filed in an attempt to enjoin the rollout and implementation of this program, was initiated by the State of Texas and twenty-five other states or their representatives. Specifically, the States allege that the Secretary's actions violate the Take Care Clause of the Constitution and the Administrative Procedure Act ("APA"). *See* U.S. Const. art. II, § 3; 5 U.S.C. §§ 500 *et seq.*[4] The States filed this suit against DHS Secretary Johnson and the individuals mentioned above, as well as Ronald D. Vitiello, the Deputy Chief of the United States Border Patrol, and the United States of America.[5] In response to Plaintiffs' suit, the Defendants have asserted two main arguments: (1) the States lack standing to bring this suit; and (2) the States' claims are not meritorious.

Multiple *amici curiae* have made appearances arguing for one side of this controversy or the other. Several separate attempts have been made by individuals—at least one attempt seemingly in support of Plaintiffs, and one in support of Defendants—to intervene in this lawsuit. Both the States and the Government opposed these interventions. Because the Court had already implemented a schedule in this time-sensitive matter that was agreed to by all

[4] Most authorities seem to indicate that the original Constitution the "Take Care Clause" actually was the "take Care Clause" with the "T" in "take" being lowercase. The Court will use upper case for the sake of consistency.

[5] All of these Defendants will be referred to collectively as the "Government" or the "Defendants" unless there is a particular need for specificity.

existing parties, it denied these attempts to intervene without prejudice. Permitting the intervention of new parties would have been imprudent, as it would have unduly complicated and delayed the orderly progression of this case. *See* Fed. R. Civ. P. 24(a)(2), (b)(3). Further, this Court notes that the interests of all putative intervenors are more than adequately represented by the Parties in this lawsuit.[6] As suggested by Fifth Circuit authority, the Court has reviewed their pleadings as if they were *amici curiae*. *See Bush v. Viterna*, 720 F.2d 350, 359 (5th Cir. 1984) (*per curiam*).

III. BACKGROUND

A. Factual Background

For some years now, the powers that be in Washington—namely, the Executive Branch and Congress—have debated if and how to change the laws governing both legal and illegal immigration into this country. This debate has necessarily included a wide-ranging number of issues including, but not limited to, border security, law enforcement, budgetary concerns, employment, social welfare, education, positive and negative societal aspects of immigration, and humanitarian concerns. The national debate has also considered potential solutions to the myriad of concerns stemming from the millions of individuals currently living in the country illegally. To date, however, neither the President nor any member of Congress has proposed

[6] While one set of the putative intervenors is allegedly covered by Secretary Johnson's memorandum and may be affected by this ruling, there was no intervention as a matter of right because there is no federal statute that gives them an unconditional right to intervene nor does this lawsuit involve property or a transaction over which they claim a property interest. *See* Fed. R. Civ. P. 24(a).

legislation capable of resolving these issues in a manner that could garner the necessary support to be passed into law.[7]

On June 15, 2012, DHS Secretary Janet Napolitano issued a memorandum creating the DACA program, which stands for "Deferred Action for Childhood Arrivals." Specifically, Secretary Napolitano's memorandum instructed her Department heads to give deferred action status to all illegal immigrants who:

1. Came to the United States before age sixteen;

2. Continuously resided in the United States for at least five years prior to June 15, 2012 and were in the United States on June 15, 2012;

3. Were then attending school, or had graduated from high school, obtained a GED, or were honorably discharged from the military;

4. Had not been convicted of a felony, significant misdemeanor, multiple misdemeanors, or otherwise pose a threat to national security; and

5. Were not above the age of thirty.

Doc. No. 38, Def. Ex. 19 (June 15, 2012 DACA Memorandum issued by Secretary Napolitano). This Directive applies to all individuals over the age of fifteen that met the criteria, including those currently in removal proceedings as well as those who are newly-encountered by the DHS. In addition, DHS employees were instructed to accept work authorization applications from those individuals awarded deferred action status under DACA. While exact numbers regarding the presence of illegal aliens in this country are not available, both sides seem to accept that at least 1.2 million illegal immigrants could qualify for DACA by the end of 2014. Doc. No. 38, Def. Ex. 21; Doc. No. 64, Pl. Ex. 6. Of these individuals, approximately 636,000 have applied

[7] Indeed this Court has received *amici curiae* briefs from many members of Congress supporting the States' position and at least one supporting the Government's position. Additionally, many officials of local political units and entities have also filed *amici curiae* briefs supporting one side of this controversy or the other.

for and received legal presence status through DACA. Doc. No. 38, Def. Ex. 28. Both of these figures are expected to rise as children "age in" and meet the program's education requirements. Doc. No. 38, Def. Ex. 6; Doc. No. 64, Pl. Ex. 6. Estimates suggest that by the time all individuals eligible for DACA "age in" to the program, approximately 1.7 million individuals will be eligible to receive deferred action. Doc. No. 38, Def. Ex. 21; Doc. No. 64, Pl. Ex. 6.

A review of the DACA program, however, would not be complete without examining the number of individuals who have applied for relief through the program but were denied legal status: of the approximately 723,000 DACA applications accepted through the end of 2014, only 38,000—or about 5%—have been denied. Doc. No. 38, Def. Ex. 28. In response to a Senate inquiry, the USCIS told the Senate that the top four reasons for denials were: (1) the applicant used the wrong form; (2) the applicant failed to provide a valid signature; (3) the applicant failed to file or complete Form I-765 or failed to enclose the fee; and (4) the applicant was below the age of fifteen and thus ineligible to participate in the program. Doc. No. 64, Pl. Ex. 29 at App. P. 0978. Despite a request by the Court, the Government's counsel did not provide the number, if any, of requests that were denied even though the applicant met the DACA criteria as set out in Secretary Napolitano's DACA memorandum. The Government's exhibit, Doc. No. 130, Def. Ex. 44, provides more information but not the level of detail that the Court requested.

The States contend and have supplied evidence that the DHS employees who process DACA applications are required to issue deferred action status to any applicant who meets the criteria outlined in Secretary Napolitano's memorandum, and are not allowed to use any real

"discretion" when it comes to awarding deferred action status.[8] Similarly, the President of the National Citizenship and Immigration Services Council—the union that represents the individuals processing the DACA applications—declared that the DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria. *See* Doc. No. 64, Pl. Ex. 23 at 3 (Dec. of Kenneth Palinkas, President of Nat'l Citizenship and Immigration Services Council) (hereinafter "Palinkas Dec."). The States also allege that the DHS has taken steps to ensure that applications for DAPA will likewise receive only a *pro forma* review.[9]

On November 20, 2014, following in his predecessor's footsteps, Secretary Johnson issued a memorandum to DHS officials instructing them to implement the DAPA program and expand the DACA program in three areas. That memorandum, in pertinent part, states the following:

[8] In their latest filing with the Court, the Government repeated these four reasons given to Congress and added a fifth: dishonesty or fraud in the application process, which of course is implied in any application process. Because the Government could not produce evidence concerning applicants who met the program's criteria but were denied DACA status, this Court accepts the States' evidence as correct.

[9] The DHS' own website states that, pursuant to the discretion granted to the DHS Secretary, its officers can use their discretion to "prevent [DACA] qualifying individuals from being apprehended, placed into removal proceedings, or removed." *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last updated Feb. 11, 2015). Clearly the discretion that exists belongs to the Secretary, who exercised it by delineating the DACA criteria; but if an applicant meets the DACA criteria, he or she will not be removed. President Obama has stated that if the DAPA applicant satisfies the delineated criteria, he or she will be permitted to remain in the United States. *See* Press Release, Remarks by President Barack Obama in the President's Address to the Nation on Immigration (Nov. 11, 2014). The DHS even provides a hotline number that individuals can call to make sure they can terminate removal proceedings if they otherwise meet the criteria for relief under DACA. *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last updated Feb. 11, 2015).

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 enter 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 the 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 Sates 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.[10]

[10] The removal of the age cap, the program's three-year extension, and the adjustment to the date of entry requirement are the three exceptions mentioned above to the general proposition that the DACA program is not at issue in this case.

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. 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.

Doc. No. 1, Pl. Ex. A (November 20, 2014 DAPA Memorandum issued by Secretary Johnson). (emphasis in original). The Government relies on estimates suggesting that there are currently 11.3 million illegal aliens residing in the United States and that this new program will apply to over four million individuals.[11]

[11] This 11.3 million figure is based upon a 2009 study from the Pew Research Center. The number appears to have increased since then, with a 2013 study finding that 11.7 million illegal immigrants resided in the United States in 2012. *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, Pew Research Center (Sept. 23, 2013). An estimated sixty percent of these illegal immigrants reside in California, Florida, Illinois, New Jersey,

Deferred action is not a status created or authorized by law or by Congress, nor has its properties been described in any relevant legislative act. Secretary Johnson's DAPA Memorandum states that deferred action has existed since at least the 1960s, a statement with which no one has taken issue. Throughout the years, deferred action has been both utilized and rescinded by the Executive Branch.[12] The practice has also been referenced by Congress in other immigration contexts. *See, e.g.*, 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), 227(d)(2). It was described by the United States Supreme Court in *Reno v. Arab-American Anti-Discrimination Committee* as follows:

> To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated.

525 U.S. 471, 484 (1999) (quoting 6 C. Gordon, S. Mailman & S. Yale-Loehr, Immigration Law and Procedure § 72.03[2][h] (1998)). It is similarly defined in 8 C.F.R. § 274a.12(c)(14).

B. Factual Contentions

Secretary Johnson supported the implementation of DAPA with two main justifications. First, he wrote that the DHS has limited resources and it cannot perform all of the duties assigned to it, including locating and removing all illegal aliens in the country. Secretary Johnson claimed

---

New York, and Texas—with Texas being the only state whose illegal immigrant population increased between 2007 and 2011. *Id.* The Court will rely on the 11.3 million figure, however, since it is the one cited by the Parties.

[12] The deferred action practice was apparently rescinded in 1979, and reinstituted in the 1981 INS Operating Manual. The 1981 program was then rescinded in 1997. Nevertheless, after that date, the concept seems to have been used by all subsequent administrations.

that the adoption of DAPA will enable the DHS to prioritize its enforcement of the immigration laws and focus its limited resources in areas where they are needed most. Second, the Secretary reasoned that humanitarian concerns also justify the program's implementation.

Plaintiffs maintain that the Secretary's justifications are conditions caused by the DHS, are pretexts, or are simply inaccurate. Regarding resources, Plaintiffs argue that the DHS has continued to be funded at record levels and is currently spending millions to create the enormous bureaucracy necessary to implement this program.[13] The States additionally maintain that the DAPA program was: politically motivated and implemented illegally. The first proposition is not the concern of the Court; the second is. To support the latter proposition, the States quote President Obama at length. First, they quote the President's statements made prior to the implementation of DAPA stating that he, as President, did not have the power under the Constitution or the laws of this country to change the immigration laws. On these occasions, he asserted that only Congress could implement these changes in this area of the law. From these statements, the States reason that if the President does not have the necessary power to make these changes, then the DHS Secretary certainly does not.

The States claim that following the announcement of the DAPA program, the President's rhetoric dramatically shifted. They cite statements made after the announcement of DAPA in which the President is quoted as saying that because Congress did not change the law, he

[13] At oral argument, Defendants maintained that the fees charged to process DAPA applications will cover the cost of the program, but had to concede that the DHS was already expending large sums of money to implement DAPA and as of yet had not received any fees. According to the declaration of one INS employee, the DHS plans to begin construction of a service center that will employ 700 DHS employees and 300 federal contract employees. *See* Doc. No. 64, Pl. Ex. 23 at 3 ("Palinkas Dec."). His statement that the DHS is shifting resources away from other duties in order to implement this program is certainly reasonable, especially since the USCIS admitted that it is shifting staff to meet the DAPA demand. *Executive Actions on Immigration: Key Questions and Answers*, U.S. Customs & Immigration Enforcement, http://www.uscis.gov/immigrationaction (last updated Jan. 30, 2015). *See id*.

changed it unilaterally. The States argue that the DAPA program constitutes a significant change in immigration law that was not implemented by Congress. Agreeing with the President's earlier declarations, the States argue that only Congress can create or change laws, and that the creation of the DAPA program violates the Take Care Clause of the Constitution and infringes upon any notion of separation of powers. Further, they assert that the President has effectuated a change in the law solely because he wanted the law changed and because Congress would not acquiesce in his demands.

Obviously, the Government denies these assertions.

C. Legal Contentions

This case presents three discrete legal issues for the Court's consideration. First, the Government maintains that none of the Plaintiffs have standing to bring this injunctive action. The States disagree, claiming that the Government cannot implement a substantive program and then insulate itself from legal challenges by those who suffer from its negative effects. Further, the States maintain that Secretary Johnson's DAPA Directive violates the Take Care Clause of the Constitution; as well as the Administrative Procedure Act ("APA") and the Immigration and Naturalization Act ("INA"). In opposition to the States' claims, the Government asserts that it has complete prosecutorial discretion over illegal aliens and can give deferred action status to anyone it chooses. Second, the Government argues that discretionary decisions, like the DAPA program, are not subject to the APA. Finally, the Government claims that the DAPA program is merely general guidance issued to DHS employees, and that the delineated elements of eligibility are not requirements that DHS officials are bound to honor. The Government argues that this flexibility, among other factors, exempts DAPA from the requirements of the APA.

IV. STANDING

A. Legal Standard

1. Article III Standing

Article III of the United States Constitution requires that parties seeking to resolve disputes before a federal court present actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. This requirement limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Plaintiffs, as the parties invoking the Court's jurisdiction, bear the burden of satisfying the Article III requirement by demonstrating that they have standing to adjudicate their claims in federal court. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must demonstrate that they have "suffered a concrete and particularized injury that is either actual or imminent." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007). Second, a plaintiff must show that there is a causal connection between the alleged injury and the complained-of conduct—essentially, that "the injury is fairly traceable to the defendant." *Id.* Finally, standing requires that it "be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

2. Prudential Standing

In addition to these three constitutional requirements, "the federal judiciary has also adhered to a set of 'prudential' principles that bear on the question of standing." *Valley Forge*

Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982). Many opinions refer to these principles as being under the banner of "prudential" standing. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 164 (1997). First, the Supreme Court has held that when the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone does not warrant exercise of jurisdiction." *Id.* Rather, these "abstract questions of wide public significance" are more appropriately left to the representative branches of the federal government. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Second, the plaintiffs must come within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*, 454 U.S. at 475 (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Finally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id*. at 474 (quoting *Warth*, 422 U.S. at 499).

3. Standing Under the Administrative Procedure Act

The APA provides that a "person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. This right of judicial review extends to agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. § 704. To demonstrate standing under the APA, the plaintiff must show that it has suffered or will suffer a sufficient injury in fact. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998). The plaintiff must also demonstrate prudential standing under the APA, which requires showing that "the interest sought to be protected by the complainant [is] arguably within

the zone of interests to be protected or regulated by the statute . . . in question." *Id.* (quoting *Data Processing*, 397 U.S. at 152). For this prudential standing inquiry, it is not necessary for a court to ask "whether there has been a congressional intent to benefit the would-be plaintiff." *Nat'l Credit Union Admin.*, 522 U.S. at 488-89. Rather, if the plaintiff's interests are "arguably within the 'zone of interests' to be protected by a statute," the prudential showing requirement is satisfied. *Id.* at 492. This requisite showing is not made, however, if the plaintiff's interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

When seeking review of agency action under the APA's procedural provisions, Plaintiffs are also operating under a favorable presumption. They are presumed to satisfy the necessary requirements for standing. *See Mendoza v. Perez*, 754 F.3d 1002, 1012 (D.C. Cir. 2014). Specifically, as stated by the D.C. Circuit, "[p]laintiffs asserting a procedural rights challenge need not show the agency action would have been different had it been consummated in a procedurally valid manner—the courts will assume this portion of the causal link." *Id.*

B. Resolution of Standing Questions

Questions regarding constitutional and prudential standing implicate the court's subject-matter jurisdiction; thus challenges to standing are evaluated as a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). When evaluating subject-matter jurisdiction, the court may consider: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming*, 281 F.3d at 161. The

court's analysis also depends on whether the challenging party has made a "facial" or "factual" attack on jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). A facial challenge consists of only a Rule (12)(b)(1) motion without any accompanying evidence; for this challenge, the court "is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true." *Id.*

Conversely, when making a factual attack on the court's jurisdiction, the challenging party submits affidavits, testimony, or other evidentiary materials to support its claims. *Id.* A factual attack requires the responding plaintiff "to submit facts through some evidentiary method" and prove "by a preponderance of the evidence that the trial court does have subject matter jurisdiction." *Id.* Here, Defendants submitted a number of exhibits in support of their attack on Plaintiffs' standing to bring this suit in federal court. Therefore, for the purposes of ruling on Defendants' challenge, the Plaintiffs bear the burden to prove by a preponderance of the evidence that they possess the requisite standing required by Article III. It is not necessary, however, for *all* Plaintiffs to demonstrate standing; rather, "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Thus Plaintiffs' suit may proceed as long as one Plaintiff can show by a preponderance of the evidence that it fulfills the necessary requirements to show standing.

C. Analysis

1. Article III Standing

a. Injury

The States allege that the DHS Directive will directly cause significant economic injury to their fiscal interests. Specifically, Texas argues that the DHS Directive will create a new class of individuals eligible to apply for driver's licenses,[14] the processing of which will impose substantial costs on its budget. Plaintiffs rely on Texas' driver's license program to demonstrate how the costs associated with processing a wave of additional driver's licenses will impact a state's budget. Texas' undocumented population is approximately 1.6 million, and Plaintiffs' evidence suggests that at least 500,000 of these individuals will be eligible for deferred action through DAPA. Doc. No. 64, Pl. Ex. 14 ¶ 33; Pl. Ex. 24 ¶ 6. Under current Texas law, applicants pay $24.00 to obtain a driver's license, leaving any remaining costs to be absorbed by the state. *See* Tex. Transp. Code Ann. § 521.421. If the majority of DAPA beneficiaries currently residing in Texas apply for a driver's license, it will cost the state $198.73 to process and issue each license, for a net loss of $174.73 per license. Doc. No. 64, Pl. Ex. 24 ¶ 8. Even if only 25,000 of these individuals apply for a driver's license—approximately 5% of the population estimated to benefit from the DHS Directive in Texas—Texas will still bear a net loss of $130.89 per license, with total losses in excess of several million dollars. *Id.* These costs,

[14] Some driver's license programs, like that in Arkansas, provide that individuals with deferred action status will be eligible to apply for a driver's license. *See, e.g.*, Ark. Code Ann. § 27-16-1105. Other programs, like the one in Texas, provide that a license will be issued to individuals who can show they are authorized to be in the country. *See, e.g.*, Tex. Transp. Code. Ann. § 521.142. Employment authorization—a benefit that will be available to recipients of DAPA—is sufficient to fulfill this requirement. Thus under either statutory scheme, DAPA will make its recipients eligible to apply for state driver's licenses.

Plaintiffs argue, are not unique to Texas; rather, they will be similarly incurred in all Plaintiff States where DAPA beneficiaries will be eligible to apply for driver's licenses.

In addition to these increased costs associated with processing a wave of additional driver's licenses, a portion of the States' alleged injury is directly traceable to fees mandated by federal law. *See* REAL ID Act of 2005, PL 109-13, 119 Stat. 231 (2005). Following the passage of the REAL ID Act in 2005, states are now required to determine the immigration status of applicants prior to issuing a driver's license or an identification card. *Id*. To verify immigration status, states must submit queries to the federal Systematic Alien Verification for Entitlements (SAVE) program and pay $0.50-$1.50 for each applicant processed. SAVE Access Methods & Transaction Charges, USCIS. In Texas, estimates suggest that the state pays the federal government on average $0.75 per driver's license applicant for SAVE verification purposes. Doc. No. 64, Pl. Ex. 24 ¶ 5. Thus by creating a new group of individuals that are eligible to apply for driver's licenses, the DHS Directive will increase the costs incurred by states to verify applicants' immigration statuses as required by federal law.[15]

As Defendants concede, "a direct and genuine injury to a State's own proprietary interests may give rise to standing." Doc. No. 38 at 23; *see also, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 430-31 (1998) (negative effects on the "borrowing power, financial strength, and fiscal planning" of a government entity are sufficient injuries to establish standing); *Sch. Dist. of City of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 261 (6th Cir. 2009) (school districts had standing "based on their allegation that they must spend state and local funds" to comply with federal law). Defendants in this case argue, however, that the projected costs to Plaintiffs'

[15] In a procedural rights case, the size of the injury is not important for defining standing; rather it is the fact of the injury. "The litigant has standing if there is some possibility that the requested relief will prompt the injury causing party to reconsider the decision." *Massachusetts v. E.P.A.*, 549 U.S. at 518, 525-26.

driver's license programs are "self-inflicted" because the DHS Directive does not directly require states to provide any state benefits to deferred action recipients, and because states can adjust their benefit programs to avoid incurring these costs. Doc. No. 38 at 21-22. This assertion, however, evaluates the DHS Directive in a vacuum. Further, this claim is, at best, disingenuous. Although the terms of DAPA do not compel states to provide any benefits to deferred action recipients, it is clear that the DHS Directive will nonetheless affect state programs. Specifically, in the wake of the Ninth Circuit's decision in *Arizona Dream Act Coalition v. Brewer*, it is apparent that the federal government will compel compliance by all states regarding the issuance of driver's licenses to recipients of deferred action. 757 F.3d 1053 (9th Cir. 2014).

In *Arizona Dream Act Coalition v. Brewer*, the plaintiffs, DACA beneficiaries, sought an injunction to prevent the defendants from enforcing an Arizona policy that denied driver's licenses to recipients of deferred action. *Id.* at 1060. Necessary for the imposition of an injunction, the Ninth Circuit examined whether the plaintiffs were likely to succeed on the merits of their case, and focused on the fact that Arizona's driver's license program permitted other non-citizens to use employment authorization documents to obtain driver's licenses—the same documentation that would be conferred upon DAPA recipients. *Id*. at 1064. Finding that this policy likely discriminated against similarly-situated parties in violation of the Equal Protection Clause, the court enjoined the defendants from denying driver's licenses to deferred action beneficiaries. *Id.* at 1069.

More importantly, the Ninth Circuit in *Arizona* also considered whether the denial of driver's licenses to deferred action recipients was preempted by the Executive Branch's determination that deferred action recipients were also authorized to work in the United States.

Id. at 1063. Stating that "the ability to drive may be a virtual necessity for people who want to work in Arizona," the court noted that more than 87% of Arizona's workforce depended on personal vehicles to commute to work. *Id*. at 1062. Although not the basis for its finding, the court addressed preemption at length. It reasoned that the defendants' policy of denying driver's licenses to deferred action recipients "interferes with Congress's intention that the Executive determine when noncitizens may work in the United States" and would be preempted by federal law. *Id*. at 1063. Reinforcing this position, the concurring opinion argued that the majority should have not merely discussed it, but should have included this reasoning as part of its holding since there was no question that federal law required the issuance of driver's licenses to deferred action recipients. *Id.* at 1069-75. The Government filed briefs in that case arguing that all of Arizona's attempts to avoid these expenses were preempted. Doc. No. 54, Pl. Ex. 3.

Although the Ninth Circuit's opinion in *Arizona* is not necessarily binding on the majority of Plaintiffs in this case, it nonetheless suggests that Plaintiffs' options to avoid the injuries associated with the DHS Directive are virtually non-existent and, if attempted, will be met with significant challenges from the federal government.[16] The federal government made it clear in *Arizona* (and would not retreat from that stance in this case) that any move by a plaintiff state to limit the issuance of driver's licenses would be viewed as illegal. As held by the Ninth Circuit in *Arizona*, denying driver's licenses to certain recipients of deferred action violated the Equal Protection clause, and would likely be preempted by DAPA, as well. *See id.* at 1067. This conclusion would be particularly persuasive in Texas since its driver's license program—like Arizona's—permits applicants to rely on federal employment authorization documentation

[16] The Ninth Circuit opinion is binding on Arizona, Idaho, and Montana, the Plaintiff States located in the Ninth Circuit. Therefore, the Government's argument with respect to these states is totally meritless.

to show legal status in the United States. If Texas denied driver's licenses to beneficiaries of the DHS Directive, as suggested by the Government here, it would immediately be sued for impermissibly discriminating against similarly-situated parties that rely on employment authorization documentation to apply for driver's licenses. *See id*. at 1064. Even if Texas could structure its driver's license program to avoid these impermissible classifications, the court in *Arizona* strongly suggested that the denial of driver's licenses to deferred action recipients would be preempted by the Executive Branch's intent that deferred action recipients work while they remain in the United States. Therefore, if Texas or any of the other non-Ninth Circuit States sought to avoid an Equal Protection challenge and instead denied driver's licenses to all individuals that rely on employment authorization documentation, they would be subjecting themselves to a different but significant challenge on federal preemption grounds. As stated above, Arizona, Idaho, and Montana—the Plaintiff States that fall within the Ninth Circuit's jurisdiction—do not even have the option of trying to protect themselves.[17]

Setting aside these legal questions, this all-or-nothing choice—that Texas either allow the DAPA beneficiaries to apply for driver's licenses and suffer financial losses or deny licenses to

[17] Also, it is not a defense to the Plaintiffs' assertion of standing to argue that it is not the DAPA program causing the harm, but rather the Justice Department's enforcement of the program. Both departments are a part of the United States and work for the same branch of the federal government.

The Court additionally notes that while the Government claimed preemption on the one hand, it correctly notes that the actual Circuit decision was based upon equal protection. Thus, it argues that the Government is not ultimately causing the States' injuries; rather, it is the Constitution. This is not accurate. This distinction is not convincing for several reasons. First, if the Government enforced the INA as written, these applicants would not be in the states to apply. Second, the Government is still maintaining and asserting its right of preemption to prevent the states from enforcing the INA provisions requiring removal of these individuals and instead is using that power to force a state's compliance with these applications. Third, whether or not the Constitution is involved, it is ultimately the combination of the REAL ID Act and DAPA combined with the failure to enforce the INA that will compel the complained-about result. It is the implementation of the DACA program that has been causing and the implementation of the DAPA program that will cause these damages when they intersect with the REAL ID Act. Stated another way, without DAPA there are no damages, and without the REAL ID Act, there are less damages. Finally, the Government has also not indicated that it will refrain from litigation or aiding litigants to compel the States to issues licenses and incur these expenses once DAPA is instituted.

all individuals that rely on employment authorization documentation—is an injury in and of itself. An injury cannot be deemed "self-inflicted" when a party faces only two options: full compliance with a challenged action or a drastic restructure of a state program. *See Texas. v. United States*, 497 F.3d 491, 496-98 (5th Cir. 2007) (finding that Texas had standing on the basis of a "forced choice": after federal regulations, Texas either had to comply with an administrative procedure it thought was unlawful or forfeit the opportunity to comment on proposed gaming regulations). Further, the necessary restructuring to ensure constitutional compliance would require Texas to deny driver's licenses to individuals it had previously decided should be eligible for them—a significant intrusion into an area traditionally reserved for a state's judgment. This illusion of choice—instead of protecting the state from anticipated injuries—merely places the states between a rock and hard place.

Defendants also argue that the projected injuries to Plaintiffs' driver's license programs are merely generalized grievances that are shared by all the states' citizens, and as such are insufficient to support standing in this case. The cases that Defendants cite for this contention, though, are easily distinguishable. In these cases, the plaintiffs broadly alleged general harm to state revenue or state spending. *See Commonwealth of Pa. v. Kleppe*, 533 F.2d 668, 672 (D.C.C. 1976) (Pennsylvania's "diminution of tax receipts [was] largely an incidental result of the challenged action" and was not sufficient to support standing); *People ex rel. Hartigan v. Cheney*, 726 F. Supp. 219, 226 (C.D. Ill. 1989) (Illinois' alleged injury of "decreased state tax revenues and increased spending on social welfare programs" not sufficient to support standing). When, however, an action directly injures a state's identifiable proprietary interests, it is more likely that the state possesses the requisite standing to challenge the action in federal court. *See*

Wyo. v. Okla., 502 U.S. 437, 448 (1992) (Wyoming had standing to challenge a state statute for direct and undisputed injuries to specific tax revenues); *Sch. Dist. of City of Pontiac*, 584 F.3d at 261-62 (school district had sufficient injury to demonstrate standing when compliance with No Child Left Behind forced plaintiffs to spend state and local funds). Here, Plaintiffs have shown that their projected injuries are more than "generalized grievances"; rather, Plaintiffs have demonstrated that DAPA will directly injure the proprietary interests of their driver's license programs and cost the States badly needed funds. In Texas alone, the state is projected to absorb significant costs. If the majority of the DHS Directive beneficiaries residing in the state apply for driver's licenses, Texas will bear directly a $174.73 per applicant expense, costing the state millions of dollars.

On a final note, it is important to reiterate the federal government's position in front of the Ninth Circuit in *Arizona*—a position that it has not retreated from in the present case: a state may not impose its own rules considering the issuance of driver's licenses due to claims of equal protection and preemption. Although the federal government conceded that states enjoy substantial leeway in setting policies for licensing drivers within their jurisdiction, it simultaneously argued that the states could not tailor these laws to create "new alien classifications not supported by federal law." Doc. No. 64, Pl. Ex. 3 at 11. In other words, the states cannot protect themselves from the costs inflicted by the Government when 4.3 million individuals are granted legal presence with the resulting ability to compel state action. The irony of this position cannot fully be appreciated unless it is contrasted with the DAPA Directive. The DAPA Directive unilaterally allows individuals removable by law to legally remain in the United States based upon a classification that is not established by any federal law. It is this very lack of

law about which the States complain. The Government claims that it can act without a supporting law, but the States cannot.

The contradictions in the Government's position extend even further. First, driver's license programs are functions traditionally reserved to state governments. Even the DHS recognizes this reservation. The DHS teaches naturalization applicants preparing for their civics examination that driver's license programs are clearly a state interest. *See* Study Materials for the Civics Test, USCIS.[18] Of the sample civics questions, the DHS provides the following question and lists five acceptable answers:

> 42. Under our Constitution, some powers belong to the states. What is <u>one</u> power of the states?
>
> - *provide schooling and education*
> - *provide protection (police)*
> - *provide safety (fire departments)*
> - *<u>give a driver's license</u>*
> - *approve zoning and land use.*

Id. (emphasis added).[19]

Nonetheless, the DHS through its DACA Directive directly caused a significant increase in driver's license applications and the costs incurred by states to process them; DAPA, a much larger program, will only exacerbate these damages. These injuries stand in stark contrast to the

[18] This website can be accessed at http://www.uscis.gov/citizenship/learners/study-test/study-materials-civics-test.

[19] *Id.*

Government's public assertion that driver's license programs fall in the realm of "powers [that] belong to the states." *Id.*

The Government's position is further undermined by the fact that a portion of Plaintiffs' alleged damages associated with the issuance of driver's licenses are fees mandated by federal law and are paid to the Government. As discussed above, the REAL ID Act requires states to pay a fee to verify the immigration status of each driver's license applicant through the federal SAVE program. *See* REAL ID Act of 2005, PL 109-13, 119 Stat. 231 (2005); SAVE Access Methods & Transaction Charges, USCIS.[20] The fees associated with this program, combined with the federal government's creation of the possibility of four to five million new driver's

[20] The SAVE price structure chart may be accessed at http://www.uscis.gov/save/getting-started/save-access-methods-transaction-charges.

It was suggested that the original Real ID Act might have been subject to attack because of the burden it placed upon the states. *See* Patrick R. Thiessen, *The Real ID Act and Biometric Technology: A Nightmare for Citizens and the States That Have to Implement It*, 6 J. Telecomm. & High Tech. L. 483 (2008) (hereinafter "*REAL ID and Biometric Technology*"). These fees have always been a source of objections and opposed by both conservative and liberal groups alike:

> The Act is also opposed by groups as diverse as the CATO Institute, a libertarian think tank, and the American Civil Liberties Union ("ACLU"), an organization designed to defend and preserve the individual liberties guaranteed under the Constitution, both of which testified in opposition to the Real ID Act in New Hampshire. The CATO Institute's opposition is based on what it characterizes as the *federal government blackmailing the states*. The CATO Institute has highlighted the fact that the states are being *forced to comply with the Real ID Act because a noncompliant state's citizens will be barred from air travel, entry to federal courthouses, and other federal checkpoints*.
>
> ACLU opposition is based on *the high cost of implementation being imposed on the states*, its belief that it will not actually prevent terrorism, and the diminished privacy Americans will experience because of the compilation of personal information. Barry Steinhardt, Director of ACLU's Technology and Liberty Project, stated:
>
> > It's likely the costs for Real ID will be billions more than today's estimate [$11 billion]--but no matter what the real figure is, Real ID needs to be repealed. *At a time when many state budgets and services are already stretched thin, it is clear that this unfunded mandate amounts to no more than a tax increase in disguise*.

Id. at 490-91 (emphasis added) (citations omitted). Under DAPA and DACA, the States are facing a new unfunded matter—one which is levied by the DHS and enforced by the Justice Department.

license applicants, give rise to a situation where states must process an increased amount of driver's license applications and remit a significant portion of their funds to the federal government as required by the REAL ID Act. Further, the states have no choice but to pay these fees. If they do not, their citizens will lose their rights to access federal facilities and to fly on commercial airlines.[21]

Another ironic aspect of the Government's argument exists again at the intersection of the DAPA Directive and the REAL ID Act. Those supporting the passage of the REAL ID Act asserted that the Act would prevent illegal immigration by making it more difficult for individuals with no legal status to get state driver's licenses. *See REAL ID and Biometric Technology*, at 492.[22] While the REAL ID Act recognized that individuals with deferred action status would be eligible to obtain driver's licenses, it seems almost without argument that the drafters of the Act did not foresee four to five million individuals obtaining deferred action by virtue of one DHS Directive, especially when the yearly average of deferred action grants prior to DACA was less than 1,000. Therefore, DAPA arguably undercuts one of the very purposes of

[21] *REAL ID and Biometric Technology*, at 486 n.14.

[22] Defenders of the Real ID Act have been able to deflect some of the criticism from various groups by arguing that the Act is necessary to prevent illegal immigration and to prevent terrorism. For instance, Representative Sensenbrenner referenced the fact that Muhammad Atta, one of the 9/11 hijackers, came over to the United States on a six-month visa, but still was able to obtain a six-year driver's license in Florida. *Supporters also argue that the Act will prevent illegal immigration by making it more difficult for illegal immigrants to get state driver's licenses.* Moreover, supporters contend that asylum seekers should bear the burden of proving a valid cause for asylum, which is required under the Real ID Act because a terrorist will not be able to easily gain residency status by claiming asylum. Supporters also argue that a true national database, which would be susceptible to hackers, is not required because the states will send electronic queries to each other that will be answered with the individual state's database.

REAL ID and Biometric Technology, at 497 (emphasis added) (citations omitted). Due to DAPA, the Real ID Act will not be used to prevent illegal immigration, but rather, together, they form a basis to compel a reward for illegal immigration.

the REAL ID Act, and will certainly undermine any deterrent effect or security benefit that may have motivated passage of the Act.

b. Causation

Establishing causation can be difficult where the plaintiff's alleged injury is caused by "the government's allegedly unlawful regulation (or lack of regulation) of *someone else* . . . ." *Lujan*, 504 U.S. at 562 (emphasis in original). In the cases cited by the Government, causation depends on the decisions made by independent actors and "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation . . . ." *Id.* Essentially, establishing causation requires the plaintiff to show that the alleged injury is not merely "remote and indirect" but is instead fairly traceable to the actions of the defendant. *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

The Supreme Court has declined to find that a plaintiff had standing sufficient to bring suit in federal court when it merely speculates as to whether the defendant's action would cause the alleged harm. *See id.* at 17-18. In *Florida v. Mellon*, the plaintiff sought to enjoin the federal government from collecting an inheritance tax in Florida, arguing that it would cause Florida residents to remove property from the state, thereby "diminishing the subjects upon which the state power of taxation may operate." *Id.* The Supreme Court held that whether the defendants' actions would cause individuals to act in such a way that would produce injury to the state was "purely speculative, and, at most, only remote and indirect." *Id.* at 18.

Here, unlike Florida's injury in *Mellon*, the alleged harm to Plaintiffs' driver's license programs would be directly caused by the DHS Directive. Further, there is no speculation as to the probability of its occurrence; rather, it is like watching the same play performed on a new

stage. The DACA Directive, implemented in 2012, permitted its recipients to receive the status or documentation necessary to subsequently apply for driver's licenses. *See Access to Driver's Licenses for Immigrant Youth Granted DACA*, NILC (Dec. 2014) ("DACA recipients who obtain an employment authorization document and a Social Security number have been able to obtain a license in almost every state").[23] Similarly, the DAPA Directive also provides its recipients with the status and the documentation necessary to apply for a driver's license in most states. *See* Ark. Code Ann. § 27-16-1105 (proof of deferred status sufficient to apply for driver's license); Tex. Transp. Code. Ann. § 521.142 (employment authorization documentation sufficient for driver's license application). Aside from furnishing the status or documents necessary to apply for a driver's license, the DAPA Directive will also provide an incentive for its applicants. The Directive permits and encourages its beneficiaries to apply for work authorization for the period that they will be granted deferred status in the United States. For individuals in the United States who commute to work, driving is the most common mode of transportation. In 2013, it was estimated that 86.3% of the United States' workforce commuted to work in private vehicles.[24] *See Commuting in America 2013: The National Report on Commuting Patterns and Trends*, American Association of State Highway and Transportation Officials (Oct. 2013).[25] This is especially true in the states that are Plaintiffs in this case, as none of them have extensive mass transit systems. In sum, the federal government's actions in *Arizona*, and its refusal to disclaim future such actions in this case, establish that it will seek to force Texas (and other similarly-

[23] A PDF of this article may be accessed at http://www.nilc.org/document.html?id=1120.

[24] The Ninth Circuit in *Arizona Dream Act Coalition v. Brewer* similarly noted that the majority of the workforce relies on private vehicles to commute to work. 757 F.3d at 1062. Specifically, the court highlighted that approximately 87% of Arizona's workforce commuted to work by car. *Id.*

[25] A PDF of this study may be accessed at http://traveltrends.transportation.org/Documents/CA10-4.pdf.

situated states) into these changes. Further, some portion of Plaintiffs' alleged injuries are fees mandated by federal law that are required to be paid by states directly to the federal government—damages that are a virtual certainty. Plaintiffs—or at least Texas—have clearly met their burden of showing that their alleged injuries have been and will be directly "traceable" to the actions of the Defendants. Far from a generalized injury or "pie in the sky" guesswork, Plaintiffs have demonstrated a direct, finite injury to the States that is caused by the Government's actions. Given that Plaintiffs have shown that they stand to suffer concrete and particularized consequences from Defendants' actions, they have pled an injury sufficient to demonstrate standing in this Court.

c. Redressability

The redressability prong of the standing analysis examines whether the remedy a plaintiff seeks will redress or prevent the alleged injury. *Lujan*, 504 U.S. at 560. Of this three-prong standing analysis, the question of redressability is easiest for this Court to resolve. The remedy Plaintiffs seek will undoubtedly prevent the harm they allege will stem from Defendants' DHS Directive. DAPA provides its beneficiaries with the necessary legal presence and documentation to allow them to apply for driver's licenses in most states; without this status or documentation, these beneficiaries would be foreclosed from seeking a driver's license. Therefore enjoining the implementation of the DHS Directive would unquestionably redress Plaintiffs' alleged harm.

Plaintiffs (or at least one Plaintiff) has clearly satisfied the requirements for Article III standing.

2. Prudential Standing

In addition to fulfilling the Article III standing requirements, Plaintiffs have also satisfied the requirements of prudential standing. As discussed above, the States have not merely pled a "generalized grievance" that is inappropriate for the Court's resolution. Rather, the States have shown that the DAPA program will directly injure their proprietary interests by creating a new class of individuals that is eligible to apply for state driver's licenses. When this class applies for driver's licenses, the States will incur significant costs to process the applications and issue the licenses—costs that the States cannot recoup or avoid. Instead of a "generalized grievance," the States have pled a direct injury to their fiscal interests.

Second, Plaintiffs' claims come within the "zone of interests" to be protected by the immigration statutes at issue in this litigation. The Supreme Court has stated time and again that it is the duty of the federal government to protect the border and enforce the immigration laws.[26] The Government has sought and obtained rulings that preempt all but token participation by the states in this area of the law. The basis for this preemption was that the states' participation was

[26] For example, in *Plyler v. Doe*, all nine justices on the Supreme Court agreed that the United States was not doing its job to protect the states. In his concurring opinion, Justice Powell stated that:

> Illegal aliens are attracted by our employment opportunities, and perhaps by other benefits as well. This is a problem of serious national proportions, as the Attorney General has recently recognized. Perhaps because of the intractability of the problem, Congress—vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens—has not provided effective leadership in dealing with this problem.

457 U.S. at 237-38 (Powell, J., concurring) (citations omitted). The dissenters in *Plyler*, while disagreeing with the result, did not disagree about who is duty bound to protect the states:

> A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here.

Id. at 242 n.1 (Burger, J., dissenting).

not wanted or required because the federal government was to provide a uniform system of protection to the states. The fact that DAPA undermines the INA statutes enacted to protect the states puts the Plaintiffs squarely within the zone of interest of the immigration statutes at issue.

Further, Congress has entrusted the DHS with the duty to enforce these immigration laws. 8 U.S.C. § 1103(a)(i). The DHS' duties include guarding the border and removing illegal aliens present in the country. 8 U.S.C. §§ 1103(a)(5), 1227. DAPA, however, is certainly at odds with these commands. These duties were enacted to protect the states because, under our federal system, they are forbidden from protecting themselves.

Finally, Plaintiffs are not resting their claim for relief solely on the rights and interests of third-parties. Rather, the States are seeking to protect their own proprietary interests, which they allege will be directly harmed by the implementation of DAPA. Thus Plaintiffs have similarly satisfied their burden to show prudential standing.

3. Standing under the APA

Relying on the APA, Plaintiffs assert not only a basis for standing but also an argument on the merits. Because these concepts are closely intertwined, the Court will address both in its discussion of the merits. Nevertheless, for the reasons stated above and the reasons articulated below, the States have APA standing as well.

D. Other Grounds for Standing

The States have asserted three additional bases for standing: (1) *parens patriae* standing; (2) *Massachusetts v. E.P.A.* standing; and (3) abdication standing. Following the Supreme Court's decision in *Massachusetts v. E.P.A*, these theories seem at least indirectly related to the *parens patriae* claim discussed below. There is, however, ample evidence to support standing

based upon the States' demonstration of direct injury flowing from the Government's implementation of the DAPA program. Since the States have, or at least Texas has, shown a direct injury, as well as for the reasons discussed below, this Court either rejects or refuses to rely solely on either of the *parens patriae* or *Massachusetts v. E.P.A.* theories as the basis for Plaintiffs' standing. Both the Parties and *amici curiae*, however, have briefed these theories in depth; thus the Court is compelled to address them.

1. *Parens Patriae*

Plaintiffs also rely on the doctrine of *parens patriae* to establish an independent basis for standing in their suit against Defendants. *Parens patriae* permits a state to bring suit to protect the interests of its citizens, even if it cannot demonstrate a direct injury to its separate interests as a sovereign entity. *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 601 (1982). Meaning literally "parent of the country," *parens patriae* recognizes the interests "that the State has in the well-being of its populace" and allows it to bring suit when those interests are threatened. *Id*. at 602; *Black's Law Dictionary* 1287 (10th ed. 2014). Here, the States allege that the DHS Directive will injure the economic interests of their residents, necessitating a *parens patriae* suit to ensure that those interests are protected from the consequences of the Government's actions.

Defendants, relying primarily on the Supreme Court's opinion in *Massachusetts v. Mellon*, contend that the States' invocation of *parens patriae* is misplaced. They claim states cannot maintain a *parens patriae* suit against the federal government since the federal government is the ultimate protector of the citizens' interests. *See* 262 U.S. 447, 485-86 (1923). In *Massachusetts v. Mellon*, Massachusetts brought a *parens patriae* suit to challenge the

constitutionality of the Maternity Act, arguing that the burden of funding the Act fell disproportionately on industrial states like Massachusetts. *Id.* at 479. Holding that the federal government is the supreme *parens patriae*, the Court stated that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* Thus, Defendants argue that the States' suit should be similarly barred since the federal government's right to protect citizens' interests trumps that of the states.

Defendants' succinct argument, however, ignores an established line of cases that have held that states may rely on the doctrine of *parens patriae* to maintain suits against the federal government. *See, e.g., Wash. Utilities and Transp. Comm'n v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975) (state regulatory agency relied on *parens patriae* to bring suit against F.C.C. and U.S.); *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797 (D. Kan. 1990) (state brought suit against U.S. under *parens patriae* theory); *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984) (state used *parens patriae* to maintain suit against the Secretary of Health and Human Services). These cases rely on an important distinction. The plaintiff states in these cases are not bringing suit to *protect* their citizens *from* the operation of a federal statute—actions that are barred by the holding of *Massachusetts v. Mellon*. *See, e.g., Wash. Utilities and Transp. Comm'n*, 513 F.2d at 1153; *Kansas ex rel. Hayden*, 748 F. Supp. at 802; *Abrams*, 582 F. Supp. at 1159. Rather, these states are bringing suit to *enforce* the rights guaranteed by a federal statute. *Id.* For example, in *Kansas ex rel. Hayden v. United States*, the governor of Kansas brought a *parens patriae* suit to enforce the provisions of the Disaster Relief Act, which provided for the disbursement of federal funds to aid areas deemed a "major disaster." *Kansas ex rel. Hayden*, 548 F. Supp. at 798. Specifically, the governor brought suit to enforce the statute after he

alleged that the area in question was wrongfully denied status as a "major disaster area" when the procedural mechanisms for making that decision were ignored. *Id.* at 799. Similarly, in *Abrams v. Heckler*, New York's attorney general brought a *parens patriae* suit to enforce the provisions of a Medicare statute after a final rule issued to implement the statute deprived New York Medicare recipients of a significant amount of funds. *Abrams*, 582 F. Supp. at 1157. Arguing that the final rule misinterpreted the provisions of the statute and thus exceeded statutory authority, the attorney general sought to have the Medicare funds distributed in compliance with the statute. *Id.*

Consequently, Defendants' rebuttal to the States' *parens patriae* argument is not as simple as they would suggest. States are not barred outright from suing the federal government based on a *parens patriae* theory; rather, provided that the states are seeking to *enforce*—rather than prevent the enforcement of—a federal statute, a *parens patriae* suit between these parties may be maintained. In the instant case, the States are suing to compel the Government to enforce the federal immigration statutes passed by Congress and to prevent the implementation of a policy that undermines those laws. Though seeking adherence to a federal statute is a necessary component for a state's *parens patriae* suit against the federal government, it alone is not enough; in addition, states must identify a quasi-sovereign interest that is harmed by the alleged under-enforcement. *See Alfred L. Snapp*, 458 U.S. at 601 ("to have such [*parens patriae*] standing the State must assert an injury to what has been characterized as a 'quasi-sovereign interest'"). The defining characteristics of a quasi-sovereign interest are not explicitly laid out in case law; rather, the meaning of the term has undergone a significant expansion over time. *See Com. of Pa. v. Kleppe*, 533 F.2d 669, 673 (D.C. Cir. 1976). Although the earliest recognized

quasi-sovereign interests primarily concerned public nuisances, the doctrine expanded rapidly to encompass two broad categories: (1) a state's quasi-sovereign interest "in the health and well-being—both physical and economic—of its residents"; and (2) a state's quasi-sovereign interest in "not being discriminatorily denied its rightful status within the federal system." *Alfred L. Snapp*, 458 U.S. at 607. In particular, courts have consistently recognized a state's quasi-sovereign interest in protecting the economic well-being of its citizens from a broad range of injuries. *See, e.g., Alfred L. Snapp*, 458 U.S. at 609 (discrimination against Puerto Rican laborers injured economic well-being of Puerto Rico); *Wash. Utilities and Transp. Comm'n*, 513 F.2d at 1152 (increased rates for intrastate phone service would injure the economic well-being of the state); *Abrams*, 582 F. Supp. at 1160 (changes to Medicare that would decrease payments to New York recipients is sufficient injury to economic well-being); *Alabama ex rel. Baxley v. Tenn. Valley Auth.*, 467 F. Supp. 791, 794 (N.D. Ala. 1979) (relocation of executive and administrative offices would damage the economic well-being of Alabama by decreasing available jobs and injuring state economy).

Here, the States similarly seek to protect their residents' economic well-being. Specifically, Plaintiffs allege that the DHS Directive will create a discriminatory employment environment that will encourage employers to hire DAPA beneficiaries instead of those with lawful permanent status in the United States.[27] To support this assertion, Plaintiffs focus on the interplay between the DHS Directive and the Affordable Care Act passed in 2010. Beginning in

[27] In addition to the injuries stemming from the alleged creation of a discriminatory employment environment, certain portions of the States' briefs—as well as various *amici* briefs—detail a number of encumbrances suffered by their residents due to the lack of immigration enforcement, such as increased costs to healthcare and public school programs. Few—if any—of these allegations have actually been specifically pled by the Parties as a basis for *parens patriae* standing.

2015, the Affordable Care Act ("ACA") requires employers with fifty or more employees to offer adequate, affordable healthcare coverage to their full-time employees. Patient Protection and Affordable Care Act, 26 U.S.C. § 4980H. If an employer with fifty or more employees chooses not to offer health insurance to its full-time employees, it instead incurs a monetary penalty. *Id*. Currently, ACA requires that employers provide health insurance only to those individuals that are "legally present" in the United States. *Id*. at § 5000A(d)(3). The definition of "legally present," however, specifically excludes beneficiaries of the 2012 DACA Directive. If an employer hires a DACA beneficiary, it does not have to offer that individual healthcare nor does it incur a monetary penalty for the failure to do so. *See* 45 C.F.R. § 152.2(8). The States argue that the Obama Administration is expected to promulgate similar regulations that will also bar beneficiaries of the DAPA Directive from participating in the ACA's employer insurance mandate. This exclusion, the States argue, will exacerbate unemployment for its citizens because it will create an employment environment that will encourage employers to discriminate against lawfully present citizens. Since the ACA's exclusion of DAPA beneficiaries makes them more affordable to employ, employers will be inclined to prefer them over those employees that are covered by the terms of the ACA. *Id*.

The States' alleged injury to their citizens' economic well-being is within the quasi-sovereign interests traditionally protected by *parens patriae* actions. *See, e.g., Alfred L. Snapp*, 458 U.S. at 609; *Wash. Utilities & Transp. Comm'n*, 513 F.2d at 1152; *Kansas ex rel. Hayden*, 548 F. Supp. at 802; *Abrams*, 582 F. Supp. at 1160; *Alabama ex rel. Baxley*, 467 F. Supp. at 794. The States' challenge, however, is premature. Although some expect that the Obama Administration will promulgate regulations barring DAPA beneficiaries from participating in the

ACA's employer insurance mandate, it has yet to do so. *See A Guide to the Immigration Accountability Executive Action*, Immigration Policy Center (Dec. 22, 2014)[28] ("[T]he Obama Administration *will* promulgate regulations to exclude DAPA recipients from any benefits under the Affordable Care Act, much as it did in the aftermath of the DACA announcement.") (emphasis added); *DACA and DAPA Access to Federal Health and Economic Support Programs*, NILC (Dec. 10, 2014)[29] (the Obama Administration "issued regulations that deny access to health coverage under the ACA for DACA recipients and *is expected* to do the same for DAPA recipients") (emphasis added); Michael D. Shear & Robert Pear, *Obama's Immigration Plan Could Shield Five Million*, N.Y. Times (Nov. 19, 2014)[30] (quoting Stephen W. Yale-Loehr, professor of immigration law at Cornell, for assertion that it "*appears*" that these individuals will be barred from health benefits under ACA) (emphasis added). Discouraging the resolution of controversies that are not ripe, the Supreme Court has held that courts should avoid "entangling themselves in abstract disagreements . . . until an administrative decision has been formalized and its effects felt in a concrete way . . . ." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003). Here, the administrative decision from which the States' alleged economic injury will flow has not been formalized. Thus, the States' *parens patriae* suit is not ripe for adjudication.

[28] This article may be accessed at http://www.immigrationpolicy.org/special-reports/guide-immigration-accountability-executive-action.

[29] A PDF of this article may be accessed at http://allianceforcitizenship.org/wp-content/uploads/2014/12/DAPA-DACA-and-fed-health-economic-supports.pdf.

[30] This article may be accessed at http://www.nytimes.com/2014/11/20/us/politics/obamacare-unlikely-for-undocumented-immigrants.html?_r=0.

2. *Massachusetts v. E.P.A.* Claims

Clearly, in addition to the traditional Article III standing, Plaintiffs can also pursue their direct damage claims under the ambiguous standards set forth in *Massachusetts v. E.P.A.* In *Massachusetts*, the Supreme Court held that Massachusetts had standing to seek redress for the damages directly caused to its interests as a landowner. Similarly, the States have standing because the Defendants' actions will allegedly cause direct damage to their proprietary interests. Consequently, no matter how one reads *Massachusetts v. E.P.A.*, it strengthens the conclusion that the States do have standing to sue for direct damages.

Nevertheless, separate and apart from their direct damage claim (for which at least Texas has standing) and somewhat related to the *parens patriae* basis for standing, the States also assert standing based upon the continual non-enforcement of the nation's immigration laws, which allegedly costs each Plaintiff State millions of dollars annually. The evidence in this case supplies various examples of large, uncompensated losses stemming from the fact that federal law mandates that states bear the burdens and costs of providing products and services to those illegally in the country. These expenses are most clearly demonstrated in the areas of education and medical care, but the record also contains examples of significant law enforcement costs.

a. Argument of the States and *Amici*

The States and some *amici* briefs argue that the Supreme Court's holding in *Massachusetts v. E.P.A.* supports the States' assertion of standing based on their injuries caused by the Government's prolonged failure to secure the country's borders. Whether negligently or even with its best efforts, or sometimes, even purposefully, the Government has allowed a situation to exist where illegal aliens move freely across the border, thus allowing—at a

minimum—500,000 illegal aliens to enter and stay in the United States each year.[31] The federal government is unable or unwilling to police the border more thoroughly or apprehend those illegal aliens residing within the United States; thus it is unsurprising that, according to prevailing estimates, there are somewhere between 11,000,000 and 12,000,000 illegal aliens currently living in the country, many of whom burden the limited resources in each state to one extent or another. Indeed, in many instances, the Government intentionally allows known illegal aliens to enter and remain in the country. When apprehending illegal aliens, the Government often processes and releases them with only the promise that they will return for a hearing if and when the Government decides to hold one.[32] In the meantime, the states—with little or no help from the Government—are required by law to provide various services to this population.[33] Not surprisingly, this problem is particularly acute in many border communities. According to the States' argument, this situation is exacerbated every time the Government or one of its leading officials makes a pro-amnesty statement or, as in the instant case, every time the DHS institutes a program that grants status to individuals who have illegally entered the country.

[31] Michael Hoefer, et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, U.S. DHS, Feb. 2011.

[32] The Court was not provided with the "no-show" rates for adult illegal aliens who are released and later summoned for an immigration hearing. It has been reported, however, that the immigration hearings for last year's flood of illegal immigrant children have been set for 2019. Further, reports also show that there is a 46% "no-show" rate at these immigration hearings for children that were released into the population. *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border: Hearing Before the S. Homeland Sec. Comm.*, 113th Cong. (July 9, 2014) (statement of Juan Osuna, Director of the Executive Office for Immigration Review). Thus, for these children that the Government released into the general population, despite a lack of legal status, the States will have to bear the resulting costs for at least five more years— if not forever, given the rate of non-compliance with appearance notices.

[33] *See, e.g., Plyler* , 457 U.S. at 224-25; *Toll v. Moreno*, 458 U.S. 1, 16 (1982).

b. Analysis

The States' argument is certainly a simplification of a more complex problem. Regardless of how simple or layered the analysis is, there can be no doubt that the failure of the federal government to secure the borders is costing the states—even those not immediately on the border—millions of dollars in damages each year. While the Supreme Court has recognized that states "have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,"[34] the federal government has effectively denied the states any means to protect themselves from these effects. Further, states suffer these negative effects regardless of whether the illegal aliens have any ties or family within the state, or whether they choose to assimilate into the population of the United States.[35] The record in this case provides many examples of these costs. Evidence shows that Texas pays $9,473 annually to educate each illegal alien child enrolled in public school.[36] In Texas, 7,409 unaccompanied illegal immigrant children were released to sponsors between October of 2013 and September of 2014. Thus, in that period alone, Texas absorbed additional education costs of at least $58,531,100 stemming from illegal immigration. Further, this figure addresses only the newly-admitted, unaccompanied children; it by no means includes all costs expended during this period to educate all illegal immigrant

[34] *Plyler*, 457 U.S. at 228.

[35] *Id*. While most Americans find the prospect of residing anywhere but the United States unthinkable, this is not a universally-held principle. Many aliens are justly proud of their own native land and come to the United States (both legally and illegally) because our economy provides opportunities that their home countries do not. Many of these individuals would be satisfied with working in the United States for part of the year and returning to their homeland for the remainder. This arrangement is often unfeasible for illegal aliens, though, because of the risk of apprehension by authorities when traveling back and forth across the border. Regardless, many illegal aliens have no intention of permanently immigrating, but rather seek to be able to provide for their families. The Supreme Court in *Arizona* noted that 476,405 aliens are returned to their home countries every year without a removal order. 132 S. Ct. at 2500. Many others return outside of any formal process. *See also*, footnotes 41 and 42 and the text accompanying footnote 42.

[36] This figure presumes the provision of bilingual services. If bilingual services are not required, the cost is $7,903 annually per student.

children residing in the state. Evidence in the record also shows that in 2008, Texas incurred $716,800,000 in uncompensated medical care provided to illegal aliens.

These costs are not unique to Texas, and other states are also affected. Wisconsin, for example, paid $570,748 in unemployment benefits just to recipients of deferred action. Arizona's Maricopa County has similarly estimated the costs to its law enforcement stemming from those individuals that received deferred action status through DACA. That estimate, which covered a ten-month period and included only the law enforcement costs from the prior year, exceeded $9,000,000.

To decrease these negative effects, the States assert that the federal government should do two things: (1) secure the border; and (2) cease making statements or taking actions that either explicitly or impliedly solicit immigrants to enter the United States illegally. In other words, the Plaintiffs allege that the Government has created this problem, but is not taking any steps to remedy it. Meanwhile, the States are burdened with ever-increasing costs caused by the Government's ineffectiveness. The frustration expressed by many States and/or *amici curiae* in their briefing is palpable. It is the States' position that each new wave of illegal immigration increases the financial burdens placed upon already-stretched State budgets.

It is indisputable that the States are harmed to some extent by the Government's action and inaction in the area of immigration. Nevertheless, the presence of an injury alone is insufficient to demonstrate standing as required to bring suit in federal court. A plaintiff must still be able to satisfy all of the elements of standing—including causation and redressability—to pursue a remedy against the one who allegedly caused the harm.

Not surprisingly, the States rely, with much justification, on the Supreme Court's holding in *Massachusetts v. E.P.A.* to support standing based on these damages. 549 U.S. 497 (2007). In *Massachusetts*, the Supreme Court held that states have special standing to bring suit for the protection of their sovereign or quasi-sovereign interests. *Id.* at 520. Justice Stevens quoted a prior decision from Justice Kennedy, stating to the effect that states "are not relegated to the role of mere provinces or political corporations but retain the dignity, though not the full authority, of sovereignty." *Id*. at 519 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)) The majority concluded that Massachusetts, in its role as a landowner, suffered (or would suffer) direct damages from the EPA's refusal to act under the Clean Air Act. *Id*. at 519, 526. Massachusetts' status as a landowner, however, was only the icing on the cake. *See id*. at 519. This status reinforced the Supreme Court's conclusion that "[Massachusetts'] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal jurisdiction." *Id*. Without explicitly delineating formal elements, the majority seemed to recognize a special form of "sovereignty standing" if the litigant state could show: (1) a procedural right to challenge the act or omission in question and (2) an area of special state interest. *See id.* at 518-26. With regard to the latter, Justice Stevens concluded that states have standing to file suit to protect the health and welfare of their citizens since our structure of government mandates that they surrender to the federal government: (1) the power to raise a military force; (2) the power to negotiate treatises; and (3) the supremacy of their state laws in areas of federal legislation. *Id.* at 519.

The States conclude that Justice Stevens' holding is equally applicable to their situation. First, the States have no right to negotiate with Mexico or any other country from which large numbers of illegal aliens immigrate; thus the States cannot rely on this avenue to resolve or

lessen the problem. Second, the States cannot unilaterally raise an army to combat invaders or protect their own borders. Third, the federal government ardently defends against any attempt by a state to intrude into immigration enforcement—even when the state seeks to enforce the very laws passed by Congress. Therefore, the States reach the same conclusion as the Supreme Court did in *Massachusetts v. E.P.A.* They have the power to sue the federal government in federal court to protect their quasi-sovereign interests in the health, welfare, and natural resources of their citizens.

The States lose badly needed tax dollars each year due to the presence of illegal aliens—a clear drain upon their already-taxed resources. These damages, the States argue, are far greater and more direct than the damages stemming from air pollution in *Massachusetts*. Thus, they conclude that they should similarly have standing. This Court agrees to the actual existence of the costs being asserted by Plaintiffs. Even the Government makes no serious attempt to counter this argument, considering that the Government's lack of border security combined with its vigilant attempts to prevent any state from protecting itself have directly led to these damages. Causation here is more direct than the attenuated causation chain patched together and accepted by the Supreme Court in *Massachusetts*.

Nevertheless, standing in *Massachusetts* was not dependent solely on damages flowing from the lax enforcement of a federal law; the Supreme Court also emphasized the procedural avenue available to the state to pursue its claims. *See id.* at 520. Specifically covering the section under which Massachusetts' claim was brought, the Clean Air Act provided that "[a] petition for review of action of the Administrator in promulgating any . . . standard under section 7521 of this title . . . may be filed only in the United States Court of Appeals for the District of

Columbia." Clean Air Act, 42 U.S.C. § 7607(b)(1). The States claim that the APA gives them a similar procedural avenue. The APA states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702 (emphasis in original). Section 703 of the APA specifically authorizes a suit like this case where the States seek a mandatory injunction. 5 U.S.C. § 703. Finally, Section 704 provides a cause of action for a "final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. It is appropriate to note that the Government has asserted that there is absolutely no remedy, under any theory, for the Plaintiffs' suit—seemingly placing the States' suit squarely within the purview of Section 704.

The Government counters this contention, however, by arguing that the DAPA program is an exercise of discretion and merely informational guidance being provided to DHS employees. Since it argues that discretion is inherent in the DAPA program, the Government concludes that it not only prevails on the merits of any APA claim, but that this discretion also

closes the standing doorway that the States are attempting to enter.[37] The Court will address these assertions in a separate part of the opinion because they are not the key to the resolution of the indirect damages contemplated in this section regarding standing under *Massachusetts v. E.P.A.*

It has been recognized that the resources of states are drained by the presence of illegal aliens—these damages unquestionably continue to grow. In 1982, the Attorney General estimated that the country's entire illegal immigrant population was as low as three million individuals. *See Plyler v. Doe*, 457 U.S. at 218-19. Today, California alone is reported to have at least that many illegal immigrants residing with its borders. Among the Plaintiff States, the only difference with regard to the population of illegal immigrants residing within each is that

[37] *See* 5 U.S.C. § 701. There is some authority in the immigration context that a private immigration organization cannot attack immigration decisions via the APA. *See Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996). These decisions are based primarily on a lack of "prudential standing" rather than on the requirements of the APA. However, for those directly affected by a federal agency action, these decisions are inapplicable. In this context, the Government in places conflates the issue of standing with that of reviewability.

> Standing to seek review is a concept which must be distinguished from reviewability. In *Association of Data Processing Serv. Organizations, Inc. v. Camp*, the Court defined "standing" in terms of a two-part test. First, the complainant must allege "that the challenged action has caused him injury in fact, economic or otherwise." Second, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."
>
> Reviewability presumes that the standing prerequisite has been satisfied and then adds the element of the courts' power to judge a certain administrative decision. Correspondingly, "unreviewable" administrative actions are those which will not be judicially scrutinized, despite the fulfillment of all prerequisites such as standing and finality, either because Congress has cut off the court's power to review or because the courts deem the issue "inappropriate for judicial determination."
>
> Even "unreviewable" administrative action may be judicially reviewed under exceptional circumstances, such as whether there has been a clear departure from the agency's statutory authority.

Statutory Preclusion of Judicial Review, 1976 Duke L. J. 431, 432 n.4 (1976) (citations omitted). The States have seemingly satisfied these two standing requirements, but that alone does not allow the Court to review the DHS' actions.

the population is not evenly distributed.[38] The Government does not dispute the existence of these damages, but instead argues that widespread and generalized damages—such as those suffered by all taxpayers collectively—do not provide a basis for one to sue the Government. The States concede that the cases cited by the Government certainly stand for that proposition; but they argue that the new rules announced in *Massachusetts v. E.P.A.* give them, in their role as states, "special solicitude" to bring an action to protect the resources of their citizens. Turning to the dissent, the States similarly find support for this new form of standing from Chief Justice Roberts' statement that the majority opinion "adopts a new theory of Article III standing for States . . . ." *Id.* at 539-40 (Roberts, J., dissenting).

The Court recognizes that the Supreme Court's opinion in *Massachusetts* appears to establish new grounds for standing—a conclusion the dissenting opinions goes to lengths to point out. Nevertheless, the Court finds that *Massachusetts* did not abandon the traditional standing requirements of causation and redressability—elements critical to the damages discussed in this section. The Court finds that the Government's failure to secure the border has exacerbated illegal immigration into this country. Further, the record supports the finding that this lack of enforcement, combined with this country's high rate of illegal immigration, significantly drains the States' resources.[39]

[38] The Court notes that, while twenty-six states or their representatives are Plaintiffs herein, thirteen states and many municipalities have filed *amici* briefs on the Government's behalf. One of the arguments raised in their brief is that DAPA may eventually change the presence of illegal aliens in this country into an economic positive, an opinion based upon a number of studies. Doc. No. 81; *see also* Doc. No. 121 (*amici* brief filed by the Mayors of New York and Los Angeles, *et al.*).

[39] The Government, though not necessarily agreeing that it has failed to secure the border, concedes that many costs associated with illegal immigration must be borne by the states, particularly in the areas of education, law enforcement, and medical care.

Regardless, the Court finds that these more indirect damages described in this section are not caused by DAPA; thus the injunctive relief requested by Plaintiffs would not redress these damages. DAPA applies only to individuals who have resided in the United States since 2010. If the DHS enforces DAPA as promulgated, this group has already been in the country for approximately five years. Therefore, the costs and damages associated with these individuals' presence have already been accruing for at least a five-year period. The relief Plaintiffs seek from their suit is an injunction maintaining the status quo—however, the status quo already includes costs associated with the presence of these putative DAPA recipients. If the Court were to grant the requested relief, it would not change the presence of these individuals in this country, nor would it relieve the States of their obligations to pay for any associated costs. Thus, an injunction against DAPA would not redress the damages described above.

The States also suggest that the special sovereign standing delineated in *Massachusetts* encompasses three other types of damages that will be caused by DAPA. First, the continued presence of putative DAPA recipients will increase the costs to which the States are subjected.[40] Specifically, the States allege that, because DAPA recipients will be granted legal status for a three-year period, those who have not already pursued state-provided benefits will now be more likely to seek them. Stated another way, DAPA recipients will be more likely to "come out of the shadows" and to seek state services and benefits because they will no longer fear deportation. Thus, the States' resources will be taxed even more than they were before the promulgation of DAPA.

[40] This discussion does not include direct costs to the state, such as the costs associated with providing additional driver's licenses, which were discussed in a prior section. This Court does not address the issue as to whether some or all of these damages might be recoverable under the theory of "abdication standing" because that ruling is not necessary to grant this temporary injunction.

Regardless of whether the States' prediction is true, the Constitution and federal law mandate that these individuals are entitled to state benefits merely because of their presence in the United States, whether they reside in the sunshine or the shadows. Further, aside from the speculative nature of these damages, it seems somewhat inappropriate to enjoin the implementation of a directive solely because it may encourage or enable individuals to apply for benefits for which they were already eligible.

The States' reply, though supported by facts, is not legally persuasive. The States rightfully point out that DAPA will increase their damages with respect to the category of services discussed above because it will increase the number of individuals that demand them. Specifically, the Plaintiffs focus on two groups. First, there are many individuals each year that self-deport from the United States and return to their homeland.[41] The States suggest, with some merit, that DAPA will incentivize these individuals to remain in the United States.

Second, the States focus on the individuals that would have been deported without the legal status granted by DAPA, alleging that their continued presence in this county will increase state costs. The States argue that the DHS has decided it will not enforce the removal statutes with regards to at least 4,300,000 people plus hypothetically millions of others that apply but are not given legal presence. They conclude in the absence of the DAPA program, the DHS in its normal course of removal proceedings would have removed at least some of these individuals. Thus DAPA will allow some individuals who would have otherwise been deported to remain in the United States. The Government has made no cogent response to this argument. Were it to

[41] As stated earlier in a footnote, many individuals voluntarily return to their homeland. *See* DHS, Office of Immigration Statistics, Immigration Enforcement Actions: 2013, at 1 (Sept. 2014). In fact, in the years 2007 through 2009, more illegal immigrants self-deported back to Mexico than immigrated into the United States.

argue against this assertion, the Government would likely have to admit that these individuals would not have been deported even without DAPA—an assertion that would damage the DHS far more than it would strengthen its position.

The States are correct that there are a number of individuals that fall into each category. Immigration experts estimate that 178,000 illegal aliens self-deport each year.[42] Though the DHS could likely calculate the number of individuals deported and estimate the number that self-deported over the past five years (and used those figures to estimate those who would in the near future) that would have otherwise qualified for DAPA relief, that evidence is not in the record. It is reasonable to conclude, however, that some of these individuals would have self-deported or been removed from the country. The absence of these individuals would likely reduce the states' costs associated with illegal immigration.

The Government has not directly addressed the suppositions inherent in this argument, but it and at least two sets of *amici curiae* have suggested a response. Specifically, they suggest that any potential reduction in state costs that could have been anticipated in the absence of DAPA will be offset by the productivity of the DAPA recipients and the economic benefits that the States will reap by virtue of these individuals working, paying taxes, and contributing to the community.

This Court, with the record before it, has no empirical way to evaluate the accuracy of these economic projections, and the record does not give the Court comfort with either position. Yet, these projections do demonstrate one of the reasons why the Court does not accept the States' argument for standing on this point. A theory without supporting evidence does not

[42] DHS, Office of Immigration Statistics, Immigration Enforcement Actions: 2013, at 1 (Sept. 2014).

support a finding of redressability. Based upon the record, the presence of damages or off-setting benefits is too speculative to be relied upon by this or any other court as a basis for redressability.

The last category of damages pled by Plaintiffs that falls within *Massachusetts*' "special solicitude" standing is predicated upon the argument that reports made by the Government and third-parties concerning the Government's actions have had the effect of encouraging illegal immigration. The Government does not deny that some of its actions have had this effect, but maintains that its actions were legal and appropriate. In other words, these actions may have had the unintended effect of encouraging illegal immigration, but that does not create a damage model that would satisfy either the causation or redressability requirements of standing.

Nevertheless, a myriad of reasons support a court's abstention from intervention when damages are premised upon the actions of third-parties motivated by reports (and misreports) of governmental action.[43] The Court will address only two.

The First Amendment protects political debate in this country. Enjoining that debate, or finding damages predicated upon that debate, would be counter-productive at best and, at worst, a violation of the Constitution. The crux of the States' claim is that the Defendants violated the Constitution by enacting their own law without going through the proper legislative or administrative channels. One cannot, however, consistently argue that the Constitution should control one aspect of the case, yet trample on the First Amendment in response to another. Speech usually elicits widely-differing responses, and its ramifications are often unpredictable. Clearly, reports of governmental activity, even if they are biased, misleading, or incorrect, are

[43] In a different case held before this Court, a DHS official confirmed under oath the existence of this unintended consequence. *See* footnote 110.

protected speech—despite the fact that they may have the unintended effect of inspiring illegal immigration.

Second, a lawful injunction that would cure this problem cannot be drafted. Unquestionably, some immigrants are encouraged to come to the United States illegally based upon the information they receive about DACA and DAPA. Reports of lax border security, minimal detention periods following apprehension, and the ease of missing immigration hearings may also encourage many to immigrate to this country illegally. Individuals may also be encouraged to immigrate illegally because they have been told that the stock market is doing well, or that the United States' economy is doing better than that of their homeland, or because the United States has better schools or more advanced medical care. The decision to immigrate illegally is motivated by innumerable factors, and a court would be jousting at windmills to craft an injunction to enjoin all of these activities.

Statements and reports about the implementation of DACA and DAPA may very well encourage individuals to try to reach the United States by any means, legal or otherwise. Further, it is undisputed that illegal immigration strains the resources of most states. This side-effect, however, is too attenuated to enjoin DAPA's implementation. The States have not shown that an injunction against DAPA would redress these particular damages.

E. Standing Created by Abdication

1. The Factual Basis

The most provocative and intellectually intriguing standing claim presented by this case is that based upon federal abdication.[44] This theory describes a situation when the federal government asserts sole authority over a certain area of American life and excludes any authority or regulation by a state; yet subsequently refuses to act in that area. Due to this refusal to act in a realm where other governmental entities are barred from interfering, a state has standing to bring suit to protect itself and the interests of its citizens.

The States concede, here, that the regulation of border security and immigration are solely within the jurisdiction of the United States—an assertion the United States agrees with and has repeatedly insisted upon in other cases. However, rather than enforcing laws pertaining to border security and immigration, the Government, through DAPA, has instead announced that it will not seek to deport certain removable aliens because it has decided that its resources may be better used elsewhere. In sum, the States argue that the Government has successfully established its role as the sole authority in the area of immigration, effectively precluding the States from taking any action in this domain and that the DHS Secretary in his memorandum establishing DAPA has announced that except for extraordinary circumstances, the DHS has no intention of enforcing the laws promulgated to address millions of illegal aliens residing in the United States.

The facts underlying the abdication claim cannot be disputed. In *Arizona v. United States*, the federal government sued Arizona when the state tried to enforce locally enacted immigration restrictions. *Arizona v. United States*, 132 S. Ct. 2492 (2012). The Supreme Court

[44] "Abdication" is defined as "[t]he act of renouncing or abandoning . . . duties, usually those connected with high office . . . ." *Black's Law Dictionary* 4 (10th ed. 2014).

upheld the Government's position, holding that federal law preempted the state's actions. *Id*. at 2495. Nonetheless, the Supreme Court, in doing so, still recognized the states' plight due to federal preemption in the area of immigration:

> The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population. And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime.
>
> Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border. Phoenix is a major city of the United States, yet signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, "DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED/Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed." The problems posed to the State by illegal immigration must not be underestimated.
>
> These concerns are the background for the formal legal analysis that follows. The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.

Id. at 2500. Despite this expression of empathy, the Supreme Court held, with minor exceptions, that states are virtually powerless to protect themselves from the effects of illegal immigration.[45]

[45] Though clearly pre-dating DACA and DAPA, courts from a variety of jurisdictions have similarly expressed sympathy for the plight of the states that bear the brunt of illegal immigration. *See, e.g., Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996). These courts invariably denied the states the relief they sought since inadequate immigration enforcement did not supply a basis for standing. *Id.* Indeed, as recently as 2013, another court dismissed similar claims by the State of Mississippi. *See Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013).

Three things were constant in all of these cases. In each, the courts expressed sympathy with the plight of the states. Second, the courts held that the states could not recover indirect costs they suffered as a result of *ineffective* enforcement. This is identical to the ruling this Court made in the prior section regarding damages stemming from

Id. Holding that States cannot even exercise their civil power to remove an illegal alien, the majority opinion stated that "Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens." *Id.* at 2495. The Government continues to take the position that "even State laws relating to matters otherwise within the core of the police power will generally be preempted . . . Arizona (or any other State) may not substitute its judgment for the federal government's when it comes to classification of aliens." Brief for the United States as Amicus Curiae at 14-16, *Arizona v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). As made clear in this DACA-related brief, the Government claims total preemption in this area of the law. Thus, the first element of an abdication claim is established.

---

the provision of services like education and medical care. Third, none of these cases, however, held that a state was absolutely precluded from ever bringing suit concerning immigration enforcement issues.

Three important factors separate those cases from the present one—any one of which would be considered a major distinction. The presence of all three, however, clearly sets this case apart from those cited-above. First, with the exception of *Crane*, none of the cases involved the Government announcing a policy of non-enforcement. Here, the DHS has clearly announced that it has decided not to enforce the immigration laws as they apply to approximately 4.3 million individuals—as well as to untold millions that may apply but be rejected by the DAPA program. The DHS has announced that the DAPA program confers legal status upon its recipients and, even if an applicant is rejected, that applicant will still be permitted to remain in the country absent extraordinary circumstances. There can be no doubt about this interpretation as the White House has made this clear by stating that the "change in priorities applies to everybody." S*ee* footnote 88. Because of this announced policy of non-enforcement, the Plaintiffs' claims are completely different from those based on mere ineffective enforcement. This is abdication by any meaningful measure.

Second, the plaintiffs in the above-cited cases did not provide proof of any direct damages—rather, the plaintiffs in these cases only pled *indirect* damages caused by the presence of illegal aliens. Conversely, in the present case, Texas has shown that it will suffer millions of dollars in *direct* damages caused by the implementation of DAPA.

Finally, with the exception of *Crane* (in which this issue was not raised), the above-cited cases pre-date the REAL ID Act of 2005. The REAL ID Act mandates a state's participation in the SAVE program, which requires that a state pay a fee to verify an applicant's identity prior to issuing a driver's license or an identification card. By creating a new class of individuals eligible for driver's licenses and identification cards, individuals that the INA commands should be removed, DAPA compounds the already federally-mandated costs that states are compelled to pay.

To establish the second element necessary for abdication standing, the States assert that the Government has abandoned its duty to enforce the law. This assertion cannot be disputed. When establishing DAPA, Secretary Johnson announced that the DHS will not enforce the immigration laws as to over four million illegal aliens eligible for DAPA, despite the fact that they are otherwise deportable. DHS agents were also instructed to terminate removal proceedings if the individual being deported qualifies for relief under the DAPA criteria. Further, the DHS has also announced that, absent extraordinary circumstances, it will not even deport illegal aliens who apply for DAPA and are rejected. The record does not contain an estimate for the size of this group, but hypothetically the number of aliens who would otherwise be deported if the INA were enforced is in the millions. Secretary Johnson has written that these exemptions are necessary because the DHS' limited funding necessitates enforcement priorities. Regardless of the stated motives, it is evident that the Government has determined that it will not enforce the law as it applies to over 40% of the illegal alien population that qualify for DAPA, plus all those who apply but are not awarded legal presence. It is not necessary to search for or imply the abandonment of a duty; rather, the Government has announced its abdication.

The Government claims, however, that its deferred action program is merely an exercise of its prosecutorial discretion. Any justifications regarding abdication, though, are not a necessary consideration for standing. This inquiry may be necessary to a discussion on the merits, but standing under a theory of abdication requires only that the Government declines to enforce the law. Here, it has.[46]

[46] In the absence of these declarations of abdication, an examination of relevant DHS statistics might be instructive, but apparently the DHS is not very forthcoming with this information. The author of a recent law review article detailed the trouble she experienced in trying to get deferred action numbers from the Government. Finally, after numerous attempts, her conclusions were:

The Government claims sole authority to govern in the area of immigration, and has exercised that authority by promulgating a complex statutory scheme and prohibiting any meaningful involvement by the states. As demonstrated by DACA and DAPA, however, the Government has decided that it will not enforce these immigration laws as they apply to well over five million people, plus those who had their applications denied. If one had to formulate from scratch a fact pattern that exemplified the existence of standing due to federal abdication, one could not have crafted a better scenario.

2. The Legal Basis

The Government has not seriously contested the Plaintiffs' factual basis for this claim—nor could it. Turning from the facts of this claim to the applicable law, the concept of state standing by virtue of federal abdication is not well-established. It has, however, been implied by a number of opinions, including several from the Supreme Court. The abdication theory of standing is discussed most often in connection with a *parens patriae* claim. It has also been discussed as providing APA standing, and in some contexts is relied upon as the exclusive basis

---

> While the grant rate for deferred action cases might cause alarm for those who challenge the deferred action program as an abuse of executive branch authority, it should be clear that regardless of outcome, the number of deferred action cases considered by ICE and USCIS are quite low . . . Even doubling the number of legible deferred action grants produced by USCIS and ICE between 2003 and 2010 (118 plus 946) yields less than 1,100 cases, or less than 130 cases annually.

Shoba S. Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1, 47 (2011) (hereinafter "Sharing Secrets"). *See also*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 San Diego L. Rev. 819 (2004). Other statistics suggest the deferred action rate between 2005 and 2010 ranged between a low 542 to an annual high of 1,029 individuals. Regardless, DACA has raised that number to an annual average over the years 2012-2014 to over 210,000 and if DAPA is implemented in a similar fashion, the average for the next three years will be in excess of 1.4 million individuals per year. The Court is not comfortable with the accuracy of any of these statistics, but it need not and does not rely on them given the admissions made by the President and the DHS Secretary as to how DAPA will work. Nevertheless, from less than a thousand individuals per year to over 1.4 million individuals per year, if accurate, dramatically evidences a factual basis to conclude that the Government has abdicated this area—even in the absence of its own announcements.

for standing. Traditionally, *parens patriae* actions were instituted by states seeking to protect the interests of their citizens, as well as for protection of their own quasi-sovereign interests. One of this principle's few limitations stems from the notion that the federal government, rather than a state, has the superior status in the role as a parent. In other words, the federal government was the supreme *parens patriae*. Thus a state can rely on *parens patriae* to protect its interests against any entity or actor—except the federal government. As explicitly noted by the dissent in *Massachusetts v. E.P.A.*:

> A claim of *parens patriae* standing is distinct from an allegation of direct injury. *See Wyoming v. Oklahoma*, 502 U.S. 437, 448–449, 451, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992). Far from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a "quasi-sovereign interest" "*apart* from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982) (emphasis added) (cited *ante*, at 1454). Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III. Focusing on Massachusetts's interests as quasi-sovereign makes the required showing here harder, not easier. The Court, in effect, takes what has always been regarded as a *necessary* condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a *sufficient* showing for purposes of Article III.
>
> What is more, the Court's reasoning falters on its own terms. The Court asserts that Massachusetts is entitled to "special solicitude" due to its "quasi-sovereign interests," *ante*, at 1455, but then applies our Article III standing test to the asserted injury of the Commonwealth's loss of coastal property. *See ante*, at 1456 (concluding that Massachusetts "has alleged a particularized injury *in its capacity as a landowner* " (emphasis added)). In the context of *parens patriae* standing, however, we have characterized state ownership of land as a "nonsovereign interes[t]" because a State "is likely to have the same interests as other similarly situated proprietors." *Alfred L. Snapp & Son*, *supra*, at 601, 102 S. Ct. 3260.
>
> On top of everything else, the Court overlooks the fact that our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government. As a general rule, we have held that while a State might assert a quasi-sovereign right as *parens*

> *patriae* "for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them." *Massachusetts v. Mellon*, 262 U.S. 447, 485–486, 43 S. Ct. 597, 67 L. Ed. 1078 (1923) (citation omitted); see also *Alfred L. Snapp & Son, supra,* at 610, n.16, 102 S. Ct. 3260.

Massachusetts, 549 U.S. at 539 (Roberts, J., dissenting). Following this assertion, Chief Justice Roberts described the majority opinion as bestowing upon the states "a new theory of Article III standing . . . ." *Id.* at 1466. Expounding further on this point, Chief Justice Roberts quoted a footnote from *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez* stating that:

> [T]he fact that a State may assert rights under a federal statue as *parens patriae* in no way refutes our clear ruling that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government."

Massachusetts, 549 U.S. at 540 n.1 (quoting *Alfred L. Snapp*, 458 U.S. at 610 n.16) (citations omitted).

As demonstrated by *Massachusetts*' conflicting opinions regarding the limitations of *parens patriae* standing, it is difficult to determine how long the law has permitted a state to rely upon this doctrine to show standing in a suit against the federal government. This interpretation may be well established, as asserted by Justice Stevens in the majority opinion, or it may be unprecedented, as described by the four dissenters. Regardless of its longevity, it is a rule delineated by the Supreme Court of the United States and which this Court is bound to follow. *See, e.g.*, Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 Wm. & Mary L. Rev. 1701 (2008).

The concept of abdication standing, however, has not been confined to *parens patriae* cases. Specifically, the States rely on the Supreme Court's opinion in *Heckler v. Chaney*, which involved a decision by the FDA not to take certain enforcement actions regarding the drugs used

in lethal injections administered by the states. 470 U.S. 821 (1985). Upholding the agency's decision not to act, the Supreme Court noted that they were not presented with "a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

The States claim that, unlike the FDA's action at issue in *Heckler*, the DAPA program is a total abdication and surrender of the Government's statutory responsibilities. They contend that the DAPA Directive basically concedes this point, and this Court agrees. The DAPA Memorandum states that the DHS cannot perform all the duties assigned to it by Congress because of its limited resources, and therefore it must prioritize its enforcement of the laws. This prioritization necessitated identifying a class of individuals who are guilty of a violation of the country's immigration laws, and then announcing that the law would not be enforced against them. The DAPA Memorandum concludes that, for the DHS to better perform its tasks in one area, it is necessary to abandon enforcement in another.

In response, the Government maintains its overall position: it is immaterial how large the putative class of DAPA beneficiaries is because DAPA is a legitimate exercise of its prosecutorial discretion. Earlier in this opinion, this Court held that Plaintiffs have standing based upon the direct damages they will suffer following the implementation of DAPA. Nevertheless, based upon the Supreme Court's opinion in *Heckler*, and the cases discussed below, this Court also finds that Plaintiffs have standing because of the DHS' abdication of its statutory duties to enforce the immigration laws.

The *Heckler* Court is not alone in addressing abdication standing. Again not involving the *parens patriae* doctrine, the Fifth Circuit has addressed the concept of abdication in a similar suit involving the same parties. *See Texas v. United States*, 106 F.3d 661 (5th Cir. 1997). In *Texas v. United States*, the Fifth Circuit held that abdication did not exist for several reasons. *Id.* at 667. First, it noted that Texas did not argue that the Government was "mandating" that it take any action with respect to undocumented aliens. *Id.* This fact situation is dissimilar to the one presently before the Court. Here, the States put forth evidence that demonstrates that the Government has required and will require states to take certain actions regarding DAPA recipients. Further, the Government has not conceded that it will refrain from taking similar action against the remaining Plaintiffs in this case. Second, the Fifth Circuit in *Texas* held that the Government's failure to effectively perform its duty to secure the border did not equate to an abdication of its duty. *Id.*

Plaintiffs contend that these distinctions made by the Fifth Circuit in *Texas* are noticeably absent in the present case. The DHS unilaterally established the parameters for DAPA and determined that it would not enforce the immigration laws as they apply to millions of individuals—those that qualify for DAPA and surprisingly even those that do not. Thus, the controlling but missing element in *Texas* that prevented a finding of abdication is not only present in this case, but is factually undisputed.[47] Further, if one accepts the Government's position, then a lack of resources would be an acceptable reason to cease enforcing environmental laws, or the Voting Rights Act, or even the various laws that protect civil rights

[47] Obviously, the Government disputes whether these facts equate to abdication, but it does not dispute the underlying facts themselves—nor could it, as these facts are set out in writing by the DHS Secretary in the DAPA Memorandum.

and equal opportunity. Its argument is that it has the discretion to cease enforcing an act as long as it does so under the umbrella of prosecutorial discretion. While the Court does not rule on the merits of these arguments, they certainly support the States' standing on the basis of abdication.

In regards to abdication standing, this case bears strong similarities to *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). In *Adams*, the Secretary of Health, Education and Welfare adopted a policy that, in effect, was a refusal to enforce Title VI of the Civil Rights Act of 1964. *Id.* at 1161. Specifically, the Secretary refused to effectuate an end to segregation in federally-funded public education institutions. *Id.* In *Adams*, as in the case before this Court, the Government argued that the "means" of enforcement is a matter of absolute agency discretion, and in the exercise of that discretion it chose to seek voluntary compliance. *See id*. at 1162. Rejecting this argument and holding that the Secretary had abdicated his statutory duty, the D.C. Circuit noted that:

> [t]his suit is not brought to challenge HEW's decisions with regard to a few school districts in the course of a generally effective enforcement program. To the contrary, *appellants allege that HEW has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty. We are asked to interpret the statute and determine whether HEW has correctly construed its enforcement obligations.*
>
> A final important factor distinguishing this case from the prosecutorial discretion cases cited by HEW is the nature of the relationship between the agency and the institutions in question. HEW is actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress. *It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools. The anomaly of this latter assertion fully supports the conclusion that Congress's clear statement of an affirmative enforcement duty should not be discounted.*

Id. (emphasis added).

In the present case, Congress has clearly stated that illegal aliens should be removed. Like that at issue in *Adams*, the DHS program clearly circumvents immigration laws and allows individuals that would otherwise be subject to removal to remain in the United States. The policy in *Adams* purported to seek voluntary compliance with Title VI. In contrast, the DHS does not seek compliance with federal law in any form, but instead establishes a pathway for non-compliance and completely abandons entire sections of this country's immigration law. Assuming that the concept of abdication standing will be recognized in this Circuit, this Court finds that this is a textbook example.

F. Conclusion

Having found that at least one Plaintiff, Texas, stands to suffer direct damage from the implementation of DAPA, this Court finds that there is the requisite standing necessary for the pursuit of this case in federal court. Fulfilling the constitutional requirements of standing, Texas has shown that it will suffer an injury, that this injury is proximately caused by the actions of the Government, and that a favorable remedy issued by the Court would prevent the occurrence of this injury.[48] This Court also finds that Texas' claim has satisfied the requirements of prudential standing: Plaintiffs' suit is not merely a generalized grievance, the Plaintiffs' fall within the "zone of interest" pertaining to the immigration statutes at issue, and Plaintiffs' suit is not based merely on the interests of third-parties.

Finally, for the various reasons discussed above and below, it is clear that Plaintiffs satisfy the standing requirements as prescribed by the APA. Thus even "unreviewable"

[48] The Court has also found that the Government has abdicated its duty to enforce the immigration laws that are designed, at least in part, to protect the States and their citizens. While many courts, including the United States Supreme Court, have suggested that the abdication of duty gives rise to standing, this Court has not found a case where the plaintiff's standing was supported solely on this basis. Though not the only reason, the Court finds Plaintiffs (at least Texas) have standing pursuant to this theory, as well.

administrative actions may be subject to judicial review under exceptional circumstances, such as when there has been a clear departure from the agency's statutory authority. *See Manges v. Camp*, 474 F.2d 97, 99 (5th Cir. 1973). With regard to APA standing, this Court emphasizes that there is a difference between the standing required to bring a lawsuit and that necessary for APA reviewability. Although traditional standing refers to the ability of a plaintiff to bring an action, APA "reviewability" concerns the ability of the Court to actually review and grant relief regarding the act or omission in question on either procedural or substantive grounds. This Court will address these redressability issues as part of its discussions on the merits.

Having reached the conclusion that standing exists for at least one Plaintiff, the Court turns to the merits.

V. THE MERITS OF THE STATES' CLAIMS

As previously noted, this opinion seeks to address three issues: standing, legality, and constitutionality. Having concluded that at least one Plaintiff, the State of Texas, has standing, the Court now addresses the merits of the States' claims regarding the DAPA program.

A. Prosecutorial Discretion and Agency Prioritization

A basic issue intrinsically interwoven in most of the arguments presented in this case warrants attention before proceeding. It does not resolve any of the ultimate remaining questions, but the Court nevertheless finds it important. Just as the Government has been reluctant to make certain concessions, prosecutorial discretion is an area where the States, possibly in fear of making a bigger concession than intended, are reluctant to concede. As discussed above, one of the DHS Secretary's stated reasons for implementing DAPA is that it

allegedly allows the Secretary to expend the resources at his disposal in areas he views as deserving the most attention. He has set forth these priorities as follows:

1. Priority 1: threats to national security, border security, and public safety;

2. Priority 2: misdemeanants and new immigration violators;

3. Priority 3: other immigration violations.

See Doc. No. 38, Def. Ex. 5 (Nov. 20, 2014 Memorandum, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants").[49]

The law is relatively clear on enforcement discretion and, thus, the Court will not address it at length. Nevertheless, because the DHS has so intertwined its stated priorities with the DAPA program as justification for its alleged exercise of discretion, the Court finds it helpful to point out some basic legal principles.

The law is clear that the Secretary's ordering of DHS priorities is not subject to judicial second-guessing:

> [T]he Government's enforcement priorities and . . . the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to make.

Reno, 525 U.S. at 490 (quoting *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)).

Further, as a general principle, the decision to prosecute or not prosecute an individual is, with narrow exceptions, a decision that is left to the Executive Branch's discretion. *Heckler*, 470 U.S. at 831 (citing a host of Supreme Court opinions). As the Fifth Circuit has stated:

[49] Interestingly, this memorandum, which is different from the DAPA Memorandum (although dated the same day), states: "Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens in the United States who are not identified as priorities herein." The DAPA recipients arguably fall under Priority 3, but the Secretary's DAPA Memorandum seems to indicate he thinks otherwise. Despite this admonition, the DAPA Memorandum instructs DHS officials not to remove otherwise removable aliens. In fact, it also instructs ICE officials to immediately stop enforcement procedures already in process, including removal proceedings.

> The prosecution of criminal cases has historically lain close to the core of the Article II executive function. The Executive Branch has extraordinarily wide discretion in deciding whether to prosecute. Indeed, that discretion is checked only by other constitutional provisions such as the prohibition against racial discrimination and a narrow doctrine of selective prosecution.

Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 756 (5th Cir. 2001).

The Judiciary has generally refrained from injecting itself into decisions involving the exercise of prosecutorial discretion or agency non-enforcement for three main reasons. First, these decisions ordinarily involve matters particularly within an agency's expertise. Second, an agency's refusal to act does not involve that agency's "coercive" powers requiring protection by courts. Finally, an agency's refusal to act largely mirrors a prosecutor's decision to not indict. *Heckler*, 470 U.S. at 821-32. This is true whether the suit is brought under common law or the APA. Absent abdication, decisions to not take enforcement action are rarely reviewable under the APA. *See, e.g.*, *Texas*, 106 F.3d at 667.

Consequently, this Court finds that Secretary Johnson's decisions as to how to marshal DHS resources, how to best utilize DHS manpower, and where to concentrate its activities are discretionary decisions solely within the purview of the Executive Branch, to the extent that they do not violate any statute or the Constitution.

The fact that the DHS has virtually unlimited discretion when prioritizing enforcement objectives and allocating its limited resources resolves an underlying current in this case. This fact does not, however, resolve the specific legal issues presented because the general concept of prosecutorial discretion—or Defendants' right to exercise it—is not the true focus of the States'

legal attack.[50] Instead, Plaintiffs argue that DAPA is not within the Executive's realm (his power to exercise prosecutorial discretion or otherwise) at all; according to Plaintiffs, DAPA is simply the Executive Branch legislating.

Indeed, it is well-established both in the text of the Constitution itself and in Supreme Court jurisprudence that the Constitution "allows the President to execute the laws, not make them." *Medellin*, 552 U.S. at 532. It is Congress, and Congress alone, who has the power under the Constitution to legislate in the field of immigration. *See* U.S. Const. art. 1, § 8, cl. 4; *Plyler*, 457 U.S. at 237–38. As the Supreme Court has explained, "[t]he conditions for entry [or removal] of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determinations should be based, have been recognized as matters *solely for the responsibility of the Congress . . . .*" *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-97 (1952) (emphasis added).

Just as the states are preempted from interfering with the "careful balance struck by Congress with respect to unauthorized employment," for example,[51] Plaintiffs argue that the doctrine of separation of powers likewise precludes the Executive Branch from undoing this careful balance by granting legal presence together with related benefits to over four million individuals who are illegally in the country. It is the contention of the States that in enacting DAPA, the DHS has not only abandoned its duty to enforce the laws as Congress has written them, but it has also enacted "legislation" contrary to the Constitution and the separation of

[50] The States obviously question the soundness of Defendants' alleged exercise of discretion. Their complaint also questions whether this program can be characterized or justified as an exercise of discretion at all.

[51] *Arizona*, 132 S. Ct. at 2505.

powers therein. Finally, the States complain that the DHS failed to comply with certain procedural statutory requirements for taking the action it did.

The Court now turns to those issues.

B. Preliminary Injunction

To support the "equitable remedy" of a preliminary injunction, the Plaintiff States must establish four elements: "(1) a substantial likelihood of success on the merits; (2) a substantial threat that the [States] will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause [Defendants]; and (4) that the injunction will not disserve the public interest." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) (quoting *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)). While a preliminary injunction should not be granted unless the plaintiff, "*by a clear showing*," carries his burden of persuasion on each of these four factors, *see Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (emphasis in the original), the plaintiff "need not prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991); *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasizing that a party "is not required to prove his case in full at a preliminary injunction hearing").

The "generally accepted notion" is that the "purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 656 (5th Cir. 1975) (citations omitted); *see also Camenisch*, 451 U.S. at 395 ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). "Given this limited purpose, and given the haste that is often necessary if [the parties'] positions

are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* The Court's analysis requires "a balancing of the probabilities of ultimate success on the merits with the consequences of court intervention at a preliminary stage." *Meis*, 511 F.2d at 656; *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) ("[T]he most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.") (quotation marks and citations omitted).

1. Preliminary Injunction Factor One: Likelihood of Success on the Merits

The first consideration in the preliminary injunction analysis is the likelihood that the plaintiff will prevail on the merits. The Fifth Circuit has previously stated that the likelihood required in a given case depends on the weight and strength of the other three factors. *See Canal Auth.*, 489 F.2d at 576-77. Although some doubt has been cast on this "sliding scale" approach, it is clear that, at a minimum, the plaintiff must demonstrate a "substantial case on the merits." *See, e.g.*, *Southerland v. Thigpen*, 784 F.2d 713, 718 n.1 (5th Cir. 1986). Thus, to meet the first requirement for a preliminary injunction, the States "must present a prima facie case," but "need not show a certainty of winning." 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.3 (3d ed. 2014) (hereinafter "Wright & Miller").

a. The Administrative Procedure Act

The States complain that the implementation of DAPA violates the APA. 5 U.S.C. §§ 501 *et seq.* Specifically, the States assert that DAPA constitutes a "substantive" or "legislative" rule that was promulgated without the requisite notice and comment process required under Section

553 of the APA.[52] Defendants concede that DAPA was not subjected to the APA's formal notice-and-comment procedure. Instead, they argue that DAPA is not subject to judicial review and, even if reviewable, is exempt from the APA's procedural requirements.

i. Judicial Review Under the Administrative Procedure Act

When a party challenges the legality of agency action, a finding that the party has standing will not, alone, entitle that party to a decision on the merits. *See Data Processing*, 397 U.S. at 173 (Brennan, J., concurring). Thus, before proceeding to the merits of Plaintiffs' claim, the Court must ensure that the agency action at issue here is reviewable under the APA.

Subject to two exceptions described below, the APA provides an avenue for judicial review of challenges to "agency action." *See* 5 U.S.C. §§ 701-706. Under Section 702, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Section 702 contains two requirements. First, the plaintiffs must identify some "'agency action' that affects [them] in the specified fashion; it is judicial review 'thereof' to which [they are] entitled." *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 702). "Agency action," in turn, is defined in the APA as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). When, as here, judicial review is sought "not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan*, 497 U.S. at 882 (citing 5

[52] The States also claim that DAPA substantively violates the APA in that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" under 5 U.S.C. § 706. If accurate (and all other requirements under the APA are satisfied), Section 706 would require that the Court "hold unlawful and set aside" the DAPA program. 5 U.S.C. § 706.

U.S.C. § 704, which provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review").

To obtain review under Section 702, Plaintiffs must additionally show that they are either "suffering legal wrong" because of the challenged agency action, or are "adversely affected or aggrieved by [that] action within the meaning of a relevant statute." 5 U.S.C. § 702. A plaintiff claiming the latter, as the States do here, must establish that the "injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan*, 497 U.S. at 871 (citing *Clarke*, 479 U.S. at 396-97).

(1) Final Agency Action

The Supreme Court has identified two conditions that must be satisfied for agency action to be "final." First, "the action must mark the consummation of the agency's decisionmaking process . . . —it must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 178 (internal quotations marks and citations omitted). One need not venture further than the DHS Directive itself to conclude that it is not "of a merely tentative or interlocutory nature." Secretary Johnson ordered immediate implementation of certain measures to be taken under DAPA. For instance, he ordered ICE and CBP to "immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the . . . criteria . . . to prevent the further expenditure of enforcement resources." Doc. No. 1, Pl. Ex. A at 5. Secretary Johnson further instructed ICE to "review *pending* removal cases, and seek administrative closure or termination" of cases with potentially eligible deferred action beneficiaries. *Id.* (emphasis added). The DHS has additionally set up a "hotline" for immigrants in the removal

process to call and alert the DHS as to their eligibility, so as to avoid their removal being effectuated.[53] USCIS was given a specific deadline by which it "should begin accepting applications under the new [DACA] criteria": "no later than ninety (90) days from the date of [the Directive's] announcement." *Id.* at 4. As of the date of this Order, that deadline is less than a week away.[54] Moreover, the DHS is currently obtaining facilities, assigning officers, and contracting employees to process DAPA applications.[55] Thus, the DHS Directive has been in effect and action has been taken pursuant to it since November of 2014.

Under the second condition identified by the Supreme Court, to be "final," the agency's action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks and citations omitted). As evidenced by the mandatory language throughout the DAPA Memorandum requiring USCIS and ICE to take certain actions, the Secretary's Directive clearly establishes the obligations of the DHS and assigns specific duties to offices within the agency. Additionally, DAPA confers upon its beneficiaries the right to stay in the country lawfully. Clearly, "legal consequences will flow" from Defendants' action: DAPA makes the illegal presence of millions of individuals legal.

---

[53] *See, e.g., Frequently Asked Questions, The Obama Administration's DAPA and Expanded DACA Programs*, NILC, at http://www.nilc.org/dapa&daca.html (last updated Jan. 23, 2015).

[54] Defendants have not indicated any intention to depart from the deadline established in the DHS Directive. To the contrary, the DHS' website states in bold, red font that it will begin accepting applications under the new DACA criteria on February 18, 2015. *See Executive Actions on Immigration*, Official Website of the Dept. of Homeland Security, at http://www.uscis.gov/immigrationaction (last updated Jan. 30, 2015). A deadline by which USCIS should begin accepting applications for DAPA was also provided in the DHS Directive: no later than 180 days from the date DAPA was announced. Thus, USCIS must begin accepting applications by mid-May of this year.

[55] Doc. No. 64, Pl. Ex. 23 (Palinkas Dec.) ("USCIS has announced that it will create a new service center to process DAPA applications. The new service center will be in Arlington, Virginia, and it will be staffed by approximately 1,000 federal employees. Approximately 700 of them will be USCIS employees, and approximately 300 of them will be federal contractors.").

Two other factors confirm that the DAPA Directive constitutes final agency action. First, the Government has not specifically suggested that it is not final. To the contrary, the DHS' own website declares that those eligible under the new DACA criteria may begin applying on February 18, 2015. Finally, the 2012 DACA Directive—which was clearly final and has been in effect for two and a half years now—was instituted in the same fashion, pursuant to a nearly identical memorandum as the one here. Indeed, Secretary Johnson in the DAPA Memorandum "direct[s] USCIS to establish a process, *similar to DACA*" for implementing the program. Doc. No. 1, Pl. Ex. A (emphasis added). This experience—and the lack of any suggestion that DAPA will be implemented in a fashion different from DACA—serves as further evidence that DAPA is a final agency action. Based upon the combination of all of these factors, there can be no doubt that the agency action at issue here is "final" in order for the Court to review it under the APA.

(2) The Zone of Interests

To challenge Defendants' action under the APA, Plaintiffs must additionally show: (1) that they are "adversely affected or aggrieved, i.e. injured in fact," and (2) that the "interest sought to be protected by the [Plaintiffs] [is] arguably within the zone of interests to be protected or regulated by the statute in question." *Clarke*, 479 U.S. at 395-96 (internal quotation marks and citations omitted). The key inquiry is whether Congress "intended for [Plaintiffs] to be relied upon to challenge agency disregard of the law." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984); *see also Clarke*, 479 U.S. at 399 ("The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively

reviewable, a particular plaintiff should be heard to complain of a particular agency decision."). The test is not "especially demanding."[56] *Id.* As the Supreme Court in *Clarke* held:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are *so marginally related to or inconsistent with the purposes implicit in the statute* that it cannot reasonably be assumed that Congress intended to permit the suit . . . . [T]here *need be no indication of congressional purpose to benefit the would-be plaintiff.*

Id. at 399-400 (citations removed) (emphasis added).

As described above in great detail, it is clear that at least one Plaintiff, the State of Texas, (and perhaps some of the other States if there had been time and opportunity for a full development of the record), will be "adversely affected or aggrieved" by the agency action at issue here. DAPA authorizes a new status of "legal presence" along with numerous other benefits to a substantial number of individuals who are currently, by law, "removable" or "deportable." The Court finds that the acts of Congress deeming these individuals removable were passed in part to protect the States and their residents. Indeed, over the decades there has been a constant flood of litigation between various states and the federal government over federal enforcement of immigration laws. The states have been unsuccessful in many of those cases and have prevailed in only a few. Regardless of which side prevailed and what contention was at issue, there has been one constant: the federal government, under our federalist system, has the

[56] The *Clarke* Court noted that, although a similar zone of interest test is often applied when considering "prudential standing" to sue in federal court (as already discussed in this opinion), the zone of interest test in the APA context is much less demanding than it is in the prudential standing context. 479 U.S. at 400 n.16 (stating that the invocation of the zone of interest test in the *standing* context "should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply"). This Court, in its consideration of prudential standing concerns, already found Plaintiffs to be within the zone of interest of the relevant immigration laws, which DAPA contravenes. Thus, based on the less-demanding nature of the APA's zone of interest test, the Court need not go into great detail in this part of its analysis.

duty to protect the states, which are powerless to protect themselves, by enforcing the immigration statutes. Congress has recognized this:

> States and localities can have significant interest in the manner and extent to which federal officials enforce provisions of the Immigration and Nationality Act (INA) regarding the exclusion and removal of unauthorized aliens.[57]

Similarly, the Supreme Court has recognized that the states have an interest in the enforcement or non-enforcement of the INA:

> Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, and those who have entered unlawfully are subject to deportation. But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.

Plyler, 457 U.S. at 205 (citations omitted). Finally, the Department of Justice has likewise acknowledged that the states' interests are related to and consistent with the purposes implicit within the INA:

> Unlawful entry into the United States and reentry after removal are federal criminal offenses.[58]
> . . . .
> To discourage illegal immigration into the United States, the INA prohibits employers from knowingly hiring or continuing to employ aliens who are not authorized to work in the United States.
> . . . .
> The federal immigration laws encourage States to cooperate with the federal government in its enforcement of immigration laws in several ways. The INA provides state officials with express authority to take certain actions to assist federal immigration officials. For example, state officers may make arrests for violations of the INA's prohibition against smuggling, transporting or harboring aliens. . . . And, if the Secretary determines that an actual or imminent mass influx of aliens presents urgent circumstances requiring an immediate federal response,

---

[57] *See, e.g.*, Kate M. Manuel, Cong. Research Serv., R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation* 2 (2014).

[58] As the Supreme Court held in *Arizona v. United States*, it is the job of ICE officers to remove those who violate Sections 1325 and 1326. *See* 132 S. Ct. at 2500.

> she may authorize any state or local officer . . . to exercise the powers, privileges or duties of federal immigration officers under the INA.
>
> Congress has also authorized DHS to enter into agreements with States to allow appropriately trained and supervised state and local officers to perform enumerated functions of federal immigration enforcement. Activities performed under these agreements . . . "shall be subject to the direction and supervision of the [Secretary]."
>
> The INA further provides, however, that a formal agreement is not required for state and local officers to "cooperate with the [Secretary]" in certain respects . . . . Even without an agreement, state and local officials may "communicate with the [Secretary] regarding the immigration status of an individual," or "otherwise cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States". . . . To further such "cooperat[ive]" efforts to "communicate," Congress has enacted measures to ensure a useful flow of information between DHS and state . . . agencies.

Brief for the United States in Opposition on Petition for Writ of Certiorari at 2-6, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 5548708 (citations omitted).

According to estimates available to the Court, at least 50-67% of potentially-eligible DAPA recipients have probably violated 8 U.S.C. § 1325.[59] The remaining 33-50% have likely overstayed their permission to stay. Under the doctrine of preemption, the states are deprived of the ability to protect themselves or institute their own laws to control illegal immigration and, thus, they must rely on the INA and federal enforcement of the same for their protection. *See Arizona*, 132 S. Ct. at 2510 (reaffirming the severe limit on state action in the field of

[59] *See, e.g.*, David Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 Yale L. J. Online 167, 171 (2012) (citing *Modes of Entry for the Unauthorized Migrant Population*, PEW Hisp. Center 3 (May 22, 2006), at http://pewhispanic.org/files/factsheets/19.pdf). (Mr. Martin served as General Counsel of the INS from 1995-1997, and as Principal Deputy General Counsel of the DHS from 2009-2010.). *See also* Andorra Bruno, Cong. Research Serv., R41207, *Unauthorized Aliens in the United States: Policy Discussion* 2 (2014) (hereinafter "Bruno, *Unauthorized Aliens in the United States*").

immigration). Despite recognizing the inability of states to tackle their immigration problems in a manner inconsistent with federal law, the Supreme Court in *Arizona* noted:

> *The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse.* Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

Id. (emphasis added).

The responsibility of the federal government, who exercises plenary power over immigration, includes not only the passage of rational legislation, but also the *enforcement* of those laws.[60] The States and their residents are entitled to nothing less. DAPA, no matter how it is characterized or viewed, clearly contravenes the express terms of the INA. Under our federalist system, the States are easily in the zone of interest contemplated by this nation's immigration laws.

(3) Exceptions to Review

Although the Court easily finds the agency action at issue here final and that the States fall within the relevant zone of interests in order to seek review, Defendants claim that review is nevertheless unavailable in this case because the APA exempts the DHS action from its purview.

There are two exceptions to the general rule of reviewability under the APA. First, agency action is unreviewable "where the statute explicitly precludes judicial review." 5 U.S.C.

[60] Congress exercises plenary power over immigration and the Executive Branch is charged with enforcing Congress' laws. *See Faillo v. Bell*, 430 U.S. 787, 792 (1997) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotation marks and citations omitted). Just like the states, albeit for a different reason, the Executive Branch "may not pursue policies that undermine federal law."

§ 701(a)(1). This exception applies when "Congress has expressed an intent to preclude judicial review." *Heckler*, 470 U.S. at 830.[61] Second, and arguably more relevant to the present case, even if Congress has not affirmatively precluded judicial review, courts are precluded from reviewing agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This second exception was first discussed in detail by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*. 401 U.S. 402 (1971). There, the Court interpreted the exception narrowly, finding it "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). Subsequently, in *Heckler v. Chaney*, the Supreme Court further refined its interpretation of Section 701(a)(2). Distinguishing the exception in Section 701(a)(1) from that in Section 701(a)(2), the Court stated:

> The former [§ 701(a)(1)] applies when Congress has expressed an intent to preclude judicial review. The latter [§701(a)(2)] applies in different circumstances; even where Congress has not affirmatively precluded review, *review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.* In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706--if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."

470 U.S. at 830 (emphasis added).

Relevant to the present issue, the Supreme Court then exempted from the APA's "presumption of reviewability" non-enforcement decisions made by an agency. *Id.* at 831

[61] The Government has not pointed the Court to any statute that precludes reviewability of DAPA. As there is no statute that authorizes the DHS to implement the DAPA program, there is certainly no statute that precludes judicial review under Section 701(a).

(disagreeing with the lower court's "insistence that the 'narrow construction' of § (a)(2) required application of a presumption of reviewability even to an agency's decision not to undertake certain enforcement actions"). The Court distinguished the availability of review for the type of agency action in *Overton Park* from the challenged agency decisions in *Heckler*:

> *Overton Park* did not involve an agency's refusal to take requested enforcement action. It involved *an affirmative act* of *approval under a statute that set clear guidelines* for determining when such approval should be given. Refusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available.

Id. (emphasis added).

Thus, according to the *Heckler* Court, there is a "rebuttable presumption" that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and, consequently, unsuitable for judicial review. *Id.* An "agency's refusal to institute proceedings" has been "traditionally committed to agency discretion," and the enactment of the APA did nothing to disturb this tradition. *Id.* at 832.

Underlying this presumption of unreviewability are three overarching concerns that arise when a court proposes to review an agency's discretionary decision to refuse enforcement. First, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are particularly within its expertise[,]" and the agency is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32. These factors or variables that an agency must assess in exercising its enforcement powers include "whether a violation has occurred, . . . 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, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831. Due to circumstances beyond its control, an agency "cannot act against each technical violation of the statute it is charged with enforcing." *Id.* For obvious reasons, this has application in the criminal and immigration contexts. Consequently, the deference generally accorded to "an agency's construction of the statute it is charged with implementing" and the "procedures it adopts" for doing so (under general administrative law principles)[62] is arguably even more warranted when, in light of the above factors, the agency chooses not to enforce the statute against "each technical violation." *Id.* at 831-32.

Second, an agency's refusal to act generally does not "infringe upon areas that courts often are called upon to protect[,]" including individual liberty or property rights. In other words, a non-enforcement decision ordinarily does not involve an exercise of governmental "*coercive* power" over an individual's rights. *Id.* at 832 (emphasis in original). By contrast, when an agency does take action exercising its enforcement power, the action in and of itself "provides a focus for judicial review." *Id.* Because the agency "must have exercised its power in some manner," its action is more conducive to review "to determine whether the agency exceeded its statutory powers." *Id.* (citing *FTC v. Klesner*, 280 U.S. 19 (1929)).

---

[62] The *Heckler* Court cited *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978), and *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975). For instance, in discussing deference to agency interpretation, the Supreme Court stated in *Vermont Yankee*:

> But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Indeed, our cases could hardly be more explicit in this regard.

435 U.S. at 543 (internal quotations and citations omitted).

Lastly, the *Heckler* Court compared agency non-enforcement decisions to the exercise of prosecutorial discretion in the criminal context—decisions that plainly fall within the express and exclusive province of the Executive Branch, which is constitutionally charged to "take Care that the Laws be faithfully executed." *See id.* ("Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'to take Care that the Laws be faithfully executed.'") (quoting U.S. Const. art. II, § 3).

While the Court recognizes (as discussed above) that the DHS possesses considerable discretion in carrying out its duties under the INA, the facts of this case do not implicate the concerns considered by *Heckler* such that this Court finds itself without the ability to review Defendants' actions. First, the Court finds an important distinction in two terms that are commonly used interchangeably when discussing *Heckler*'s presumption of unreviewability: "non-enforcement" and "inaction." While agency "non-enforcement" might imply "inaction" in most circumstances, the Court finds that, in this case, to the extent that the DAPA Directive can be characterized as "non-enforcement," it is actually affirmative *action* rather than inaction.

The Supreme Court's concern that courts lack meaningful focus for judicial review when presented with agency *inaction* (*see Heckler*, 470 U.S. at 832) is thus not present in this situation. Instead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work

authorization permits, and the ability to travel.[63] Absent DAPA, these individuals would not receive these benefits.[64] The DHS has not instructed its officers to merely refrain from arresting, ordering the removal of, or prosecuting unlawfully-present aliens. Indeed, by the very terms of DAPA, that is what the DHS *has* been doing for these recipients for the last five years[65]—whether that was because the DHS could not track down the millions of individuals they now deem eligible for deferred action, or because they were prioritizing removals according to limited resources, applying humanitarian considerations, or just not removing these individuals for "administrative convenience."[66] Had the States complained only of the DHS' mere failure to (or

[63] *See, e.g.*, *Frequently Asked Questions, The Obama Administration's DAPA and Expanded DACA Programs*, NILC, at http://www.nilc.org/dapa&daca.html (last updated Jan. 23, 2015) (instructing potential DAPA/DACA beneficiaries that "[o]nce [their] work permit arrives," to look up their local Social Security office at www.ssa.gov to apply for Social Security numbers). The official website for the Social Security Administration offers information for noncitizens, explaining that noncitizens "authorized to work in the United States by the Department of Homeland Security (DHS) can get a Social Security number . . . . You need a Social Security number to work, collect Social Security benefits and receive some other government services." *Social Security Numbers for Noncitizens*, Official Website of the Social Security Administration (Aug. 2013), http://www.ssa.gov/pubs/EN-05-10096.pdf.

[64] The States raised, but did not address at length, the tax benefit issue perhaps because this is an expense that the federal taxpayers must bear. Nevertheless, it is clear from the testimony of IRS Commissioner John A. Koskinen presented to the Senate Finance Committee that the DAPA recipients would be eligible for earned income tax credits once they received a Social Security number. *See* Testimony of IRS Commissioner John A. Koskinen on February 3, 2015 before Senate Finance Committee that DAPA confers another sizable benefit in addition to those that directly affect the States due to certain tax credits. *See also* "Taxpayer Identification Number Requirements of Eligible Individuals and Qualifying Children Under the EIC," FTC A-4219, 19 XX WL 216976, and Chief Counsel Advice, IRS CCA 200028034, 2000 WL 33116180 (IRS CCA 2000). One way to estimate the effect of this eligibility is to assign as an earned income tax credit the sum of $4,000 per year for three years (the number of years for which an individual can file) and multiply that by the number of DAPA recipients. If, for instance, that number is 4.3 million, if calculated accurately, the tax benefits bestowed by DAPA will exceed $50,000,000,000. Obviously, such a calculation carries with it a number of assumptions. For example, it is somewhat unlikely that every DAPA recipient would actually claim or qualify for these credits. Nevertheless, the importance lies not in the amount, but in the fact that DAPA makes individuals eligible at all. Bestowing a tax benefit on individuals that are otherwise not entitled to that benefit is one more reason that DAPA must be considered a substantive rule.

[65] In order to qualify for DAPA, an unlawfully-present alien must have "continuously resided in the United States since before January 1, 2010." Doc. No. 1, Pl. Ex. A at 4. Thus, expected beneficiaries of DAPA have been present in the country illegally for *at least* five years, yet the DHS (whether knowingly or unknowingly/intentionally or unintentionally) has not acted to enforce the INA's removal provisions against them during those years.

[66] *See* 8 C.F.R. 274a.12(c)(14) (defining deferred action as "an act of administrative convenience to the government which gives some cases lower priority").

decision not to) prosecute and/or remove such individuals in these preceding years, any conclusion drawn in that situation would have been based on the *inaction* of the agency in its refusal to enforce. In such a case, the Court may have been without any "focus for judicial review." *See Heckler*, 470 U.S. at 832.

Exercising prosecutorial discretion and/or refusing to enforce a statute does not also entail bestowing benefits. Non-enforcement is just that—not enforcing the law.[67] Non-enforcement does not entail refusing to remove these individuals as required by the law *and then* providing three years of immunity from that law, legal presence status, plus any benefits that may accompany legal presence under current regulations. This Court seriously doubts that the Supreme Court, in holding non-enforcement decisions to be presumptively unreviewable, anticipated that such "non-enforcement" decisions would include the affirmative act of bestowing multiple, otherwise unobtainable benefits upon an individual. Not only does this proposition run afoul of traditional exercises of prosecutorial discretion that generally receive judicial deference, but it also flies in the face of the very concerns that informed the *Heckler* Court's holding. This Court finds the DHS Directive distinguishable from the non-enforcement decisions to which *Heckler* referred, and thus concludes that *Heckler's* presumption of unreviewability is inapplicable in this case.

[67] *See, e.g., In re Aiken Cnty.*, 725 F.3d 255, 266 (D.C. Cir. 2013) (explaining that prosecutorial discretion includes the decision to not *enforce* a law, but does not include the discretion not to *follow* a law). The law requires these individuals to be removed. The DHS could accomplish—and has accomplished—non-enforcement of the law without implementing DAPA. The award of legal status and all that it entails is an impermissible refusal to *follow* the law.

(4) If Applicable, the Presumption is Rebutted

Assuming *arguendo* that a presumption of unreviewability applied in this case, the Court nonetheless finds that presumption rebutted. Notably, in *Heckler*, after listing the above-addressed concerns underlying its conclusion that an agency's non-enforcement decisions are presumed immune from review under Section 701(a)(2), the Supreme Court emphasized that any non-enforcement decision "is only presumptively unreviewable." The presumption "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. Drawing on its prior analysis of Section 701(a)(2)'s exception in O*verton Park*, the Supreme Court elaborated on instances when the presumption may be rebutted:

> Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. 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. How to determine when Congress has done so is the question left open by *Overton Park*.

Id. at 833.

a. The Applicable Statutory Scheme

Here, the very statutes under which Defendants claim discretionary authority[68] actually compel the opposite result. In particular, detailed and mandatory commands within the INA provisions applicable to Defendants' action in this case circumscribe discretion. Section 1225(a)(1) of the INA provides that "[a]n alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C.

[68] As detailed below, the Defendants claim that Congress granted them discretion under two statutory provisions: 8 U.S.C. § 1103 and 6 U.S.C. § 202.

§ 1225(a)(1). All applicants for admission "shall be inspected by immigration officers." *Id.* § 1225(a)(3). "[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a [of the INA]." *Id.* § 1225(b)(2)(A).[69]

Section 1229a provides for removal proceedings. In these proceedings, if the alien is an applicant for admission, the burden of proof rests with the alien to establish that he or she is "clearly and beyond doubt entitled to be admitted and is not admissible under section 1182" of the INA. 8 U.S.C. § 1229a(c)(2)(A). Alternatively, the alien has the burden of establishing "by clear and convincing evidence" that he or she is "lawfully present in the United States pursuant to a prior admission." *Id.* § 1229a(c)(2)(B). An alien is "removable" if the alien has not been admitted and is inadmissible under Section 1182, or in the case of an admitted alien, the alien is deportable under Section 1227. *Id.* § 1229a(e)(2). Section 1182 classifies and defines "Inadmissible Aliens." Inadmissible aliens are ineligible to receive visas and ineligible to be admitted to the United States. Among the long list of grounds for inadmissibility are those related to health, crime, and security. Section 1227 classifies and defines individuals who are deportable. Potential DAPA beneficiaries who entered unlawfully are inadmissible under Section 1182 and the law dictates that they should be removed pursuant to the authority under Sections 1225 and 1227. Those potential recipients who entered legally, but overstayed their

---

[69] It is understood that unauthorized aliens enter the United States in three main ways:

> (1) [S]ome are admitted to the United States on valid nonimmigrant (temporary) visas (e.g., as visitors or students) or on border-crossing cards and either remain in the country beyond their authorized period of stay or otherwise violate the terms of their admission; (2) some are admitted based on fraudulent documents (e.g., fake passports) that go undetected by U.S. officials; and (3) some enter the country illegally without inspection (e.g., by crossing over the Southwest or northern U.S. border).

Bruno, *Unauthorized Aliens in the United States* at 2.

legal permission to be in the United States fall under Section 1227(a)(1). Thus, regardless of their mode of entry, DAPA putative recipients all fall into a category for removal and no Congressionally-enacted statute gives the DHS the affirmative power to turn DAPA recipients' illegal presence into a legal one through deferred action, much less provide and/or make them eligible for multiple benefits.[70]

The Government must concede that there is no specific law or statute that authorizes DAPA. In fact, the President announced it was the failure of Congress to pass such a law that prompted him (through his delegate, Secretary Johnson) to "change the law."[71] Consequently, the Government concentrates its defense upon the *general* discretion it is granted by law.

While there is no specific grant of discretion given to the DHS supporting the challenged action, Congress has conferred (and the DHS relies upon) two general grants of discretion under 8 U.S.C. § 1103(a)(3) (the "INA Provision") and 6 U.S.C. § 202 (the Homeland Security Act of 2005 ("HSA")) (the "HSA Provision").[72] Under the first of these provisions, the INA provides:

> [The Secretary] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

---

[70] In rejecting an agency's claimed use of prosecutorial discretion as justifying its inaction, the D.C. Circuit has emphasized:

> [P]rosecutorial discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch.

In re Aiken County, 725 F.3d at 266 (emphasis in original).

[71] *See* Press Release, Remarks by the President on Immigration – Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014).

[72] Despite using the name of the Acts throughout, the Court will refer to the codified provisions of the INA and the HSA, as provided for in Title 8 and Title 6, respectively.

8 U.S.C. § 1103(a)(3). Under the latter of these provisions, the HSA provides in relevant part:

> The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following:
>
> (1) Preventing the entry of terrorists and the instruments of terrorism into the United States.
> (2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.
> (3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.
> (4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.
> (5) Establishing national immigration enforcement policies and priorities.

6 U.S.C. § 202.

The INA Provision is found in the "General Provisions," Subchapter I, of Title 8, which provides definitions of terms used throughout the INA and identifies the general powers and duties of the DHS Administration.[73] The HSA Provision establishes the "responsibilities" of the DHS Secretary. The INA thus gives the DHS Secretary the authority (and indeed directs the Secretary) to establish regulations that he deems necessary to execute the laws passed by Congress. The HSA delegates to the Secretary in Section 202(4) the authority to establish and administer rules that govern the various forms of acquiring *legal* entry into the United States

[73] (It is in Title I of the Immigration and Nationality Act (Section 103)).

under 6 U.S.C. § 236 (dealing with visas). *See* 6 U.S.C. § 202(4). Expected DAPA recipients, who by definition are already illegally present, are not encompassed by subsection 4 of HSA Provision. They are not aliens seeking visas or other forms of permission to come to the United States. Instead, the individuals covered by DAPA have already entered and either achieved that entry illegally, or unlawfully overstayed their legal admission.

The HSA, through subsection 5 of the HSA Provision, makes the Secretary responsible for establishing enforcement policies and priorities. The Government defends DAPA as a measure taken to prioritize removals and, as previously described, the DAPA Memorandum mentions or reiterates some of the Secretary's priorities. The States do not dispute that Secretary Johnson has the legal authority to set these priorities, and this Court finds nothing unlawful about the Secretary's priorities. The HSA's delegation of authority may not be read, however, to delegate to the DHS the right to establish a national rule or program of awarding *legal presence*—one which not only awards a three-year, renewable reprieve, but also awards over four million individuals, who fall into the category that Congress deems removable, the right to work, obtain Social Security numbers, and travel in and out of the country.[74] A tour of the INA's provisions reveals that Congress clearly knows how to delegate discretionary authority because in certain instances it has explicitly done so. For example, Section 1227 (involving "Deportable Aliens") specifically provides:

[74] If implemented like DACA, the DAPA program will actually be more widespread. The DHS has published notice that even those who were not granted DACA "will not be referred to ICE for purposes of removal . . . except where DHS determines there are exceptional circumstances" (assuming their cases did not involve a criminal offense, fraud, or a threat to national security or public safety). *See Frequently Asked Questions*, *Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#DACA%20process (last updated Dec. 4, 2014). According to the President, DAPA will be implemented in the same fashion. Thus, as long as you are not a criminal, a threat to security, or fraudulent, and if you qualify under these programs, you receive legal presence and are allowed to stay in the country; if you do not qualify, you still get to stay.

> (d)(1) If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, *the Secretary may grant the alien an administrative stay* of a final order of removal under section 1231(c)(2) of this title until
>
> (A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or
>
> (B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.
>
> (2) the denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.
>
> (3) During any period in which the administrative stay of removal is in effect, the alien shall not be removed.
>
> (4) Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.

8 U.S.C. § 1227(d).

In the above situations, Congress has expressly given the DHS Secretary the discretion to grant or not grant an administrative stay of an order of removal. Thus, when Congress intended to delegate to the Secretary the right to ignore what would otherwise be his statutory duty to enforce the removal laws, it has done so clearly. *See, e.g.*, *F.C.C. v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (holding that when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding no indication that Congress intended to make the phase of national banking at issue there subject to local restrictions, as it had done by express language in other instances); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the

recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy.").

The DHS cannot reasonably claim that, under a general delegation to establish enforcement policies, it can establish a blanket policy of non-enforcement that also awards legal presence and benefits to otherwise removable aliens. As a general matter of statutory interpretation, if Congress intended to confer that kind of discretion through the HSA Provision (and INA Provision) to apply to all of its mandates under these statutes, there would have been no need to expressly and specifically confer discretion in only a few provisions. The canon of statutory construction warning against rendering superfluous any statutory language strongly supports this conclusion. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

Despite this, the Government argues that the INA Provision and the HSA Provision, combined with inherent executive discretion, permits the enactment of DAPA. While the Government would not totally concede this point in oral argument, the logical end point of its argument is that the DHS, solely pursuant to its implied authority and general statutory enforcement authority, could have made DAPA applicable to all 11.3 million immigrants estimated to be in the country illegally. This Court finds that the discretion given to the DHS Secretary is not unlimited.

Two points are obvious, and each pertain to one of the three statutes (5 U.S.C. § 701, 6 U.S.C. § 202, and 8 U.S.C. § 1103) at issue here. The first pertains to prosecutorial discretion and the INA Provision and the HSA Provision. The implementation of DAPA is clearly not "necessary" for Secretary Johnson to carry out his authority under either title of the federal code.

The Secretary of the DHS has the authority, as discussed above, to dictate DHS objectives and marshal its resources accordingly. Just as this Court noted earlier when it refused the States standing to pursue certain damages, the same is true here. The DAPA recipients have been present in the United States for at least five years; yet, the DHS has not sought them out and deported them. [75]

The Court notes that it might be a point of discussion as to what "legal presence" constitutes, but it cannot be questioned that DAPA awards some form of affirmative status, as evidenced by the DHS' own website. It tells DACA recipients that:

> *[Y]ou are considered to be lawfully present in the United States* . . . and are not precluded from establishing domicile in the United States. Apart from immigration laws, "lawful presence," "lawful status," and similar terms are used in various other federal and state laws.[76]

It is this affirmative action that takes Defendants' actions outside the realm of prosecutorial discretion, and it is this action that will cause the States the injury for which they have been conferred standing to seek redress.

---

[75] The implementation of DAPA is not a necessary adjunct for the operation of the DHS or for effecting its stated priorities. In fact, one could argue given the resources it is using and manpower it is either hiring or shifting from other duties, that DAPA will actually hinder the operation of the DHS. *See Executive Actions on Immigration*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/immigrationaction (last updated Jan. 30, 2015) ("USCIS will need to adjust its staffing to sufficiently address this new workload. Any new hiring will be funded through application fees rather than appropriated funds . . . . USCIS is working hard to build capacity and increase staffing to begin accepting requests and applications . . . ."). *See also* Doc. No. 64, Pl. Ex. 23 (Palinkas Dec.) ("USCIS has announced that it will create a new service center to process DAPA applications . . . . and it will be staffed by approximately 1,000 federal employees. Approximately 700 of them will be USCIS employees, and approximately 300 of them will be federal contractors."). However, such considerations are beside the point for resolving the issue currently before the Court.

[76] *See Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the DHS, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last updated Feb. 11, 2015) (emphasis added). *See also* Doc. No 38, Def. Ex. 6 at 11 (U.S. Citizenship and Immigration Services (USCIS), Deferred Action For Childhood Arrivals (DACA) Toolkit: Resources for Community Partners (2014)). This response clearly demonstrates that the DHS knew by DACA (and now by DAPA) that by giving the recipients legal status, it was triggering obligations on the states as well as the federal government.

The second obvious point is that no statute gives the DHS the power it attempts to exercise. As previously explained, Section 701(a)(2) of the APA forbids reviewability of acts "committed to agency discretion by law." The Government has pointed this Court to no law that gives the DHS such wide-reaching discretion to turn 4.3 million individuals from one day being illegally in the country to the next day having lawful presence.

The DHS' job is to enforce the laws Congress passes and the President signs (or at least does not veto). It has broad discretion to utilize when it is enforcing a law. Nevertheless, no statute gives the DHS the discretion it is trying to exercise here.[77] Thus, Defendants are without express authority to do so by law, especially since by Congressional Act, the DAPA recipients are illegally present in this country. As stated before, most, if not all, fall into one of two categories. They either illegally entered the country, or they entered legally and then overstayed their permission to stay. Under current law, regardless of the genesis of their illegality, the Government is charged with the duty of removing them. Subsection 1225(b)(1)(A) states unequivocally that the DHS "shall order the alien removed from the United States without further hearing or review . . . ." Section 1227, the corresponding section, orders the same for aliens who entered legally, but who have violated their status. While several generations of statutes have amended both the categorization and in some aspects the terminology, one thing has remained constant: the duty of the Federal Government is to effectuate the removal of illegal aliens. The Supreme Court most recently affirmed this duty in *Arizona v. United States*: "ICE

[77] Indeed, no law enacted by Congress expressly provides for deferred action as a form of temporary relief. Only regulations implemented by the Executive Branch provide for deferred action. That is not to say that deferred action itself is necessarily unlawful—an issue on which this Court need not touch.

officers are responsible for the identification, apprehension, and removal of illegal aliens." 132 S. Ct. at 2500.

Notably, the applicable statutes use the imperative term "shall," not the permissive term "may."[78] There are those who insist that such language imposes an absolute duty to initiate removal and no discretion is permitted.[79] Others take the opposition position, interpreting "shall" to mean "may."[80] This Court finds both positions to be wanting. "Shall" indicates a congressional mandate that does not confer discretion—i.e., one which should be complied with to the extent possible and to the extent one's resources allow.[81] It does not divest the Executive Branch of its inherent discretion to formulate the best means of achieving the objective, but it does deprive the Executive Branch of its ability to directly and substantially contravene statutory commands. Congress' use of the term "may," on the other hand, indicates a Congressional grant of discretion to the Executive to either accept or not accept the goal.

In the instant case, the DHS is tasked with the duty of removing illegal aliens. Congress has provided that it "shall" do this. Nowhere has Congress given it the option to either deport these individuals or give them legal presence and work permits. The DHS does have the

[78] The Court additionally notes that in 8 U.S.C. § 1227 ("Deportable Aliens") Congress uses both "may" and "shall" within the same section, which distinguishes the occasions in which the Secretary has discretion to award a stay from removal from when he is required to remove an alien. For instance, in § 1227(a), an alien "shall" be removed upon order of the Secretary if he or she is in one of the classes of deportable aliens. In § 1227(d), however, Congress provides circumstances when the Secretary "may" award an administrative stay of removal. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of the mandatory 'shall' in the very same section."); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895) ("[I]n the law to be construed here, it is evident that the word 'may' is used in special contradistinction to the word 'shall.'").

[79] See the plaintiffs' contentions as recounted in the court's Memorandum Opinion and Order dated April 23, 2013, in *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23, 2013).

[80] *See, e.g.*, *Matter of E-R-M & L-R-M*, 25 I&N Dec. 520 (BIA 2011).

[81] *See Lopez*, 531 U.S. at 241 (distinguishing between Congress' use of the "permissive may" and the "mandatory shall" and noting that "shall" "imposes discretionless obligations").

discretion and ability to determine *how* it will effectuate its statutory duty and use its resources where they will do the most to achieve the goals expressed by Congress. Thus, this Court rejects both extremes. The word "shall" is imperative and, regardless of whether or not it eliminates discretion, it certainly deprives the DHS of the right to do something that is clearly contrary to Congress' intent.

That being the case, this Court finds that the presumption of unreviewability, even if available here, is also rebuttable under the express theory recognized by the *Heckler* Court. In *Heckler*, the Supreme Court indicated that an agency's decision to "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," would not warrant the presumption of unreviewability. 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).[82]

Since *Heckler* and *Adams*, it has clearly been the law that "[r]eal or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty." *See Texas*, 106 F.3d at 667. That is not the situation here. This Court finds that DAPA does not simply constitute *inadequate* enforcement; it is an announced program of non-enforcement of the law that contradicts Congress' statutory goals. Unlike the Government's position in *Texas v.*

[82] In *Adams*, as noted above in the abdication discussion, the agency-defendants (including executive officials of Health, Education, and Welfare (HEW)) were sued for not exercising their duty to enforce Title VI of the Civil Rights Act because they had not been taking appropriate action to end segregation in schools receiving federal funds, as required by the Act. Defendants insisted that enforcement of Title VI was committed to agency discretion and thus that their actions were unreviewable. The Court first noted that the agency-discretion-exception in the APA is a narrow one, citing *Citizens to Preserve Overton Park*. It found that the statute provided "with precision the measures available to enforce" Title VI and thus the terms of the statute were "not so broad as to preclude judicial review." Like Defendants here, the defendants in *Adams* relied on cases in which courts declined to interfere with exercises of prosecutorial discretion. Rejecting defendants' reliance on those cases, the court emphasized: "[t]hose cases do not support a claim to absolute discretion and are, in any event, distinguishable from the case at bar." Unlike the cases cited, Title VI required the agency to enforce the Act and also set forth specific enforcement procedures. The INA removal provisions at issue here are no different and, like those at issue in *Adams*, are not so broad as to preclude review.

U.S., the Government here is "doing nothing to enforce" the removal laws against a class of millions of individuals (and is additionally providing those individuals legal presence and benefits). *See id.* Furthermore, if implemented exactly like DACA (a conclusion this Court makes based upon the record), the Government has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances).[83] Theoretically, the remaining 6-7 million illegal immigrants (at least those who do not have criminal records or pose a threat to national security or public safety) could apply and, thus, fall into this category.[84] DAPA does not represent mere inadequacy; it is complete abdication.

The DHS does have discretion in the manner in which it chooses to fulfill the expressed will of Congress. It cannot, however, enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them. As the Government's own legal memorandum—which purports to justify DAPA—sets out, "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences." *See* Doc. No. 38, Def. Ex. 2 at 6 (OLC Op.) (citing *Heckler*, 470 U.S. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers")). The DHS Secretary is not just rewriting the laws; he is creating them from scratch.

[83] *See Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#DACA%20process (last updated Dec. 4, 2014).

[84] *See also* Press Release, Remarks by the President on Immigration–Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014) ("*[T]he way the change in the law works* is that we're reprioritizing how we enforce our immigration laws generally. So not everybody qualifies for being able to sign up and register, *but the change in priorities applies to everybody*."). (Court's emphasis). Thus, as under the DACA Directives, absent exceptional circumstances, the DHS is not going to remove those who do not qualify for DAPA either.

b. Past Uses of Deferred Action

Defendants argue that historical precedent of Executive-granted deferred action justifies DAPA as a lawful exercise of discretion. In response, the Plaintiffs go to great lengths to distinguish past deferred action programs from the current one, claiming each program in the past was substantially smaller in scope. The Court need not decide the similarities or differences between this action and past ones, however, because past Executive practice does not bear directly on the legality of what is now before the Court. Past action previously taken by the DHS does not make its current action lawful. President Truman in *Youngstown Sheet & Tube Co. v. Sawyer*, similarly sought "color of legality from claimed executive precedents," arguing that, although Congress had not expressly authorized his action, "practice of prior Presidents has authorized it." 343 U.S. at 648. The Supreme Court firmly rejected the President's argument finding that the claimed past executive actions could not "be regarded as even a precedent, much less an authority for the present [action]." *Id.* at 649; *see also Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 n.27 (5th Cir. 1995) ("[T]he fact that we previously found another FDA compliance policy guide to be a policy statement [and thus not subject to the APA's formal procedures] is not dispositive whether CPG 7132.16 is a policy statement.").

The Supreme Court was again faced with the argument that action taken by the President was presumptively lawful based on the "longstanding practice" of the Executive in *Medellin*, 552 U.S. at 530-32. There, the Federal Government cited cases that held, "if pervasive enough, history of congressional acquiescence can be treated as a gloss on Executive power vested in the President by § 1 of Art. II." *Id.* at 531 (internal citations and quotations marks omitted). The

Supreme Court, however, distinguished those cases as involving a narrow set of circumstances; they were "based on the view that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,' can 'raise a presumption that the [action] had been [taken] in pursuance of [Congress'] consent.'" *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. 654 (1981)). In these "narrowly" construed cases cited by the government there, the Court had upheld the (same) Executive action involved in each as "a particularly longstanding practice . . . . [g]iven the fact that the practice [went] back over 200 years, and [had] received congressional acquiescence throughout its history . . . ." *Id.* In *Medellin*, the Supreme Court clarified that, even in those cases, however, "the limitations on this source of executive power are clearly set forth and the Court has been careful to note that 'past practice does not, by itself, create power.'" *Id.* at 531-32. Thus, the *Medellin* Court found that President Bush's "Memorandum [was] not supported by a 'particularly longstanding practice' of congressional acquiescence . . ., but rather [was] what the United States itself [had] described as 'unprecedented action.'" *Id.* at 532. Here, DAPA, like President Bush's Memorandum/directive issued to state courts in *Medellin*, is not a "longstanding practice" and certainly cannot be characterized as "systematic" or "unbroken." Most importantly, the Court is not bound by past practices (especially ones that are different in kind and scope)[85] when determining the legality of the current one. Past practice by immigration officials does not create a source of power for the DHS to implement DAPA. *See id.* at 531-32. In sum, Defendants' attempt to find a source of discretion committed to it by law (for purposes of Section 701(a)(2)) through Congress's alleged

[85] A member of the President's own Office of Legal Counsel, in advising the President and the DHS on the legality of DAPA, admitted that the program was unprecedented in that it exceeded past programs "in size." *See* Doc. No. 38, Def. Ex. 2 at 30 (OLC Memo).

acquiescence of its past, smaller-scaled grants of deferred action is unpersuasive, both factually and legally.

i. Rulemaking Under the APA

Neither party appears to contest that, under the APA, the DAPA Directive is an agency "rule,"[86] and its issuance therefore represents "rulemaking." *See* 5 U.S.C. § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."); *id.* § 551(5) ("'[R]ule making' means agency process for formulating, amending, or repealing a rule."). Thus, it is clear that the rulemaking provisions of the APA apply here. The question is whether Defendants are exempt from complying with specific procedural mandates within those rulemaking provisions.[87]

Section 553 of Title 5, United States Code, dictates the formal rulemaking procedures by which an agency must abide when promulgating a rule. Under Section 553(b), "[g]eneral notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. § 553(b). The required notice must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

[86] While Defendants in one place assert in passing that the DAPA Directive is not a rule, it is in the context of distinguishing a substantive rule from a statement of policy. [*See* Doc. No. 38 at 45 ("[T]he Deferred Action Guidance is not a rule, but a policy that 'supplements and amends . . . guidance' . . . . *Further*, unlike *substantive rules*, a general statement of policy is one 'that does not impose any rights or obligations' . . . .").]. There can be no doubt that the DAPA Directive is a rule within the meaning of § 551 of the APA. Instead, the issue focuses on whether the rule is substantive, subjecting it to the formal procedural requirements for rule making, or whether it is exempt from those requirements.

[87] Interestingly, the legal memorandum from the President's Office of Legal Counsel, whose opinion the Defendants have cited to justify DAPA, in no way opines that the DHS may ignore the requirements of the APA.

Id. Upon providing the requisite notice, the agency must give interested parties the opportunity to participate and comment and the right to petition for or against the rule. *See id.* § 553(c)-(e).

There are two express exceptions to this notice-and-comment requirement, one of which Defendants argue applies in this case. Pursuant to Section 553(b)(3)(A), the APA's formal rulemaking procedures do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(b)(3)(A). On the other hand, if a rule is "substantive," this exception does not apply, and all notice-and-comment requirements "must be adhered to scrupulously." *Shalala*, 56 F.3d at 595. The Fifth Circuit has stressed that the "'APA's notice and comment exemptions must be narrowly construed.'" *Id.* (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)).

The APA does not define "general statements of policy" or "substantive rules"; however, the case law in this area is fairly well-developed and provides helpful guidelines in characterizing a rule. With that said, the analysis substantially relies on the specific facts of a given case and, thus, the results are not always consistent. Here, Plaintiffs' procedural APA claim turns on whether the DAPA Directive is a substantive rule or a general statement of policy.[88] If it is substantive, it is "unlawful, for it was promulgated without the requisite notice-and-comment." *Id.*

This Circuit, following guidelines laid out in various cases by the D.C. Circuit, utilizes two criteria to distinguish substantive rules from nonsubstantive rules:

[88] Defendants specifically assert that the DAPA Directive is a general statement of policy. They do not argue that it is an "interpretative rule[]" or a "rule[] of agency organization, procedure, or practice" under § 553(b)(3)(A). Nor do they cite the other exception provided for in § 553(b)(3)(B) ("[W]hen the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."). Thus, this Court will confine its analysis to whether the Directive is a general statement of policy or substantive rule.

> First, courts have said that, unless a pronouncement acts prospectively, it is a binding norm. Thus ... a *statement of policy may not have a present effect*: "a 'general statement of policy' is one that does not impose any rights and obligations".... The second criterion is whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion.
>
> The court [in *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987)] further explained that "*binding effect*, not the timing, ... *is the essence of criterion one.*" In analyzing these criteria, we are to give some deference, "albeit 'not overwhelming,' " to the agency's characterization of its own rule.

Id. (emphasis added) (citations omitted).

The rule's effect on agency discretion is the primary determinant in characterizing a rule as substantive or nonsubstantive. *Id.* ("While mindful but suspicious of the agency's own characterization, we follow the D.C. Circuit's analysis . . ., focusing primarily on whether the rule has binding effect on agency discretion or severely restricts it."). For instance, rules that award rights, impose obligations, or have other significant effects on private interests have been found to have a binding effect on agency discretion and are thus considered substantive. *Id.* n.19 (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983)). A rule, while not binding per se, is still considered substantive if it "severely restricts" agency discretion. Put another way, any rule that "narrowly constrict[s] the discretion of agency officials by largely determining the issue addressed" is substantive. *Id.* n.20. Lastly, a substantive rule is generally characterized as one that "establishes a standard of conduct which has the force of law." *Id.* (quoting *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 847 F.2d 1168, 1174 (5th Cir. 1988)).

In sharp contrast to a substantive rule, a general statement of policy does not establish a binding norm, nor is it "finally determinative of the issues or rights to which it is addressed." *Shalala*, 56 F.3d at 596. A general statement of policy is best characterized as announcing the

agency's "tentative intentions for the future." *Id.* Thus, it cannot be applied or relied upon as law because a statement of policy merely proclaims what an agency seeks to establish as policy.[89] *See id.*

(1) The Government's Characterization of DAPA

Both parties[90] acknowledge that, in line with the Fifth Circuit's analysis above, the starting point in determining whether a rule is substantive or merely a statement of policy is the DHS' own characterization of the DAPA Directive. Defendants insist that the Directive is "a policy that 'supplements and amends . . . guidance' for the use of deferred action." [Doc. No. 38 at 45]. In their briefings before the Court, Defendants label DAPA "Deferred Action Guidance."[91] The Court finds Defendants' labeling disingenuous and, as discussed below,

[89] The Fifth Circuit in *Panhandle Producers* further defined a general statement of policy:

> When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

847 F.2d at 1175.

[90] Although Plaintiffs strenuously insist that Defendants "mislabel" the DAPA Directive and that an agency's characterization of its own rule is "self-aggrandizement," they apparently agree that the agency's characterization is at least relevant to the analysis. *See* Doc. No. 64 at 38 (citing *Shalala*, 56 F.3d at 596, where the Fifth Circuit states that an agency's characterization of its own rule, while not conclusive, is the starting point to the analysis).

[91] The DHS may have a number of reasons for using the language and specific terms it uses in the DAPA Memorandum--whether to assure itself, the public and/or a future reviewing court that it need not comply with formal agency rulemaking procedures, or simply because it is standard language used in its other memoranda. The Court, however, finds substance to be more important than form in this case. The DHS' actions prove more instructive than its labels.

Moreover, the Court notes that it is not bound by any decision a different court may have reached regarding the characterization of a *prior* DHS/INS memorandum (e.g., the Ninth Circuit's opposing holdings in *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979) and *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987)). For one, past DHS/INS memoranda, including the operating instructions reviewed in the 1970s and 80s by the Ninth Circuit, have been expressly superseded by subsequent DHS memoranda or instructions. Further, both Ninth Circuit opinions (each dealing with a different INS memorandum) support this Court's findings on the characterization of DAPA. Finally, as the Fifth Circuit has held, a prior court ruling that characterizes an agency's rule as a general statement of policy

contrary to the substance of DAPA. Although Defendants refer to DAPA as a "guidance" in their briefings and in the DAPA Memorandum, elsewhere, it is given contradictory labels. For instance, on the official website of the DHS, DAPA is referred to as "a new Deferred Action for Parents of Americans and Lawful Permanent Residents *program*."[92]

The DHS website does use the term "guidelines" in describing DAPA's criteria; however, this is only in the context of a "list" of guidelines that candidates must satisfy in order to qualify for DAPA (or the newly expanded DACA).[93] Thus, not only does this usage of the term "guidelines" not refer to the DAPA program itself, but it is also a misnomer because these "guidelines" are in fact requirements to be accepted under these programs. Throughout its description of DAPA, the DHS website also refers to the various "executive actions" taken in conjunction with the implementation of the DAPA Directive as "initiatives." *Id.* ("On November 20, 2014, the President announced a series of executive actions . . . . These initiatives include . . . ."). For example, the site states that "USCIS and other agencies and offices are responsible for implementing these initiatives as soon as possible." *Id.* The term "initiative" is defined in Black's Law Dictionary as:

---

is not dispositive in determining the characterization of that agency's current rule. *See Shalala*, 56 F.3d at 596 n.27 ("[T]he fact that we previously found another FDA compliance policy guide to be a policy statement is not dispositive whether [the current FDA compliance policy guide] is a policy statement."). This rule would be especially applicable to a directive that changes the current law.

[92] *Executive Actions on Immigration*, Official Website of the Dept. of Homeland Security, http://www.uscis.gov/immigrationaction (last updated Jan. 30, 2015) (emphasis added); *see also*, Doc. No. 1, Pl. Ex. A ("In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows . . . .").

[93] *See, e.g.*, *id.* (listing out the new DACA criteria and including as the last criterion, "meet all the other DACA guidelines").

> An electoral process by which a percentage of voters can *propose legislation* and compel a vote on it by the legislature or by the full electorate. Recognized in some state constitutions, the initiative is one of the few methods of direct democracy in an otherwise representative system.

Black's Law Dictionary (9th ed. 2009) (emphasis added) (the sole definition offered for "initiative"). An "initiative," by definition, is a legislative process—the very thing in which Defendants insist they have not partaken.

What is perhaps most perplexing about the Defendants' claim that DAPA is merely "guidance" is the President's own labeling of the program. In formally announcing DAPA to the nation for the first time, President Obama stated, "I just took an action to change the law."[94] He then made a "deal" with potential candidates of DAPA: "if you have children who are American citizens . . . if you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community – *you're not going to be deported . . . . If you meet the criteria, you can come out of the shadows . . . .*"[95]

While the DHS' characterization of DAPA is taken into consideration by this Court in its analysis, the "label that the . . . agency puts upon its given exercise of administrative power is not . . . conclusive; rather, it is what the agency does in fact." *Shalala*, 56 F.3d at 596 (internal quotation marks omitted) (citing *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th

[94] Press Release, Remarks by the President on Immigration – Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014) ("But what you're not paying attention to is the fact that I just took action to change the law . . . . [t]he way the change in the law works is that we're reprioritizing how we enforce our immigration laws generally. So not everybody qualifies for being able to sign up and register, but the change in priorities applies to everybody.").

[95] President Obama, Remarks in Nevada on Immigration (Nov. 20, 2014) (emphasis added). (Court's emphasis). *See also* Doc. No. 64, Pl. Ex. 26 (Press Release, Remarks by the President in Immigration Town Hall – Nashville, Tennessee, The White House Office of the Press Secretary (Dec. 9, 2014) ("What we're also saying, though, is that for those who have American children or children who are legal permanent residents, that you can actually register and submit yourself to a criminal background check, pay any back taxes and commit to paying future taxes, *and if you do that, you'll actually get a piece of paper that gives you an assurance that you can work and live here without fear of deportation.*") (emphasis added)).

Cir. 1979)). Thus, the Court turns its attention to the primary focus of its analysis: the substance of DAPA. Nevertheless, the President's description of the DHS Directive is that it changes the law.

(2) Binding Effect

The Fifth Circuit in *Shalala* propounded as a "touchstone of a substantive rule" the rule's binding effect. The question is whether the rule establishes a "binding norm." *Id.* at 596. The President's pronouncement quoted above clearly sets out that the criteria are binding norms. Quoting the Eleventh Circuit, the *Shalala* Court emphasized:

> The key inquiry ... is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy *so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria.* As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Id. at 596-97 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)). In this case, upon application, USCIS personnel working in service centers (established for the purpose of receiving DACA and DAPA applications), need only determine whether a case is within the set-criteria. If not, applicants are immediately denied.

Despite the DAPA memorandum's use of phrases such as "case-by-case basis" and "discretion," it is clear from the record that the only discretion that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the criteria therein. That criteria is binding. At a minimum, the memorandum "severely restricts" any discretion that Defendants argue exists. It ensures that "officers will be provided with *specific* eligibility criteria for deferred action." Doc. No. 1, Pl. Ex. A at 5 (emphasis added).

Indeed, the "Operating Procedures" for implementation of DACA[96] contains nearly 150 pages[97] of specific instructions for granting or denying deferred action to applicants.[98] Denials are recorded in a "check the box" standardized form, for which USCIS personnel are provided templates.[99] Certain denials of DAPA must be sent to a supervisor for approval before issuing the denial.[100] Further, there is no option for granting DAPA to an individual who does not meet each criterion.[101] With that criteria set, from the President down to the individual USCIS employees actually processing the applications, discretion is virtually extinguished.

---

[96] There is no reason to believe that DAPA will be implemented any differently than DACA. In fact, there is every reason to believe it will be implemented exactly the same way. The DAPA Memorandum in several places compares the procedure to be taken for DAPA to that of DACA. [*See, e.g.*, Doc. No. 1, Ex. 1 at 5 ("As with DACA, the above criteria are to be considered for all individuals encountered . . . .")].

[97] The Court was not provided with the complete Instructions and thus cannot provide an accurate page number.

[98] *See* Doc. No. 64, Ex. 10 (National Standard Operating Procedures (SOP), Deferred Action for Childhood Arrivals (DACA), (Form I-821D and Form I-765)).

[99] *See id.* Defendants assert that "even though standardized forms are used to record decisions, those decisions are to be made on a case-by-case basis." [Doc. No. 130 at 34]. For one, the Court is unaware of a "form" or other process for recording any discretionary denial based on factors other than the set-criteria (to the extent that such a denial is even genuinely available to an officer). Further, the means for making such discretionary decisions are limited considering the fact that applications are handled in a service center and decisions regarding deferred action are no longer made in field offices where officers may interview the immigrant.

[100] *See id.* at 96.

[101] Defendants argue that officers retain the ability to exercise discretion on an individualized basis in reviewing DAPA applications as evidenced by the last factor listed in DAPA's criteria ("present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate"). Evidence of DACA's approval rate, however, persuades the Court that this "factor" is merely pretext. As previously noted, there is every indication, including express statements made by the Government, that DAPA will be implemented in the same fashion as DACA. No DACA application that has met the criteria has been denied based on an exercise of individualized discretion. Whether Plaintiffs' or Defendants' calculations are correct, it is clear that only 1-6% of applications have been denied at all, and all were denied for failure to meet the criteria (or "rejected" for technical filing errors, errors in filling out the form or lying on the form, and failures to pay fees), or for fraud. *See, e.g.*, Doc. No. 64, Pl. Ex. 29 at App. p. 0978; *id.* Pl. Ex. 23 at 3 (Palinkas Dec.) (citing a 99.5% approval rate for all DACA applications from USCIS reports). Other sources peg the acceptance rate at approximately 95%, but, again, there were apparently no denials for those who met the criteria.

The Court in oral argument specifically asked for evidence of individuals who had been denied for reasons other than not meeting the criteria or technical errors with the form and/or filing. Except for fraud, which always disqualifies someone from any program, the Government did not provide that evidence. Defendants claim that some

In stark contrast to a policy statement that "does not impose any rights and obligations" and that "*genuinely* leaves the agency and its decisionmakers free to exercise discretion," the DAPA Memorandum confers the right to be legally present in the United States and enables its beneficiaries to receive other benefits as laid out above. The Court finds that DAPA's disclaimer that the "memorandum confers no substantive right, immigration status, or pathway to citizenship" may make these rights revocable, but not less valuable. While DAPA does not provide legal permanent residency, it certainly provides a legal benefit in the form of legal presence (plus all that it entails)—a benefit not otherwise available in immigration laws. The DAPA Memorandum additionally imposes specific, detailed and immediate obligations upon DHS personnel—both in its substantive instructions and in the manner in which those instructions are carried out. Nothing about DAPA "*genuinely* leaves the agency and its [employees] free to exercise discretion." In this case, actions speak louder than words.

(3) Substantive Change in Existing Law

Another consideration in determining a rule's substantive character is whether it is essentially a "legislative rule." A rule is "legislative" if it "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citations omitted).

---

requests have been denied for public safety reasons (e.g. where the requestor was suspected of gang-related activity or had a series of arrests), or where the requestor had made false prior claims of U.S. citizenship. Public safety threats and fraud are specifically listed in the Operation Instructions as reasons to deny relief, however. More importantly, one of the criterion for DAPA is that the individual not be an enforcement priority as reflected in another November 20, 2014 Memorandum ("Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants"). That DHS memorandum lists a threat to public safety as a reason to prioritize an individual for removal in the category, "Priority 1" (the highest priority group). *See* Doc. No. 38, Def. Ex. 5 at 5 (Nov. 20, 2014, Memorandum, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants").

The DAPA program clearly represents a substantive change in immigration policy. It is a program instituted to give a certain, newly-adopted class of 4.3 million illegal immigrants not only "legal presence" in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled.[102] It does more than "supplement" the statute; if anything, it contradicts the INA. It is, in effect, a new law. DAPA turns its beneficiaries' illegal status (whether resulting from an illegal entry or from illegally overstaying a lawful entry) into a legal presence. It represents a massive change in immigration practice, and will have a significant effect on, not only illegally-present immigrants, but also the nation's entire immigration scheme and the states who must bear the lion's share of its consequences. *See Shalala*, 56 F.3d at 597 (concluding the agency's policy guidance was not a binding norm largely because it did "*not represent a change in [agency] policy* and *[did] not have a significant effect* on [the subjects regulated]"). In the instant case, the President, himself, described it as a change.

Far from being mere advice or guidance, this Court finds that DAPA confers benefits and imposes discrete obligations (based on detailed criteria) upon those charged with enforcing it. Most importantly, it "severely restricts" agency discretion.[103] *See Community Nutrition Inst. v.*

[102] One could argue that it also benefits the DHS as it decides who to remove and where to concentrate their efforts, but the DHS did not need DAPA to do this. It could have done this merely by concentrating on its other prosecutorial priorities. Instead, it has created an entirely new bureaucracy just to handle DAPA applications.

[103] This is further evidenced by the "plain language" of the DAPA Directive. *See Shalala*, 56 F.3d at 597 (considering the policy's plain language in determining its binding effect). Without detailing every use of a mandatory term, instruction, or command throughout Secretary Johnson's memorandum, the Court points to a few examples:

> (1) When detailing DAPA and its criteria, the Secretary states: "I hereby direct USCIS to establish a process . . . . Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics . . . . Each person who applies . . . shall also be eligible to apply for work authorization . . . ."

Young, 818 F.2d 943, 948 (D.C. Cir. 1987) ("[C]abining of an agency's prosecutorial discretion can in fact rise to the level of a substantive . . . rule.").

In sum, this Court finds, both factually based upon the record and the applicable law, that DAPA is a "legislative" or "substantive" rule that should have undergone the notice-and-comment rule making procedure mandated by 5 U.S.C. § 553. The DHS was not given any "discretion by law" to give 4.3 million removable aliens what the DHS itself labels as "legal presence." *See* 5 U.S.C. § 701(a)(2). In fact the law *mandates* that these illegally-present individuals be removed.[104] The DHS has adopted a new rule that substantially changes both the status and employability of millions. These changes go beyond mere enforcement or even non-enforcement of this nation's immigration scheme. It inflicts major costs on both the states and federal government. Such changes, if legal, at least require compliance with the APA.[105] The Court therefore finds that, not only is DAPA reviewable, but that its adoption has violated the procedural requirements of the APA. Therefore, this Court hereby holds for purposes of the temporary injunction that the implementation of DAPA violates the APA's procedural requirements and the States have clearly proven a likelihood of success on the merits.

---

(2) When explaining the expansion of DACA, the Secretary states: "I hereby direct USCIS to expand DACA as follows . . . DACA will apply . . . The current age restriction . . . will no longer apply . . . . The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than two-year increments. This change shall apply to all first-time applicants . . . . USCIS should issue all work authorization documents valid for three years . . . ."

[104] The Court again emphasizes that it does not find the removal provisions of the INA as depriving the Executive Branch from exercising the inherent prosecutorial discretion it possesses in enforcing the laws under which it is charged. Whether or not Defendants may exercise prosecutorial discretion by merely not removing people in individual cases is not before this Court. It is clear, however, that no *statutory* law (i.e., no express Congressional authorization) related to the removal of aliens confers upon the Executive Branch the discretion to do the opposite.

[105] This Memorandum Opinion and Order does not rule on the substantive merits of DAPA's legality.

2. Preliminary Injunction Factor Two: Irreparable Harm

In addition to showing a likelihood of success on the merits of at least one of their claims, the Plaintiff States must also demonstrate a "likelihood of substantial and immediate irreparable injury" if the injunction is not granted, and the "inadequacy of remedies at law." *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

It is clear that, to satisfy this factor, speculative injuries are not enough; "there must be more than an unfounded fear on the part of [Plaintiffs]." Wright & Miller § 2948.1. Thus, courts will not issue a preliminary injunction "simply to prevent the possibility of some remote future injury." *Id.* Instead, the Plaintiff States must show a "presently existing actual threat." *Id.*; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("We agree . . . that the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (internal citations omitted). The Plaintiffs' injury need not have already been inflicted or *certain* to occur; a strong threat of irreparable injury before a trial on the merits is adequate for a preliminary injunction to issue. *See, e.g.*, Wright & Miller § 2948.1.

Plaintiffs allege that they will suffer two "categories" of irreparable injuries if this Court declines to grant a preliminary injunction. First, according to Plaintiffs, the DAPA Directive will cause a humanitarian crisis along the southern border of Texas and elsewhere, similar to the surge of undocumented aliens in the summer of 2014. *See* Doc. No. 5 at 25-26. The State of Texas specifically points to the economic harm it experienced in the last "wave" of illegal immigration allegedly caused by DACA. *See id.* at 26 ("Texas paid almost $40 million for Operation Strong Safety to clean up the consequences of Defendants' actions."). Texas

additionally complains of the millions of dollars it must spend each year in providing uncompensated healthcare for these increasing numbers of undocumented immigrants.

The Court finds primarily, for the reasons stated above, this claimed injury to be exactly the type of "possible remote future injury" that will not support a preliminary injunction. For the same reasons the Court denied standing to Plaintiffs on their asserted injury that DAPA will cause a wave of immigration thereby exacerbating their economic injuries, the Court does not find this category of alleged irreparable harm to be immediate, direct, or a presently-existing, actual threat that warrants a preliminary injunction. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (noting that standing considerations "obviously shade into those determining whether the complaint states a sound basis for [injunctive] relief," and that, even if a complaint presents an existing case or controversy under Article III, it may not also state an adequate basis for injunctive relief). The general harms associated with illegal immigration, that unfortunately fall on the States (some of whom must bear a disproportionate brunt of this harm), are harms that may be exacerbated by DAPA, but they are not immediately caused by it.[106] Whether or not Defendants' implementation of DACA in 2012 actually contributed to the flood of illegal immigration experienced by this country in 2014—an issue not directly before this Court—injuries associated with any future wave of illegal immigration that may allegedly stem from DAPA are neither immediate nor direct. *Lyons*, 461 U.S. at 102 (citing *O'Shea*, 414 U.S. at 496, in which the Court denied a preliminary injunction because the "prospect of future injury rested

[106] Indeed, Chief Kevin Oaks, Chief of the Rio Grande Valley Sector of U.S. Border Patrol, testified before this Court in Cause No. B-14-119 that in his experience, it has been traditionally true that when an administration talks about amnesty, or some other immigration relief publicly, it increases the flow across the border and has an adverse effect on enforcement operations. As of the time he testified, on October 29, 2014, he stated that the DHS was preparing for another surge of immigrants given the talk of a change in immigration policy. *See* Test. of Kevin Oaks, Cause No. B-14-119 (S.F. 172-176).

'on the likelihood that [plaintiffs] [would] again be arrested for and charged with violations'" and be subjected to proceedings; thus, the "threat to the plaintiff was not sufficiently real and immediate to show an existing controversy simply because they anticipate" the same injury occurring in the future). The law is clear that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Id.* Consequently, this Court will exclude Plaintiffs' first category of injuries from the Court's determination of irreparable injury.

Plaintiffs additionally allege that legalizing the presence of millions of people is a "virtually irreversible" action once taken. *See* Doc. No. 5 at 25-28. The Court agrees. First, there are millions of dollars at stake in the form of unrecoverable costs to the States if DAPA is implemented and later found unlawful in terms of infrastructure and personnel to handle the influx of applications. Doc. No. 64, Pl. Ex. 24. The direct costs to the States for providing licenses would be unrecoverable if DAPA was ultimately renounced. Further, and perhaps most importantly, the Federal Government is the sole authority for determining immigrants' lawful status and presence (particularly in light of the Supreme Court's holding in *Arizona v. United States*, 132 S. Ct. 2492 (2012)) and, therefore, the States are forced to rely on the Defendants "to faithfully determine an immigrant's status." Once Defendants make such determinations, the States accurately allege that it will be difficult or even impossible for anyone to "unscramble the egg." *Id.* Specifically, in Texas and Wisconsin, as this Court has already determined, through

benefits conferred by DAPA, recipients are qualified for driver's licenses, in addition to a host of other benefits.[107]

The Court agrees that, without a preliminary injunction, any subsequent ruling that finds DAPA unlawful after it is implemented would result in the States facing the substantially difficult—if not impossible—task of retracting any benefits or licenses already provided to DAPA beneficiaries. This genie would be impossible to put back into the bottle. The Supreme Court has found irreparable injury in the form of a payment of an allegedly unconstitutional tax that could not be recovered if the law at issue was ultimately found unlawful. *See Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929). There, the Court held that "[w]here the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted and the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable . . . the injunction usually will be granted." *Id.* at 814.

Similarly, here, any injury to Defendants, even if DAPA is ultimately found lawful, will be insubstantial in comparison to Plaintiffs' injuries. A delay of DAPA's implementation poses no threat of immediate harm to Defendants.[108] The situation is not such that individuals are currently considered "legally present" and an injunction would remove that benefit; nor are potential beneficiaries of DAPA—who are under existing law illegally present—entitled to the benefit of legal presence such that this Court's ruling would interfere with individual rights.

[107] For example, in Texas, these individuals, according to Plaintiffs, would also qualify for unemployment benefits (citing Tex. Lab. Code § 207.043(a)(2)); alcoholic beverage licenses (citing 16 Tex. Admin. Code § 33.10); licensure as private security officers (citing 37 Tex. Admin. Code § 35.21); and licensure as attorneys (citing Tex. Rules Govern. Bar Adm'n, R. II(a)(5)(d)).

[108] To the contrary, if individuals begin receiving benefits under DAPA but DAPA is later declared unlawful, Defendants, just like the States, would suffer irreparable injuries.

Preliminarily enjoining DAPA's implementation would in this case merely preserve the status quo that has always existed.

> According to the authors of Wright & Miller's Federal Practice and Procedure:
>
> > Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. *Therefore, if a trial on the merits can be conducted before the injury would occur, there is no need for interlocutory relief.* In a similar vein, a preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief.

Wright & Miller § 2948.1 (emphasis added).

Here, the Government has required that USCIS begin accepting applications for deferred action under the new DACA criteria "no later than ninety days from the date of" the announcement of the Directive. Doc. No. 1, Pl. Ex. A. The Directive was announced on November 20, 2014. Thus, by the terms of the Directive, USCIS will begin accepting applications no later than February 20, 2015. Further, as already mentioned, the DHS' website provides February 18, 2015 as the date it will begin accepting applications under DACA's new criteria, and mid-to-late May for DAPA applications. The implementation of DAPA is therefore underway. Due to these time constraints, the Court finds that a trial on the merits cannot be conducted before the process of granting deferred action under the DAPA Directive begins. Without a preliminary injunction preserving the status quo, the Court concludes that Plaintiffs will suffer irreparable harm in this case.

3. Preliminary Injunction Factors Three and Four: Balancing Hardship to Parties and the Public Interest

Before the issuance of an injunction, the law requires that courts "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). Thus, in addition to demonstrating threatened irreparable harm, the Plaintiffs must show that they would suffer more harm without the injunction than would the Defendants if it were granted. The award of preliminary relief is never "strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," but is rather "a matter of sound judicial discretion" and careful balancing of the interests of—and possible injuries to—the respective parties. *Yakus v. United States*, 321 U.S. 414, 440 (1944). If there is reason to believe that an injunction issued prior to a trial on the merits would be burdensome, the balance tips in favor of denying preliminary relief. *See Winter*, 555 U.S. at 27 ("The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome.") (quoting Wright & Miller § 2948.2).

The final factor in the preliminary injunction analysis focuses on policy considerations. Plaintiffs have the burden to show that if granted, a preliminary injunction would not be adverse to public interest. *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986). If no public interest supports granting preliminary relief, such relief should ordinarily be denied, "even if the public interest would not be harmed by one." Wright & Miller § 2948.4. "Consequently, an evaluation of the public interest should be given considerable weight in determining whether a motion for a preliminary injunction should be granted." *Id.*

Here, the Plaintiffs seek to preserve the status quo by enjoining Defendants from acting. The Court is not asked to order Defendants to take any affirmative action. *See* Wright & Miller § 2948.2 (noting that one significant factor considered by courts when balancing the hardships is whether a mandatory or prohibitory injunction is sought—the latter being substantially less burdensome to the defendant). Further, the Court's findings at the preliminary injunction stage in this case do not grant Plaintiffs all of the relief to which they would be entitled if successful at trial. *See id.* (explaining that if "a preliminary injunction would give plaintiff all or most of the relief to which the plaintiff would be entitled if successful at trial," courts are less likely to grant the injunction). Indeed, as detailed below, the Court is ruling on the likelihood of success for purposes of preliminary relief on only one of the three claims (and that one being a procedural, not a substantive claim) brought by Plaintiffs. Thus, neither of the usual concerns in considering potential burdens on a defendant in granting a preliminary injunction is applicable here. Preliminarily enjoining Defendants from carrying out the DAPA program would certainly not be "excessively burdensome" on Defendants. *See id.*

Additional considerations suggest that the Government would not be harmed at all by the issuance of a temporary injunction before a trial is held on the merits. The DHS may continue to prosecute or not prosecute these illegally-present individuals, as current laws dictate. This has been the status quo for *at least* the last five years[109] and there is little-to-no basis to conclude that harm will fall upon the Defendants if it is temporarily prohibited from carrying out the DAPA program. If a preliminary injunction is issued and the Government ultimately prevails at a trial on the merits, it will not be harmed by the delay; if the Government ultimately loses at trial, the

[109] Obviously, this has been the status quo for at least the last five years with respect to the specific individuals eligible for DAPA. Given that DAPA is a program that has never before been in effect, one could also conclude that enjoining its implementation would preserve the status quo that has *always* existed.

States avoid the harm that will be done by the issuance of SAVE-compliant IDs for millions of individuals who would not otherwise be eligible.

If the preliminary injunction is denied, Plaintiffs will bear the costs of issuing licenses and other benefits once DAPA beneficiaries—armed with Social Security cards and employment authorization documents—seek those benefits. Further, as already noted, once these services are provided, there will be no effective way of putting the toothpaste back in the tube should Plaintiffs ultimately prevail on the merits. Thus, between the actual parties, it is clear where the equities lie—in favor of granting the preliminary injunction.

This is not the end of the inquiry; in fact, in this case, it is really the tip of the iceberg. Obviously, this injunction (as long as it is in place) will prevent the immediate provision of benefits and privileges to millions of individuals who might otherwise be eligible for them in the next several months under DAPA and the extended-DACA. The Court notes that there is no indication that these individuals will otherwise be removed or prosecuted. They have been here for the last five years and, given the humanitarian concerns expressed by Secretary Johnson, there is no reason to believe they will be removed now. On the other hand, if the Court denies the injunction and these individuals accept Secretary Johnson's invitation to come out of the shadows, there may be dire consequences for them if DAPA is later found to be illegal or unconstitutional. The DHS—whether under this administration or the next—will then have all pertinent identifying information for these immigrants and could deport them.

For the members of the public who are citizens or otherwise in the country legally, their range of interests may vary substantially: from an avid interest in the DAPA program's consequences to complete disinterest. This Court finds that, directly interested or not, the public

interest factor that weighs the heaviest is ensuring that actions of the Executive Branch (and within it, the DHS—one of the nation's most important law enforcement agencies) comply with this country's laws and its Constitution. At a minimum, compliance with the notice-and-comment procedures of the APA will allow those interested to express their views and have them considered.

Consequently, the Court finds, when taking into consideration the interests of all concerned, the equities strongly favor the issuance of an injunction to preserve the status quo. It is far preferable to have the legality of these actions determined before the fates of over four million individuals are decided. An injunction is the only way to accomplish that goal.

The Court finds that Plaintiffs' injuries cannot be redressed through a judicial remedy after a hearing on the merits and thus that a preliminary injunction is necessary to preserve the status quo in this case. While recognizing that a preliminary injunction is sometimes characterized as a "drastic" remedy, the Court finds that the judicial process would be rendered futile in this case if the Court denied preliminary relief and proceeded to a trial on the merits. If the circumstances underlying this case do not qualify for preliminary relief to preserve the status quo, this Court finds it hard to imagine what case would.

C. Remaining Claims

In this order, the Court is specifically not addressing Plaintiffs' likelihood of success on their *substantive* APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine. Judging the constitutionality of action taken by a coequal branch of government is a "grave[]" and "delicate duty" that the federal judiciary is called on to perform. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (citations omitted).

The Court is mindful of its constitutional role to ensure that the powers of each branch are checked and balanced; nevertheless, if there is a non-constitutional ground upon which to adjudge the case, it is a "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question." *Id.* at 205 (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*)). In this case, the Plaintiffs brought substantive and procedural claims under the APA in addition to their constitutional claim to challenge the Defendants' actions. All three claims are directed at the same Defendants and challenge the same executive action. Thus, the Court need only find a likelihood of success on one of these claims in order to grant the requested relief. This "constitutional avoidance" principle is particularly compelling in the preliminary injunction context because the Court is not abstaining from considering the merits of Plaintiffs' constitutional claim altogether. It is only declining to address it now.[110]

Consequently, despite the fact that this ruling may imply that the Court finds differing degrees of merit as to the remaining claims, it is specifically withholding a ruling upon those issues until there is further development of the record. As stated above, preliminary injunction requests are by necessity the product of a less formal and less complete presentation. This Court, given the importance of these issues to millions of individuals—indeed, in the abstract, to virtually every person in the United States—and given the serious constitutional issues at stake,

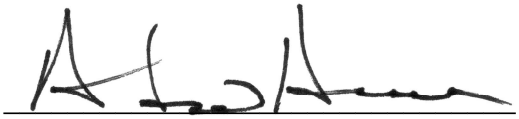
[110] Given the dearth of cases in which the Take Care Clause has been pursued as a cause of action rather than asserted as an affirmative defense (and indeed the dearth of cases discussing the Take Care Clause at all), a complete record would no doubt be valuable for this Court to decide these unique claims. It also believes that should the Government comply with the procedural aspects of the APA, that process may result in the availability of additional information for this Court to have in order for it to consider the substantive APA claim under 5 U.S.C. § 706.

finds it to be in the interest of justice to rule after each side has had an opportunity to make a complete presentation.

VI. CONCLUSION

This Court, for the reasons discussed above, hereby grants the Plaintiff States' request for a preliminary injunction. It hereby finds that at least Texas has satisfied the necessary standing requirements that the Defendants have clearly legislated a substantive rule without complying with the procedural requirements under the Administration Procedure Act. The Injunction is contained in a separate order. Nonetheless, for the sake of clarity, this temporary injunction enjoins the implementation of the DAPA program that awards legal presence and additional benefits to the four million or more individuals potentially covered by the DAPA Memorandum and to the three expansions/additions to the DACA program also contained in the same DAPA Memorandum.[111] It does not enjoin or impair the Secretary's ability to marshal his assets or deploy the resources of the DHS. It does not enjoin the Secretary's ability to set priorities for the DHS. It does not enjoin the previously instituted 2012 DACA program except for the expansions created in the November 20, 2014 DAPA Memorandum.

Signed this 16th day of February, 2015.



Andrew S. Hanen
United States District Judge

[111] While this Court's opinion concentrates on the DAPA program, the same reasoning applies, and the facts and the law compel the same result, to the expansions of DACA contained in the DAPA Directive.

ATTACHMENT 1

Annual Report
SEPTEMBER 2014

Immigration Enforcement Actions: 2013

JOHN F. SIMANSKI

Each year, the Department of Homeland Security (DHS) undertakes immigration enforcement actions involving hundreds of thousands of aliens who may be or are in violation of U.S. immigration laws. These actions include the apprehension or arrest, detention, return, and removal from the United States of aliens (see Box 1). Aliens may be removable from the United States for violations including illegally entering the United States, failing to abide by the terms and conditions of admission, or committing crimes. Primary responsibility for the enforcement of immigration law within DHS rests with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS). CBP is generally responsible for immigration enforcement at and between the ports of entry, and ICE is generally responsible for interior enforcement, and detention and removal operations. USCIS is generally responsible for the administration of immigration and naturalization functions (see **APPENDIX**).

This Office of Immigration Statistics (OIS) Annual Report presents information on aliens determined inadmissible, apprehended, arrested, detained, returned, or removed, during 2013.[1] Key findings in this report include:

- CBP determined approximately 204,000 aliens were inadmissible.
- DHS apprehended approximately 662,000 aliens; 64 percent were citizens of Mexico.
- ICE detained nearly 441,000 aliens.
- Approximately 178,000 aliens were returned to their home countries through processes that did not require a removal order.
- DHS removed approximately 438,000 aliens from the United States.[2] The leading countries of origin for those removed were Mexico (72 percent), Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.8 percent).
- Expedited removal orders accounted for 44 percent, of all removals.
- Reinstatements of final orders accounted for 39 percent, of all removals.
- ICE removed approximately 198,000 known criminal aliens from the United States.[3]

[1] In this report, years refer to fiscal years (October 1 to September 30).

[2] Includes removals, counted in the year the events occurred, by both ICE and CBP. Removals and returns are reported separately.

[3] Refers to persons removed who have a prior criminal conviction.

ENFORCEMENT ACTIONS PROCESS

Inspection Process

All aliens who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States are inspected. CBP officers within the Office of Field Operations (OFO) determine the admissibility of aliens who are applying for admission to the United States at designated ports of entry. Applicants for admission determined to be inadmissible may be, as appropriate, permitted to voluntarily withdraw their application for admission and return to their home country, processed for expedited removal or referred to an immigration judge for removal proceedings. CBP officers may transfer aliens issued a charging document (e.g., Notice to Appear (NTA), Notice of Referral to an Immigration Judge) to ICE for detention and custody determinations. Aliens who apply under the Visa Waiver Program (VWP) who are found to be inadmissible are refused admission without referral to an immigration judge, per Section 217 of the Immigration and Nationality Act (INA), unless the alien requests asylum.

Apprehension Process

Aliens who enter without inspection between ports of entry and are apprehended by U.S. Border Patrol (USBP) of CBP may be, as appropriate, removed, permitted to return to their country, or issued a NTA to commence proceedings before the immigration court. Aliens issued a charging document are either transferred to ICE for detention and custody determinations pending a hearing or

released on their own recognizance. Beginning in FY12, USBP implemented the Consequence Delivery System (CDS) across all sectors. CDS guides USBP agents through a process designed to uniquely evaluate each subject and identify the ideal consequences to deliver to impede and deter further illegal activity. CDS consequences can include administrative, criminal, or programmatic actions.

Aliens unlawfully present in the United States and those lawfully present who are subject to removal may be identified and apprehended by ICE within the interior of the United States. The agency's two primary operating components are Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO). ICE may identify aliens in violation of their status for removal while they are incarcerated, during worksite enforcement operations, or through other means. Aliens apprehended by ICE are generally subject to the same consequences as aliens who are apprehended by USBP.

Benefit Denial

USCIS has authority to issue an NTA or otherwise refer an alien for removal proceedings upon determining that an alien is inadmissible or has violated immigration law pursuant to INA Sections 212 and 237. USCIS will also issue an NTA when required by statute or regulation,[4] e.g., termination of conditional permanent resident status, denial of asylum application, termination of refugee status, or positive credible fear determination.

Detention Process

Following arrest or transfer of custody from CBP, ICE ERO makes custody redeterminations, which may result in detention or release on bond, orders of supervision, or orders of recognizance. An alien may be detained during the pendency of removal proceedings, and, if an alien is ordered removed, the alien may be detained for a certain period of time pending repatriation.

Removal Process

Removal proceedings include the administrative process that leads to the removal of an alien pursuant to Sections 237 or 212 of the INA.

Unless eligible for relief, the most common dispositions for aliens found within the United States, are returns, expedited removals, reinstatements of final orders and removal obtained through removal proceedings.

Return. Certain apprehended aliens who appear to be inadmissible or deportable may be offered the opportunity to *voluntarily* return to their home country in lieu of formal removal proceedings before an immigration judge.[5] Generally, aliens waive their right to a hearing, remain in custody, and, if applicable, agree to depart the United States under supervision. Some aliens apprehended within the United States may agree to *voluntarily depart* and pay the expense of departing. Voluntary departure may be granted by an immigration judge, during an immigration hearing or prior to an immigration hearing by certain DHS officials.

Expedited Removal. DHS officers and agents may order the expedited removal of certain aliens who are inadmissible because they do not possess valid entry documents or are inadmissible for fraud or misrepresentation of material fact; or because the alien, who has not been admitted or paroled in the United State, has not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period. Aliens placed in expedited removal proceedings are generally not entitled to immigration proceedings before an immigration judge unless the alien is

BOX 1.

Definitions of Immigration Enforcement Terms

Administrative Removal: The removal of an alien not admitted for permanent residence, or of an alien admitted for permanent residence on a conditional basis pursuant to section 216 of the INA, under a DHS order based on the determination that the individual has been convicted of an aggravated felony (INA § 238(b)(1)). The alien may be removed without a hearing before an immigration judge.

Alien: A person who is not a citizen or national of the United States.

Deportable Alien: An alien inspected and admitted into the United States but who is subject to removal under INA § 237(a).

Detention: The physical custody of an alien in order to hold him/her, pending a determination on whether the alien is to be removed from the United States or awaiting return transportation to his/her country of citizenship after a final order of removal has been entered.

Expedited Removal: The removal without a hearing before an immigration judge of an alien arriving in the United States who is inadmissible because the individual does not possess valid entry documents or is inadmissible for fraud or misrepresentation of material fact; or the removal of an alien who has not been admitted or paroled in the United States and who has not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period (INA § 235(b)(1)(A)).

Inadmissible Alien: An alien who is ineligible to receive a visa and ineligible to be admitted to the United States, according to the provisions of INA § 212(a).

Reinstatement of Final Removal Orders: The removal of an alien on the reinstatement of a prior removal order, where the alien departed the United States under an order of removal and illegally re-entered the United States (INA § 241(a)(5)). The alien may be removed without a hearing before an immigration judge.

Removable Alien: An alien who is inadmissible or deportable (INA § 240(e)(2)).

Removal: The compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry.

Return: The confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

[4] As authorized by Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, PM 602-0050, November 7, 2011. http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf

[5] Examples include voluntary departure under INA § 240B, VWP returns under INA § 217(b), crewmembers under INA § 252(b) and stowaways under INA § 217(b).

seeking asylum or makes a claim to legal status in the United States. An expedited removal order issued by a DHS officer is equivalent to a removal order issued by an immigration judge.

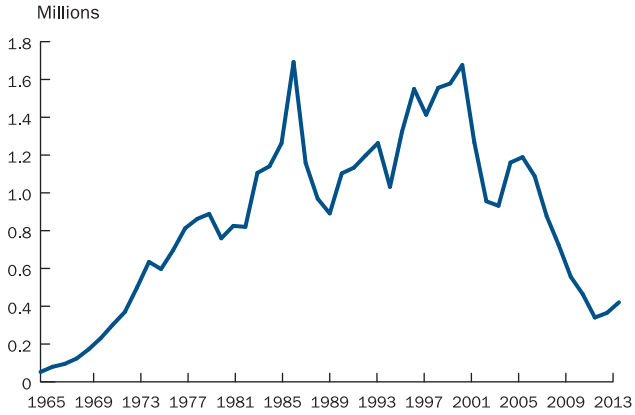
Reinstatement of Final Removal Orders. Section 241(a)(5) of the INA permits DHS to reinstate final removal orders, without further hearing or review, for aliens who were removed or departed voluntarily under an order of removal and who illegally re-entered the United States.

Removal Proceedings. Aliens not immediately returned or processed for removal by a DHS officer, e.g. due to a fear of return or because the alien has applied for certain forms of adjustment of status, may be issued an NTA for an immigration hearing and may be transferred to ICE for a custody determination, which may result in detention or release on bond, orders of supervision, or orders of recognizance. Removal hearings before an immigration court may result in a variety of outcomes including an order of removal; a grant of voluntary departure at the alien's expense (considered a "return"); a grant of certain forms of relief or protection from removal, which could include adjustment to lawful permanent resident status; or termination of proceedings. Decisions of immigration judges can be appealed to the Board of Immigration Appeals.

The penalties associated with removal include not only the removal itself but also possible fines, imprisonment for up to ten years for those who fail to appear at hearings or who fail to depart, and a bar to future legal entry.[6] The imposition and extent of these penalties depend upon the individual circumstances of the case.

[6] The bar is permanent for aggravated felons and up to 20 years for certain other aliens.

Figure 1.
Apprehensions by the U.S. Border Patrol: Fiscal Years 1965 to 2013



Source: U.S. Department of Homeland Security.

DATA[7]

Apprehension and inadmissibility data are collected in the Enforcement Integrated Database (EID) using Form I-213, Seized Asset and Case Tracking System (SEACATS), and EID Arrest Graphical User Interface for Law Enforcement (EAGLE). Data on individuals detained are collected through the ICE ENFORCE Alien Detention Module (EADM) and the ENFORCE Alien Removal

[7] CBP data (apprehensions, inadmissible aliens, removals, and returns) are current as of November 2013. ICE ERO apprehension data are current as of October 2013. ICE HSI data are current as of October 2013. ICE removal and return data are current as of January 2014. USCIS NTA data current as of May 2014.

Table 1.

Apprehensions by Program and Country of Nationality: Fiscal Years 2011 to 2013

(Countries ranked by 2013 apprehensions)

Program and country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
PROGRAM						
Total	662,483	100.0	671,327	100.0	678,606	100.0
CBP U.S. Border Patrol	420,789	63.5	364,768	54.3	340,252	50.1
Southwest sectors (sub-total)	414,397	62.6	356,873	53.2	327,577	48.3
ICE Enforcement and Removal Operations	229,698	34.7	290,622	43.3	322,093	47.5
ICE Homeland Security Investigations	11,996	1.8	15,937	2.4	16,261	2.4
COUNTRY OF NATIONALITY						
Total	662,483	100.0	671,327	100.0	678,606	100.0
Mexico	424,978	64.1	468,766	69.8	517,472	76.3
Guatemala	73,208	11.1	57,486	8.6	41,708	6.1
Honduras	64,157	9.7	50,771	7.6	31,189	4.6
El Salvador	51,226	7.7	38,976	5.8	27,652	4.1
Ecuador	5,680	0.9	4,374	0.7	3,298	0.5
Dominican Republic	3,893	0.6	4,506	0.7	4,433	0.7
Cuba	2,809	0.4	4,121	0.6	4,801	0.7
Nicaragua	2,712	0.4	2,532	0.4	2,278	0.3
Jamaica	2,147	0.3	2,655	0.4	2,862	0.4
Haiti	1,992	0.3	1,492	0.2	1,351	0.2
All other countries, including unknown	29,681	4.5	35,648	5.3	41,562	6.1

Source: U.S. Department of Homeland Security, Enforcement Integrated Database (EID); Seized Asset and Case Tracking System (SEACATS); EID Arrest Graphical User Interface for Law Enforcement (EAGLE); CBP U.S. Border Patrol data for 2013 are current as of November 2013, 2012 are current as of November 2012, 2011 are current as of December 2011; ICE Enforcement and Removal Operations data for 2013 are current as of October 2013, 2012 are current as of October 2012, 2011 are current as of January 2012; Homeland Security Investigations data for 2013 are current as of October 2013, 2012 are current as of October 2012, 2011 are current as of June 2012.

Module (EARM). Data on USCIS NTAs are collected using the USCIS NTA Database. Data on individuals removed or returned are collected through both EARM and EID.

The data on enforcement actions (e.g., inadmissible aliens, apprehensions, NTAs, and removals) relate to events. For example, an alien may be apprehended more than once, and each apprehension would count as a separate record. Removals and returns are reported separately and counted in the years the events occurred. Data appearing for a given year may change in subsequent years due to updating of the data series.[8]

TRENDS AND CHARACTERISTICS OF ENFORCEMENT ACTIONS

Apprehensions

DHS made 662,483 apprehensions in 2013 (see Table 1). The U.S. Border Patrol was responsible for 420,789 or 64 percent (see Figure 1) of all apprehensions. Ninety-eight percent of USBP apprehensions occurred along the Southwest border. ICE ERO made 229,698 administrative arrests and ICE HSI made 11,996 administrative arrests.[9]

Nationality of All Apprehended Aliens. In 2013, Mexican nationals accounted for 64 percent of all aliens apprehended by Immigration and Customs Enforcement or the U.S. Border Patrol, down from 70 percent in 2012. The next leading countries were Guatemala (11 percent), Honduras (9.7 percent), and El Salvador (7.7 percent). These four countries accounted for 93 percent of all apprehensions.

Nationality of Aliens Apprehended by Border Patrol. Non-Mexican aliens accounted for 36 percent of all USBP apprehensions in 2013, up from 27 percent in 2012. USBP apprehensions of non-Mexican aliens increased 182 percent from 2011 to 2013.

[8] Arrests under INA § 287(g) are included in ICE ERO apprehension data for 2011 to 2013.

[9] An administrative arrest refers to the arrest of an alien who is charged with an immigration violation. Administrative arrests are included in the DHS apprehension totals.

Table 2.

Apprehensions by U.S. Border Patrol Sector: Fiscal Years 2011 to 2013

(Sectors ranked by 2013 apprehensions)

U.S. Border Patrol Sector	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	420,789	100.0	364,768	100.0	340,252	100.0
Rio Grande Valley, TX	154,453	36.7	97,762	26.8	59,243	17.4
Tucson, AZ	120,939	28.7	120,000	32.9	123,285	36.2
Laredo, TX	50,749	12.1	44,872	12.3	36,053	10.6
San Diego, CA	27,496	6.5	28,461	7.8	42,447	12.5
Del Rio, TX	23,510	5.6	21,720	6.0	16,144	4.7
EL Centro, CA	16,306	3.9	23,916	6.6	30,191	8.9
EL Paso, TX	11,154	2.7	9,678	2.7	10,345	3.0
Yuma, AZ	6,106	1.5	6,500	1.8	5,833	1.7
Big Bend, TX*	3,684	0.9	3,964	1.1	4,036	1.2
Miami, FL	1,738	0.4	2,509	0.7	4,401	1.3
All other sectors	4,654	1.1	5,386	1.5	8,274	2.4

* Formerly known as Marfa, TX.

Source: U.S. Department of Homeland Security, Customs and Border Protection (CBP) U.S Border Patrol (USBP), Enforcement Integrated Database (EID), November 2013.

Table 3.

Aliens Determined Inadmissible by Mode of Travel, Country of Citizenship, and Field Office: Fiscal Years 2011 to 2013

(Ranked by 2013 inadmissible aliens)

Characteristic	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
MODE OF TRAVEL						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Land	103,480	50.7	100,341	51.8	107,205	50.5
Sea	51,568	25.3	52,509	27.1	66,227	31.2
Air	49,060	24.0	40,756	21.1	38,802	18.3
COUNTRY						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Mexico	56,267	27.6	58,658	30.3	67,410	31.8
Canada	29,387	14.4	30,731	15.9	32,141	15.1
Philippines	23,389	11.5	22,486	11.6	25,197	11.9
Cuba	17,679	8.7	12,253	6.3	7,759	3.7
China, People's Republic	13,552	6.6	12,888	6.7	16,931	8.0
India	11,815	5.8	6,907	3.6	5,983	2.8
Ukraine	2,882	1.4	2,928	1.5	4,359	2.1
Russia	2,618	1.3	2,946	1.5	3,905	1.8
Spain	2,423	1.2	1,717	0.9	988	0.5
El Salvador	2,194	1.1	1,028	0.5	853	0.4
All other countries, including unknown	41,902	20.5	41,064	21.2	46,708	22.0
FIELD OFFICE						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Laredo, TX	31,781	15.6	28,005	14.5	25,790	12.2
San Diego, CA	25,632	12.6	26,889	13.9	33,719	15.9
New Orleans, LA	21,011	10.3	20,204	10.4	20,855	9.8
San Francisco, CA	14,939	7.3	9,832	5.1	6,954	3.3
Buffalo, NY	13,425	6.6	14,050	7.3	15,712	7.4
Houston, TX	10,909	5.3	12,706	6.6	19,528	9.2
Tucson, AZ	9,991	4.9	7,612	3.9	7,951	3.7
Pre-Clearance*	9,695	4.7	8,559	4.4	8,586	4.0
Seattle, WA	9,343	4.6	10,529	5.4	10,650	5.0
Miami, FL	8,684	4.3	7,593	3.9	6,896	3.2
All other field offices, including unknown	48,698	23.9	47,627	24.6	55,593	26.2

*Refers to field offices abroad.

Source: U.S. Department of Homeland Security, Customs and Border Protection, Office of Field Operations. Enforcement Integrated Database (EID), October 2013.

Table 4.

Notices to Appear Issued by Homeland Security Office: Fiscal Years 2011 to 2013

(Ranked by 2013 notices to appear)

Homeland Security office	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	224,185	100.0	235,687	100.0	250,127	100.0
ICE Enforcement and Removal Operations	101,571	45.3	140,707	59.7	156,208	62.5
United States Citizenship and Immigration Services	56,896	25.4	41,778	17.7	44,638	17.8
CBP U.S. Border Patrol	42,078	18.8	31,506	13.4	31,739	12.7
CBP Office of Field Operations	23,640	10.5	21,696	9.2	17,542	7.0

Source: U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol, November 2013; ICE Enforcement and Removal Operations, October 2013; CBP Office of Field Operations, October 2013, United States Citizenship and Immigration Services, NTA Database, May 2014.

Southwest Border Apprehensions. Apprehensions by the USBP along the Southwest border increased 16 percent from 356,873 in 2012 to 414,397 in 2013. Rio Grande Valley was the leading sector for apprehensions (154,453) and displayed the highest increase from 2012 to 2013 (56,691 or 58 percent) (see Table 2). The next leading sectors in 2013 were Tucson (120,939) Laredo (50,749), San Diego (27,496), and Del Rio (23,510).

Inadmissible Aliens

CBP Office of Field Operations (OFO) determined 204,108 aliens arriving at a port of entry were inadmissible in 2013, up 5.4 percent from 193,606 in 2012 (See Table 3). Fifty-one percent of all inadmissible aliens in 2013 were processed at land ports, followed by 25 percent at sea ports, and 24 percent at airports.

Nationality of Inadmissible Aliens. Mexican nationals accounted for 28 percent of inadmissible aliens in 2013, followed by Canada (14 percent) and the Philippines (12 percent). Other leading countries included Cuba, China, India, Ukraine, Russia, Spain and El Salvador. The greatest increases from 2012 to 2013 were for nationals of El Salvador (113 percent) and India (71 percent) (see Table 3).

Notices to Appear

DHS issued 224,185 NTAs in 2013, down from 235,687 in 2012 (see Table 4). ICE ERO issued 101,571 or 45 percent of all NTAs in 2013, down from 140,707 or 60 percent in 2012. NTAs issued by USCIS accounted for 25 percent of all NTAs in 2013, up from 18 percent in 2012, partly due to an increase in the number of

Table 5.

Initial Admissions to ICE Detention Facilities by Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 detention admissions)

Country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	440,557	100.0	477,523	100.0	429,247	100.0
Mexico	244,585	55.5	307,523	64.4	288,581	67.2
Guatemala	59,189	13.4	50,723	10.6	38,450	9.0
Honduras	50,609	11.5	40,469	8.5	26,416	6.2
El Salvador	40,261	9.1	31,286	6.6	23,792	5.5
Ecuador	4,716	1.1	3,856	0.8	2,957	0.7
India	4,057	0.9	1,522	0.3	3,438	0.8
Dominican Republic	3,537	0.8	4,265	0.9	4,201	1.0
Haiti	2,382	0.5	1,609	0.3	1,775	0.4
Nicaragua	2,323	0.5	2,131	0.4	2,015	0.5
Jamaica	1,933	0.4	2,365	0.5	2,597	0.6
All other countries, including unknown	26,965	6.1	31,774	6.7	35,025	8.2

Note: Excludes Office of Refugee Resettlement and Mexican Interior Repatriation Program facilities.

Source: U.S. Department of Homeland Security, ENFORCE Alien Detention Module (EADM), October 2013.

Table 6.

Aliens Removed by Component: Fiscal Years 2011 to 2013

Component	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	438,421	100.0	418,397	100.0	387,134	100.0
ICE	330,651	75.4	345,628	82.6	314,453	81.2
CBP U.S. Border Patrol	86,253	19.7	51,012	12.2	42,952	11.1
CBP Office of Field Operations	21,517	4.9	21,757	5.2	29,729	7.7

Note: OIS and ICE totals may differ. See footnote 2 on page 1.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Table 7.

Trends in Total Removals, Expedited Removals, and Reinstatements of Final Removal Orders: Fiscal Years 2011 to 2013

Removals	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	438,421	100.0	418,397	100.0	387,134	100.0
Expedited Removals	193,032	44.0	163,308	39.0	122,236	31.6
Reinstatements	170,247	38.8	146,044	34.9	124,784	32.2
All other removals	75,142	17.1	109,045	26.1	140,114	36.2

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

"Credible Fear" issued NTAs. USBP issued NTAs accounted for 19 percent of all NTAs in 2013, up from 14 percent in 2012. OFO issued 11 percent of NTAs in 2013 and 9 percent in 2012.

Detentions

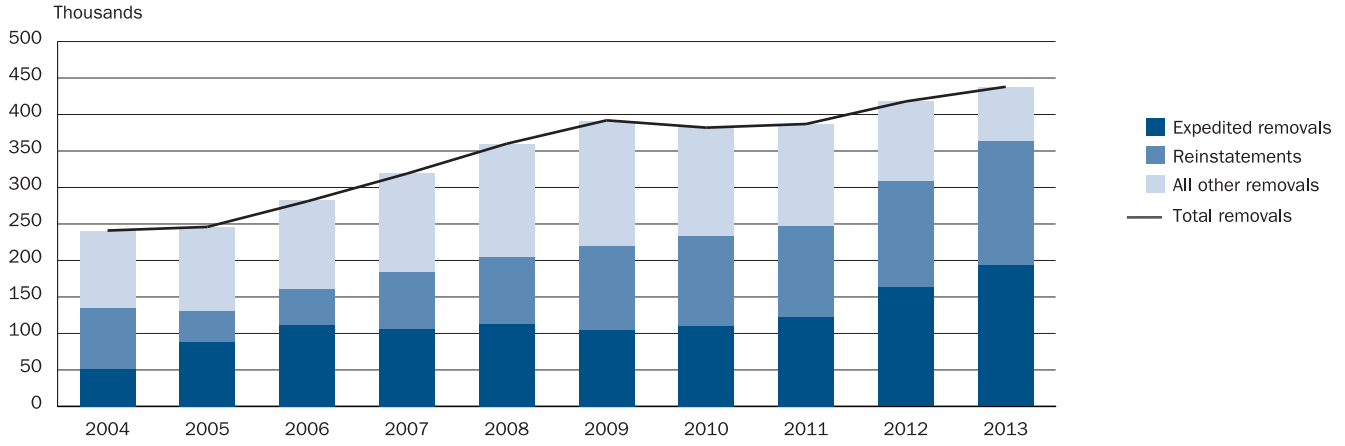
ICE detained 440,557 aliens during 2013, a decrease of 8 percent from 2012 (See Table 5). Mexican nationals accounted for 56 percent of total detainees in 2013, down from 64 percent in 2012. The next leading countries in 2013 were Guatemala (13 percent), Honduras (12 percent) and El Salvador (9 percent). These four countries accounted for 90 percent of all detainees in 2013.

Removals and Returns

Total Removals. The number of removals increased from 418,397 in 2012 to an all-time high of 438,421 in 2013 (see Tables 6, 7 and Figure 2). ICE accounted for 75 percent of all removals in 2013, down from 83 percent in 2012. USBP accounted for 20 percent of all removals in 2013, up from 12 percent in 2012. OFO performed 4.9 percent of removals in 2013 and 5.2 percent in 2012 (see table 6). Mexican nationals accounted for 72 percent of all aliens removed in 2013. The next leading countries were Guatemala (11 percent), Honduras (8.3 percent) and El Salvador (4.7 percent). These four countries accounted for 96 percent of all removals in 2012 (see Table 8).

Expedited Removals. Expedited removals represented 44 percent of all removals in 2013, up from 39 percent in 2012 but down from an all-time high of 49 percent in 1999. Aliens from Mexico accounted for 75 percent of expedited removals in 2013. The next leading countries were Guatemala, Honduras, and El Salvador. Nationals from these four countries accounted for 98 percent of all expedited removals in 2013.

Figure 2.
Total Removals, Expedited Removals and Reinstatements: Fiscal Years 2004 to 2013



Source: U.S. Department of Homeland Security.

Table 8.

Aliens Removed by Criminal Status and Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 aliens removed)

Country of nationality	2013			2012			2011		
	Total	Criminal*	Non-Criminal	Total	Criminal*	Non-Criminal	Total	Criminal*	Non-Criminal
Total	438,421	198,394	240,027	418,397	200,143	218,254	387,134	188,964	198,170
Mexico	314,904	146,298	168,606	303,745	151,444	152,301	288,078	145,133	142,945
Guatemala	46,866	15,365	31,501	38,900	13,494	25,406	30,343	11,718	18,625
Honduras	36,526	16,609	19,917	31,740	13,815	17,925	22,027	10,825	11,202
El Salvador	20,862	9,440	11,422	18,993	8,674	10,319	17,381	8,507	8,874
Dominican Republic	2,278	1,805	473	2,868	2,182	686	2,893	2,142	751
Ecuador	1,491	580	911	1,763	706	1,057	1,716	704	1,012
Colombia	1,421	956	465	1,591	1,055	536	1,899	1,048	851
Brazil	1,411	366	1,045	2,397	424	1,973	3,350	550	2,800
Nicaragua	1,337	691	646	1,400	731	669	1,502	696	806
Jamaica	1,101	993	108	1,319	1,150	169	1,474	1,225	249
All other countries, including unknown	10,224	5,291	4,933	13,681	6,468	7,213	16,471	6,416	10,055

* Refers to persons removed who have a prior criminal conviction.

Note: Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Reinstatements. Reinstatements of previous removal orders accounted for 39 percent of all removals in 2013. The number of removals based on a reinstatement of final orders increased every year between 2005 and 2013. In 2013, aliens from Mexico accounted for 75 percent of all reinstatements. Other leading countries included Guatemala, Honduras, and El Salvador. These four countries accounted for 99 percent of all reinstatements in 2013.

Criminal Activity. Approximately 198,000 aliens removed in 2013 had a prior criminal conviction.[10] The most common categories of crime were immigration-related offenses, dangerous drugs, criminal traffic offenses, and assault. Immigration-related offenses increased 31 percent from 2012 to 2013 and 65 percent between 2011 and 2013. Dangerous drugs and criminal traffic offenses decreased 28 and 35 percent respectively from 2012 to 2013. These four leading categories accounted for 72 percent of all criminal alien removals in 2013 (see Table 9).

[10] Excludes criminals removed by CBP; CBP EID data do not identify if aliens removed were criminals.

Returns. In 2013, 178,371 aliens were returned to their home countries without an order of removal, a decline of 23 percent from 2012 and the lowest number since 1967 (see Table 10). 2013 was the ninth consecutive year in which returns declined. Fifty-nine percent of returns were performed by OFO in 2013, up from 48 percent in 2012. USBP accounted for 22 percent of all returns in 2013, down from 25 percent in 2012. From 2011 to 2013, returns by USBP decreased 66 percent. ICE accounted for the remaining 20 percent of returns in 2013, down from 27 percent in 2012. Mexican nationals accounted for 49 percent of all returns in 2013, down from 57 percent in 2012. The next leading countries of nationality for returns in 2013 were Canada (13 percent), the Philippines (12 percent) and China (6.6 percent) (see Table 11).

FOR MORE INFORMATION

For more information about immigration and immigration statistics, visit the Office of Immigration Statistics Website at www.dhs.gov/immigration-statistics.

Table 9.

Criminal Aliens Removed by Crime Category: Fiscal Years 2011 to 2013

(Ranked by 2013 criminal aliens removed)

Crime Category	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	198,394	100.0	200,143	100.0	188,964	100.0
Immigration*	62,194	31.3	47,616	23.8	37,606	19.9
Dangerous Drugs**	30,603	15.4	42,679	21.3	43,378	23.0
Criminal Traffic Offenses†	29,844	15.0	46,162	23.1	43,154	22.8
Assault	20,181	10.2	13,045	6.5	12,783	6.8
Burglary	5,505	2.8	3,569	1.8	3,808	2.0
Weapon Offenses	5,296	2.7	2,513	1.3	2,730	1.4
Larceny	5,290	2.7	5,428	2.7	5,728	3.0
Fraudulent Activities	5,179	2.6	3,879	1.9	4,232	2.2
Sexual Assault	3,166	1.6	3,353	1.7	3,576	1.9
Forgery	3,032	1.5	2,430	1.2	2,858	1.5
All other categories, including unknown	28,104	14.2	29,469	14.7	29,111	15.4

* Including entry and reentry, false claims to citizenship, and alien smuggling.
** Including the manufacturing, distribution, sale, and possession of illegal drugs.
† Including hit and run and driving under the influence.

Notes: Data refers to persons removed who have a prior criminal conviction. Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014.

Table 10.

Aliens Returned by Component: Fiscal Years 2011 to 2013

Component	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	178,371	100.0	230,386	100.0	322,124	100.0
CBP Office of Field Operations	104,300	58.5	109,468	47.5	130,996	40.7
CBP U.S. Border Patrol	38,779	21.7	58,197	25.3	113,886	35.4
ICE	35,292	19.8	62,721	27.2	77,242	24.0

Note: OIS and ICE totals may differ. See footnote 2 on page 1.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Table 11.

Aliens Returned by Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 aliens returned)

Country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	178,371	100.0	230,386	100.0	322,124	100.0
Mexico	88,042	49.4	131,983	57.3	205,158	63.7
Canada	23,963	13.4	27,039	11.7	28,274	8.8
Philippines	21,523	12.1	20,903	9.1	23,150	7.2
China, People's Republic	11,684	6.6	11,780	5.1	16,234	5.0
Ukraine	2,604	1.5	2,589	1.1	4,111	1.3
India	2,462	1.4	3,273	1.4	4,136	1.3
Russia	1,991	1.1	2,464	1.1	3,512	1.1
Burma	1,920	1.1	2,337	1.0	2,582	0.8
Guatemala	1,347	0.8	2,332	1.0	3,026	0.9
Korea, South	1,259	0.7	1,191	0.5	1,619	0.5
All other countries, including unknown	21,576	12.1	24,495	10.6	30,322	9.4

Note: Returns are the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

APPENDIX

ENFORCEMENT PROGRAM OFFICES

U.S. Customs and Border Protection (CBP)

Office of Field Operations

CBP's Office of Field Operations (OFO) is responsible for securing the U.S. border at ports of entry while facilitating lawful trade and travel. CBP officers determine the admissibility of aliens who are applying for admission to the United States at designated ports of entry.

U.S. Border Patrol

The primary mission of the U.S. Border Patrol (USBP) is to secure approximately 7,000 miles of international land border with Canada and Mexico and 2,600 miles of coastal border of the United States. Its major objectives are to deter, detect, and interdict the illegal entry of aliens, terrorists, terrorist weapons, and other contraband into the United States. USBP operations are divided into geographic regions referred to as sectors.

U.S. Immigration and Customs Enforcement (ICE)

Homeland Security Investigations

The U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Directorate is a critical asset in the ICE mission, responsible for disrupting and dismantling transnational criminal threats facing the United States. HSI uses its legal authorities to investigate immigration and customs violations such as: human rights violations; narcotics; weapons smuggling and the smuggling of other types of contraband; financial crimes; cyber crimes; human trafficking; child pornography; intellectual property violations; commercial fraud; export violations; and identity and benefit fraud. HSI special agents also conduct national security investigations aimed at protecting critical infrastructure vulnerable to sabotage, attack, or exploitation. In addition to domestic HSI criminal investigations, HSI oversees ICE's international affairs operations and intelligence functions.

Enforcement and Removal Operations

Officers and agents of ICE Enforcement and Removal Operations (ERO) serve as the primary enforcement arm within ICE for the identification, apprehension, and removal of certain aliens from the United States. ERO transports removable aliens, manages aliens in custody or subject in conditions of release, and removes individuals ordered to be removed from the United States.

U.S. Citizenship and Immigration Services (USCIS)

U.S. Citizenship and Immigration Services (USCIS) oversees lawful immigration to the United States and processes applications for immigration benefits within the United States. USCIS provides accurate and useful information to its customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of the immigration system.

ATTACHMENT 2

Secretary

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

Homeland Security

June 15, 2012

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

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

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

FROM: Janet Napolitano
Secretary of Homeland Security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Janet Napolitano

ATTACHMENT 3

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

Homeland Security

November 20, 2014

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

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

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

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

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

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

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

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

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

---

[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).

ATTACHMENT 4

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

Homeland Security

November 20, 2014

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

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

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

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

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

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

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

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

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

A. Civil Immigration Enforcement Priorities

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

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

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

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

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

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

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

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

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

Priority 2 (misdemeanants and new immigration violators)

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

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

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

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

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

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

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

Priority 3 (other immigration violations)

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

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

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

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

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

C. Detention

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

D. Exercising Prosecutorial Discretion

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

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

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

E. Implementation

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

F. Data

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

G. No Private Right Statement

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

ATTACHMENT 5

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

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

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

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

November 19, 2014

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

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

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

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

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

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

I.

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

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

A.

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

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

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

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

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

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

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

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

132 S. Ct. at 2499.

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

II.

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

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

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

---

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

ATTACHMENT 6

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

STATE OF TEXAS, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 1:14-CV-254
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF DONALD W. NEUFELD

I, Donald W. Neufeld, hereby make the following declaration with respect to the above captioned matter.

1. I am the Associate Director for Service Center Operations (SCOPS) for U.S. Citizenship and Immigration Services (USCIS), a component within the U.S. Department of Homeland Security (DHS or Department). I have held this position since January 2010. In this position, I oversee all policy, planning, management and execution functions of SCOPS. My current job duties include overseeing a workforce of more than 3,000 government employees and 1,500 contract employees at the four USCIS Service Centers located in California, Nebraska, Texas and Vermont. These four centers adjudicate about four million immigration-related applications and requests annually, including all requests for deferred action under the Deferred Action for Childhood Arrivals (DACA) process.

2. I was previously the Deputy/Acting Associate Director for USCIS Domestic Operations from June 2007 to January 2010 where I oversaw all immigration adjudication activities at USCIS's four Service Centers and 87 field offices throughout the United States, as well as 130

Application Support Centers, four Regional Offices, two Call Centers, the Card Production Facility and the National Benefits Center. From January 2006 to June 2007, I was Chief of USCIS Field Operations managing and overseeing the 87 field offices delivering immigration benefit services directly to applicants and petitioners in communities across the United States and the National Benefits Center (NBC) which performs centralized front-end processing of certain applications and petitions. My career with USCIS and the legacy Immigration and Naturalization Service spans more than 30 years, where I have held several leadership positions including Deputy Assistant District Director for the Los Angeles District, Assistant District Director and later District Director of the Miami District, and Service Center Director for the California and Nebraska Service Centers. I began my career in 1983, initially hired as a clerk in the Los Angeles District, then serving as an Information Officer, then an Immigration Examiner, conducting interviews and adjudicating applications for immigration benefits. I also performed inspections of arriving passengers at Los Angeles International Airport.

3. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

USCIS's Role in Immigration Enforcement

4. DHS has three components with responsibilities over the enforcement of the nation's immigration laws: (1) Immigration and Customs Enforcement (ICE); (2) Customs and Border Protection (CBP); and (3) USCIS. USCIS is the DHS component that administers a variety of immigration-related programs. Currently, USCIS adjudicates approximately seven million applications, petitions and requests per year, including applications for naturalization by lawful permanent residents (LPRs), immigrant visa petitions (including employment-based visa petitions filed by U.S. employers and family-based visa petitions filed by U.S. citizens and

LPRs), a variety of non-immigrant petitions (including temporary worker categories such as the H-1B), asylum and refugee status, other humanitarian protections under the Violence Against Women Act (VAWA) and for victims of trafficking and crimes, humanitarian parole, and deferred action, among others.

5. USCIS's current budget is approximately $3.2 billion. This budget is funded overwhelmingly by user fees paid by individuals who file applications. Only approximately 5% of our budget is from Congressionally-appropriated taxpayer funds, and those appropriations are specifically designated for operation and maintenance of the employment verification system, known as E-Verify, and for limited citizenship-related services (none of which are related to requests for deferred action).

6. USCIS employs approximately 13,000 federal employees and an additional 5,000 contract employees housed in a range of facilities throughout the United States and overseas. USCIS maintains 87 Field Offices under its Field Operations Directorate (FOD) and four major Service Centers under SCOPS. These Service Centers are located in Dallas, Texas; Laguna Niguel, California; Lincoln, Nebraska; and St. Albans, Vermont. Altogether, the Service Centers employ approximately 3,000 federal workers. USCIS also operates the NBC, which is similar in size to a Service Center. The NBC performs some limited adjudications, although it was originally established to prepare cases for adjudication in other offices by conducting pre-interview case review.

7. The Field Offices and Service Centers adjudicate a wide range of immigration-related applications and requests. USCIS distributes the responsibility for processing and adjudicating various categories of applications and requests among the Field Offices and Service Centers

based on multiple considerations in order to achieve maximum efficiency, reliability, consistency, and accuracy.

8. The Service Centers are designed to adjudicate applications, petitions and requests of programs that have higher-volume caseloads, including non-immigrant visa petitions (such as H-1Bs), I-130 petitions establishing relationships between a U.S. citizen or LPR and a foreign national relative, employment-based applications for adjustment of status to lawful permanent residence, multiple forms of humanitarian protection (including temporary protected status, protection under the VAWA, non-immigrant status for victims of crimes and trafficking), and requests for deferred action under the DACA process.[1]

9. In addition to the Field Offices and Service Centers, USCIS also uses three centralized "lockboxes" for the initial receipt and processing of most applications, requests, and fee payments received by the agency each year. At the lockbox, every application and request is opened, reviewed for basic filing requirements, then fees are collected, and data is captured. In order to ensure reliability and proper processing, each application and request must be logged into one of the USCIS computer systems, the paper applications and requests must be scanned, the payment must be processed, a receipt must be issued, and the hardcopy applications and requests must be distributed to the appropriate Field Office, Service Center, or the NBC for further processing.

[1] DACA is not the only deferred action program handled by USCIS Service Centers. For example, the Vermont Service Center (VSC) currently administers two programs through which individuals may be placed in deferred action, one related to relief under VAWA and one related to U nonimmigrant status. VAWA allows certain spouses, children, and parents to self-petition for family-based immigration benefits if they have been battered or subjected to extreme cruelty by the U.S citizen or LPR spouse or parent, or U.S. citizen son or daughter. If the VAWA self-petition is approved by VSC, the self-petitioner can file an application for adjustment of status that is adjudicated by the appropriate field office. In addition, based on the approved self-petition, the self-petitioner is eligible for consideration for deferred action and for an employment authorization document. VSC adjudicates all VAWA self-petitions and also administers the deferred action and EAD component of the VAWA program.

The DACA Process

10. In 2012, then-Secretary of Homeland Security Napolitano "set[] forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws." In doing so, USCIS was tasked with implementing the DACA process and adjudicating these requests for deferred action. As explained by then-Secretary Napolitano, the DACA process supports DHS-wide efforts to efficiently prioritize overall enforcement resources through the removal of criminals, recent border crossers, and aliens who pose a threat to national security and public safety, while recognizing humanitarian principles embedded within our immigration laws. The individuals who could be considered for DACA "lacked the intent to violate the law" because they were "young people brought to this country as children[.]" She further explained such children and young adults could be considered, on a case-by-case basis, for deferred action if they met the guidelines, passed a criminal background check, and lived in the U.S. continuously for five years. Secretary Napolitano explained that DACA was part of "additional measures to ensure that [DHS's] enforcement resources [were] not expended on these low priority cases but [were] instead appropriately focused on people who meet [DHS's] enforcement priorities." *See* Exhibit A (June 15, 2012 Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," (hereinafter "the Napolitano Memo")).

11. Under DACA, aliens brought to the United States as children before the age of 16 and who are determined to meet other certain guidelines, including continuous residence in the United States since June 15, 2007, can be considered for deferred action on a case-by-case basis.[2]

[2] The guidelines for DACA under the Napolitano Memo include: 1) being under the age of 31 as of June 15, 2012; 2) entering the U.S. before reaching the age of 16; 3) continuously residing in the U.S. since June 15, 2007 to the present time; 4) being physically present in the U.S. on June 15, 2012 and at the time of making the request for

Requestors who meet the guidelines are not automatically granted deferred action under DACA. Rather, each initial DACA request is individually considered, wherein an adjudicator must determine whether a requestor meets the guidelines and whether there are other factors that might adversely impact the favorable exercise of discretion.

12. In addition to satisfying the DACA guidelines, requestors must submit to, and pay for, a background check. Information discovered in the background check process is also considered in the overall discretionary analysis. If granted, the period of deferred action under the existing DACA program is—depending on the date of the grant—two or three years.[3] Requestors simultaneously apply for employment authorization, although the application for employment authorization is not adjudicated until a decision is made on the underlying DACA request.

13. Procedurally, the review and adjudication of an initial request for deferred action under DACA is a multi-step, case-specific process described in greater detail below. The process begins with the request being mailed to a USCIS lockbox, which then reviews requests for completeness. Following review at the lock-box stage, those requests that are not rejected (as briefly described below) are sent to one of the four USCIS Service Centers for further substantive processing. Once a case arrives at a Service Center, a specially trained USCIS adjudicator is assigned to determine whether the requestor satisfies the DACA guidelines and ultimately determine whether a request should be approved or denied.

---

consideration for DACA; 5) having no lawful status on June 15, 2012; 6) being currently in school, having graduated or obtained a certificate of completion from high school, having obtained a General Educational Development (GED) certificate, or being an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and, 7) having not been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, and not otherwise posing a threat to national security or public safety.

[3] The 2012 Napolitano Memo directed USCIS to issue two-year periods of deferred action under DACA. Pursuant to the November, 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA requests and requests for renewals now receive a three-year period of deferred action.

14. Unlike a "denial," a DACA request is "rejected" when the lockbox determines upon intake that the request has a fatal flaw, such as failure to submit the required fee,[4] failure to sign the request, illegible or missing required fields on the form, or it is clear that the requestor does not satisfy the age guidelines.

15. A DACA request is "denied" when a USCIS adjudicator, on a case-by-case basis, determines that the requestor has not demonstrated that they satisfy the guidelines for DACA or when an adjudicator determines that deferred action should be denied even though the threshold guidelines are met. Both scenarios necessarily involve the consideration of and exercise of USCIS's discretion.

16. Adjudicators evaluate the evidence each requestor submits in conjunction with the relevant DACA guidelines, assess the appropriate weight to accord such evidence, and ultimately determine whether the evidence is sufficient to satisfy the guidelines. Adjudicators must utilize judgment in determining weight accorded to the submitted evidence.

17. Where a guideline is not prescriptive, USCIS must also exercise significant discretion in determining whether that guideline, and the requestor's case in relation to that guideline, counsels for or against a grant of deferred action. For example, one of the DACA guidelines is that the requestor "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." *See* Exhibit A, at 1. While determining whether a requestor has been convicted of a felony is straightforward, determining whether a requestor "poses a threat to national security or public safety" necessarily involves the exercise of the agency's discretion.

[4] Very limited fee exemptions are considered. *See* Exhibit B (FAQ 8).

18. Even if it is determined that a requestor has satisfied the threshold DACA guidelines, USCIS may exercise discretion to deny a request where other factors make the grant of deferred action inappropriate. For example, if the DACA requestor is believed to have submitted false statements or attempted to commit fraud in a prior application or petition, USCIS has denied DACA even when all the DACA guidelines, including public safety considerations, have been met. As another example, when USCIS learned that a DACA requestor falsely claimed to be a U.S. citizen and had prior removals, as an exercise of discretion, USCIS denied the request even though those issues are not specifically part of the DACA guidelines.

19. Under current DACA procedures, denials issued solely on discretionary grounds, including for national security and public safety reasons, are generally required to undergo review by USCIS headquarters. There is an exception to that requirement for cases involving gang affiliation—where such affiliation is confirmed by interview—and those cases may be denied without further guidance from USCIS headquarters. After an adjudicator in a USCIS Service Center determines that, in his or her discretion, a request should be denied for purely discretionary reasons, the adjudicator may send to USCIS headquarters a "Request for Adjudicative Guidance," which summarizes the case, usually recommends a denial for discretionary reasons, and seeks concurrence or guidance before rendering a final decision. This process has been established to allow USCIS to ensure consistency and avoid arbitrary decisions regarding discretionary denials.

20. Adjudicators have the authority to verify documents, facts, and statements provided by the requestor by contacting educational institutions, other government agencies, employers, or other entities. *See* Exhibit B (USCIS Frequently Asked Questions for DACA Requestors (hereinafter DACA FAQs)), FAQ 21. In addition, adjudicators at the Service Centers may refer

a case for interview at a Field Office. *See* Exhibit C (redacted DACA interview notices). Typically, an interview would be requested when the adjudicator determines, after careful review of the request and supporting documents, that a request is deniable, but potentially curable, with information that can best be received through an interview instead of requesting additional supporting documents. For example, where an adjudicator suspected a requestor was associated with a gang, an interview was conducted to question the requestor regarding this association.

21. An adjudicator may also issue a "Request for Evidence" (RFE) or a Notice of Intent to Deny (NOID) to require the requestor to submit additional evidence in support of the request for DACA. An RFE is issued when not all of the required initial evidence has been submitted or the adjudicator determines that the totality of the evidence submitted does not meet the DACA guidelines or other discretionary factors. A NOID is more appropriate than issuing an RFE when the officer intends to deny the request based on the evidence already submitted because the request does not appear to meet DACA guidelines or other discretionary factors, but the request is not necessarily incurable. Since August 15, 2012 through December 31, 2014, 188,767 RFEs and 6,496 NOIDs have been issued in the process of adjudicating DACA requests. Failure to respond may result in a denial. *See* Exhibit D (redacted DACA-related RFEs and NOIDs); Exhibit E. In addition, all DACA requestors must submit to background checks, and requests are denied if these background checks show that deferred action would be inappropriate. Information discovered in this process may be provided to ICE, CBP, and other law enforcement authorities for further action if appropriate. *See* Exhibit B (DACA FAQs 19 and 20).

22. If USCIS denies a DACA request, USCIS applies its policy guidance governing the referral of cases to ICE. Normally, if the case does not involve a criminal offense, fraud, or a threat to national security or public safety, the case is not referred to ICE for purposes of removal

proceedings. Many of the cases involving discretionary denials were referred to ICE due to public safety issues.

23. Since the inception of DACA through December 31, 2014, USCIS accepted as filed 727,164 initial requests for deferred action under DACA. An additional 43,174 requests were submitted to USCIS, but were rejected at the lockbox stage. Of the 727,164 initial requests that were accepted for filing, 638,897 were approved, 38,597 were ultimately denied, and the rest remain pending. All DACA requestors also submit applications for employment authorization. Of the 970,735 employment authorization applications received, 825,640 were approved.[5] *See* Exhibit E.

24. The reasons for these 38,597 denials vary. Most were based on a determination that the requestor failed to meet certain threshold criteria, such as continuous residence in the United States. Other denials involved cases in which the deciding official exercised further judgment and discretion in applying the criteria set forth in the policy, including where individuals were determined to pose a public safety risk based on the individual circumstances of the case. For example, DACA requests have been denied for discretionary public safety reasons because the requestor was suspected of gang membership or gang-related activity, had a series of arrests without convictions, arrests resulting in pre-trial diversionary programs, or ongoing criminal investigations. Requests have also been denied on the basis that deferred action was not appropriate for other reasons not expressly set forth in 2012 DACA Memorandum, such as evidence of immigration fraud. See supra ¶ 18 (citing examples). Until very recently, USCIS

[5] The total number of employment authorization document application receipts is higher than the number of DACA requests because USCIS systems do not distinguish between employment authorization document applications made by initial requestors, renewal requestors, or those seeking to replace an employment authorization document.

lacked any ability to automatically track and sort the reasons for DACA denials, and it still lacks the ability to do so for all DACA denials except for very recent ones.

25. DACA is funded exclusively through the fees requestors submit with their DACA request. No Congressional appropriations are used to administer DACA.

2014 DACA Modifications and
Deferred Action for Parents of U.S. Citizens and LPRs (DAPA)

26. On November 20, 2014, Secretary Johnson issued a memorandum directing DHS to implement certain modifications to DACA and to create a process for certain parents of U.S. Citizens and LPRs to apply for deferred action (DAPA). The DACA modifications include: (1) allowing individuals over 31 to request deferred action; (2) increasing the period of deferred action and work authorization from two to three years; and (3) adjusting the date regarding the beginning of the continuous residence period from June 15, 2007 to January 1, 2010. These modifications will not change the case-by-case process for reviewing DACA requests described above. USCIS is in the process of determining the procedures for reviewing requests under DAPA, and thus USCIS has not yet determined whether the process to adjudicate DAPA requests will be similar to the DACA process. However, as with DACA, DAPA will be funded through fees submitted by requestors, and USCIS will not use Congressional appropriations to administer DAPA.

27. The 2014 DACA modifications and DAPA do not restrict the longstanding authority of USCIS to grant deferred action in the exercise of its discretion. Accordingly, if a requestor is denied DACA or DAPA, USCIS may consider deferred action for the requestor if such action is considered appropriate in the agency's discretion. *See* Exhibit B (DACA FAQ 71).

28. USCIS has taken some steps to implement the expanded DACA and DAPA, such as securing adequate office space and beginning to develop a form, among others. In taking these

steps, USCIS has counted on receiving the fees that will be generated by requestors when submissions commence in February for DACA and May 2015 for DAPA. USCIS has carefully calibrated expenses incurred in light of anticipated revenues to ensure the continuing fiscal integrity of our budget. USCIS's budget contemplates that we will begin receiving fees from requestors soon to cover some of the expenses we have already incurred and fund the process as it continues to go forward.

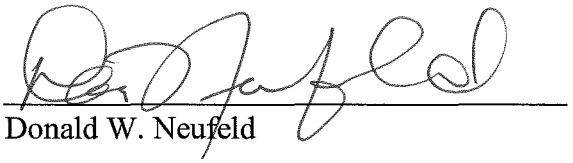
29. Based on our experience implementing DACA in 2012, we anticipate that fewer than the total number of estimated persons who might meet the guidelines for DAPA would submit requests. The total estimated population for DACA was projected to be approximately 1.2 million individuals in 2012. To date, approximately 720,000 initial DACA requests, or roughly 60% of the total estimated population, have been received by the agency. The projected total population for DAPA is estimated at approximately 3.85 million. USCIS currently anticipates approximately 50% of this population will submit requests in the 18-month period after USCIS begins accepting requests.

30. As the foregoing paragraphs explain, the DACA program requires case-by-case consideration of each request and provides for individualized adjudicatory judgment and discretion. Each case is first reviewed by lockbox contractors who reject requests that are incomplete. All non-rejected cases are then forwarded to a USCIS Service Center for a case-by-case review. Upon careful review of the case, adjudicators regularly issue RFEs and NOIDs for additional evidence, where after initially reviewing the request, adjudicators determine the request is deniable, but also curable with additional evidence. In making a decision on each case, adjudicators must carefully evaluate the weight of the submitted evidence to ensure compliance with the discretionary guidelines broadly outlined by the Secretary when establishing DACA.

They must also make determinations on individual requests based on non-prescriptive guidelines such as "public safety" and "national security." Finally, in DACA, USCIS exercises its discretion by otherwise denying a request where other factors not included in the guidelines would make the grant of deferred action inappropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of January of 2015.



Donald W. Neufeld

EXHIBIT A

Secretary

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

Homeland Security

June 15, 2012

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

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

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

FROM: Janet Napolitano
Secretary of Homeland Security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Janet Napolitano

EXHIBIT B

U.S. Citizenship and Immigration Services

Frequently Asked Questions

FAQs updated Oct. 23, 2014

General Information for All Requestors

- **What is Deferred Action for Childhood Arrivals?**
- **DACA Process**
- **Background Checks**
- **After USCIS Makes a Decision**

Initial Requests for DACA
Renewal of DACA
Travel
Criminal Convictions
Miscellaneous

I. General Information for All Requestors

A. What is Deferred Action for Childhood Arrivals?

Over the past several years, this Administration has undertaken an unprecedented effort to transform the immigration enforcement system into one that focuses on national security, public safety, border security and the integrity of the immigration system. As the Department of Homeland Security (DHS) continues to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety, DHS will exercise prosecutorial discretion as appropriate to ensure that enforcement resources are not expended on low priority cases, such as individuals who came to the United States as children and meet other key guidelines. Individuals who demonstrate that they meet the guidelines below may request consideration of deferred action for childhood arrivals (DACA) for a period of three years, subject to renewal for a period of three years, and may be eligible for employment authorization.

You may request consideration of DACA if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012, meaning that:
   - You never had a lawful immigration status on or before June 15, 2012, or
   - Any lawful immigration status or parole that you obtained prior to June 15, 2012, had expired as of June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Individuals can call U.S. Citizenship and Immigration Services (USCIS) at 1-800-375-5283 with questions or to request more information on DACA. Those with pending requests can also use a number of online self-help tools which include the ability to check case status and processing times, change your address, and send an inquiry about a case pending longer than posted processing times or non-delivery of a card or document.

Q1: What is deferred action?
A1: Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon **unlawful presence**, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer **lawful status** upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

Under existing regulations, an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." DHS can terminate or renew deferred action at any time, at the agency's discretion.

Q2: What is DACA?
A2: On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of three years, subject to renewal, and would then be eligible for work authorization.

Individuals who can demonstrate through verifiable documentation that they meet these guidelines will be considered for deferred action. Determinations will be made on a case-by-case basis under the DACA guidelines.

Q3: Is there any difference between "deferred action" and DACA under this process?
A3: DACA is one form of deferred action. The relief an individual receives under DACA is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion.

Q4: If my removal is deferred under the consideration of DACA, am I eligible for employment authorization?
A4: Yes. Under existing regulations, if your case is deferred, you may obtain employment authorization from USCIS provided you can demonstrate an economic necessity for employment.

Q5: If my case is deferred, am I in lawful status for the period of deferral?
A5: No. Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful status.

The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. However, although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time. **Individuals granted deferred action are not precluded by federal law from establishing domicile in the U.S.**

Apart from the immigration laws, "lawful presence," "lawful status" and similar terms are used in various other federal and state laws. For information on how those laws affect individuals who receive a favorable exercise of prosecutorial discretion under DACA, please contact the appropriate federal, state or local authorities.

Q6: Can I renew my period of deferred action and employment authorization under DACA?
A6: Yes. You may request consideration for a renewal of your DACA. Your request for a renewal will be considered on a case-by-case basis. If USCIS renews its exercise of discretion under DACA for your case, you will receive deferred action for another three years, and if you demonstrate an economic necessity for employment, you may receive employment authorization throughout that period.

Return to top.

B. DACA Process

Q7: How do I request consideration of DACA?
A7: To request consideration of DACA (either as an initial request or to request a renewal), you must submit Form I-821D, Consideration of Deferred Action for Childhood Arrivals to USCIS. Please visit www.uscis.gov/i-821d before you begin the process to make sure you are using the most current version of the form available. This form must be completed, properly signed and accompanied by a Form I-765, Application for Employment Authorization, and a Form I-765WS, Worksheet, establishing your economic need for employment. If you fail to submit a completed Form I-765 (along with the accompanying filing fees for that form, totaling $465), USCIS will not consider your request for deferred action. Please read the form instructions to ensure that you answer the appropriate questions (determined by whether you are submitting an initial or renewal request) and that you submit all the required documentation to support your initial request.

You must file your request for consideration of DACA at the USCIS Lockbox. You can find the mailing address and instructions at www.uscis.gov/i-821d. As of June 5, 2014, requestors must use the new version of the form. After your Form I-821D, Form I-765, and Form I-765 Worksheet have been received, USCIS will review them for completeness, including submission of the required fee, initial evidence and supporting documents (for initial filings).

If it is determined that the request is complete, USCIS will send you a receipt notice. USCIS will then send you an appointment notice to visit an Application Support Center (ASC) for biometric services, if an appointment is required. Please make sure you read and follow the directions in the notice. Failure to attend your biometrics appointment may delay processing of your request for consideration of deferred action, or may result in a denial of your request. You may also choose to receive an email and/or text message notifying you that your form has been accepted by completing a Form G-1145, E-Notification of Application/Petition Acceptance.

Each request for consideration of DACA will be reviewed on an individual, case-by-case basis. USCIS may request more information or evidence from you, or request that you appear at a USCIS office. USCIS will notify you of its determination in writing.

Note: All individuals who believe they meet the guidelines, including those in removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA from USCIS through this process. Individuals who are currently in immigration detention and believe they meet the guidelines may not request consideration of deferred action from USCIS but may identify themselves to their deportation officer or Jail Liaison. You may also contact the ICE Field Office Director. For more information visit ICE's website at www.ice.gov/daca.

Q8: Can I obtain a fee waiver or fee exemption for this process?
A8: There are no fee waivers available for employment authorization applications connected to DACA. There are very limited fee exemptions available. Requests for fee exemptions must be filed and favorably adjudicated before an individual files his/her request for consideration of DACA without a fee. In order to be considered for a fee exemption, you must submit a letter and supporting documentation to USCIS demonstrating that you meet one of the following conditions:

- You are under 18 years of age, have an income that is less than 150 percent of the U.S. poverty level, and are in foster care or otherwise lacking any parental or other familial support; or
- You are under 18 years of age and homeless; or
- You cannot care for yourself because you suffer from a serious, chronic disability and your income is less than 150 percent of the U.S. poverty level; or,
- You have, at the time of the request, accumulated **$10,000** or more in debt in the past 12 months as a result of unreimbursed medical expenses for yourself or an immediate family member, and your income is less than 150 percent of the U.S. poverty level.

You can find additional information on our Fee Exemption Guidance Web page. Your request must be submitted and decided before you submit a request for consideration of DACA without a fee. In order to be considered for a fee exemption, you must provide documentary evidence to demonstrate that you meet any of the above conditions at the time that you make the request. For evidence, USCIS will:

- Accept affidavits from community-based or religious organizations to establish a requestor's homelessness or lack of parental or other familial financial support.
- Accept copies of tax returns, bank statement, pay stubs, or other reliable evidence of income level. Evidence can also include an affidavit from the applicant or a responsible third party attesting that the applicant does not file tax returns, has no bank accounts, and/or has no income to prove income level.
- Accept copies of medical records, insurance records, bank statements, or other reliable evidence of unreimbursed medical expenses of at least $**10,000**.
- Address factual questions through Requests for Evidence (RFEs).

Q9: If individuals meet the guidelines for consideration of DACA and are encountered by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), will they be placed into removal proceedings?
A9: DACA is intended, in part, to allow CBP and ICE to focus on priority cases. Under the direction of the Secretary of Homeland Security, if an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed. If individuals believe that, in light of this policy, they should not have been apprehended or placed into removal proceedings, contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).

Q10: Does this process apply to me if I am currently in removal proceedings, have a final removal order, or have a voluntary departure order?
A10: This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those who have never been in removal proceedings as well as those in removal proceedings, with a final order, or with a voluntary departure order (as long as they are not in immigration detention).

Q11: If I am not in removal proceedings but believe I meet the guidelines for consideration of DACA, should I seek to place myself into removal proceedings through encounters with CBP or ICE?
A11: No. If you are not in removal proceedings but believe that you meet the guidelines, you should submit your DACA request to USCIS under the process outlined below.

Q12: Can I request consideration of DACA from USCIS if I am in immigration detention under the custody of ICE?
A12: No. If you are currently in immigration detention, you may not request consideration of DACA from USCIS. If you think you may meet the guidelines of this process, you should identify yourself to your deportation officer or Jail Liaison. You may also contact the ICE Field Office Director. For more information, visit ICE's website at www.ice.gov/daca.

Q13: If I am about to be removed by ICE and believe that I meet the guidelines for consideration of DACA, what steps should I take to seek review of my case before removal?
A13: If you believe you can demonstrate that you meet the guidelines and are about to be removed, you should immediately contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).

Q14: What should I do if I meet the guidelines of this process and have been issued an ICE detainer following an arrest by a state or local law enforcement officer?
A14: If you meet the guidelines and have been served a detainer, you should immediately contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).

Q15: If I accepted an offer of administrative closure under the case-by-case review process or my case was terminated as part of the case-by-case review process, can I be considered for deferred action under this process?
A15: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you have accepted an offer of administrative closure or termination under the case-by-case review process.

Q16: If I declined an offer of administrative closure under the case-by-case review process, can I be considered for deferred action under this process?
A16: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you declined an offer of administrative closure under the case-by-case review process.

Q17: If my case was reviewed as part of the case-by-case review process but I was not offered administrative closure, can I be considered for deferred action under this process?
A17: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you were not offered administrative closure following review of your case as part of the case-by-case review process.

Q18: Can I request consideration of DACA under this process if I am currently in a nonimmigrant status (e.g. F-1, E-2, H-4) or have Temporary Protected Status (TPS)?

A18: No. You can only request consideration of DACA under this process if you currently have no immigration status and were not in any lawful status on June 15, 2012.

Q19: Will the information I share in my request for consideration of DACA be used for immigration enforcement purposes?
A19: Information provided in this request is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). Individuals whose cases are deferred pursuant to DACA will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor. This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

Q20: If my case is referred to ICE for immigration enforcement purposes or if I receive an NTA, will information related to my family members and guardians also be referred to ICE for immigration enforcement purposes?
A20: If your case is referred to ICE for purposes of immigration enforcement or you receive an NTA, information related to your family members or guardians that is contained in your request will not be referred to ICE for purposes of immigration enforcement against family members or guardians. However, that information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.

This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Q21: Will USCIS verify documents or statements that I provide in support of a request for DACA?

A21: USCIS has the authority to verify documents, facts, and statements that are provided in support of requests for DACA. USCIS may contact education institutions, other government agencies, employers, or other entities in order to verify information.

Return to top.

C. Background Checks

Q22: Will USCIS conduct a background check when reviewing my request for consideration of DACA?
A22: Yes. You must undergo biographic and biometric background checks before USCIS will consider your DACA request.

Q23: What do background checks involve?
A23: Background checks involve checking biographic and biometric information provided by the individuals against a variety of databases maintained by DHS and other federal government agencies.

Q24: What steps will USCIS and ICE take if I engage in fraud through the new process?
A24: If you knowingly make a misrepresentation, or knowingly fail to disclose facts, in an effort to obtain DACA or work authorization through this process, you will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States.

Return to top.

D. After USCIS Makes a Decision

Q25: Can I appeal USCIS' determination?
A25: No. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of DACA.

You may request a review of your I-821D denial by contacting USCIS' Call Centers at 1-800-375-5283 to have a service request created if you believe that you actually did meet all of the DACA guidelines and you believe that your request was denied due to one of the following errors:

- Denied the request based on abandonment, when you actually responded to an RFE or NOID within the prescribed time;
- Mailed the RFE or NOID to the wrong address although you had submitted a Form AR-11, Change of Address, or changed your address online at www.uscis.gov before USCIS issued the RFE or NOID;
- Denied the request on the grounds that you did not come to the United States prior to your 16th birthday, but the evidence submitted **at the time of filing** shows that you did arrive before reaching that age;
- Denied the request on the grounds that you were under age 15 **at the time of filing** but not in removal proceedings, while the evidence submitted **at the time of filing** show that you indeed were in removal proceedings when the request was filed;
- Denied the request on the grounds that you were 31 or older as of June 15, 2012, but the evidence submitted **at the time of filing** shows that you were **under the age of** 31 as of June 15, 2012;
- Denied the request on the grounds that you had lawful status on June 15, 2012, but the evidence submitted **at the time of filing** shows that you indeed were in an **unlawful** immigration status on that date;
- Denied the request on the grounds that you were not physically present in the United States on June 15, 2012, and up through the date of filing, but the evidence submitted **at the time of filing** shows that you were, in fact, present;

- Denied the request due to your failure to appear at a USCIS ASC to have your biometrics collected, when you in fact either did appear at a USCIS ASC to have this done or requested prior to the scheduled date of your biometrics appointment to have the appointment rescheduled; or
- Denied the request because you did not pay the filing fees for Form I-765, Application for Employment Authorization, when you actually did pay these fees.

If you believe your request was denied due to any of these administrative errors, you may contact our National Customer Service Center at 1-800-375-5283 or 1-800-767-1833 (TDD for the hearing impaired). Customer service officers are available Monday – Friday from 8 a.m. – 6 p.m. in each U.S. time zone.

Q26: If USCIS does not exercise deferred action in my case, will I be placed in removal proceedings?
A26: If you have submitted a request for consideration of DACA and USCIS decides not to defer action in your case, USCIS will apply its policy guidance governing the referral of cases to ICE and the issuance of Notices to Appear (NTA). If your case does not involve a criminal offense, fraud, or a threat to national security or public safety, your case will not be referred to ICE for purposes of removal proceedings except where DHS determines there are exceptional circumstances. For more detailed information on the applicable NTA policy, visit www.uscis.gov/NTA. If after a review of the totality of circumstances USCIS determines to defer action in your case, USCIS will likewise exercise its discretion and will not issue you an NTA.

Q27: Can my deferred action under the DACA process be terminated before it expires?

A27: Yes.

DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion.

Return to top.

II. Initial Requests for DACA

Q28: What guidelines must I meet to be considered for deferred action for childhood arrivals (DACA)?
A28: Under the Secretary of Homeland Security's June 15, 2012 memorandum, in order to be considered for DACA, you must submit evidence, including supporting documents, showing that you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA. U.S. Citizenship and Immigration Services (USCIS) retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

Q29: How old must I be in order to be considered for deferred action under this process?
A29:

- If you have never been in removal proceedings, or your proceedings have been terminated before your request for consideration of DACA, you must be at least 15 years of age or older at the time of filing and meet the other guidelines.
- If you are in removal proceedings, have a final removal order, or have a voluntary departure order, and are not in immigration detention, you can request consideration of DACA even if you are under the age of 15 at the time of filing and meet the other guidelines.
- In all instances, you must have been under the age of 31 as of June 15, 2012, to be considered for DACA.

Q30: I first came to the United States before I turned 16 years old and have been continuously residing in the United States since at least June 15, 2007. Before I turned 16 years old, however, I left the United States for some period of time before returning and beginning my current period of continuous residence. May I be considered for deferred action under this process?
A30: Yes, but only if you established residence in the United States during the period before you turned 16 years old, as evidenced, for example, by records showing you attended school or worked in the United States during that time, or that you lived in the United States for multiple years during that time. In addition to establishing that you initially resided in the United States before you turned 16 years old, you must also have maintained continuous residence in the United States from June 15, 2007, until the present time to be considered for deferred action under this process.

Q31: To prove my continuous residence in the United States since June 15, 2007, must I provide evidence documenting my presence for every day, or every month, of that period?
A31: To meet the continuous residence guideline, you must submit documentation that shows you have been living in the United States from June 15, 2007, up until the time of your request. You should provide documentation to account for as much of the period

as reasonably possible, but there is no requirement that every day or month of that period be specifically accounted for through direct evidence.

It is helpful to USCIS if you can submit evidence of your residence during at least each year of the period. USCIS will review the documentation in its totality to determine whether it is more likely than not that you were continuously residing in the United States for the period since June 15, 2007. Gaps in the documentation as to certain periods may raise doubts as to your continued residence if, for example, the gaps are lengthy or the record otherwise indicates that you may have been outside the United States for a period of time that was not brief, casual or innocent.

If gaps in your documentation raise questions, USCIS may issue a Request for Evidence to allow you to submit additional documentation that supports your claimed continuous residence.

Affidavits may be submitted to explain a gap in the documentation demonstrating that you meet the five-year continuous residence requirement. If you submit affidavits related to the continuous residence requirement, you must submit two or more affidavits, sworn to or affirmed by people other than yourself who have direct personal knowledge of the events and circumstances during the period as to which there is a gap in the documentation. Affidavits may only be used to explain gaps in your continuous residence; they cannot be used as evidence that you meet the entire five-year continuous residence requirement.

Q32: Does "currently in school" refer to the date on which the request for consideration of deferred action is filed?
A32: To be considered "currently in school" under the guidelines, you must be enrolled in school on the date you submit a request for consideration of deferred action under this process.

Q33: Who is considered to be "currently in school" under the guidelines?
A33: To be considered "currently in school" under the guidelines, you must be enrolled in:

- a public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program that meets state requirements;
- an education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; or
- an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other state-authorized exam (e.g., HiSet or TASC) in the United States.

Such education, literacy, career training programs (including vocational training), or education programs assisting students in obtaining a regular high school diploma or its recognized equivalent under state law, or in passing a GED exam or other state-authorized exam in the United States, include, but are not limited to, programs funded, in whole or in part, by federal, state, county or municipal grants or administered by non-profit organizations. Programs funded by other sources may qualify if they are programs of demonstrated effectiveness.

In assessing whether such programs not funded in whole or in part by federal, state, county or municipal grants or administered by non-profit organizations are of demonstrated effectiveness, USCIS will consider the duration of the program's existence; the program's track record in assisting students in obtaining a regular high school diploma or its recognized equivalent, in passing a GED or other state-authorized exam (e.g., HiSet or TASC), or in placing students in postsecondary education, job training, or employment; and other indicators of the program's overall quality. For individuals seeking to demonstrate that they are "currently in school" through enrollment in such a program, the burden is on the requestor to show the program's demonstrated effectiveness.

Q34: How do I establish that I am currently in school?

A34: Documentation sufficient for you to demonstrate that you are currently in school may include, but is not limited to:

- evidence that you are enrolled in a public, private, or charter elementary school, junior high or middle school, high school or secondary school; alternative program, or homeschool program that meets state requirements; or
- evidence that you are enrolled in an education, literacy, or career training program (including vocational training) that:
  - has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; and
  - is funded, in whole or in part, by federal, state, county or municipal grants or is administered by non-profit organizations, or if funded by other sources, is a program of demonstrated effectiveness; or
- evidence that you are enrolled in an education program assisting students in obtaining a high school equivalency diploma or certificate recognized under state law (such as by passing a GED exam or other such state-authorized exam [for example, HiSet or TASC]), and that the program is funded in whole or in part by federal, state, county or municipal grants or is administered by non-profit organizations or if funded by other sources, is of demonstrated effectiveness.

Such evidence of enrollment may include: acceptance letters, school registration cards, letters from a school or program, transcripts, report cards, or progress reports which may show the name of the school or program, date of enrollment, and current educational or grade level, if relevant.

Q35: What documentation may be sufficient to demonstrate that I have graduated from high school?
A35: Documentation sufficient for you to demonstrate that you have graduated from high school may include, but is not limited to, a high school diploma from a public or private high school or secondary school, a certificate of completion, a certificate of attendance, or an alternate award from a public or private high school or secondary school, or a recognized equivalent of a high school diploma

under state law, or a GED certificate or certificate from passing another such state authorized exam (e.g., HiSet or TASC) in the United States.

Q36: What documentation may be sufficient to demonstrate that I have obtained a GED certificate or certificate from passing another such state authorized exam (e.g., HiSet or TASC)?
A36: Documentation may include, but is not limited to, evidence that you have passed a GED exam, or other state-authorized exam (e.g., HiSet or TASC), and, as a result, have received the recognized equivalent of a regular high school diploma under state law.

Q37: If I am enrolled in a literacy or career training program, can I meet the guidelines?
A37: Yes, in certain circumstances. You may meet the guidelines if you are enrolled in an education, literacy, or career training program that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement. Such programs include, but are not limited to, programs funded, in whole or in part, by federal, state, county or municipal grants or administered by non-profit organizations, or if funded by other sources, are programs of demonstrated effectiveness.

Q38: If I am enrolled in an English as a Second Language (ESL) program, can I meet the guidelines?
A38: Yes, in certain circumstances. Enrollment in an ESL program may be used to meet the guidelines if the ESL program is funded in whole or in part by federal, state, county or municipal grants, or administered by non-profit organizations, or if funded by other sources is a program of demonstrated effectiveness. You must submit direct documentary evidence that the program is funded in whole or part by federal, state, county or municipal grants, administered by a non-profit organization, or of demonstrated effectiveness.

Q39: Will USCIS consider evidence other than that listed in Chart #1 to show that I have met the education guidelines?
A39: No. Evidence not listed in Chart #1 will not be accepted to establish that you are currently in school, have graduated or obtained a certificate of completion from high school, or have obtained a GED or passed another state-authorized exam (e.g., HiSet or TASC). You must submit any of the documentary evidence listed in Chart #1 to show that you meet the education guidelines.

Q40: Will USCIS consider evidence other than that listed in Chart #1 to show that I have met certain initial guidelines?
A40: Evidence other than those documents listed in Chart #1 may be used to establish the following guidelines and factual showings if available documentary evidence is insufficient or lacking and shows that:

- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;
- You satisfy the continuous residence requirement, as long as you present direct evidence of your continued residence in the United States for a portion of the required period and the circumstantial evidence is used only to fill in gaps in the length of continuous residence demonstrated by the direct evidence; and
- Any travel outside the United States during the period of required continuous presence was brief, casual, and innocent.

However, USCIS will not accept evidence other than the documents listed in Chart #1 as proof of any of the following guidelines to demonstrate that you:

- Were under the age of 31 on June 15, 2012; and
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.

For example, even if you do not have documentary proof of your presence in the United States on June 15, 2012, you may still be able to satisfy the guideline. You may do so by submitting credible documentary evidence that you were present in the United States shortly before and shortly after June 15, 2012, which, under the facts presented, may give rise to an inference of your presence on June 15, 2012 as well. However, evidence other than that listed in Chart #1 will not be accepted to establish that you have graduated high school. You must submit the designated documentary evidence to satisfy that you meet this guideline.

Chart #1 provides examples of documentation you may submit to demonstrate you meet the initial guidelines for consideration of deferred action under this process. Please see the instructions of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, for additional details of acceptable documentation.

Chart #1 Examples of Documents to Submit to Demonstrate You Meet the Guidelines

Proof of identity	• Passport or national identity document from your country of origin • Birth certificate with photo identification • School or military ID with photo • Any U.S. government immigration or other document bearing your name and photo
Proof you came to U.S. before your 16th birthday	• Passport with admission stamp • Form I-94/I-95/I-94W • School records from the U.S. schools you have attended • Any Immigration and Naturalization Service or DHS document stating your date of entry (Form I-862, Notice to Appear) • Travel records • Hospital or medical records • Rent receipts or utility bills

Chart #1 Examples of Documents to Submit to Demonstrate You Meet the Guidelines

	• Employment records (pay stubs, W-2 Forms, etc.) • Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Birth certificates of children born in the U.S. • Dated bank transactions • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof of immigration status	• Form I-94/I-95/I-94W with authorized stay expiration date • Final order of exclusion, deportation, or removal issued as of June 15, 2012 • A charging document placing you into removal proceedings
Proof of presence in U.S. on June 15, 2012	• Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc.) • School records (letters, report cards, etc.) • Military records (Form DD-214 or NGB Form 22) • Official records from a religious entity confirming participation in a religious ceremony
Proof you continuously resided in U.S. since June 15, 2007	• Copies of money order receipts for money sent in or out of the country • Passport entries • Birth certificates of children born in the U.S. • Dated bank transactions • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof of your education status at the time of requesting consideration of DACA	• School records (letters, report cards, etc.) from the school that you are currently attending in the United States showing the name(s) of the school(s) and periods of school attendance and the current educational or grade level • U.S. high school diploma, certificate of completion, or other alternate award • High school equivalency diploma or certificate recognized under state law • Evidence that you passed a state-authorized exam, including the GED or other state-authorized exam (for example, HiSet or TASC) in the United States
Proof you are an honorably discharged veteran of the U.S. Armed Forces or the U.S. Coast Guard	• Form DD-214, Certificate of Release or Discharge from Active Duty • NGB Form 22, National Guard Report of Separation and Record of Service • Military personnel records • Military health records

Q41: May I file affidavits as proof that I meet the initial guidelines for consideration of DACA?
A41: Affidavits generally will not be sufficient on their own to demonstrate that you meet the guidelines for USCIS to consider you for DACA. However, affidavits may be used to support meeting the following guidelines only if the documentary evidence available to you is insufficient or lacking:

- Demonstrating that you meet the five year continuous residence requirement; and
- Establishing that departures during the required period of continuous residence were brief, casual and innocent.

If you submit affidavits related to the above criteria, you must submit two or more affidavits, sworn to or affirmed by people other than yourself, who have direct personal knowledge of the events and circumstances. Should USCIS determine that the affidavits are insufficient to overcome the unavailability or the lack of documentary evidence with respect to either of these guidelines, it will issue a Request for Evidence, indicating that further evidence must be submitted to demonstrate that you meet these guidelines.

USCIS will not accept affidavits as proof of satisfying the following guidelines:

- You are currently in school, have graduated or obtained a certificate of completion or other alternate award from high school, have obtained a high school equivalency diploma or certificate (such as by passing the GED exam or other state-authorized exam [for example, HiSet or TASC]), or are an honorably discharged veteran from the Coast Guard or Armed Forces of the United States;
- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;
- You were under the age of 31 on June 15, 2012; and
- Your criminal history, if applicable.

If the only evidence you submit to demonstrate you meet any of the above guidelines is an affidavit, USCIS will issue a Request for Evidence, indicating that you have not demonstrated that you meet these guidelines and that you must do so in order to demonstrate that you meet that guideline.

Q42: Will I be considered to be in unlawful status if I had an application for asylum or cancellation of removal pending before either USCIS or the Executive Office for Immigration Review (EOIR) on June 15, 2012?
A42: Yes. If you had an application for asylum or cancellation of removal, or similar relief, pending before either USCIS or EOIR as of June 15, 2012, but had no lawful status, you may request consideration of DACA.

Q43: I was admitted for "duration of status" or for a period of time that extended past June 14, 2012, but violated my immigration status (e.g., by engaging in unauthorized employment, failing to report to my employer, or failing to pursue a full course of study) before June 15, 2012. May I be considered for deferred action under this process?
A43: No, unless the Executive Office for Immigration Review terminated your status by issuing a final order of removal against you before June 15, 2012.

Q44: I was admitted for "duration of status" or for a period of time that extended past June 14, 2012 but "aged out" of my dependent nonimmigrant status as of June 15, 2012. May I be considered for deferred action under this process?

A44: Yes. For purposes of satisfying the "had no lawful status on June 15, 2012," guideline alone, if you were admitted for "duration of status" or for a period of time that extended past June 14, 2012 but "aged out" of your dependent nonimmigrant status, on or before June 15, 2012, (meaning you turned 21 years old on or before June 15, 2012), you may be considered for deferred action under this process.

Q45: I was admitted for "duration of status" but my status in SEVIS is listed as terminated on or before June 15, 2012. May I be considered for deferred action under this process?

A45: Yes. For the purposes of satisfying the ""had no lawful status on June 15, 2012," guideline alone, if your status as of June 15, 2012, is listed as "terminated" in SEVIS, you may be considered for deferred action under this process.

Q46: I am a Canadian citizen who was inspected by CBP but was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

A46: In general, a Canadian citizen who was admitted as a visitor for business or pleasure and not issued an I-94, Arrival/Departure Record, (also known as a "non-controlled" Canadian nonimmigrant) is lawfully admitted for a period of six months. For that reason, unless there is evidence, including verifiable evidence provided by the individual, that he or she was specifically advised that his or her admission would be for a different length of time, the Department of Homeland Security (DHS) will consider for DACA purposes only, that the alien was lawfully admitted for a period of six months. Therefore, if DHS is able to verify from its records that your last non-controlled entry occurred on or before Dec. 14, 2011, DHS will consider your nonimmigrant visitor status to have expired as of June 15, 2012 and you may be considered for deferred action under this process.

Q47: I used my Border Crossing Card (BCC) to obtain admission to the United States and was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

A47: Because the limitations on entry for a BCC holder vary based on location of admission and travel, DHS will assume that the BCC holder who was not provided an I-94 was admitted for the longest period legally possible—30 days—unless the individual can demonstrate, through verifiable evidence, that he or she was specifically advised that his or her admission would be for a different length of time. Accordingly, if DHS is able to verify from its records that your last admission was using a BCC, you were not issued an I-94 at the time of admission, and it occurred on or before May 14, 2012, DHS will consider your nonimmigrant visitor status to have expired as of June 15, 2012, and you may be considered for deferred action under this process.

Q48: Do I accrue unlawful presence if I have a pending initial request for consideration of DACA?
A48: You will continue to accrue unlawful presence while the request for consideration of DACA is pending unless you are under 18 years of age at the time of the request. If you are under 18 years of age at the time you submit your request, you will not accrue unlawful presence while the request is pending, even if you turn 18 while your request is pending with USCIS. If action on your case is deferred, you will not accrue unlawful presence during the period of deferred action. However, having action deferred on your case will not excuse previously accrued unlawful presence.

Return to top.

III. Renewal of DACA

Q49: When should I file my renewal request with U.S. Citizenship and Immigration Services (USCIS)?

A49: USCIS strongly encourages you to submit your Deferred Action for Childhood Arrivals (DACA) renewal request between 150 days and 120 days before the expiration date located on your current Form I-797 DACA approval notice and Employment Authorization Document (EAD). Filing during this window will minimize the possibility that your current period of DACA will expire before you receive a decision on your renewal request. If you have filed your renewal request at least 120 days before your deferred action expires and USCIS is delayed in processing your renewal request, USCIS may provide you with DACA and employment authorization for up to an additional 120 days.

USCIS' current goal is to process DACA renewal requests within 120 days. However, you may submit an inquiry about the status of your renewal request after it has been pending more than 105 days. To submit an inquiry online, please visit https://egov.uscis.gov/e-request.

Please Note: USCIS will not provide any such short-term deferred action and employment authorization when USCIS is delayed in reaching a final decision on your renewal request because, for example: 1) of factors within your control (such as failure to file the renewal request within the suggested timeframe or filing an incomplete renewal request); 2) additional time is needed to resolve issues with background or security checks in your case; and/or 3) your renewal submission contained evidence that you may not satisfy the DACA renewal guidelines and USCIS must send you a request for additional information or explanation.

Q50: Can I file a renewal request outside the recommended filing period of 150 days to 120 days before my current DACA expires?

A50: Yes, you may submit your renewal request outside of the recommended filing window.

However:

- If you file before the recommended filing window (meaning more than 150 days before your current period of DACA expires), USCIS may reject your submission and return it to you with instructions to resubmit your request within the recommended filing period.
- If you file after the recommended filing period (meaning less than 120 days before your current period of DACA expires), USCIS will not consider providing you with any additional short-term period of deferred action and employment authorization before reaching a final decision on your renewal request. This will be true even if your current period of DACA expires while USCIS is considering your renewal request.

If you file after your most recent DACA period expired, but within one year of its expiration, you may submit a request to renew your DACA. If you are filing beyond one year after your most recent period of DACA expired, you may still request DACA by submitting a new initial request.

Q51: How will USCIS evaluate my request for renewal of DACA:

A51: You may be considered for renewal of DACA if you met the guidelines for consideration of Initial DACA (see above) AND you:

1. Did not depart the United States on or after Aug. 15, 2012, without advance parole;

2. Have continuously resided in the United States since you submitted your most recent request for DACA that was approved up to the present time; and

3. Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA renewal. USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

Q512 Do I accrue unlawful presence if I am seeking renewal and my previous period of DACA expires before I receive a renewal of deferred action under DACA? Similarly, what would happen to my work authorization?

A52: Yes, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request.

Similarly, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will not be authorized to work in the United States regardless of your age at time of filing until and unless you receive a new employment authorization document from USCIS.

However, if you have filed your renewal request with USCIS approximately 120 days before your deferred action and EAD expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS may provide deferred action and employment authorization for a short period of time.

Q53. Do I need to provide additional documents when I request renewal of deferred action under DACA?

A53. No, unless you have *new* documents pertaining to removal proceedings or criminal history that you have not already submitted to USCIS in a previously approved DACA request. USCIS, however, reserves the authority to request at its discretion additional documents, information or statements relating to a DACA renewal request determination.

CAUTION: If you knowingly and willfully provide materially false information on Form I-821D, you will be committing a federal felony punishable by a fine, or imprisonment up to five years, or both, under 18 U.S.C. Section 1001. In addition, individuals may be placed into removal proceedings, face severe penalties provided by law, and be subject to criminal prosecution.

Q54. If I am no longer in school, can I still request to renew my DACA?
A54. Yes. Neither Form I-821D nor the instructions ask renewal requestors for information about continued school enrollment or graduation. The instructions for renewal requests specify that you may be considered for DACA renewal if you met the guidelines for consideration of initial DACA, including the educational guidelines and:

1. Did not depart the United States on or after August 15, 2012, without advance parole;
2. Dave continuously resided in the United States, up to the present time, since you submitted your most recent request for DACA that was approved; and

3. Have not been convicted of a felony, a significant misdemeanor or three or more misdemeanors, and are not a threat to national security or public safety.

Q55. If I initially received DACA and was under the age of 31 on June 15, 2012, but have since become 31 or older, can I still request a DACA renewal?
A55. Yes. You may request consideration for a renewal of DACA as long as you were under the age of 31 as of June 15, 2012.

IV. Travel

Q56: May I travel outside of the United States before I submit an initial Deferred Action for Childhood Arrivals (DACA) request or while my initial DACA request remains pending with the Department of Homeland Security (DHS)?
A56: Any unauthorized travel outside of the United States on or after Aug. 15, 2012, will interrupt your continuous residence and you will not be considered for deferred action under this process. Any travel outside of the United States that occurred on or after June 15, 2007, but before Aug. 15, 2012, will be assessed by U.S. Citizenship and Immigration Services (USCIS) to determine whether the travel qualifies as brief, casual and innocent. (See Chart #2.)

CAUTION: You should be aware that if you have been ordered deported or removed, and you then leave the United States, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.

Q57: If my case is deferred under DACA, will I be able to travel outside of the United States?
A57: Not automatically. If USCIS has decided to defer action in your case and you want to travel outside the United States, you must apply for advance parole by filing a Form I-131, Application for Travel Document and paying the applicable fee ($360). USCIS will determine whether your purpose for international travel is justifiable based on the circumstances you describe in your request. Generally, USCIS will only grant advance parole if your travel abroad will be in furtherance of:

- humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative;
- educational purposes, such as semester-abroad programs and academic research, or;
- employment purposes such as overseas assignments, interviews, conferences or, training, or meetings with clients overseas.

Travel for vacation is not a valid basis for advance parole.

You may not apply for advance parole unless and until USCIS defers action in your case under the consideration of DACA. You cannot apply for advance parole at the same time as you submit your request for consideration of DACA. All advance parole requests will be considered on a case-by-case basis.

If USCIS has deferred action in your case under the DACA process after you have been ordered deported or removed, you may still request advance parole if you meet the guidelines for advance parole described above.

CAUTION: However, for those individuals who have been ordered deported or removed, before you actually leave the United States, you should seek to reopen your case before the Executive Office for Immigration Review (EOIR) and obtain administrative closure or termination of your removal proceeding. Even after you have asked EOIR to reopen your case, you should not leave the United States until after EOIR has granted your request. If you depart after being ordered deported or removed, and your removal proceeding has not been reopened and administratively closed or terminated, your departure may result in your being considered deported or removed, with potentially serious future immigration consequences. If you have any questions about this process, you may contact U.S. Immigration and Customs Enforcement (ICE) through the local ICE Office of the Chief Counsel with jurisdiction over your case.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.

Q58: Do brief departures from the United States interrupt the continuous residence requirement?
A58: A brief, casual and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States, your absence will be considered brief, casual and innocent if it was on or after June 15, 2007, and before Aug. 15, 2012, and:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;
2. The absence was not because of an order of exclusion, deportation or removal;
3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation or removal proceedings; and
4. The purpose of the absence and/or your actions while outside the United States were not contrary to law.

Once USCIS has approved your request for DACA, you may file Form I-131, Application for Travel Document, to request advance parole to travel outside of the United States.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.

Travel Guidelines (Chart #2)

Travel Dates	Type of Travel	Does It Affect Continuous Residence

Travel Dates	Type of Travel	Does It Affect Continuous Residence
On or after June 15, 2007, but before Aug. 15, 2012	Brief, casual and innocent	No
	For an extended time Because of an order of exclusion, deportation, voluntary departure, or removal To participate in criminal activity	Yes
On or after Aug. 15, 2012, and before you have requested deferred action	Any	Yes. You cannot apply for advance parole unless and until DHS has determined whether to defer action in your case and you cannot travel until you receive advance parole. In addition, if you have previously been ordered deported and removed and you depart the United States without taking additional steps to address your removal proceedings, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.
On or after Aug. 15, 2012, and after you have requested deferred action	Any	
On or after Aug. 15, 2012 and after receiving DACA	Any	It depends. If you travel after receiving advance parole, the travel will not interrupt your continuous residence. However, if you travel *without* receiving advance parole, the travel *will* interrupt your continuous residence.

Q59: May I file a request for advance parole concurrently with my DACA package?

A59: Concurrent filing of advance parole is not an option at this time. DHS is, however, reviewing its policy on concurrent filing of advance parole with a DACA request. In addition, DHS is also reviewing eligibility criteria for advance parole. If any changes to this policy are made, USCIS will update this FAQ and inform the public accordingly.

Return to top.

V. Criminal Convictions

Q60: If I have a conviction for a felony offense, a significant misdemeanor offense, or multiple misdemeanors, can I receive an exercise of prosecutorial discretion under this new process?
A60: No. If you have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, you will not be considered for Deferred Action for Childhood Arrivals (DACA) except where the Department of Homeland Security (DHS) determines there are exceptional circumstances.

Q61: What offenses qualify as a felony?
A61: A felony is a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year.

Q62: What offenses constitute a significant misdemeanor?
A62: For the purposes of this process, a significant misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or,
2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by U.S. Immigration and Customs Enforcement (ICE). Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion. DHS retains the discretion to determine that an individual does not warrant deferred action on the basis of a single criminal offense for which the individual was sentenced to time in custody of 90 days or less.

Q63: What offenses constitute a non-significant misdemeanor?
A63: For purposes of this process, a non-significant misdemeanor is any misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Is not an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; and
2. Is one for which the individual was sentenced to time in custody of 90 days or less. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE.

Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion.

Q64: If I have a minor traffic offense, such as driving without a license, will it be considered a non-significant misdemeanor that counts towards the "three or more non-significant misdemeanors" making me unable to receive consideration for an exercise of prosecutorial discretion under this new process?
A64: A minor traffic offense will not be considered a misdemeanor for purposes of this process. However, your entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, you warrant an exercise of prosecutorial discretion.

It is important to emphasize that driving under the influence is a significant misdemeanor regardless of the sentence imposed.

Q65: What qualifies as a national security or public safety threat?
A65: If the background check or other information uncovered during the review of your request for deferred action indicates that your presence in the United States threatens public safety or national security, you will not be able to receive consideration for an exercise of prosecutorial discretion except where DHS determines there are exceptional circumstances. Indicators that you pose such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.

Q66: Will offenses criminalized as felonies or misdemeanors by state immigration laws be considered felonies or misdemeanors for purpose of this process?
A66: No. Immigration-related offenses characterized as felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors for the purpose of considering a request for consideration of deferred action under this process.

Q67: Will DHS consider my expunged or juvenile conviction as an offense making me unable to receive an exercise of prosecutorial discretion?
A67: Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. If you were a juvenile, but tried and convicted as an adult, you will be treated as an adult for purposes of the DACA process.

Return to top.

VI. Miscellaneous

Q68: Does this Administration remain committed to comprehensive immigration reform?
A68: Yes. The Administration has consistently pressed for passage of comprehensive immigration reform, including the DREAM Act, because the President believes these steps are critical to building a 21st century immigration system that meets our nation's economic and security needs.

Q69: Is passage of the DREAM Act still necessary in light of the new process?
A69: Yes. The Secretary of Homeland Security's June 15, 2012, memorandum allowing certain people to request consideration for deferred action is one in a series of steps that DHS has taken to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety. Deferred Action for Childhood Arrivals (DACA) is an exercise of prosecutorial discretion and does not provide lawful status or a pathway to citizenship. As the President has stated, individuals who would qualify for the DREAM Act deserve certainty about their status. Only the Congress, acting through its legislative authority, can confer the certainty that comes with a pathway to permanent lawful status.

Q70: Does deferred action provide me with a path to permanent resident status or citizenship?
A70: No. Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.

Q71: Can I be considered for deferred action even if I do not meet the guidelines to be considered for DACA?
A71: This process is only for individuals who meet the specific guidelines for DACA. Other individuals may, on a case-by-case basis, request deferred action from U.S. Citizenship and Immigration Services (USCIS) or U.S. Immigration and Customs Enforcement (ICE) in certain circumstances, consistent with longstanding practice.

Q72: How will ICE and USCIS handle cases involving individuals who do not satisfy the guidelines of this process but believe they may warrant an exercise of prosecutorial discretion under the June 2011 Prosecutorial Discretion Memoranda?
A72: If USCIS determines that you do not satisfy the guidelines or otherwise determines you do not warrant an exercise of prosecutorial discretion, then it will decline to defer action in your case. If you are currently in removal proceedings, have a final order, or have a voluntary departure order, you may then request ICE consider whether to exercise prosecutorial discretion.

Q73: How should I fill out question 9 on Form I-765, Application for Employment Authorization?
A73. When you are filing a Form I-765 as part of a DACA request, question 9 is asking you to list those Social Security numbers that were officially issued to you by the Social Security Administration.

Q74: Will there be supervisory review of decisions by USCIS under this process?
A74: Yes. USCIS has implemented a successful supervisory review process to ensure a consistent process for considering requests for DACA.

Q72: Will USCIS personnel responsible for reviewing requests for DACA receive special training?
A72: Yes. USCIS personnel responsible for considering requests for consideration of DACA have received special training.

Q75: Must attorneys and accredited representatives who provide pro bono services to deferred action requestors at group assistance events file a Form G-28 with USCIS?

A75: Under 8 C.F.R. §§ 292.3 and 1003.102, practitioners are required to file a Notice of Entry of Appearance as Attorney or Accredited Representative when they engage in practice in immigration matters before DHS, either in person or through the preparation or filing of any brief, application, petition, or other document. Under these rules, a practitioner who consistently violates the requirement to file a Form G-28 may be subject to disciplinary sanctions; however on Feb. 28, 2011, USCIS issued a statement indicating that it does not intend to initiate disciplinary proceedings against practitioners (attorneys and accredited representatives) based solely on the failure to submit a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) in relation to pro bono services provided at group assistance events. DHS is in the process of issuing a final rule at which time this matter will be reevaluated.

Q76: When must an individual sign a Form I-821D as a preparer?
A77: Anytime someone other than the requestor prepares or helps fill out the Form I-821D, that individual must complete Part 5 of the form.

Q78: If I provide my employee with information regarding his or her employment to support a request for consideration of DACA, will that information be used for immigration enforcement purposes against me and/or my company?
A78: You may, as you determine appropriate, provide individuals requesting DACA with documentation which verifies their employment. This information will not be shared with ICE for civil immigration enforcement purposes under section 274A of the Immigration and Nationality Act (relating to unlawful employment) unless there is evidence of egregious violations of criminal statutes or widespread abuses.

Q79: Can I request consideration for deferred action under this process if I live in the Commonwealth of the Northern Mariana Islands (CNMI)?
A79: Yes, in certain circumstances. The CNMI is part of the United States for immigration purposes and is not excluded from this process. However, because of the specific guidelines for consideration of DACA, individuals who have been residents of the CNMI are in most cases unlikely to qualify for the program. You must, among other things, have come to the United States before your 16th birthday and have resided continuously in the United States since June 15, 2007.

Under the Consolidated Natural Resources Act of 2008, the CNMI became part of the United States for purposes of immigration law only on Nov. 28, 2009. Therefore entry into, or residence in, the CNMI before that date is not entry into, or residence in, the United States for purposes of the DACA process.

USCIS has used parole authority in a variety of situations in the CNMI to address particular humanitarian needs on a case-by-case basis since Nov. 28, 2009. If you live in the CNMI and believe that you meet the guidelines for consideration of deferred action under this process, except that your entry and/or residence to the CNMI took place entirely or in part before Nov. 28, 2009, USCIS is willing to consider your situation on a case-by-case basis for a grant of parole. If this situation applies to you, you should make an appointment through INFOPASS with the USCIS ASC in Saipan to discuss your case with an immigration officer.

Q80: Someone told me if I pay them a fee, they can expedite my DACA request. Is this true?
A80: No. There is no expedited processing for deferred action. Dishonest practitioners may promise to provide you with faster services if you pay them a fee. These people are trying to scam you and take your money. Visit our Avoid Scams page to learn how you can protect yourself from immigration scams.

Make sure you seek information about requests for consideration of DACA from official government sources such as USCIS or the DHS. If you are seeking legal advice, visit our Find Legal Services page to learn how to choose a licensed attorney or accredited representative.

Q81: Am I required to register with the Selective Service?

A81: Most male persons residing in the U.S., who are ages 18 through 25, are required to register with Selective Service. Please see link for more information. [Selective Service].

Return to top.

Last Reviewed/Updated: 12/04/2014

EXHIBIT C

Request for Appearance for Initial Interview			NOTICE DATE OCTOBER 1, 2014
CASE TYPE Form I-821D, Consideration of Deferred Action for Childhood Arrivals			USCIS A# [redacted]
APPLICATION NUMBER [redacted]		PRIORITY DATE	PAGE #

PETITIONER NAME AND ADDRESS

[redacted]

You are hereby notified to appear for an interview appointment, as scheduled below, related to your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and Form I-765, Application for Employment Authorization. **Failure to appear for this interview and/or failure to bring the below listed items may result in the denial of your Form I-821D and Form I-765 (Title 8 Code of Federal Regulations 103.2(b)(13)).**

If you are over 18 years of age, you must come to the interview with identification bearing your name and photograph, such as a driver's license, state-issued identification card or passport, in order to enter the building and to verify your identity at the time of the interview. Please be on time, but do not arrive more than 45 minutes before your scheduled interview to avoid overcrowding.

You must bring the following items with you: (Please use this as a checklist to prepare for your interview)

- This interview notice and your identification.
- All documentation establishing you meet the guidelines for deferred action for childhood arrivals. An individual may be considered for deferred action for childhood arrivals if you:
  - Were under the age of 31 as of June 15, 2012;
  - Came to the United States before reaching your 16th birthday;
  - Have continuously resided in the United States since June 15, 2007, up to the present time;
  - Were present in the United States on June 15, 2012, and at the time of making your request;
  - Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
  - Are currently in school at the time of filing, have graduated or obtained a certificate of completion from a high school, have obtained a general educational development certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and,
  - Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.
- If you have ever been arrested, please bring a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law. If you are unable to provide such records because the case was expunged or sealed, please bring evidence demonstrating that such records are unavailable under the law of the particular jurisdiction.

For additional information on documentary evidence needed under the guidelines to establish eligibility, please visit www.uscis.gov/childhoodarrivals

You must appear for this interview. If an emergency, such as your own illness or a close relative's hospitalization, prevents you from appearing, call the National Customer Service Center at 1-800-375-5283 (Hearing Impaired TDD Service is 1-800-767-1833) as soon as possible. Please be advised that rescheduling this appointment will delay the processing of your Form I821D and Form I-765.

If you have any questions or comments regarding this notice or the status of your case, please contact our office at the below address or customer service number. You will be notified separately about any other cases you may have filed.

PLEASE COME TO:
U.S. Citizenship and Immigration Services
1177 Fulton Mall
Fresno, CA 93721

ON: OCTOBER 22, 2014 AT: 9:00 A.M.
ISO: [redacted]

U.S. Department of Homeland Security
790 Sandhill Road
Reno, NV 89521

U.S. Citizenship and Immigration Services

[redacted]

File: [redacted]
Date: October 15, 2014

cc: [redacted], Attorney at Law

OFFICE LOCATION	U.S. Department of Homeland Security USCIS 790 Sandhill Road Reno, NV 89521
DATE/TIME OF APPOINTMENT	**Oct 21, 2014 @ 8:00 a.m.**
REASON FOR APPOINTMENT	**I-821 Deferred Action for Childhood Arrivals (DACA)**

You must bring picture ID with you (i.e., passport, valid driver license, military ID, etc.). Additionally, bring this letter as proof of your appointment and any previously requested documents.

Failure to attend this interview will result in the denial of any pending petitions or applications. (8CFR 103.2(9))

Sincerely,

Walter L. Haith
Field Office Director
sj

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Boise Field Office
1185 S. Vinnell Way
Boise Idaho 83709

U.S. Citizenship and Immigration Services

HAND DELIVERED AT INTERVIEW

[redacted]

Date: September 10, 2014

Interviewing Officer: [redacted]

Form Type: I-821D

NOTICE OF INTERVIEW RESULTS

You have just completed your interview for, Consideration of Deferred Action for Childhood Arrivals (Form I-821D). USCIS is unable to provide a final decision to you at this time because your request requires additional review. Please see below for further explanation.

REASON FOR CONTINUANCE

Your case is being transferred to the Nebraska Service Center for additional file review and processing of Form I-765, Application for Employment Authorization. Should further information or documents be required to complete the processing of Form I-821D or Form I-765, the Nebraska Service Center will issue you a notice in the mail within 30 days.

Please allow for no less than 120 days before making a status inquiry on your case. You may make a status inquiry through the national customer service line at 1(800)375-5283 or check your case status online at www.uscis.gov. If you change your address while Form I-821D remains pending, you must file Form AR-11 and contact the national customer service line to ensure that your file and all systems are updated with your current address. Form AR-11 and its instructions may be obtained at http://www.uscis.gov/ar-11.

Sincerely,

Field Office Director

cc: [redacted]

U.S. Department of Homeland Security
B[redacted]ield Office
11[redacted] Vinnell Way
Boise, ID 83709

U.S. Citizenship and Immigration Services

Refer To File Number: A[redacted]

Date: August 19, 2014

[redacted]

Dear [redacted],

Our office has received your I-821D Consideration of Defered Action for Childhood Arrivals. Please see the attached Form I-797C, Notice of Action.

Best Regards,

[redacted]
ISO, USCIS
Boise Field Office

Cc: [redacted]

Form I-797C, Notice of Action

Request for Appearance for Initial Interview
Case Type: Form I-821D, Consideration of Deferred Action for Childhood Arrivals
You are hereby notified to appear for an interview appointment, as scheduled below, related to your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and Form I-765, Application for Employment Authorization. Failure to appear for this interview and/or failure to bring the below listed items may result in the denial of your Form I-821D and Form I-765 (Title 8 Code of Federal Regulations 103.2(b)(13)).
If you are over 18 years of age, you must come to the interview with identification bearing your name and photograph, such as a driver's license, state-issued identification card or passport, in order to enter the building and to verify your identity at the time of the interview. Please be on time, but do not arrive more than 45 minutes before your scheduled interview to avoid overcrowding.

You must bring the following items with you: (Please use this as a checklist to prepare for your interview)
☐ This interview notice and your identification.
☐ All documentation establishing you meet the guidelines for deferred action for childhood arrivals. An individual may be considered for deferred action for childhood arrivals if you:
o Were under the age of 31 as of June 15, 2012;
o Came to the United States before reaching your 16th birthday;
o Have continuously resided in the United States since June 15, 2007, up to the present time;
o Were present in the United States on June 15, 2012, and at the time of making your request;
o Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
o Are currently in school at the time of filing, have graduated or obtained a certificate of completion from a high school, have obtained a general educational development certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and,
o Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.
☐ If you have ever been arrested, please bring a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law. If you are unable to provide such records because the case was expunged or sealed, please bring evidence demonstrating that such records are unavailable under the law of the particular jurisdiction.
For additional information on documentary evidence needed under the guidelines to establish eligibility, please visit www.uscis.gov/childhoodarrivals

You must appear for this interview. If an emergency, such as your own illness or a close relative's hospitalization, prevents you from appearing, call the National Customer Service Center at 1-800-375-5283 (Hearing Impaired TDD Service is 1-800-767-1833) as soon as possible. Please be advised that rescheduling this appointment will delay the processing of your Form I-821D and Form I-765.
Please come to: U.S. Citizenship and Immigration Service 1185 S Vinnell Way, Boise, Idaho 83709.

On: September 10, 2014

At: 9:00am

EXHIBIT D

[redacted]

[redacted]

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

September 26, 2014

[redacted]

RE: I-821 D, Deferred Action for Childhood Arrivals

[redacted]

[redacted]

REQUEST FOR EVIDENCE

The documentation submitted is not sufficient to warrant favorable consideration of your request.

See Letter for Details
Your response must be received in this office by December 19, 2014

Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record; or
3. Withdraw the request. (Please note that if the request is withdrawn, the filing fee cannot be refunded.)

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based on the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied. If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

If you submit a document in any language other than English, it must be accompanied by a full **complete** English translation. The translator must certify the translation is accurate and he or she is competent to translate. Note: You must submit the requested foreign language document along with the translation.

For deferred action for childhood arrivals, **affidavits or sworn statements generally are not satisfactory evidence.** Affidavits will only be considered as evidence in two situations: 1. When there is a shortcoming in documentation to explain brief, casual, and innocent departures during the period of continuous residence in the United States; and 2. To explain a minor gap in documentation showing you meet the continuous residence requirement. If you submit affidavits for these two reasons, you should provide two or more affidavits, sworn to or affirmed by people other than yourself who have direct, personal knowledge of the information.

NOV 26 2014 -D [redacted] 404

GRADUATED FROM SCHOOL

The evidence you submitted with your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, to show that you graduated or received a certificate of completion from a U.S. High School, public or private college, or university or community college, or have obtained a General Educational Development (GED) Certificate in the United States or equivalent under State law is insufficient. You did not submit a copy of your diploma showing you have graduated. You may still submit evidence, which may include, but is not limited to, copies of:

- A high school diploma from a public or private high school or secondary school;
- A recognized equivalent of a high school diploma under state law, including a General Educational Development (GED) certificate, a certificate of completion, or a certificate of attendance;
- A transcript that identifies the date of graduation or program completion;
- An enrollment history that shows the date of graduation or program completion;
- A degree from a public or private college or university or community college; or
- An alternate award from a public or private high school or secondary school.

Documentation sufficient to demonstrate that you obtained a GED includes, but is not limited to, evidence you passed a GED exam, or other comparable State-authorized exam, and, as a result, you received the recognized equivalent of a regular high school diploma under State law.

SUBMIT JUDGMENT AND CONVICTION DOCUMENTS

A background check has been conducted based upon the fingerprints you provided at the Application Support Center. Your criminal history check has revealed that you were arrested on [redacted], in Wenatchee, WA and charged with Driving Under the Influence.

At this time you must provide a **final** certified court disposition, arrest record, charging document, sentencing record, etc. for each arrest, unless disclosure is prohibited under state law within the United States. If you are unable to provide such records because your case was expunged or sealed, you must provide information about your arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. The charge and disposition of each arrest must be specifically identified (not just numeric citations or codes). Additionally, if you were convicted, you may submit a copy of the pertinent statute, sentencing guide, or statement from the court clerk or police department identifying the statute under which you were convicted and the sentence you received.

If you fail to submit such evidence, USCIS may deny your request for consideration of deferred action for childhood arrivals.

PLACE THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL. PLEASE USE THE ENCLOSED ENVELOPE TO MAIL THE ADDITIONAL EVIDENCE REQUESTED BACK TO THIS OFFICE.

Sincerely,

Mark J. Hazuda
Director
Officer: [redacted]

[redacted]

June 27, 2014

COPY

JUL 31 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

[redacted]

[redacted]

RE: I-821 D, Deferred Action for Childhood Arrivals

[redacted]

REQUEST FOR EVIDENCE

The documentation submitted is not sufficient to warrant favorable consideration of your request.

See Letter for Details

Your response must be received in this office by September 19, 2014

Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record; or
3. Withdraw the request. (Please note that if the request is withdrawn, the filing fee cannot be refunded.)

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based on the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied. If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

If you submit a document in any language other than English, it must be accompanied by a full **complete** English translation. The translator must certify the translation is accurate and he or she is competent to translate. Note: You must submit the requested foreign language document along with the translation.

For deferred action for childhood arrivals, **affidavits or sworn statements generally are not satisfactory evidence.** Affidavits will only be considered as evidence in two situations: 1. When there is a shortcoming in documentation to explain brief, casual, and innocent departures during the period of continuous residence in the United States; and 2. To explain a minor gap in documentation showing you meet the continuous residence requirement. If you submit affidavits for these two reasons, you should provide two or more affidavits, sworn to or affirmed by people other than yourself who have direct, personal knowledge of the information.

AUG 25 2014 [illegible] 2404

CONTINUOUS RESIDENCE

The evidence you submitted with your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, to establish that you have continuously resided in the United States during the 5-year period immediately before June 15, 2012, and up to the time of filing is insufficient because no evidence was submitted for 2014.

a. Employment records (e.g., pay stubs, W-2 Forms, certification of the filing of Federal income tax returns, State verification of the filing of state income tax returns, letters from employer(s), or, if you are self employed, letters from banks and other firms with whom you have done business);

NOTE: In all of these documents, your name and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers must be signed by the employer and must include the employer's contact information.

Such letters must include: **(1)** your address(es) at the time of employment; **(2)** the exact period(s) of employment; **(3)** period(s) of layoff; and **(4)** duties with the company.

b. Rent receipts, utility bills (gas, electric, phone, etc.), receipts or letters from companies showing the dates during which you received service;

c. School records (transcripts, letters, report cards, etc.) from the schools that you have attended in the United States, showing the name(s) of the schools and periods of school attendance;

d. Military records (e.g., Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Form 22, National Guard Report of Separation and Record of Service; military personnel records; or military health records);

e. Hospital or medical records concerning treatment or hospitalization, showing the name of the medical facility or physician and the date(s) of the treatment or hospitalization;

f. Official records from a religious entity in the United States confirming your participation in a religious ceremony, rite, or passage (e.g., baptism, first communion, wedding, etc.);

g. Money order receipts for money sent into or out of the country; passport entries; birth certificates of children born in the United States; dated bank transactions; correspondence between you and another person or organization; U.S. Social Security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, rental agreements, contracts to which you have been a party; tax receipts; insurance policies; receipts; postmarked letters; or

h. Any other relevant document.

ANSWERED "NO" TO QUESTIONS 1 AND 2 IN PART 3– USCIS FOUND CLEAR CHARGES OR OTHER DEROGATORY INFORMATION, SUBMIT JUDGMENT AND CONVICTION DOCUMENTS

A background check has been conducted based upon the fingerprints you provided at the Application

Support Center. Your background check revealed that you were arrested on [redacted], in Albuquerque, NM and charged with POSSESSION OF A CONTROLLED SUBSTANCE.

At this time you must provide a certified court disposition, arrest record, charging document, sentencing record, etc. for each arrest, unless disclosure is prohibited under state law within the United States. If you are unable to provide such records because your case was expunged or sealed, you must provide information about your arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. The charge and disposition of each arrest must be specifically identified (not just numeric citations or codes). Additionally, if you were convicted, you may submit a copy of the pertinent statute, sentencing guide, or statement from the court clerk or police department identifying the statute under which you were convicted and the sentence you received.

If you fail to submit such evidence, USCIS may deny your request for consideration of deferred action for childhood arrivals.

PLACE THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL. PLEASE USE THE ENCLOSED ENVELOPE TO MAIL THE ADDITIONAL EVIDENCE REQUESTED BACK TO THIS OFFICE.

Sincerely,

Mark J. Hazuda
Director
Officer: [redacted]

[redacted]

August 13, 2014

[redacted]

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

[redacted]

RE: [redacted]
I-821 D, Deferred Action for Childhood Arrivals

REQUEST FOR EVIDENCE

The documentation submitted is not sufficient to warrant favorable consideration of your request.

See Letter for Details
Your response must be received in this office by November 5, 2014

Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record; or
3. Withdraw the request. (Please note that if the request is withdrawn, the filing fee cannot be refunded.)

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based on the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied. If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

If you submit a document in any language other than English, it must be accompanied by a full **complete** English translation. The translator must certify the translation is accurate and he or she is competent to translate. Note: You must submit the requested foreign language document along with the translation.

For deferred action for childhood arrivals, **affidavits or sworn statements generally are not satisfactory evidence.** Affidavits will only be considered as evidence in two situations: 1. When there is a shortcoming in documentation to explain brief, casual, and innocent departures during the period of continuous residence in the United States; and 2. To explain a minor gap in documentation showing you meet the continuous residence requirement. If you submit affidavits for these two reasons, you should provide two or more affidavits, sworn to or affirmed by people other than yourself who have direct, personal knowledge of the information.

IDENTITY

No evidence was submitted with your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, to prove your identity. You may still submit evidence, which may include, but is not limited to, copies of:

- Passport;
- Birth certificate accompanied by photo identification;
- Any national identity documents from your country of origin bearing your photo and/or fingerprint;
- Any U.S.-government immigration or other document bearing your name and photograph (e.g., Employment Authorization Documents (EADs), expired visas, driver's licenses, non-driver cards, etc.);
- Any school-issued form of identification with photo;
- Military identification document with photo;
- State issued photo ID showing date of birth; or
- Any other document that you believe is relevant.

Expired documents are acceptable.

CONTINUOUS RESIDENCE

The evidence you submitted with your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, to establish that you have continuously resided in the United States during the 5-year period immediately before June 15, 2012, and up to the time of filing is insufficient. You have submitted sufficient evidence to document your residency in the United States for 2007, 2008, 2010 and 2013. You submitted a account statements as evidence of your residence in the United States for the years 2009, 2011, 2012. However, these documents are insufficient as evidence of your residency for those years. Additionally, no evidence was submitted for 2014. You may still submit evidence, which may include, but is not limited to, copies of:

a. Employment records (e.g., pay stubs, W-2 Forms, certification of the filing of Federal income tax returns, State verification of the filing of state income tax returns, letters from employer(s), or, if you are self employed, letters from banks and other firms with whom you have done business);

   NOTE: In all of these documents, your name and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers must be signed by the employer and must include the employer's contact information.

   Such letters must include: **(1)** your address(es) at the time of employment; **(2)** the exact period(s) of employment; **(3)** period(s) of layoff; and **(4)** duties with the company.

b. Rent receipts, utility bills (gas, electric, phone, etc.), receipts or letters from companies showing the dates during which you received service;

c. School records (transcripts, letters, report cards, etc.) from the schools that you have attended in the United States, showing the name(s) of the schools and periods of school attendance;

d. Military records (e.g., Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Form 22, National Guard Report of Separation and Record of Service; military personnel records; or military health records);

e. Hospital or medical records concerning treatment or hospitalization, showing the name of the medical facility or physician and the date(s) of the treatment or hospitalization;

f. Official records from a religious entity in the United States confirming your participation in a religious ceremony, rite, or passage (e.g., baptism, first communion, wedding, etc.);

g. Money order receipts for money sent into or out of the country; passport entries; birth certificates of children born in the United States; dated bank transactions; correspondence between you and another person or organization; U.S. Social Security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, rental agreements, contracts to which you have been a party; tax receipts; insurance policies; receipts; postmarked letters; or

h. Any other relevant document.

PROOF OF PRESENCE IN THE UNITED STATES ON JUNE 15, 2012

The evidence you submitted with your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, to show that you were present in the United States on June 15, 2012 is insufficient. You submitted copies of account statements for 2012. However, the account statements you submitted for 2012 do not contain sufficient information to verify that you were physically present in the U.S. on June 15, You may still submit evidence, which may include, but is not limited to, copies of:

a. Employment records (e.g., pay stubs, W-2 Forms, certification of the filing of Federal income tax returns, State verification of the filing of state income tax returns, letters from employer(s), or, if you are self-employed, letters from banks and other firms with whom you have done business).

NOTE: In all of these documents, your name and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers must be signed by the employer and must include the employer's contact information.

Such letters must include: **(1)** your address(es) at the time of employment; **(2)** the exact period(s) of employment; **(3)** period(s) of layoff; and **(4)** duties with the company.

b. Rent receipts, utility bills (gas, electric, phone, etc.), receipts or letters from companies showing the dates during which you received service.

c. School records (transcripts, letters, report cards, etc.) from the schools that you have attended in the United States, showing the name(s) of the schools and periods of school attendance.

d. Military records (e.g., Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Form 22, National Guard Report of Separation and Record of Service; military personnel records; or military health records).

e. Hospital or medical records concerning treatment or hospitalization, showing the name of the

medical facility or physician and the date(s) of the treatment or hospitalization.

f. Official records from a religious entity in the United States confirming your participation in a religious ceremony, rite, or passage (e.g., baptism, first communion, wedding, etc.).

g. Money order receipts for money sent into or out of the country; passport entries; birth certificates of children born in the United States; dated bank transactions; correspondence between you and another person or organization; U.S. Social Security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, contracts to which you have been a party; tax receipts; insurance policies; receipts; postmarked letters; or

h. Any other relevant document.

SUBMIT JUDGMENT AND CONVICTION DOCUMENTS

A background check has been conducted based upon the fingerprints you provided at the Application Support Center. Your criminal history check has revealed that you were arrested for the following:

- Arrested [redacted] in McAllan Texas and charged with False Report to Police Officer/Law Enforce Empl (37.08 PC).

At this time you must provide a certified court disposition, arrest record, charging document, sentencing record, etc. for each arrest, unless disclosure is prohibited under state law within the United States. If you are unable to provide such records because your case was expunged or sealed, you must provide information about your arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. The charge and disposition of each arrest must be specifically identified (not just numeric citations or codes). Additionally, if you were convicted, you may submit a copy of the pertinent statute, sentencing guide, or statement from the court clerk or police department identifying the statute under which you were convicted and the sentence you received.

If you fail to submit such evidence, USCIS may deny your request for consideration of deferred action for childhood arrivals.

PLACE THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL. PLEASE USE THE ENCLOSED ENVELOPE TO MAIL THE ADDITIONAL EVIDENCE REQUESTED BACK TO THIS OFFICE.

Sincerely,

Mark J. Hazuda
Director
Officer: [redacted]

June 10, 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

[redacted]

[redacted]

[redacted]

RE: [redacted]
I-821D, Deferred Action for Childhood Arrivals

NOTICE OF INTENT TO DENY

USCIS has reviewed your request for consideration of deferred action for childhood arrivals.

In order to be considered for deferred action as a childhood arrival, you are to demonstrate that you warrant the favorable exercise of prosecutorial discretion.

According to the information provided with your request, and/or based on information obtained during routine systems checks, it appears that you have a record of juvenile delinquency.

The record indicates that you committed the following offense(s) as a minor.

- On [redacted], at the age of 16 you committed Robbery and Grand Theft, in violation of PC 211 and PC 487. Your case was adjudicated as a juvenile delinquency at Los Angeles CA.

While a finding of juvenile delinquency is not considered a criminal conviction for purposes of deferred action, given the seriousness of your offense, USCIS has determined that you do not merit a favorable exercise of discretion.

Accordingly, USCIS intends to deny your request for consideration for deferred action for childhood arrivals. You are afforded thirty-three (33) days from the date of this notice of intent to deny to submit additional information, evidence, or arguments overcoming the grounds for the intended denial. Failure to respond to this notice of intent to deny will result in the denial of your request for consideration of deferred action for childhood arrivals.

Sincerely,

Mark J. Hazuda
Director
Officer: [redacted]

[redacted]

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

[redacted]

U.S. Citizenship and Immigration Services

September 12, 2014

[redacted]

[redacted]

[redacted]

RE: [redacted]
I-821 D, Deferred Action for Childhood Arrivals

[redacted]

NOTICE OF INTENT TO DENY

USCIS has reviewed your request for consideration of deferred action for childhood arrivals.

In order to be considered for deferred action for childhood arrivals, you are to demonstrate that you have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

According to the information provided with your request, and/or based on information obtained during routine systems checks, it appears that you pose a threat to public safety because you committed multiple felonies as a juvenile and have been involved in the sale of illegal drugs.

Furthermore, based on the totality of the circumstances, it does not appear that you warrant a favorable exercise of prosecutorial discretion.

Accordingly, USCIS intends to deny your request for consideration for deferred action for childhood arrivals. You are afforded thirty-three (33) days from the date of this notice of intent to deny to submit additional information, evidence, or arguments overcoming the grounds for the intended denial. Failure to respond to this notice of intent to deny will result in the denial of your request for consideration of deferred action for childhood arrivals.

Sincerely,

Mark J. Hazuda
Director
Officer: [redacted]

[redacted]

OCT 14 2014 PM 1003

EXHIBIT E

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

U.S. Citizenship and Immigration Services

U.S. Citizenship & Immigration Services Deferred Action for Childhood Arrivals Receipts, Rejections, Approvals, Denials, NOIDs, and RFEs from August 15, 2012 -December 31, 2014						
Type of Filing	**Receipts**	**Rejections**	**Approvals**	**Denials**	**NOIDs**	**RFEs**
Initials	727,164	43,174	638,897	38,597	6,496	188,767
Renewals	234,991	12,648	148,171	71	117	2,685
Grand Total	**962,155**	**55,822**	**787,068**	**38,668**	**6,613**	**191,452**

Please note:

1) The report reflects the most up-to-date data available at the time the report is generated.

2) The duplicates and rejected cases have been removed.

Database Queried January 6, 2015

Report Created: January 29 2015

System: CIS Consolidated Operational Repository (CISCOR)

By: Office of Performance and Quality (OPQ), Performance Analysis & External Reporting (PAER), DL

Parameter

Date: Receipts, Approvals, Denials, Rejections, Requests for Evidence, Notice of Intent to Deny
from 08/15/2012 to 01/23/2015

Form Type(s): I-821D

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

U.S. Citizenship and Immigration Services

U.S. Citizenship and Immigration Services
Form I-765, Application for Employment Authorization
Class Preference C33 (Deferred Action for Childhood Arrivals)
Receipts and Approvals
Fiscal Years 2012- 2014 (December)

Count	Receipts	Approvals
Total	970,735	825,640

Please note:
1) The report reflects the most up-to-date data available at the time the report is generated.
2) The Rejections and duplicates have been removed.

Report Created: January 28, 2015
System: CIS Consolidated Operational Repository (CISCOR)
By: Office of Performance and Quality (OPQ), Performance Analysis & External Reporting (PAER), DL

Parameters:
Date: Fiscal Years 2012-2014 (December 31)
Form Type: I-765, Class Preference C33
Data Type: Receipts, Approvals

ATTACHMENT 7

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

STATE OF TEXAS, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 1:14-cv-254

DECLARATION OF SARAH R. SALDAÑA

I, Sarah R. Saldaña, hereby make the following declaration with respect to the above-captioned matter.

1. I am the Director of U.S. Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (DHS or Department). I have held this position since December 23, 2014. My current work address is: 500 12th Street Southwest, Washington, D.C. I am a graduate of Texas A&I University, currently Texas A&M University, and hold a Bachelor of Science degree. I also hold a Juris Doctorate from Southern Methodist University.

2. Before becoming ICE Director, I served as United States Attorney for the Northern District of Texas for more than three years. I was previously an Assistant United States Attorney in the Northern District of Texas and a partner in the trial department of a law firm in Dallas, Texas.

3. In my current position as ICE Director, I lead the largest investigative agency within DHS, overseeing nearly 20,000 employees in 400 offices across the country.

4. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

The DHS and ICE Immigration Enforcement Mission

5. ICE is one of the three DHS components with responsibilities over the administration and enforcement of the nation's immigration laws. The other two agencies are: U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. In working to achieve its mission, ICE coordinates closely with CBP, which includes the Offices of Border Patrol, Field Operations, and Air and Marine Operations, and employs the uniformed corps of officers and agents charged with patrolling our nation's ports and borders. ICE also partners with USCIS immigration adjudicators who decide eligibility for immigration benefits and certain other forms of immigration relief.

6. Within ICE, the Office of Enforcement and Removal Operations (ERO) is responsible for identifying, apprehending, detaining, and removing inadmissible or deportable aliens from the United States, as appropriate. ERO also removes aliens transferred to ICE by CBP officers and agents, and aliens against whom removal proceedings are initiated by USCIS. Based on limited resources, DHS does not have the capacity to investigate, detain, and remove all individuals who violate our immigration laws. For the last several years, ERO has consistently removed between 300,000 and 400,000 aliens annually from the United States. In light of DHS's limited resources and statutory mandates, ICE prioritizes the apprehension and removal of persons who pose a threat to national security, persons apprehended while attempting to illegally cross the border or who recently did so ("recent border crossers"), and persons convicted of serious crimes or who

otherwise threaten public safety. The vast majority of individuals removed by ICE fall into one of these categories.

ICE Enforcement Challenges

7. Besides limited resources, ICE faces several challenges in accomplishing its enforcement mission. One challenge requiring ICE to spend more resources conducting removals is the changing demographics of the immigrant population entering the country. Since FY 2010, the number of Mexican nationals apprehended by the Border Patrol has fallen by 43 percent, while the number of apprehensions of nationals from El Salvador, Guatemala, and Honduras has increased by 423 percent, in FY 2014. In general, removing Central Americans is more resource-intensive than removing Mexican nationals. While a Mexican national apprehended by CBP may, in many cases, be removed in a matter of hours, often without entering ICE custody, a national of a non-contiguous country apprehended at the border must generally be transferred to ICE and may need to remain in ICE custody for weeks or months until travel documents can be obtained from that country and removal arrangements via aircraft can be arranged.[1]

8. Another important demographic change impacting Department operations was the unprecedented surge of children and families from El Salvador, Guatemala, and Honduras intercepted at the border during FY 2014. Such cases present unique challenges for ICE given the special care needed and the legal obligations imposed by applicable laws and court orders

[1] Although inadmissible aliens apprehended at the border are often subject to the "expedited removal" process, those who demonstrate a "credible fear" of persecution or torture if returned to their countries are legally entitled to formal removal proceedings before an immigration judge, which can take many months, if not years, to complete. Because nationals of some Central American countries are more likely than Mexican nationals to claim a fear of return, the increased percentage of Central American apprehensions increases DHS's costs in managing and deterring border violations.

with regard to providing housing for alien children in immigration proceedings,[2] as well as the stringent standards applicable to ICE family residential centers.[3] In order to respond to these developments, ICE has significantly expanded its family-appropriate housing, which must be designed and operated in a manner appropriate for the unique needs of this population and compliant with applicable legal requirements and residential standards, which are far more expensive to satisfy than those applicable to adult detention facilities.

9. As mentioned above, ICE's mission includes both the removal of aliens from the interior of the country and the removal of aliens apprehended by CBP while attempting to illegally enter the United States. To address the demographic changes in illegal immigration (i.e., increases in Central Americans and families requiring ICE involvement), and to do our part to ensure border integrity, ICE has detailed resources from the interior of the country to the border. This, in turn, results in fewer resources available to identify, detain, and remove individuals in the interior of the country. For instance, over the course of FY 2014, ERO detailed over 800 of its officers and support personnel (over 10 percent of the ERO workforce) to support southwest border operations. ICE also reallocated increased detention capacity, transportation resources, and other assets to support those operations.

10. Additionally, the fact that many state and local jurisdictions have restricted or prohibited their law enforcement officers from cooperating with immigration detainers, which are used by ICE to facilitate the transfer of a removable alien from criminal custody, has also required ICE to expend additional resources in attempting to gain custody of these individuals before they are released or shortly thereafter.

---

[2] *See* William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, Pub. L. No. 110–457 (Dec. 23, 2008); *Flores* settlement agreement, *Flores v. Reno*, Case No. CV 85-4544 (C.D. Cal. Jan. 17, 1997).

11. Another factor significantly impacting the ability of ICE to remove individuals from the United States is the backlog of the nation's immigration courts, which are under the jurisdiction of the Department of Justice. At the end of FY 2014, there were 418,861 cases pending before the immigration courts, up from 262,622 at the end of FY 2010. In particular, cases on the non-detained immigration court dockets now routinely take years or more to complete.

Establishment of Department-Wide, Coordinated Enforcement Efforts

12. Given DHS finite resources, Secretary Johnson issued Department-wide immigration enforcement priorities on November 20, 2014. Under the Secretary's November 20, 2014 guidance, all DHS immigration components operate under the same three enforcement priorities: Priority 1, for aliens who pose a threat to national security, are apprehended at the border, are members of organized criminal gangs, or have been convicted of felony offenses; Priority 2, for aliens who have been convicted of certain misdemeanors, have recently entered the country, or have significantly abused the visa or visa waiver programs; and Priority 3, for certain aliens with final orders of removal. To further ensure that DHS's limited resources are available to pursue such aliens, the memorandum directs that resources "be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified." This memorandum ensures that the three DHS immigration components have the same removal priorities, which enhances coordination and efficiency.

13. In conjunction with this prioritization memo, the Secretary also issued on November 20, 2014, the memorandum that has now been enjoined that provides guidelines for the use of a form of prosecutorial discretion known as "deferred action," on a case-by-case basis, for certain aliens. The memorandum generally provides guidelines for two types of undocumented aliens who have

[3] *See* ICE Family Residential Standards, at http://www.ice.gov/detention-standards/family-residential.

been living in the United States since before January 1, 2010, who have significant ties to the country, who submit fingerprints and pass background checks, and who otherwise pose no danger to the country. First, the memorandum expands the 2012 "Deferred Action for Childhood Arrivals" (DACA) policy, which established guidelines concerning the availability of deferred action for such individuals who were brought to the country as children (*i.e.*, before the age of 16). Second, the memorandum establishes "Deferred Action for Parents of Americans or Lawful Permanent Residents" (DAPA), which provides guidelines on the availability of deferred action for those who are parents of U.S. citizens or lawful permanent residents.

Effects of the Injunction

14. The expansion of DACA and the implementation of DAPA represent an effort by DHS to better prioritize its limited resources against individuals who pose threats to national security, public safety, or the integrity of the border. Among other things, the policies are intended to: incentivize certain non-priority aliens to present themselves to DHS, submit biographic and biometric information, and undergo background checks; and provide temporary relief from removal, which is expected to assist state and local law enforcement agencies with community-policing efforts, as explained in the amicus brief submitted in this case by numerous sheriffs and police chiefs. These policies are intended to complement and support DHS's effective, priority-based use of its resources.

15. Enjoining the policies would prevent ICE from benefitting from the efficiencies that such policies are intended to create. For instance, when state and local law enforcement agencies encounter an alien who has received deferred action under these policies, ICE personnel would be able to quickly confirm the alien's identity through a biometric match. This is because USCIS collects fingerprints and conducts background checks for DACA and DAPA requestors.

The availability of such information allows ICE to more efficiently work with our law enforcement partners to promote public safety.

16. Similarly, when ICE officers are engaged in at-large enforcement operations, such as to locate criminal and fugitive alien targets, they often encounter non-target aliens who may also be removable from the United States. If such aliens have received deferred action under these guidelines and have documentary proof of this on their persons, ICE officers would be able to ascertain more quickly whether enforcement resources should be expended to detain and initiate removal proceedings against the individuals. This would also allow ICE to further focus its resources on priority aliens.

17. The DACA and DAPA policies are also intended to assist with the efficient processing of high-priority cases in the immigration courts. While ICE attorneys who represent DHS in removal proceedings before the immigration courts can and do exercise prosecutorial discretion to promote efficient handling of dockets by immigration judges, DAPA and expanded DACA, once implemented, can potentially further assist ICE attorneys and immigration judges in identifying non-priority cases. And, when an alien in removal proceedings receives deferred action from USCIS under DAPA or expanded DACA, the immigration judge may administratively close the case, thereby making additional docket time available for high-priority cases. Once the cases of aliens with deferred action under DAPA and expanded DACA are taken off the immigration dockets, immigration judges should be able to focus more time and effort on the adjudication of cases involving recent border entrants and national security and public safety threats.

18. Enjoining the DAPA and expanded DACA policies is also likely to limit, in certain circumstances, the ability of law enforcement officials to protect public safety. As I recently

wrote in an opinion editorial for the Dallas Morning News, "cooperation between police and community members is a cornerstone of modern law enforcement."[4] While ICE has long taken steps to ensure that prosecutorial discretion is appropriately used when the agency encounters individuals who are crime victims and witnesses,[5] I believe that DAPA and expanded DACA will further enhance the willingness of undocumented crime victims and witnesses to come forward and cooperate with their local law enforcement agencies, thereby bolstering efforts by police to address crimes that affect our communities, including domestic violence, human trafficking, and gang activity.

19. In sum, preventing the deferred action policies from going into effect interferes with the Federal Government's comprehensive strategy for enforcing our immigration laws. The halting of DAPA and expanded DACA jeopardizes the efficiencies that such policies can provide to ICE, making it more difficult to efficiently and effectively carry out its mission. The injunction also undermines the effectiveness of community policing in various jurisdictions, impedes the identification of non-priority aliens, and leaves in place a barrier to more efficient proceedings to remove threats from our country.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of February, 2015.

Sarah R. Saldaña
Director
U.S. Immigration and Customs Enforcement

[4] Sarah Saldaña and Gil Kerlikowske, *Obama's immigration initiative will make nation safer*, The Dallas Morning News, Jan. 20, 2015, http://www.dallasnews.com/opinion/latest-columns/20150120-sarah-saldana-and-gil-kerlikowske-obamas-immigration-initiative-will-make-nation-safer.ece.

[5] *See, e.g.*, ICE Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

ATTACHMENT 8

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

STATE OF TEXAS, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 1:14-cv-254

DECLARATION OF R. GIL KERLIKOWSKE

I, R. Gil Kerlikowske, hereby make the following declaration with respect to the above-captioned matter.

1. I am the Commissioner of U.S. Customs and Border Protection (CBP). I have held this position since March 7, 2014. My current work address is 1300 Pennsylvania Ave., N.W., Washington, D.C. I hold a B.A. and an M.A. in criminal justice from the University of South Florida.

2. Prior to my tenure as CBP Commissioner, I had approximately four decades of experience with law enforcement and drug policy. From 2000 to 2009, I served as the Chief of Police for Seattle, Washington. From 2009 to 2014, I served as the Director of the Office of National Drug Control Policy, and from 1998 to 2000, I served as Deputy Director for the U.S. Department of Justice, Office of Community Oriented Policing Services. In addition, I served as the Police Commissioner for Buffalo, New York, from 1994 to 1998. I began my law enforcement career as a police officer in St. Petersburg, Florida, in 1972.

3. In my position as CBP Commissioner, I oversee approximately 60,000 employees. CBP officers protect our nation's borders and safeguard national security by keeping criminal organizations, terrorists, and their weapons out of the United States while facilitating lawful international travel and trade.

4. I make this declaration on the basis of my personal knowledge as well as information made available to me in the course of my official duties.

The DHS and CBP Immigration Enforcement Mission

5. DHS has three components with responsibilities over the administration and enforcement of the nation's immigration laws: CBP, U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). CBP secures the borders at and between ports of entry, preventing the admission of inadmissible aliens and the entry of illicit goods. CBP works closely with ICE, which is responsible for identifying, apprehending, detaining and removing inadmissible and deportable aliens from the United States, including many such aliens apprehended by officers and agents of CBP. CBP also works closely with USCIS, which, among other duties, determines on a case-by-case basis whether deferred action is appropriate under certain circumstances.

6. CBP Officers and Agents regularly encounter individuals who lack lawful status to enter or remain in the United States. For instance, in fiscal year (FY) 2014, Border Patrol apprehended 486,651 individuals who lacked lawful presence in the United States. While the vast majority of these individuals were apprehended while attempting to illegally cross the border, or after recently crossing the border into the United States, the Border Patrol also encounters individuals who are unlawfully in the country, often at checkpoints located at places of strategic importance, furthering the broader work of border security throughout the area.

Benefits of Deferred Action for CBP Immigration Enforcement Efforts

7. When a Border Patrol Agent at a checkpoint or other location encounters an individual whose lawful status is not apparent after initial questioning, that alien is taken to the nearest location where the Agent can more fully question and process the alien. During processing, an alien's biographic information and biometrics (i.e., fingerprints) are collected. Records checks are run through CBP and other law enforcement systems. Agents review all of the pertinent facts and circumstances to determine whether or not the alien is a priority for removal, consistent with Secretary Johnson's memorandum of November 20, 2014, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, including whether the alien poses a threat to national security, border security (including those who recently unlawfully entered the United States), or public safety. Processing individuals (which involves questioning the individuals, collecting biographic and biometric information, and conducting background checks) takes Border Patrol Agent time that could otherwise be spent at the checkpoint or on other enforcement duties.

8. Individuals who were granted deferred action under the 2012 Deferred Action for Childhood Arrivals (DACA) guidelines are, at times, encountered by Border Patrol Agents at checkpoints or other locations. When a DACA recipient is encountered at a checkpoint or other location and is able to provide DACA documentation or a work authorization document, a Border Patrol Agent can more efficiently verify the identity of the individual, as well as the authenticity of the documentation provided. Absent other facts and circumstances meriting further inquiry, upon verifying the information provided, Border Patrol Agents normally take no further action with respect to that individual. Instead, Border Patrol Agents rely on the determination made by another component of DHS, USCIS, that the encountered individual is not a priority for an

immigration enforcement action. Thus, DACA facilitates CBP more efficiently identifying those individuals who are not a priority for removal and better concentrate its limited enforcement efforts on those who pose a threat to national security, border security, and public safety.

9. I expect that the Deferred Action for Parents of Americans or Lawful Permanent Residents (DAPA) guidelines, as well as the guidelines that expanded DACA, announced by Secretary Johnson in November 2014, would create the same resource efficiencies that DACA, as announced in 2012, created, as they involve conducting background checks and providing similar documentation to certain aliens who have strong ties to the United States and are not enforcement priorities. Because policies like DACA and DAPA encourage certain aliens to come forward and identify themselves to USCIS, these policies create an efficient mechanism for CBP to quickly identify aliens who are not priorities for removal and thus focus limited resources on high priority aliens. DACA and DAPA thus support CBP's overall mission to secure the border.

10. I am aware that this Court has temporarily enjoined implementation of DAPA and the 2014 modifications to DACA. By preventing certain aliens who are not a priority for deportation from obtaining DAPA documents (or DACA documents under the expanded guidelines), the temporary injunction interferes with the agency's ability to obtain the enforcement efficiencies that DAPA and the expansion of DACA are anticipated to create, for the time that the injunction remains in place. The injunction is thus expected to impair CBP's ability to ensure that its limited enforcement resources are spent in the most effective and efficient way to safeguard national security, border security and public safety.

Effects of Injunction

11. Based on my years of experience in law enforcement, I believe that DACA and DAPA substantially benefit the overall safety of our communities, and that the temporary injunction the Court has entered detracts from those benefits.

12. As a former police chief and now the Commissioner of one of the world's largest law enforcement organizations, I understand the critical need to prioritize law enforcement resources. If law enforcement organizations do not ensure that their limited resources are directed to their highest priorities, overall public safety might be compromised. Focusing limited immigration enforcement resources on aliens who are eligible for DACA and DAPA is anticipated to divert resources from recent border crossers and real national security and public safety threats, such as those who may be terrorists, smugglers, drug traffickers, or engaged in transnational organized crime.

13. Another anticipated law enforcement benefit of DACA and DAPA is that, by temporarily eliminating the immediate fear of detention and deportation, recipients might be more inclined to cooperate with federal, state, and local law enforcement in reporting crimes or serving as witnesses in criminal cases. As the numerous law enforcement officials have made clear in an amicus brief filed in this case, DAPA and DACA are expected to support community policing efforts and help law enforcement agencies safeguard their communities.

14. DAPA and the expansion of DACA would allow a significant number of otherwise law-abiding aliens with strong ties to the country to step forward and request deferred action. By halting implementation of DAPA and the expansion of DACA, the temporary injunction undermines these potential law enforcement benefits for the duration of time that the injunction remains in place.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of February of 2015.

R. Gil Kerlikowske
Commissioner

ATTACHMENT 9

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

STATE OF TEXAS, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 1:14-CV-254

DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Executive Branch is constitutionally and statutorily vested with broad discretion to enforce the Nation's immigration laws. *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). The 2014 Deferred Action Guidance at issue in this case, which sets forth general parameters for the exercise of discretion and provides for such exercise on a case-by-case basis, responds to compelling enforcement needs and falls within the recognized scope of that discretion. *See Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471, 483-84 (1999). Plaintiffs' claims to the contrary are based on rhetoric, not law. Plaintiffs' Reply and presentation at oral argument confirm that their motion for the extraordinary relief of preliminary injunction fails as a matter of law – both on Article III standing and on the merits.

As an initial matter, Plaintiffs lack standing – and thus necessarily lack the irreparable harm that must be shown for a preliminary injunction. Plaintiffs' submission of voluminous factual materials with their Reply does nothing to cure the inherent legal defects in their theories of standing. Key among these defects is that their alleged and speculative harm based on driver's licensing is the result of state policy choices, not the challenged federal policies, and therefore is not an actionable Article III injury traceable to Defendants. Lacking a non-speculative injury, Plaintiffs – both in their Reply and at argument – rested significantly on the claim that they may sue the federal government to protect their citizens on a *parens patriae* theory. That is simply incorrect as a matter of law. At base, the States' grievance is a generalized one about the vague and indirect effects of a federal policy they oppose. As a matter of law, that is not a proper basis for standing, particularly in the immigration context, where the Federal Government has plenary and exclusive authority. It thus necessarily fails as a predicate for the irreparable harm that Plaintiffs must prove to obtain the relief they seek.

Although the lack of standing and irreparable harm are dispositive, Plaintiffs' claims are

not reviewable on the merits and in any event are unfounded. Despite mentioning *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), only in passing in their opening brief, Plaintiffs have made clear through their Reply and at oral argument that their purported constitutional claim hinges fully on that case. But *Youngstown* is inapposite and fails to support Plaintiffs' claim. In *Youngstown*, the Executive concededly acted outside statutorily-delegated authority and therefore sought to justify its actions by reference to the Take Care Clause. By contrast, the Secretary of Homeland Security's actions here were based on authority delegated to him by Congress pursuant to statutes that require him to prioritize the enforcement of immigration laws, consistent with the scarce resources provided by Congress. Plaintiffs' claim is therefore a challenge to agency action governed by the Administrative Procedure Act ("APA"). And that claim fails. As an initial matter, Plaintiffs are not within the zone of interests of the Immigration and Nationality Act ("INA") and thus cannot bring an APA claim. Moreover, because the Secretary is exercising prosecutorial discretion to enforce federal immigration laws using limited available resources, and no statute precludes the exercise of that discretion, *Heckler v. Chaney*, 470 U.S. 821 (1985), clearly forecloses judicial review. Plaintiffs' procedural challenge under the APA also fails because the Guidance is a general statement of policy that is not subject to the APA's notice-and-comment requirements.

The policy challenged by Plaintiffs is part of an integrated and comprehensive effort to most effectively deploy existing resources to enforce the Nation's immigration laws. As reflected in the concurrently-issued memoranda setting forth the Department's enforcement priorities, the Deferred Action Guidance is part and parcel of the Secretary's judgment on how best to focus on the removal of priority threats to the Nation and to secure the Nation's borders in light of indisputably limited resources. Plaintiffs' novel and expansive arguments concerning

standing, reviewability, and the merits are legally insufficient and would have no logical end. Federal control over immigration policy would be subject to challenge by any State whenever it might disagree with such policy, despite the plenary power of the Federal Government over immigration. Having failed to satisfy any of the requirements for a preliminary injunction, Plaintiffs' motion should be denied.

ARGUMENT

I. Plaintiffs Fail to Demonstrate Standing

The Plaintiff States have no legally cognizable interest in the enforcement or non-enforcement of the immigration laws against particular aliens (here, individuals who may be considered for deferred action under the challenged guidance), and thus they lack Article III standing to pursue this case. It is a fundamental principle of American jurisprudence that a plaintiff "lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. ("Defs.' Opp.") at 15 [ECF No. 38]. And the Supreme Court has specifically held that "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws by the INS [now DHS]." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). Nor do the Plaintiff States. Under the constitutional structure, the Federal Government has exclusive authority over immigration. *Arizona*, 132 S. Ct. at 2499. In addition, under settled case law that recognizes the need to avoid unnecessary "state interference with the exercise of federal powers," States may not invoke the jurisdiction of the federal courts on the basis of the kind of indirect "economic repercussions of . . . federal policies" that Plaintiffs seek to rely on here. *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 672, 678 (D.C. Cir. 1976); *see also* Defs.' Opp. at 23, 29.

In their Reply, Plaintiffs make no effort to address these first principles, or deal with the three most closely analogous standing cases, *see Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.D.C. 2014), *appeal pending*, No. 14-05325 (D.C. Cir.); *Crane v. Napolitano*, 920 F. Supp. 2d 724, 745-46 (N.D. Tex. 2013), *appeal pending*, No. 14-10049 (5th Cir.) (oral arg. to be heard Feb. 3, 2015); *Texas v. United States*, No. B-94-228, at *7 (S.D. Tex. Aug. 7, 1995), *aff'd on other grounds*, 106 F.3d 661 (5th Cir. 1997). Relying on extensive precedent, all three of these cases rejected similar attempts by state and local governments to challenge federal immigration policies based on predictions about the indirect effects of those policies on the flow of undocumented immigrants and the public fisc. Plaintiffs' voluminous factual materials, submitted for the first time with Plaintiffs' Reply, are an attempt to obscure the same legal impediments that preclude standing for Plaintiffs in the present case.

A. Plaintiffs Cannot Demonstrate Article III Injury on the Basis of Benefits They Choose to Provide

Only three of the Plaintiff States – Texas, Wisconsin, and Indiana – have filed declarations purporting to show that the 2014 Deferred Action Guidance will impose costs on the State as a result of "state licensing programs."[1] *See* Pls.' Reply in Supp. of Mot. for Prelim. Inj. ("Pls.' Reply") at 42 [ECF No. 64]. And even then, their purported showing confirms the fatal flaw in Plaintiffs' theory: the States' obligation to provide licenses and other benefits to future DACA and DAPA recipients, and any costs attendant thereto, flow directly from these States' policy choices. *See, e.g.*, Snemis Decl. ¶ 13 (Pls.' Ex. 30). It is well-established that "injuries to

[1] Contrary to Plaintiffs' suggestion, no State can be excused from demonstrating standing in this case. Each party seeking separate relief must itself demonstrate an independent basis for standing. *See LULAC v. City of Boerne*, 659 F.3d 421, 428 (5th Cir. 2011). And each State necessarily seeks separate relief here, because an injunction may only be granted (if at all) to the extent necessary to remedy the harm *to the party seeking it*. *See Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying nationwide injunction to apply only to plaintiff).

[a State's] fisc[] . . .[that] result[] from decisions by [the] state legislatures" cannot form the basis of Article III standing.[2] *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (concluding that Pennsylvania did not have standing to challenge laws of New Jersey based on allegations of harm tied to interplay between the two states' laws). Indeed, it would be anathema to the principles of federalism to deem Defendants responsible for consequences that flow directly from state legislative choices.

Then-Governor Rick Perry conceded this point in a letter to then-Attorney General Greg Abbott shortly after the announcement of the 2012 DACA initiative. Governor Perry clearly stated: "In Texas, the legislature has passed laws that reflect the policy choices that they believe are right for Texas," and the Federal Government's deferred action policy "does not undermine or change our state laws" or "change our obligations . . . to determine a person's eligibility for state and local public benefits." *See* Ltr. from Perry to Abbott (Aug. 16, 2012) (Ex. 34). Not only do Texas, Wisconsin, and Indiana choose to provide driver's licenses to deferred action recipients, but they also choose to subsidize those licenses with state funds – a decision that presumably reflects the States' view that the public safety benefits gained by providing licenses outweigh the cost. *Cf.* Amicus Br. of Major Cities Chiefs Ass'n *et al.* at 7-9 (explaining that driver's licenses promote road safety and assist law enforcement efforts) [ECF No. 83-1]. Thus, to the extent Plaintiff States "will lose money" from their issuance of licenses to future DACA and DAPA recipients, Pls.' Reply at 43, it is money that those states have chosen to spend.

[2] Plaintiffs err when they suggest that *Texas v. United States*, 497 F.3d 491, 496-97 (5th Cir. 2007), supports their view that their alleged injuries are not self-inflicted. *See* Pls.' Reply at 47. In that case, unlike this one, Texas challenged a policy that purported to *directly* regulate its conduct by compelling it to participate in mediation. *See Texas*, 497 F.3d at 497-98 (noting that Texas was the "object" of the regulation at issue).

Plaintiffs also contend that the "obligation to change state law" in order to "avoid giving licenses to DHS Directive beneficiaries" itself states an Article III injury. Pls.' Reply at 47. That misstates the choice facing these States. The Guidance does not require the Plaintiffs to do anything with respect to these laws. And a State's decision to change its law in response to the policy choices of another sovereign does not give rise to Article III standing. *See Pennsylvania*, 426 U.S. at 664 (finding that standing did not lie where "nothing prevent[ed] Pennsylvania from withdrawing" the state law that reduced its revenues). Were it otherwise, States would have virtually limitless ability to hale the Federal Government (or another State) into court and demand preliminary injunctive relief whenever they disagreed with a change in federal policy that they claimed would make it desirable to change state law.

Plaintiffs try to create the appearance of coercion by Defendants – notwithstanding the fact that Texas, Wisconsin, and Indiana have freely opted to provide driver's licenses to deferred action recipients – by noting that the United States submitted an amicus brief in *Arizona Dream Act Coalition v. Brewer*, in which it expressed the view that federal law preempted Arizona's policy of refusing to accept federal Employment Authorization Documents ("EADs") from deferred action recipients while accepting them from all other aliens. *See* Amicus Br. of United States in Opp'n to Reh'g En Banc, No. 13-16248 (9th Cir.) (filed Sept. 30, 2014) (Pls.' Ex. 3). This effort is a red herring. The United States explained in that amicus brief that Arizona's driver's licensing scheme was preempted not because it denied licenses to deferred action recipients, but because it relied on "new alien classifications not supported by federal law" – in that case, a redefinition of which EADs were to be regarded by the State as evidence of *federal* authorization. *Id.* at 11. The government's position thus turned on the particulars of that state scheme. As a matter of preemption, neither the 2014 Deferred Action Guidance nor any federal

statute compels States to provide driver's licenses to DACA and DAPA recipients, so long as the States base eligibility on existing federal alien classifications – such as deferred action recipients, or other categories of aliens – rather than creating new state-law classifications of aliens.

Plaintiffs also contend that Arizona, Idaho, and Montana are injured because they are bound by the Ninth Circuit's decision in *Arizona Dream Act Coalition*, which ordered entry of a preliminarily injunction of Arizona's policy of selectively accepting EADs.[3] 757 F.3d 1053 (9th Cir. 2014). Although none of those three States submitted declarations alleging harm in this case, such alleged harms are in any event insufficient to establish standing for the reasons stated above. Like the 2014 Deferred Action Guidance, the decisions in *Arizona Dream Act Coalition* do not require States to provide driver's licenses to deferred action recipients. *See Arizona Dream Act Coalition v. Brewer*, No. 12-2546, 2015 WL 300376, at *9 (D. Ariz. Jan. 22, 2015) ("The Court is not saying that the Constitution requires the State of Arizona to grant driver's licenses to all noncitizens."). And those three States still retain the choice to decline to subsidize any state licenses provided. *Cf. Texas*, 106 F.3d at 666 (state expenditures on services for undocumented aliens, including those required by the Equal Protection Clause, "are not the result of federal coercion" nor legally attributable to the actions of federal immigration authorities).[4]

[3] The Ninth Circuit's finding of a likely Equal Protection violation was premised on the specific way that Arizona chose to structure its policy. In particular, the court found that Arizona's selective acceptance of federal Employment Authorization Documents was an "attempt to distinguish between these noncitizens on the basis of an immigration classification that has no basis in federal law" and thus was not likely to survive even rational basis review. 757 F.3d at 1066. On January 22, 2015, the district court entered a permanent injunction in the case on similar grounds. *See Ariz. Dream Act Coal.*, No. 12-2546, 2015 WL 300376, at *8 (D. Ariz. Jan. 22, 2015). In doing so, the district court also rejected Arizona's argument that DHS "lacked the authority to grant [DACA recipients] deferred status." *See id*. at 6.

[4] Plaintiffs also attempt to repackage their claim of economic harm as one that amounts to an "affront to their sovereignty," Pls.' Reply at 48, but this effort gets them no closer to establishing an injury cognizable under Article III. *See Texas v. ICC*, 258 U.S. 158, 162 (1922) (state's claim of infringement upon state sovereignty was merely "an abstract question of legislative power," not a justiciable case or controversy). Plaintiffs "cannot have a quasi-sovereign interest" in creating their own alien classifications

B. Plaintiffs' Theory of Harm from Increased Immigration Fails as Inherently Speculative and Attenuated

Plaintiffs' second theory of standing hypothesizes that the 2014 Deferred Action Guidance will increase the population of undocumented aliens in the Plaintiff States, leading them to expend additional funds on law enforcement and social services. Defendants have explained that this theory is both inherently speculative and not traceable to the challenged conduct of Defendants, and nothing in Plaintiffs' Reply or oral argument presentation cures these defects.

1. Plaintiffs Have Not Demonstrated a "Certainly Impending" Injury

Like the State of Mississippi, which was found to lack standing to challenge the 2012 DACA Memoranda by another district court in this State, Plaintiffs have failed to show that the costs associated with the presence of undocumented aliens will increase *at all* as a result of the 2014 Deferred Action Guidance. *See Crane*, 920 F. Supp. 2d at 745-46.

The vast majority of the declarations submitted by state officials contend only that expenditures on law enforcement and social services "will increase *if* additional undocumented immigrants come to Texas." Pls.' Reply at 53 (citing declarations) (emphasis added). In an effort to cure this acknowledged uncertainty, Plaintiffs submit a declaration from a demographer employed by the State of Texas, who speculates that the 2014 Deferred Action Guidance will cause or incentivize greater numbers of undocumented aliens to enter and remain in the United States. But Plaintiffs cannot satisfy the rigorous requirements of Article III with predictions about how third parties will respond to the supposed incentives created by prosecutorial enforcement policies. *See Linda R.S.*, 410 U.S. at 619; *Allen v. Wright*, 468 U.S. 737, 758-59

---

for purposes of licensure statutes, "because the matter falls within the sovereignty of the Federal Government." *Kleppe*, 533 F.2d at 677; *see also Traux v. Raich*, 239 U.S. 33, 42 (1915).

(1984). And in any event, Plaintiffs' predictions are themselves uncertain and speculative, resting on hypothesized outcomes. *See* Eschbach Decl. ¶ 5a (Pls.' Ex. 33) (DAPA "*may*" encourage undocumented immigrants to enter the country in the hope of getting benefits to which they are not actually entitled); *id.* ¶ 26 (it is "reasonable to *hypothesize*" that the 2012 DACA policy increased the size of the undocumented population); *id.* ¶ 28 (there is a "*theoretical*" basis to believe that the challenged policy will increase the unauthorized immigrant population) (emphasis added). The speculative nature of Plaintiffs' theory of harm, though evident from the face of the Eschbach declaration, is further highlighted by the Declaration of Michael Hoefer, a technical expert on immigration statistics at USCIS's Office of Policy and Strategy, who explains that the predictions offered by Mr. Eschbach "rest on speculation and unsupported inferences . . . without sufficient data to support his conclusions."[5] *See* Hoefer Decl. ¶ 35. Such speculation, regardless of whether plausible as a theoretical matter, falls well short of demonstrating that Plaintiffs' posited future injury is "certainly impending." *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Contrary to Plaintiffs' speculation, it is equally if not more plausible to expect that the challenged policy may *decrease* the number of undocumented aliens in the United States by rededicating scarce agency resources to border security.[6] *See* Defs.' Opp. at 21; *see also Crane*, 920 F. Supp. 2d at 745 (faulting Mississippi for failing to account for potential "increased

[5] Because the Eschbach Declaration fails, as a matter of law, to satisfy the requirements of Article III, the Court should reject Plaintiffs' flawed theory of standing, without the need to consider the Hoefer Declaration. The Hoefer Declaration simply provides additional detail on the unfounded premises that underlie the speculative assertions in the Eschbach Declaration.

[6] Defendants have not, as Plaintiffs suggest, "conceded" that unspecified "immigration policies are causing increases in illegal immigration." Pls.' Reply at 54. Plaintiffs base this contention solely on material cited in the Amended Complaint, which is not in the record before this Court on Plaintiffs' Motion for Preliminary Injunction (and the very existence of which has never been established). *Id.* And even accepting Plaintiffs' unsupported characterization of that material as true, it is not connected to the particular immigration policies at issue in this case.

removal of high-priority illegal aliens"). It would be inappropriate for this Court to assume, before the Guidance has even gone into effect, that that effort will fail. Moreover, even assuming that the challenged policy would increase the total number of undocumented aliens present in the Plaintiff States, it would still require another speculative leap to conclude that any given State would be economically harmed, on balance, by the policy – a leap that Plaintiffs fail to substantiate in their Reply. Allowing certain individuals already present in the Plaintiff States to work legally is expected to expand state tax bases, *see* Amicus Br. of the State of Washington, *et al.* at 6 (noting that grant of work authorization to individuals who may receive DACA or DAPA in Texas will lead to estimated $338 million increase in the state tax base over five years) [ECF No. 81], and will also make it more likely that those individuals obtain work-sponsored health insurance, thereby decreasing their need to rely on state health care, *see id.* at 9 & App. 55 (citing Roberto Gonzales & Angie Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*). Plaintiffs make no effort to account for these anticipated effects and thus have failed to show that the policy would "harm rather than help" them. *United Transp. Union v. ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989) ("indeterminacy" about effect of challenged policy "is enough to defeat. . . standing"); *see also Crane*, 920 F. Supp. 2d at 731 (finding no standing, where Mississippi failed to show a "*net* fiscal cost [to] the state") (emphasis added).

2. Plaintiffs Have Not Demonstrated Any Injury Traceable to Defendants or Capable of Redress by an Order of This Court

Even if Plaintiffs' speculation were sufficient to show a "certainly impending" injury, the chain of causation on which it is based is too attenuated, as a matter of law, to permit the Court to conclude that the predicted injury is "fairly traceable" to the 2014 Deferred Action Guidance rather than "the result of the independent action[s] of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal punctuation and citations

omitted). Such actions "break[] the causal chain" as a matter of law, regardless of the factual showing about incentives and influences. *See Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230, 234-36 (4th Cir. 2005) (concluding that harm was not traceable to government action even though the "record [left] no doubt" that third party was influenced by the challenged law); *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) ("Because any harm to the plaintiffs results from the actions of third parties not before this court, the plaintiffs are unable to demonstrate traceability."). Here, the 2014 Deferred Action Guidance expressly forecloses deferred action for newly arriving aliens. The possibility that third party aliens might nevertheless misunderstand the policy and migrate based on that misunderstanding is not "*fairly* trace[able]" to Defendants. *Lujan*, 504 U.S. at 560 (emphasis added).

Moreover, there is no reason to believe that individuals who would allegedly migrate to the United States on the basis of misunderstandings about the scope of the 2014 Deferred Action Guidance would cease to do so if that guidance were enjoined. Other federal immigration policies, including 2012 DACA (which is not subject to challenge here), will remain in place, and Plaintiffs cannot demonstrate that the migratory effect they allege is independent of these policies. There is therefore no reason to believe (let alone proof) that a temporary injunction against one of these policies would have the effect of reducing immigration.

3. *Massachusetts v. EPA* Does Not Support Plaintiffs' Theory of Standing

Plaintiffs are also incorrect when they contend that their standing "follows *a fortiori*" from the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). *See* Pls.' Reply at 49-50 (capitalization altered). In that case, the Court did not recognize standing based on speculative future effects, such as Massachusetts' "generalized concern over 'global warming,'" *id.* at 42, nor on the basis of state expenditures on public programs, as Plaintiffs

suggested at oral argument. Rather, the Court found standing to challenge the EPA's failure to regulate greenhouse gas emissions based on injuries to state-owned coastal property that had "already begun" and that would "only increase" in the future. 549 U.S. at 522. Importantly, and unlike here, the EPA "[did] not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming," such that there was no question that "EPA's refusal to regulate such emissions 'contribute[d]' to Massachusetts' injuries." *Id.* at 523.[7] In contrast, Plaintiffs here have failed to identify an injury to the States' interests *qua* States that is currently ongoing, let alone one that is traceable to the challenged policy, as discussed above.

Massachusetts also presented a categorically different situation for standing purposes, because (1) Massachusetts' challenge to emissions standards did not (unlike here) involve an area of the law that is constitutionally-committed exclusively to the Federal Government, and (2) Massachusetts identified specific authorization by Congress for its challenge to agency inaction (none of which exists here).[8] *See id.* at 516 (noting that such authorization was "critical . . . to the standing inquiry").

C. Plaintiffs Lack *Parens Patriae* Standing

Plaintiffs cannot cure their failure to show an Article III injury by claiming to represent the purported interests of their citizens under a *parens patriae* theory of standing. *See* Defs.' Opp. at 24. A State may not sue the Federal Government unless it demonstrates an injury-in-fact

[7] Plaintiffs' speculation about how third parties may respond to federal enforcement policies is also quite different, as a matter of law, from Massachusetts' scientific modeling of the behavior of molecules in the atmosphere. *See Linda R.S.*, 410 U.S. at 619; *Lujan*, 504 U.S. at 575.

[8] To the extent that Plaintiffs suggest that *Massachusetts* recognizes standing anytime a State sues to challenge a federal law that has supremacy over state law, *see* Pls.' Reply at 50, this argument cannot be reconciled with the reasoning of that case or with other precedent. *See, e.g.*, *Florida v. Mellon*, 273 U.S. 12, 17 (1927) (fact that federal law "interferes with the exercise by the state of its full powers of taxation . . . affords no ground for judicial relief"); *cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011).

to *its own* legally cognizable interests. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). Instead of citing precedent to the contrary, Plaintiffs attempt to draw support from suits against *private* defendants, which present entirely distinct issues. Indeed, the leading case cited by Plaintiffs, *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592 (1982), confirms that a "State does not have standing as *parens patriae* to bring an action on behalf of its citizens against the Federal Government." *Id.* at 610 n.16.

Plaintiffs' suggestion at oral argument that *Massachusetts* overruled, *sub silentio*, this well-established principle is incompatible with the holding of that case; the Court found that Massachusetts had standing not on the basis of an injury to its citizens' health and welfare, but to property that the State itself owned. *Massachusetts*, 549 U.S. at 519-22 & n.17. Plaintiffs' reading of *Massachusetts* is also directly contrary to the manner in which the case has been interpreted and applied by numerous courts. *See, e.g., Wyoming v. U.S. Dep't of the Interior*, 674 F.3d 1220, 1232 (10th Cir. 2012) ("[S]tanding pursuant to *parens patriae* . . . is not available when a state sues the federal government because the federal government is presumed to represent the citizens' interests."); *Oklahoma ex rel. Pruitt v. Sebelius*, No. 11-30, 2013 WL 4052610, at *3-4 (E.D. Okla. Aug. 12, 2013); *Florida ex rel. Cobb v. U.S. Dep't of Justice*, No. 5:10-cv-118, 2010 WL 3211992, at *1 (N.D. Fla. Aug. 12, 2010) (citing *Massachusetts*, 549 U.S. at 519), affirmed by 440 Fed. App'x. 860 (11th Cir. 2011).

Plaintiffs alternatively contend that the bar to *parens patriae* suits against the Federal Government applies only where a State challenges a federal statute, rather than an agency action. Pls.' Reply at 61-62. There is no support for such a distinction. Numerous courts have recognized that, whether acting through regulation or statute, "it is the United States, and not the state, which represents [its citizens] as *parens patriae*." *Mellon*, 262 U.S. at 486; *see also, e.g.*,

Kleppe, 533 F.2d at 676-78 & n.56 (state challenge to federal agency's decision not to provide disaster assistance); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 354 (8th Cir. 1985) (state suit to compel U.S. Department of Agriculture to implement federal agricultural disaster relief programs); *Oklahoma*, 2013 WL 4052610, at *3-4 (state challenge to, *inter alia*, an IRS rule); *Puerto Rico by Hernandez Colon v. Walters*, 660 F. Supp. 1230, 1233 (D.P.R. 1987) (rejecting contention that *Mellon* does not apply "[w]hen a state sues [a federal agency] over rights and benefits flowing from Federal legislation").

Even if Plaintiffs were not barred from bringing suit against the Federal Government on behalf of their citizens (which they clearly are), they could not maintain a *parens patriae* suit here, having failed to show that their citizens will suffer any concrete injury as a result of the challenged guidance. Plaintiffs' conjecture that the guidance will injure U.S. citizen workers in the Plaintiff States, *see* Pls.' Reply at 60, does not state a cognizable injury. Plaintiffs hypothesize that unknown employers will someday discriminate against U.S. citizens, in favor of DACA and DAPA recipients, to avoid an employment tax under the Affordable Care Act. *Id.* Not only does this theory improperly rest on numerous layers of speculation about third-party conduct, but it also ignores the fact that it is against the law for an employer to discriminate against U.S. citizens who are receiving tax credits under the ACA in favor of alien employees who are not eligible for them. *See* Pub. L. No. 111-148, § 1558, 124 Stat. 119, 261 (codified as amended at 29 U.S.C. § 218c (2010)); *see also Tel. and Data Sys., Inc. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994) (refusing to "presume illegal activities on the part of actors not before the court" in order to find standing).

Plaintiffs' second theory of *parens patriae* standing rests on their claim that the challenged policy will interfere with their ability to enforce state laws that allegedly "prohibit

employers . . . from hiring undocumented immigrants." Reply at 60. But the provisions of state law cited by Plaintiffs prohibit employers from hiring immigrants *who are not authorized to work*, and each state statute *tracks* the federal definition of work authorization. Accordingly, the 2014 Deferred Action Guidance stands as no obstacle to their enforcement.

D. Further Considerations Compel Dismissal of Plaintiffs' Claims

1. Plaintiffs' Claims Amount to a Generalized Policy Grievance

Plaintiffs do not dispute that this suit is animated by their ideological disagreement with the challenged federal policy rather than an effort to protect the States from the economic consequences they allege as the basis for standing. *See* Defs.' Opp. at 28 n. 4 ("[W]e're not suing for that economic harm . . . [W]hat we're suing for is actually. . . harm to the [C]onstitution . . . .") (quoting interview of Greg Abbott). Nor do Plaintiffs dispute that they invoke this Court's jurisdiction for the purpose of "the ventilation of public grievances." *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 881 (10th Cir. 1992) (internal quotation marks omitted). Instead, Plaintiffs note that Article III does not "bar[] the federal courts from adjudicating issues of 'broad public significance.'" Pls.' Reply at 57. But it is not the "public significance" of the legal issues in this case that deprives this Court of jurisdiction. Rather, it is the abstract and generalized nature of the harms alleged, which – to the extent they exist at all – would be "pervasively shared" by all citizens and thus would be "more appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State Inc.*, 454 U.S. 464, 475 (1982). Given that all federal policies may be said to have some indirect and generalized consequence on the populace, and thus on States in which that populace resides, if this Court were to accept Plaintiffs' theory of standing here, "no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal

court."[9] *Cuccinelli*, 656 F.3d at 272 (finding the lack of a limiting principle a basis for rejecting state standing); *see also Kleppe*, 533 F.2d at 672-73.

2. Plaintiffs Are Not Within the Zone of Interests of the Relevant Provisions of the Immigration Laws

Even if Plaintiffs had satisfied the requirements of Article III standing, they still would not be entitled to adjudication of their APA claims, because they have not established that Congress intended to confer on them a right to challenge the Secretary's immigration enforcement policies. *See* Defs.' Opp. at 27 & n. 22. It is not enough, as Plaintiffs suggest, *see* Pls.' Reply at 56, that the APA contains a general cause of action. In order to obtain judicial review under the APA, a party must show that it is "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, and that requires it to show that its interests fall "arguably within the zone of interests to be protected or regulated by the [substantive] statute in question." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (citation and internal ellipses omitted); *Sierra Club v. Morton*, 405 U.S. 727, 732-33 (1972). The "essential inquiry" under the "zone of interests" test is "whether Congress intended for a particular class of plaintiffs to be relied upon to challenge" alleged violations of the specific statutory provisions they seek to enforce. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 389 (1987) (internal quotations and brackets omitted); *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991). Thus, the question before the Court is whether Congress intended to allow States to challenge the Secretary's immigration enforcement policies with respect to individuals already residing in the United States.

[9] This concern is heightened in the immigration context, where any grant of citizenship, lawful permanent residency, or other lawful immigration status (including asylum, parole, or other relief) may make an individual eligible for benefits under state law. By Plaintiffs' logic, States would have standing to challenge even these individual adjudications.

The Supreme Court's decision in *Arizona* compels the conclusion that Congress had no such intent. While crediting the "importance of immigration policy to the States" as a general matter, the Court went on to conclude that Congress did not intend to permit States to countermand decisions by the Executive Branch about whether it is "appropriate to allow a foreign national to continue living in the United States." *Arizona*, 132 S. Ct. at 2505-06. This absence of congressional intent is dispositive here. *See Nat'l Credit Union Admin.*, 522 U.S. at 516 ("The pertinent question . . . is whether Congress *intended* to protect certain interests through a particular provision, not whether, irrespective of congressional intent, a provision may have the *effect* of protecting those interests."); *cf. Hartigan v. Cheney*, 726 F. Supp. 219, 227 (C.D. Ill. 1989) (Illinois not within zone of interest of the Base Closure and Realignment Act, because "states have no constitutional or statutory role in federal military policy"). As the D.C. Circuit held in *Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996), the public's interest in preventing "stresses on the provision of government services" – the interest sought to be advanced here – does not lie within the zone of interests of any provisions limiting the Executive Branch's authority to grant immigration relief. [10] *Id.* at 901.

II. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits

Even if Plaintiffs were able to establish standing, which they cannot, they would still not be entitled to the extraordinary relief requested, because, among other things, they have failed to demonstrate a likelihood of success on the merits, in the light of the significant discretion enjoyed by the Secretary in the enforcement of the Nation's immigration laws.

[10] By contrast, the statute at issue in *Massachusetts* specifically directed the Administrator of the EPA to act in the interests of the "public health or welfare" when considering whether to issue emissions standards. 549 U.S. at 519-20 (citing 42 U.S.C. § 7521(a)(1)).

A. *Youngstown* Does Not Establish an Independent Cause of Action Against the Executive Under the Take Care Clause and, In Any Event, Does Not Support Plaintiffs' Claims

Plaintiffs now focus singularly on Justice Jackson's concurrence in *Youngstown*, 343 U.S. 579 (1952), to support their constitutional claim, but that case does not demonstrate an independent cause of action against the Executive under the Take Care Clause.[11] The Take Care Clause vests discretionary authority directly in the President, not the Legislative or Judicial Branch, to take care that the laws are properly executed. This is consistent with Supreme Court precedent that – far from countenancing judicial review of how the President exercises the authority vested in him under the Take Care Clause – has emphasized the need to protect the President's Article II power from intrusion by Congress or the courts. *See, e.g.*, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); *Allen*, 468 U.S. at 761 (declining to recognize Article III standing where adjudication of claim would interfere with President's Take Care Clause authority); *Franklin v. Massachusetts*, 505 U.S. 788, 827-28 (1992) (Scalia, J., concurring) (Court cannot order relief that would interfere with President's constitutional responsibility under the Take Care Clause).

To be clear, *Youngstown* did not involve a claim brought under the Take Care Clause against the President. Rather, the steel companies brought an action against the Secretary of Commerce claiming that the President's Executive Order, which directed the Secretary of Commerce to seize privately owned steel mills, was not authorized by an act of Congress or by the Constitution. 343 U.S. at 583. The Government acknowledged that it failed to meet

[11] Although Plaintiffs previously relied upon a host of other cases as purported authority for a Take Care Clause claim, all of those cases are distinguishable, *see* Defs.' Opp. at 30 n.25, and Plaintiffs have not contested in their Reply Defendants' arguments with respect to those cases.

conditions necessary to invoke two statutes that would have authorized the Executive to take personal and real property under certain circumstances. *Id.* at 585-86. Instead, the Government invoked, *as a defense*, the President's inherent authority under Article II, including the Take Care Clause, to act without statutory authority. *Id.* at 587. Thus, *Youngstown*'s use of the Take Care Clause obtains only in the rare circumstance where the President takes action concededly outside the authority conferred by statute and then relies solely on powers inherent in Article II as a defense to a claim that his order was *ultra vires*. *See Dalton v. Specter*, 511 U.S. 462, 473 (1994) (explaining that *Youngstown* "involved the conceded *absence* of *any* statutory authority, not a claim that the President acted in excess of such authority," and holding that "claims simply alleging that the President has exceeded his statutory authority" are not constitutional claims subject to judicial review). That is categorically different from the situation here, where the Secretary of Homeland Security has acted pursuant to a congressional mandate to prioritize enforcement resources and within the Executive Branch's longstanding enforcement discretion under the immigration laws, Homeland Security Act, and other congressional enactments. *See* Defs.' Opp. at 33-34, 43.[12]

Additionally, Plaintiffs here are not suing the President, nor are they challenging any action taken by him. Unlike *Youngstown*, there has been no Executive Order issued by the President; the only issue before the Court is whether the Secretary's 2014 Deferred Action Guidance is lawful within the framework of the INA and other immigration laws.

[12] Plaintiffs mischaracterize the President's prior statements concerning the Executive's inability to grant a non-statutory path to lawful immigration status (which the Secretary has not done here) as implying that the immigration laws and other congressional enactments do not confer discretion upon the Secretary to prioritize removals, including through the use of deferred action. But no such concession has been made, and Supreme Court precedent makes clear that such discretion continues to exist. *See Arizona*, 132 S. Ct. at 2499; *AAADC*, 525 U.S. at 483-84.

In all events, Plaintiffs' Take Care Clause claim – even were it cognizable – necessarily fails because Plaintiffs cannot demonstrate that the Executive acted contrary to the express command of the statutes Congress has enacted. As explained below, the Secretary's actions are not foreclosed by statute, and, indeed, are consistent with recognized enforcement discretion under the immigration laws.[13]

B. The Secretary's Guidance Regarding the Exercise of Deferred Action for Certain Low Priority Aliens Is an Unreviewable Form of Prosecutorial Discretion Under *Heckler v. Chaney*

Quite apart from the other threshold bars to this suit discussed above, a challenge to an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is "presumed" to be "immune from judicial review under § 701(a)(2)" of the APA. *See* Defs.' Opp. at 31-32 (citing *Chaney*, 470 U.S. at 832). Thus, the Court must determine whether the statute bars the exercise of prosecutorial discretion here. *See Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990) (holding, in challenge to immigration enforcement decisions, that "[r]eview of agency nonenforcement decisions is permissible *only* where statutory language sets constraints on the agency's discretion."); *see also Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003). Such standards are not present here, and thus the Federal Government's discretionary immigration enforcement efforts are not subject to judicial review. *See Texas*, 106 F.3d at 667 ("Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty").

[13] The OLC Memorandum's discussion of *Youngstown* is consistent with the above points, as it cited the Jackson concurrence for the obvious point that, as a statutory matter, enforcement decisions have to be consonant with, rather than contrary to, congressional policies underlying the statute that the agency is charged with administering. OLC Op. at 6 (Defs.' Ex. 2). The Secretary has not exceeded those limits here. *Id.* at 31.

1. *Chaney* Applies Because Plaintiffs Do Not Identify Any Statutory Provision Limiting the Exercise of Prosecutorial Discretion Through Deferred Action

The Secretary's use of deferred action is part of a comprehensive Departmental effort to most effectively enforce the Nation's immigration laws, consistent with the language and purpose of the INA. *See* Defs.' Opp. at 11. Specifically, Congress has afforded the Secretary broad discretion to take necessary actions to carry out his authority, *see* 8 U.S.C. § 1103(a), and directed him to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5). That is precisely what the Secretary has done with the 2014 Deferred Action Guidance, which is part of a series of interrelated memoranda that set Department-wide enforcement priorities and allow resources to be deployed most effectively in support of those priorities.[14] This integrated approach allows DHS to implement its comprehensive scheme to prioritize the removal of high priority aliens in a way that promotes national security and public safety, as well as family unity,[15] and is consistent with the plain language and purpose of the immigration laws. Because Congress has not foreclosed this discretion, *Chaney* applies.

In response, Plaintiffs contend that certain inapplicable provisions of the INA, which they

[14] On November 20, 2014, the Secretary issued ten interrelated memoranda aimed at, among other things, strengthening border security, revising removal priorities, improving personnel policies for ICE officers, expanding availability of provisional waivers of inadmissibility under 8 U.S.C. § 1182(a)(9)(B)(v) to spouses and children of U.S. citizens or lawful permanent residents, revising parole rules, promoting the naturalization process, and supporting high-skilled business and workers. Although Plaintiffs only challenge the 2014 Deferred Action Memorandum, *see* Am. Compl. ¶¶ 71, 83, 87 [ECF No. 14]; *see also* Proposed Order on Mot. for Prelim. Inj. [ECF No. 5-1], copies of the other memoranda that have not already been submitted in this case are attached hereto, at the Court's request. *See* Exs. 36-43.

[15] Plaintiffs base much of their argument on the conclusory assertion that "family unity" is not a proper objective of the immigration laws. The immigration laws further a variety of Congressional objectives, but it is well-established that maintenance of family unity and the liberal treatment of children represent well-known goals of the INA. H.R. Rep. No. 82-1365, at 29 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1680 (statute implements "the underlying intention of our immigration laws regarding the preservation of the family unit"); *see, e.g.*, *Holder v. Martinez Gutierrez*, --- U.S. ---, 132 S. Ct. 2011, 2019 (2012) (observing that the "objectives of providing relief to aliens with strong ties to the United States and promoting family unity **. . .** underlie or inform many provisions of immigration law" (internal quotation marks and citations omitted)).

mischaracterize in their Reply, invalidate the Secretary's actions. *See* Pls.' Reply at 9-14. The logical extension of Plaintiffs' statutory arguments would be that *all* grants of deferred action, and not just the challenged policy, violate the INA – an outcome that the Supreme Court has already foreclosed. Plaintiffs' arguments cannot be squared with the language or purpose of the immigration laws, nor with the Supreme Court's and Congress's historical recognition of the valid exercise of prosecutorial discretion through deferred action. *See* Defs.' Opp. at 33-37.

First, Plaintiffs' argument that 8 U.S.C. § 1225(b)(2)(A) creates a mandatory duty of removal[16] is inconsistent with the text of the statute and the Supreme Court's recognition in *Arizona* that "a principal feature of the removal system is the broad discretion exercised by immigration officials," which includes the decision "whether it makes sense to pursue removal at all."[17] 132 S. Ct. at 2499. Moreover, Plaintiffs ignore the settled case law that a statute does not foreclose prosecutorial discretion simply because it speaks in mandatory terms (*e.g.*, "shall"). *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative

[16] This legal question is currently before the 5th Circuit in *Crane v. Johnson*, No. 14-10049 (5th Cir.) (oral argument to be heard Feb. 3, 2015).

[17] Plaintiffs also misstate the scope of 8 U.S.C. § 1225(b)(2)(A), which states that "an alien seeking admission . . . shall be detained for [removal proceedings]." *Id.* This provision, on its face, does not apply to aliens who are already present within the United States and who are taking no action to "seek" admission. *Id.* Although Plaintiffs contend otherwise, their argument rests on a conflation of those aliens who are "seeking admission" with aliens who are "applicants for admission." Some aliens who may be considered for DACA and DAPA, who already must be physically present within the United States, may be "deemed" to be "applicant[s] for admission" by operation of law. *See* 8 U.S.C. § 1225(a)(1). But unlike aliens arriving at the border, or a port of entry, they are not engaged in any affirmative behavior that qualifies as "seeking admission," and instead are requesting temporary relief from removal. If Congress intended section 1225(b)(2)(A) to apply to all aliens deemed "applicants for admission," it could easily have used that existing term of art instead of the distinct formulation of "seeking admission." *See Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 354, 356 (5th Cir. 1981) ("There is . . . a well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect."). Indeed, some aliens who may request DACA and DAPA are not even "applicants for admission," including aliens who were lawfully admitted but overstayed their period of authorized admission.

commands"); *see also City of Seabrook v. Costle*, 659 F.2d 1371, 1373-75 (5th Cir. 1981) (concluding that the phrase "shall notify" did not create a nondiscretionary duty, given the "broad discretion" afforded administrative agencies charged with enforcing the laws, as well as their limited resources). Given that Congress granted the Secretary discretion to prioritize enforcement efforts, and that Congress has not appropriated sufficient resources for DHS to detain and commence proceedings against all removable aliens (including undocumented immigrants, persons apprehended at the border, and lawfully authorized aliens who commit crimes or otherwise violate the terms of their immigration status), Plaintiffs' reading of section 1225 to create a mandatory duty to remove all undocumented immigrants would lead to an "absurd result[]."[18] *Bartholomew v. United States*, 740 F.2d 526, 531 (7th Cir. 1984) (courts should consider whether "a mandatory construction would yield harsh or absurd results").

Second, ignoring the structure and complexity of the immigration laws, Plaintiffs attempt to mischaracterize unrelated provisions of the INA to suggest that deferred action somehow circumvents the INA's scheme for lawful admission. *See* Pls.' Reply at 10-14. But the longstanding practice of deferred action does not confer lawful status on recipients or constitute lawful admission. For purposes of the INA, "the terms 'admission' and 'admitted' mean . . . lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); *see also Martinez v. Mukasey*, 519 F.3d 532, 543-44 (5th Cir. 2008). An alien who is present in the United States unlawfully – either because he was not inspected and admitted by an immigration officer or because he overstayed his

[18] Moreover, even under Plaintiffs' interpretation, section 1225(b)(2)(A) applies only to the decision to file a "notice to appear" commencing removal proceedings. Thus, the Government would remain free to exercise prosecutorial discretion to terminate removal proceedings at any subsequent stage. Plaintiffs' construction would thus have the illogical consequence of requiring the Government to spend its time and resources to commence removal proceedings that it has no intention of prosecuting further. The language of the statute does not compel such absurd results.

authorized period of admission as a nonimmigrant – cannot turn his or her unlawful status into a lawful one simply by being granted deferred action. *See Ariz. Dream Act Coalition*, 757 F.3d at 1058 ("Like recipients of other forms of deferred action, DACA recipients enjoy no formal immigration status."). The statutory provisions concerning admission discussed by Plaintiffs are thus irrelevant to the issues before the Court.

Plaintiffs suggest that deferred action contravenes provisions of the INA that place conditions on the lawful admission of certain relatives of U.S. citizens or lawful permanent residents (LPRs) pursuant to immigrant or nonimmigrant visas.[19] *See* Pls.' Reply at 10-11, 13-14 (citing, *inter alia*, 8 U.S.C. § 1151(a)(1), (a)(2)(A)(i)). But a grant of deferred action is categorically different from admission pursuant to a visa: deferred action does not constitute lawful admission, does not confer any lawful immigration status, does not provide a basis from which to seek lawful permanent residence or U.S. citizenship, and can be revoked at any time for any reason whatsoever.[20] In fact, Congress itself indicated that granting deferred action to immediate relatives of LPRs did not contravene its statutory scheme, by expressly providing that certain of those aliens were "eligible for deferred action" and "work authorization" in some circumstances. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b)(1), 115 Stat. 272, 361; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)(1)(A), (d)(1), 117 Stat. 1392, 1694. Similarly, Plaintiffs' reliance on the eligibility

[19] Immigrant visas lead to lawful permanent residence (commonly known as having a "green card") upon admission. Nonimmigrant visas lead to lawful temporary status (such as H-1B specialty occupation worker status) upon admission.

[20] Under long-standing policy, deferred action tolls the accrual of "unlawful presence" for purposes of the so-called "3- and 10-year bars" under 8 U.S.C. § 1182(a)(9)(B). Such tolling is irrelevant for virtually all individuals who may be considered for deferred action under DACA or DAPA. An individual need only have been here unlawfully for one year to trigger the 10-year bar. Additional unlawful presence triggers no additional consequences or penalties, and neither tolling nor deferred action cures any unlawful presence an individual has already accumulated.

criteria for cancellation of removal (a term of art for certain relief in the INA) is inapt, because, unlike deferred action, a grant of cancellation of removal to an otherwise inadmissible and removable alien confers LPR status and all the rights that come with such status, including prospective eligibility for U.S. citizenship. *See* 8 U.S.C. § 1229b(b).

Indeed, none of the provisions cited by Plaintiffs demonstrates that deferred action is prohibited by statute or that it confers lawful immigration status, which the Fifth Circuit has held "implies a right protected by law." *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013). The statutory provisions on which Plaintiffs rely reflect the intent to limit DHS's ability to provide lawful immigration status, which deferred action does not provide. No provision cited by Plaintiffs – or in the immigration laws – reflects an intent to limit DHS's enforcement discretion, much less the clear intent that would be required to permit judicial review under *Chaney*.

2. The Secretary Has Exercised His Statutory Responsibilities by Providing a Framework for the Exercise of Prosecutorial Discretion

Plaintiffs also fail to support their claim that *Chaney* does not apply because Defendants allegedly have abdicated a statutory duty by announcing a framework for the exercise of prosecutorial discretion. *See* Pls.' Reply at 9, 32 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)). Specifically, they argue that the challenged policy does not conserve resources and that its use of deferred action is different in "kind or scale" than past exercises of agency discretion. *See* Pls.' Reply at 18-23, 27. These arguments, while lacking in merit, fail to demonstrate that the Secretary is violating an express statutory mandate akin to *Adams*. As the Fifth Circuit has held, real or perceived inadequacies in federal immigration enforcement policy do not constitute an abdication of a statutory duty, especially given the broad discretionary authority conferred upon the Secretary by the immigration laws. *See Texas*, 106 F.3d at 667; *see also Arizona*, 132 S. Ct. at 2499. For similar reasons, DHS's decisions regarding how to deploy

enforcement resources or how to design guidelines for exercising prosecutorial discretion for a group do not constitute an abdication of statutory responsibilities under the INA. *See* Defs.' Opp. at 37-44. To the contrary, these decisions fulfil the Secretary's charge under the Homeland Security Act to "establish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

Plaintiffs first argue that the granting of deferred action to a high percentage of DACA requestors is indicative of an abdication of a statutory duty similar to *Adams v. Richardson*. Pls.' Reply at 32. But contrary to Plaintiffs' characterization, the D.C. Circuit's holding in *Adams* did not hinge on the number of noncompliant school districts that were receiving Title VI funds from the Department of Health, Education, and Welfare, but rather focused on the Department's failure to carry out a "clear and direct statutory mandate." *See Cutler v. Hayes*, 818 F.2d 879, 893 (D.C. Cir. 1987). Here, on the other hand, Congress has enacted no provision forbidding the exercise of deferred action, comparable to the provisions of the Civil Rights Act that were dispositive in *Adams*.[21] In addition, the existence of unreviewable discretion here is further supported by the fact that "the [agency] lacks the resources necessary to locate and prosecute every [statutory] violator." *Adams*, 480 F.2d at 1162.

Plaintiffs also have failed to demonstrate the kind of extreme conduct required to establish even a remotely colorable claim of abdication under *Chaney*. Plaintiffs do not dispute that DHS lacks funds to pursue removal of anything more than a small fraction of the removable

[21] Numerous courts have distinguished *Adams* on the ground that plaintiffs have failed to demonstrate extreme dereliction or complete abandonment of enforcement efforts. *See, e.g., Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 344 (D.C. Cir. 2002); *Block v. SEC*, 50 F.3d 1078, 1082-84 (D.C. Cir. 1995); *Wash. Legal Found. v. Alexander*, 984 F.2d 483, 487-88 (D.C. Cir. 1993); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1412 (10th Cir. 1990); *Sierra Club v. Larson*, 882 F.2d 128, 132-33 (4th Cir. 1989); *Cutler v. Hayes*, 818 F.2d 879, 892-93 (D.C. Cir. 1987); *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 578-79 (6th Cir. 1985).

aliens present in the United States and encountered at the border, nor do they contest that DHS is using all funds appropriated to it for removal. Instead, they contend that implementation of the 2014 Deferred Action Guidance does not conserve resources, Pls.' Reply at 27, questioning resource allocation decisions uniquely within the agency's expertise and discretion. Notably, though, Plaintiffs ignore the fact that the costs of administering the Deferred Action Guidance will be covered through fees submitted by requestors and not with congressionally appropriated funds. *See* Decl. of Donald W. Neufeld ("Neufeld Decl.") ¶¶ 5, 26 (Ex. 44); *see also* OLC Op. at 10 (citing, *inter alia*, 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH)). Plaintiffs also disregard that by using USCIS's fee-funded resources to investigate potential candidates for non-removal and to provide a means for identifying them on a prospective basis, DHS has enabled U.S. Immigration and Customs Enforcement ("ICE") and U.S. Customs and Border Protection ("CBP") to more easily identify low-priority aliens and instead focus on the aliens that Congress has prioritized for removal. *See* OLC Op. at 28. This includes being able to more efficiently devote manpower to border security, expend resources attempting to locate, apprehend, and remove criminal aliens who were released by state and local authorities, and reduce costs associated with detaining low priority aliens and obtaining travel documents and transporting them back to their home countries, particularly those countries not contiguous to the United States.[22] *See generally* Defs.' Ex. 3 at 4 (DHS Immigration Enforcement Actions: 2013),

[22] For example, between fiscal years 2011 and 2013, the total number of aliens apprehended at the border rose, including the number and percentage from non-contiguous countries (*i.e.*, other than Mexico), *see* Defs.' Ex. 3 at 4. Generally, the removal of nationals to non-contiguous countries is far more costly, takes significantly more time, and requires added officer resources, as compared to removals of Mexican nationals. *See* Defs.' Ex. 4 at 4, 9. In addition, the influx of unaccompanied children (UACs) at the border in FY2014 required ICE to reassign 800 officers from the interior to support southwest border operations, as well as to construct and staff additional detention facilities. *See id.* at 3. During FY2014, Congress did not act upon a DHS request for emergency supplemental funding, requiring DHS to reprogram funds from other key homeland security priorities. *Id.* Finally, ICE has been challenged by an

Ex.4 at 2-6, 9 (ICE Enforcement and Removal Operations Report, FY2014). As recognized by *Chaney*, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. 470 U.S. at 831.

Plaintiffs also argue that prior programs identifying certain groups of aliens who may be eligible for an exercise of discretion were of a different "kind or scale." *See* Pls.' Reply at 18-19. Of course, this alone is not dispositive of the lawfulness of the present initiative. In any event, Plaintiffs fail to distinguish the 2014 Deferred Action Guidance from the Family Fairness Program of 1990, which addressed a similar type of family-based classification[23] and reflected a statutory concern for promoting unity among U.S. citizens and their undocumented families. As to the scope, although a limited number of potential recipients ultimately applied for temporary relief under the 1990 Family Fairness Program, *see* Pls.' Reply at 19, the relevant data point for comparison purposes is the number of potential applicants estimated at the time of the program's announcement, which was 1.5 million.[24] As a percentage of the total estimated undocumented population at present (11.3 million), the estimated potential applicant pool under the 2014 Deferred Action Guidance (35%, or 4 million) is below the estimated potential requestor pool for the Family Fairness Program (43%, or 1.5 million) as a percentage of the total undocumented

---

increasing number of state and local jurisdictions that are declining to honor ICE immigration detainers. *Id.* at 4. This has meant that ICE has to use additional resources to try to locate, apprehend, and remove criminal aliens who are released by state and local authorities. *Id.* at 5.

[23] In that program, the Executive granted "extended voluntary departure" and provided work authorization for certain aliens who were ineligible for legal status under the Immigration Reform and Control Act of 1986 but who were the spouses and children of aliens who qualified for legal status under the Act. *See* Defs.' Opp. at 42 (citing OLC Op. at 14-15).

[24] *See* Defs.' Ex. 8 ("At the time, [INS Commissioner] McNary stated that an estimated 1.5 million unauthorized aliens would benefit from the policy."); *see also* Decision Mem. to Gene McNary, *The Implementation of the Family Fairness Policy* at 1 (Feb. 8, 1990) (Ex. 45) (stating that the program would provide voluntary departure and employment authorization "to potentially millions of individuals"); *Draft Processing Plan, Processing of Family Fairness Applications, Utilizing Direct Mail Procedures* at 1 (Feb. 8, 1990) (estimating that "greater than one million IRCA-ineligible family members" would file for relief under the announced policy) (Ex. 46).

population at the time when that program was first announced (3.5 million).[25] *See* OLC Op. at 1, 14-15, 30-31. Given these relative percentages, combined with Congress's implicit approval of the Family Fairness policy, *see* OLC Op. at 30 n. 15, the 2014 Deferred Action Guidance is not, by virtue of its kind and scale, inconsistent with what Congress has previously deemed to be a reasonable exercise of enforcement discretion.[26] *Id.* at 31.

Although Plaintiffs contend that prior deferred action programs were limited to providing a "temporary bridge" to lawful status for which recipients were already eligible by statute, that was true of neither the 1990 Family Fairness Program nor 2012 DACA (which Plaintiffs are not challenging here).[27] Plaintiffs have cited no statute or regulation that confines the Executive's exercise of deferred action to only providing a temporary bridge to lawful status. Nor could they, as Congress has long been aware of the practice of granting deferred action, including through the use of categorical framework, and has never acted to disapprove or limit the practice. OLC Op. at 18. To the extent that Congress has considered legislation that would limit the practice of granting deferred action, it has never enacted such a measure. *See* OLC Op. at 18 n.

---

[25] There remains uncertainty regarding how many people will apply for or receive deferred action under the 2014 Guidance. Approximately 1.2 million people, for example, were estimated to be eligible for deferred action under 2012 DACA when the program was announced. But as of December 31, 2014, only 638,897 of DACA eligible individuals had been granted deferred action. *See* Neufeld Decl. ¶ 23. Moreover, any comparison between the number of aliens who may receive deferred action under the 2014 guidance and those who received temporary relief under the Family Fairness Program would also have to take into account that Congress enacted a statute in 1990 providing certain relief less than a year after the program's announcement, thereby rendering the program unnecessary. *See infra* note 25.

[26] Indeed, other high-level officials have in the past exercised their discretion to set policies that exempted large numbers of people from prosecution, including based on bright-line categories. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 604, 609-10 (1985) (upholding application of policy that categorically exempted from prosecution 99.96% of a class of 674,000 violators of the selective-service registration requirement).

[27] After INS implemented the Family Fairness policy, Congress enacted a separate statute granting recipients under 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 that grant of relief did not take effect 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).

9. Plaintiffs' contention that the House of Representatives has issued a "rebuke[]" of the Secretary's November 20 guidance, Pls.' Reply at 24, is irrelevant. As the Supreme Court has made clear, an unenacted bill is an unreliable indicator of legislative intent. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n. 11(1969); *see also Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc*., 501 U.S. 252, 276 (1991).

For all of these reasons, the Secretary's proposed exercise of deferred action at issue here does not constitute an abdication of a statutory duty and hence is not reviewable by this Court.

3. The Secretary's 2014 Deferred Action Guidance Appropriately Reflects the Exercise of the Agency's Prosecutorial Discretion at Several Different Levels

Contrary to Plaintiffs' claim, the fact that the Secretary has established a framework for the exercise of DHS's prosecutorial discretion, which nevertheless preserves ultimate decisionmaking on a case-by-case basis, does not remove that exercise of discretion from the rule of *Chaney* and the non-reviewability of exercised of enforcement discretion. As explained previously, the creation of a framework *itself* is an exercise of discretion. *See Lopez v. Davis*, 531 U.S. 230, 243-44 (2001). And DAPA's framework for the exercise of this discretion in individual cases helps ensure that it is not employed arbitrarily, *see* Defs.' Opp. at 40 (citing cases), and that this discretion is being exercised both at a Department-level and on a case-by-case basis. *Id.* at 41-42. Consistent with his statutory charge to set Department-wide enforcement priorities, *see* 6 U.S.C. § 202(5), the Secretary in the exercise of his discretion has first established general guidelines for who may be considered—for example, having a U.S. citizen or LPR son or daughter, continuous residence for five years, and no current lawful status. These parameters, reflecting the exercise of discretion by the agency's top law-enforcement official, are designed to ensure that the policy is limited in scope, reflects enforcement priorities,

and at the same time serves a particularized humanitarian interest in promoting family unity and is consonant with congressional policies embodied in the immigration laws.

The Guidance further preserves significant judgment and discretion to be exercised on a case-by-case basis, by including broad and flexible criteria, such as whether the person constitutes a threat to public safety or whether the person presents any other "factors that, in the exercise of discretion, [would] make[] the grant of deferred action inappropriate." Deferred Action Guidance at 4. Plaintiffs incorrectly claim that each guideline is akin to a check-box that allows no discretion, when in fact many of the guidelines, such as the public safety factor, necessarily require USCIS adjudicators to exercise significant discretion. Although Plaintiffs speculate, without foundation, that this discretion may not be implemented on a case-by-case basis, *see, e.g.*, Pls.' Reply at 28-32, what matters for purposes of this Court's inquiry under *Chaney* is that the Deferred Action Guidance reflects multiple layers of prosecutorial discretion on a matter committed by law to agency discretion.

Plaintiffs' argument that the Deferred Action Guidance will amount to "rubber-stamping," *see* Pls.' Reply at 28-29, is also contrary to the Secretary's policy. Because Plaintiffs challenge a memorandum that has not yet gone into effect, it would be inappropriate and contrary to law for this Court to assume that the Government will not administer the policy in keeping with its terms, which clearly contemplate case-by-case consideration. *See USPS v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies"). Plaintiffs have cited no case in which a court has rejected an exercise of prosecutorial discretion by second-guessing the manner in which an agency implemented a policy that is lawful on its face, let alone based on an assumption about the agency's presumed failure to comply with the policy as written before it has gone into effect.

In any event, Plaintiffs' claim of "rubber-stamping" with respect to the existing DACA policy that they carefully avoid challenging is incorrect and rests on erroneous assumptions.[28] As an initial matter, approximately six percent of adjudicated DACA requests have been denied, in addition to the six percent that were initially rejected when filed. Defs.' Opp. at 41.[29] The denials have been based on an adjudicator's case-by-case determination that the requestor has not met the substantive criteria of the policy or for other discretionary reasons. Neufeld Decl. ¶ 15. While these numbers alone (in addition to the express terms of the 2012 DACA policy itself) show that discretion is being exercised under that policy, there are also concrete examples in which requests have been denied based on decidedly discretionary grounds (although the absence of such cases in the record would not be dispositive of the relevant legal issues). *See id.* ¶¶ 17, 18, 24; *see also* Amicus Br. of Am. Immigration Council *et al.* at 2 [ECF No. 39-1) (noting *amici*'s experience seeing "individuals who meet all of the DACA eligibility requirements [but are] still denied deferred action"). For example, requests have been denied for public safety reasons where the requestor was suspected of gang membership or gang-related

[28] For example, Plaintiffs' complaint about the relatively high rate of approval under 2012 DACA fails to take into account that an individual who may not merit deferred action, *e.g.*, one who has multiple arrests, is unlikely to apply in the first place. Defs.' Opp. at 41-42.

[29] In the Neufeld Declaration, Defendants provide further details about DHS's implementation of 2012 DACA at the request of the Court and to respond to some of the points made in Plaintiffs' papers. Because the 2014 Deferred Action Guidance is, on its face, a valid exercise of DHS's prosecutorial discretion for the reasons discussed above, the details about the agency's implementation of 2012 DACA are not necessary to reject Plaintiffs' pre-enforcement challenge to that Guidance. Moreover, challenges brought pursuant to the APA are ordinarily confined to the administrative record or appropriately explanatory materials. This is in contrast to the Kenneth Palinkas Declaration (Pls.' Ex. 23) [ECF No. 64-42] submitted by Plaintiffs, which, aside from reflecting conclusory, generalized assertions lacking support, is unrelated to the agency's administrative action, and thus does not bear on whether Plaintiffs can demonstrate a likelihood of success on the merits. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Harvard Pilgrim Health Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) (when constitutional and APA claims overlap, review must be on the administrative record); *cf. Seafarers Int'l Union of N. Am. v. U.S.*, 891 F. Supp. 641, 647 (D.D.C. 1995) ("Although judicial review is normally confined to the administrative record, *agency* affidavits may be used to supplement the administrative record to further explain the administrative record and describe the background information that was available to the agency") (emphasis added).

activity or had a series of arrests without convictions, arrests resulting in a pre-trial diversionary program, or an ongoing criminal investigation. Neufeld Decl. ¶ 24. In addition, requests have been denied on the basis of factors not expressly set forth in the 2012 DACA guidance, such as where the requestor had made false prior claims of U.S. citizenship. *Id.* ¶¶ 18, 24. Thus, contrary to Plaintiffs' unsupported contentions, implementation of 2012 DACA demonstrates the entirely appropriate use of case-by-case discretion.[30]

Plaintiffs question USCIS's ability to exercise discretion under the upcoming 2014 Deferred Action Guidance on two additional grounds, *see* Pls.' Reply at 31-32, both of which are flawed. First, Plaintiffs contend that the use of service centers to process requests under DACA has "prevent[ed] investigators from interviewing applicants." Pls.' Reply at 31 (citing Palinkas Decl. ¶ 8). This contention is unfounded. USCIS uses its service centers for substantive processing of DACA requests because they are capable of handling high-volume caseloads. *See* Neufeld Decl. ¶ 8. And such handling is not dissimilar from several other programs through which individuals may receive deferred action. *Id.* ¶ 8 n.1. As explained in the Neufeld Declaration, after a DACA request is received and determined to be complete, it is subject to a substantive determination by a USCIS adjudicator, in which the adjudicator considers the guidelines and weighs the evidence submitted by the requestor. *Id.* ¶¶ 14-18. The USCIS service center has the authority to refer a case for interview at a USCIS field office in order to

[30] Other documents submitted by Plaintiffs describing the 2012 DACA program also fail to show that USCIS is not exercising discretion in adjudicating DACA requests. Plaintiffs cite a letter from USCIS Director Rodriguez to Senator Grassley in support of this point, but that letter lists only the four most common reasons why DACA requests were *rejected* during the time period from August 15, 2012 to August 31, 2014 (all of which relate to failing to meet the guidelines), Pls.' Ex. 29; the letter does not address why DACA requests were *denied* for other discretionary reasons. DACA rejections are based on a deficiency in the request (*e.g.*, missing fee) or failure to meet one of the age-related guidelines, while denials require adjudication of particular factors and weighing of evidence. Neufeld Decl. ¶¶ 14-15. The Migration Policy Institute Study (also cited by Plaintiffs) similarly does not address the reasons for DACA denials, including any discretionary reasons for those denials. *See* Pls.' Ex. 6.

resolve outstanding concerns on DACA requestors, examples of which are attached to the Neufeld Declaration. *Id.* ¶ 20. Thus, contrary to Mr. Palinkas's unsupported and conclusory assertions, *see*, *e.g.*, Palinkas Decl. ¶ 10, the process for consideration of DACA requests by the service centers preserves the case-by-case consideration contemplated by the policy.

Plaintiffs also err when they contend that the existence of agency-wide procedures for accepting evidentiary submissions and sending notices to requestors somehow indicates that adjudicators are prevented from exercising discretion under DACA. Pls.' Reply at 31-32. Such instructions do not indicate a lack of discretion; rather, they highlight that DACA requests must be supported by evidence presented in each case and that officers are encouraged to consider all relevant factors and evidence before determining whether deferred action is appropriate. *See* Neufeld Decl. ¶¶ 18-19. Likewise, Plaintiffs' assertion that DACA involves solely the mechanical use of "templates," *see* Pls.' Reply at 32, is baseless: the portion of the DACA Standard Operation Procedures they cite in support of this claim clearly reflects that, even though standardized forms are used to record decisions, those decisions are to be made "on a case-by-case basis, according to the facts and circumstances of a particular case." Pls.' Ex. 10. In the end, the existence of standardized forms and procedures for administering DACA shows only that the agency has processes in place for managing work flows and for ensuring that discretion is exercised consistent with articulated enforcement priorities and in a non-arbitrary fashion.[31]

[31] Contrary to Plaintiffs' contention, *see* Pls.' Reply at 32-34, deferred action has been terminated under DACA for discretionary reasons, *see* Ltr. from USCIS Dir. Leon Rodriguez to Sen. Charles Grassley, Oct. 9, 2014, Enclosure 1, Pls.' Ex. 29 (listing twelve different reasons that deferred action has been terminated under DACA). The fact that there have not been more terminations should not be held against the agency, as it most likely indicates that discretion is being exercised carefully in the initial consideration of DACA requests.

4. Work Authorization for Deferred Action Is Based on Longstanding Legal Authority

Plaintiffs also erroneously characterize the 2014 Deferred Action Guidance as a "massive new permitting scheme" not subject to *Chaney*'s limits on judicial review of prosecutorial discretion, Pls.' Reply at 27, on the ground that it may ultimately lead to the grant of federal work authorization to individuals granted deferred action. Federal work authorization is made available not through the challenged guidance, but through a separate statutory and regulatory scheme that confers discretion to the Secretary to consider which aliens are authorized to be employed in the United States – a legal scheme Plaintiffs do not separately challenge. *See* Am. Compl. ¶¶ 71, 83, 87. Accordingly, any subsequent grant of work authorization is irrelevant to the agency's exercise of prosecutorial discretion under the Guidance. It is not legally significant, for purposes of *Chaney*, that Plaintiffs complain of what they anticipate to be the independent statutory and regulatory consequences of a discretionary decision to defer removal. *See Texas*, 106 F.3d at 667 (regardless of costs to State from defendants' alleged failure to control illegal immigration, Attorney General's immigration enforcement decisions are not subject to a "workable standard against which to judge the agency's exercise of discretion").

In any event, the statutory and regulatory scheme for granting federal work authorization to deferred action recipients is well-grounded in established law and precedent. Federal immigration officials are specifically authorized by statute to determine which aliens are authorized to work in the United States. *See* 8 U.S.C. § 1324a(h)(3) (defining "unauthorized alien" not entitled to work as an alien who is neither a legal permanent resident nor "authorized to be . . . employed by [the INA] or *by the Attorney General* [now the Secretary of Homeland Security].") (emphasis added). Other provisions also indicate that federal immigration officials

possess broad discretion in determining when aliens may work in the United States.[32] Congress has therefore provided the Secretary with authority to address which aliens may work under these circumstances. *See Arizona Dream Act Coalition*, 757 F.3d at 1062 ("Congress has given the Executive Branch broad discretion to determine when noncitizens may work") (citing 8 U.S.C. § 1324a(h)(3)). Exercising the discretion within these statutory provisions, the Secretary has determined that those granted deferred action may ordinarily apply for work authorization. 8 C.F.R. § 274a.12(c)(14). This regulation, which was subject to notice-and-comment, dates back to 1981, and in both its original and current form, defines "deferred action" as an "act of administrative convenience to the government which gives some cases lower priority." *See* Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25079-03, 25081 (May 5, 1981); 8 C.F.R. § 274a.12(c)(14). In numerous enactments since, Congress has indicated its approval of this longstanding practice of granting work authorization to recipients of deferred action. *See* Pub. L. No. 107-56, § 423(b)(1) (certain relatives of LPRs "may be eligible for deferred action *and work authorization*" (emphasis added)); Pub. L. No. 108-136, § 1703(c)(1)(A), (d)(1) (certain immediate relatives "shall be eligible for deferred action . . . *and work authorization*" (emphasis added)); 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (certain children

[32] *See, e.g.*, 8 U.S.C. § 1324a(h)(l) (providing that Attorney General is responsible for documenting aliens' right to work in the United States); § 1324a(b)(1)(C)(ii) (providing that a document is valid as evidence of employment authorization if "the Attorney General finds [it], by regulation, to be acceptable" for that purpose). Moreover, in the few instances in which Congress has determined to limit employment authorization for certain classes of aliens, it has done so expressly. *See, e.g.*, 8 U.S.C. § 1158(d)(2) ("An [asylum] applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum."); § 1226(a)(3) (restricting employment authorization for aliens who have been arrested and are in removal proceedings unless the alien is a lawful permanent resident "or otherwise would (without regard to removal proceedings) be provided [work] authorization"); § 1231(a)(7) (providing that alien who has been ordered removed is ineligible for work authorization unless the Secretary finds that the alien cannot be removed for lack of a country willing to receive the alien or "the removal of the alien is otherwise impracticable or contrary to the public interest").

are "eligible for deferred action *and work authorization*" (emphasis added)).

Plaintiffs argue that 8 U.S.C. § 1324a(h)(3) is a "definitional provision" and that the Secretary's interpretation is inconsistent with other provisions of the INA. Pls.' Reply at 15-16. Shortly after Congress enacted 8 U.S.C. § 1324a(h)(3) as part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, the Immigration and Naturalization Service ("INS") was presented with the identical argument as part of a petition for rescission of the employment authorization regulation. *See* Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987). INS rejected the argument that 8 U.S.C. § 1324a(h)(3) precludes the Secretary (then the Attorney General) from granting work authorization. Rather, INS concluded "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those . . . authorized by statute." 52 Fed. Reg. at 46,093. Given that an agency's "contemporaneous interpretation of the statute it is entrusted to administer" is given "considerable weight," *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986), Plaintiffs' argument fails.

Further, the Fifth Circuit has explicitly recognized that 8 U.S.C. § 1324a(h)(3) provides federal immigration officials with extensive flexibility in granting work authorization. *See Perales*, 903 F.2d at 1048-50. In *Perales*, immigration visa applicants brought a class action requesting that INS "change its method of considering petitions for voluntary departure and employment authorization for certain types of aliens." *Id.* at 1045. The Fifth Circuit found that, under *Chaney*, neither 8 U.S.C. § 1324a(h)(3) nor 8 C.F.R. § 274a.12(c) provides a court with

judicially manageable standards for reviewing the manner in which federal immigration officials exercise their discretionary power to grant work authorizations. *See Perales*, 903 F.2d at 1048-50.[33]

In short, the provision of federal work authorization for deferred action recipients, whether related to DACA or DAPA or some other grant of deferred action, has a strong statutory and regulatory basis and does not contravene the express or implied will of Congress.

C. Even If It Were Reviewable, the Deferred Action Guidance Must Be Upheld as a Valid Exercise of Discretion Under the APA

Even if the Guidance Memorandum were subject to judicial review on the merits—which it is not—Plaintiffs' vague and unsupported argument that it violates the substantive requirements of the APA, *see* Pls.' Reply at 40-42, is without merit. Plaintiffs' first claim is that the Deferred Action Guidance violates "Congress's clear statutory commands." *Id.* at 41. But as Defendants demonstrated above, Plaintiffs fail to show that the Guidance violates any provision of the INA. *See supra* Part II.B.1.

To the extent that Plaintiffs separately contend that the Deferred Action Guidance is arbitrary and capricious, even though it is not contrary to the terms of the immigration laws, Plaintiffs fall far short of meeting the extremely high bar for such a showing. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) ("We have made clear . . . that 'a court is not to substitute its judgment for that of the agency.'"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (courts should "uphold a decision of less than ideal

[33] Moreover, there is a long history of the Executive providing work authorization for categories of individuals who have had their removals deferred. Under the Family Fairness Program in 1990, the Executive granted "extended voluntary departure" and provided work authorization for certain aliens who were ineligible for legal status under IRCA but who were the spouses and children of aliens who qualified for legal status under the Act. *See* OLC Op. at 14-15. Likewise, students who wished to apply for deferred action under a program for foreign student affected by Hurricane Katrina were required to submit an application for work authorization. *Id*. at 16.

clarity if the agency's path may reasonably be discerned."). Under this standard, a court must presume the validity of agency action. *See Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 388, 393 (5th Cir.1980). Plaintiffs have made no effort whatsoever to explain how they can overcome this presumption.

Plaintiffs' only other ground for invalidating the Guidance under the APA—a meritless non-delegation argument that they raise for the first time in their Reply—fares no better. The Supreme Court has repeatedly endorsed broad grants of discretion to agencies to carry out legislative commands. *See, Whitman v. Am. Trucking Ass'ns, Inc*., 531 U.S. 457, 474-75 (2001) (citing *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 194, 225-26 (1943) (upholding delegation to the FCC to regulate airwaves in the "public interest")). Also, *Arizona* makes clear that discretion pervades the INA. Because Plaintiffs have failed to raise any colorable challenge to the Secretary's use of deferred action, the Court should deny their motion.

D. Plaintiffs Fail to State a Procedural Challenge Under the APA

Plaintiffs' procedural claim that the Guidance violates the APA because it was not issued using notice-and-comment procedures rests on a fundamental misunderstanding of the principles of administrative law and the relevant precedent. It is not the law, as Plaintiffs claim, that if "the APA applies" to a particular agency action, that agency action – regardless of its content and form – can be issued only after notice to the public and opportunity to comment. *See* Pls.' Reply at 34. As Defendants have already explained, the APA does not subject general statements of policy to the notice-and-comment requirements set forth in 5 U.S.C. § 553. *See id.* § 553(b)(3)(A). Plaintiffs are thus flatly incorrect when they suggest that Defendants "concede that they will lose if the Court reaches the merits [of their notice-and-comment] claim, because they [have] undisputedly failed to engage in notice-and-comment rulemaking." Pls.' Reply at

34-35. To be sure, Plaintiffs' notice-and-comment claim is *not* subject to review, because Plaintiffs are not within the relevant zone of interests under the APA. *See supra* Part I.D.2; *cf. Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014) ("Although the plaintiffs here assert a [notice and comment] cause of action under the APA, in considering whether plaintiffs are authorized to sue . . . we look to whether they fall within the zone of interests sought to be protected by the substantive statute pursuant to which [agency] acted"). But even if their claim were properly presented, it fails as a matter of law because the 2014 Deferred Action Guidance is expressly exempt from the requirement of notice-and-comment rulemaking, as a "statement of general policy." Defs.' Opp. at 44-47.

In *Lincoln v. Vigil*—a case Plaintiffs fail to cite, let alone distinguish—the Supreme Court defined "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." 508 U.S 182, 197 (1993) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979). The 2014 Deferred Action Guidance, which seeks to inform the public prospectively about the manner in which DHS proposes to exercise prosecutorial discretion in certain instances, falls squarely within the statutory exemption. *See id.*; *see also Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 601 (5th Cir. 1995) ("*PPCC*") (finding FDA policy announcing nine factors it will consider in bringing discretionary enforcement action fits the Fifth Circuit's definition of general statement of policy "to a tee"). The policy *itself* is an exercise of discretion and should be exempt from notice-and-comment requirements on that ground alone; and in any event, it further contemplates the exercise of discretion on a case-by-case basis without proscribing any result.

Plaintiffs erroneously claim that general statements of policy must be "legally

meaningless." *See* Pls.' Reply at 38. However, that is contrary to the standard recognized by the Fifth Circuit, which has provided that a general statement of policy is one that "does not impose any rights and obligations" and that "genuinely leaves the agency and its decisionmakers free to exercise discretion." *PPCC*, 56 F. 3d at 595. In *PPCC*, the Fifth Circuit found that FDA-issued guidance setting forth enforcement standards qualified as a "statement of policy" after first analyzing the plain language of the policy itself to determine whether it created binding norms. *Id.* at 597. The court noted that, although the policy directed that the FDA "will consider" nine factors that were included in the guidance, the policy "afford[ed] an opportunity for individualized determinations," and noted that even if the factors were met, the FDA retained discretion on whether to bring an enforcement action. *Id*. at 597-98. The Court also noted that the policy included "broad, general, [and] elastic" criteria that required discretion to apply. *Id*. at 598. The same is true of the Deferred Action Guidance. *See supra* Part II.B.3.

Plaintiffs' argument that the Deferred Action Guidance cannot be a general policy statement because it has "substantive effects," *see* Pls.' Reply at 37-38, is also unavailing. First, contrary to Plaintiffs' suggestion, deferred action is not "conferred through the [Guidance]," *id.* at 38; rather, it is conferred through the determination by an immigration officer to defer removal in a given case. Moreover, it was irrelevant to the Supreme Court's definition of a "general statement of policy" in *Vigil* whether such a policy has some substantive impact. 508 U.S. at 197. The argument that a rule has some substantive impact "alone does not undercut the conclusion that . . . [it is a] general statement[] of policy." *Guardian Fed. Sav. and Loan Ass'n v. Fed. Sav. and Loan Ins. Corp.*, 589 F.2d 658, 668 (D.C. Cir. 1978).

Plaintiffs assert that the Guidance "uses a series of *shalls* and *musts*," Pls.' Reply at 36, but none of these verbs directs officials to deny or grant particular requests for deferred action.

Accordingly, this language is irrelevant to the inquiry, which turns on whether "the rule has binding effect *on agency discretion*." *PPCC*, 56 F.3d at 595 (emphasis added); *see also Guardian Fed. Sav. and Loan Ass'n*, 589 F.2d at 667 (concluding that rule was "statement of policy," notwithstanding its "mandatory tone"). Plaintiffs' reliance on *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), is also misplaced. In that case, the agency's guidance "from beginning to end . . . read[] like a ukase," [*i.e.*, an unfair edict] *id.* at 1024, which manifestly cannot be said about the guidance here. In addition, the policy at issue in *Appalachian Power*, unlike the present one, purported to impose new legal obligations on regulated parties that commanded compliance. *Id.* at 1023. In contrast, the Guidance here is akin to the FDA enforcement guidance that the Fifth Circuit found to be exempt from notice-and-comment requirements in *PPCC*.

Plaintiffs invite the Court to ignore that the guidance is a "policy statement," as well as the language of the Guidance generally, and to find that it leaves no discretion to agency officials to make individualized determinations. *See* Pls.' Reply at 38-39. Thus, even though the Guidance expressly provides that "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis," Deferred Action Guidance at 5, Plaintiffs ask this Court to assume the contrary. This approach is not permitted under the law of this Circuit. *PPCC*, 56 F. 3d at 596 ("[T]he starting point is 'the agency's characterization of the rule.'"); *see also Nat'l Ass'n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009) (determination of "whether the agency has imposed any rights and obligations or has left itself free to exercise discretion" must "tak[e] into account the agency's phrasing").

Further, this argument fails for the reasons previously explained in Part II.B.3, *supra*. As noted, Plaintiffs' claim that "it is undisputed that the [Guidance] has yielded a 99.5-94.4%

approval rate," Pls.' Reply at 37, is wrong. To begin with, the 2014 Deferred Action Guidance has not gone into effect yet, so it cannot have "yielded" any approval rate. To the extent Plaintiffs refer to the approval rate of 2012 DACA requests, this statistic is both inaccurate and irrelevant, as 2012 DACA is not at issue in this case. Moreover, Plaintiffs have identified no case in which a court has determined that a policy such as this one, which is addressed to the exercise of agency discretion, was subject to notice-and-comment requirements based on the rate at which that discretion was ultimately exercised under the policy.[34] Further, Plaintiffs' claim that immigration "officers have no discretion to grant a reprieve" to an individual who does not meet the guidelines, Pls.' Reply at 36, ignores the fact that USCIS retains discretion to grant deferred action or certain forms of discretionary relief to such an individual. *See* Neufeld Decl. ¶ 27. The Deferred Action Guidance does not purport to restrict the existing discretion that immigration officers have to defer removal or provide certain forms of discretionary relief.

For all of these reasons, the Court must reject Plaintiffs' procedural APA claim.

III. Plaintiffs Have Failed To Establish Irreparable Harm or That the Balance of the Harms Favor an Injunction

Because Plaintiffs have failed to establish that they will suffer a concrete injury as a result of the 2014 Deferred Action Guidance, and thus lack standing, they have necessarily failed to show that they will suffer irreparable injury absent an injunction. Defs.' Opp. at 49; *cf. Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012) (no irreparable harm when plaintiffs could avoid harm). Indeed, Plaintiffs' assertion that, absent an injunction, future

[34] Plaintiffs suggestion that *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999), found a "70%-90% rate" to be "sufficient" to show that a rule is substantive and binding, Pls.' Reply at 37, is quite misleading. That case did not involve consideration of the rate of grants or denials of discretionary relief under the policy subject to challenge; rather, it involved a policy that, on its face, left "no room for discretionary choices by inspectors in the field," and provided that every company that did not comply with its terms would be inspected, which meant that the effect of the rule was to "inform employers of a decision already made." 174 F.3d at 213.

Presidents will be emboldened to exceed their authority, Pls.' Reply at 66-67, underscores the highly speculative and abstract nature of Plaintiffs' claims of harm, which are insufficient to justify the extraordinary remedy of a preliminary injunction. *See* Defs.' Opp. at 49.

And although Plaintiffs contend that Defendants "cannot claim any countervailing injury," Pls.' Reply at 65, it is Plaintiffs, not Defendants, who have the burden of showing that "the threatened harm to [Plaintiffs] will outweigh any potential injury the injunction may cause [to Defendants]" and that the injunction "will not be adverse to public interest." *Star Satellite, Inc. v. City of Biloxi*, 779 F. 2d 1074, 1079 (5th Cir. 1986). Plaintiffs have failed to meet this burden. As demonstrated by the numerous amicus briefs submitted in opposition to Plaintiffs' Motion, a preliminary injunction would have a significant negative impact on other States, and on municipalities and communities nationwide. *See* ECF Nos. 39-1, 49-2, 81, 121. Among other things, DACA and DAPA will have important public safety benefits, as leading law enforcement officials from a wide range of cities (including in the Plaintiff States) have explained, and an injunction will prevent communities from reaping those benefits. *See* ECF No. 83-1. Plaintiffs weakly contend that an injunction cannot harm the public because "the status quo has existed 'for years.'" Pls.' Reply at 65. But Plaintiffs ignore the need to address the challenges DHS confronts in enforcing our immigration laws. As Defendants explained in their Opposition, the need for the 2014 Deferred Action Guidance, which allows DHS to efficiently identify and temporarily set aside aliens who are low priorities for removal, and thus to focus on its top enforcement priorities (threats to public safety, national security risks, and recent border crossers), is especially acute in light of recent demographic shifts in the immigrant population, restrictions on ICE's use of detainers, the backlog in the immigration courts, and DHS's limited resources. Defs.' Opp. at 51-54. DACA and DAPA are tools that help DHS address these

challenges while promoting other legitimate immigration objectives, such as humanitarian concerns and family unity. *Id.* at 52-53. Halting or delaying policies that promote national security, public safety, administrative efficiency, and humanitarian concerns is not in the public interest. *Id*. at 54.

CONCLUSION

This Court should deny Plaintiffs' motion for preliminary injunction and dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

Dated: January 30, 2015

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

DANIEL DAVID HU
Assistant United States Attorney
Deputy Chief, Civil Division

JOYCE R. BRANDA
Acting Assistant Attorney General

KATHLEEN R. HARTNETT
Deputy Assistant Attorney General

DIANE KELLEHER
Assistant Branch Director

/s/ Kyle R. Freeny
KYLE R. FREENY (Cal. Bar No. 247857)
Attorney-in-Charge
HECTOR G. BLADUELL
BRADLEY H. COHEN
ADAM D. KIRSCHNER
JULIE S. SALTMAN
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Tel.: (202) 514-5108
Fax: (202) 616-8470
Kyle.Freeny@usdoj.gov
Counsel for Defendants

State of Texas, et al. v. United States of America, et al.
No. 1:14-CV-254

INDEX OF EXHIBITS

EXHIBIT NO.	DOCUMENT NAME	PAGE NO.
43	Memorandum from Jeh Charles Johnson, Secretary, DHS, to León Rodriguez, Director, USCIS, *Policies to Promote and Increase Access to U.S. Citizenship* (November 20, 2014)	499 - 501
44	Declaration of Donald W. Neufeld	502 - 558
45	Decision Memo to Gene McNary, *The implementation of the Family Fairness Policy – Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the spouses and children of legalized aliens (sections 245a and section 210)* (Feb. 8, 1990)	559 - 561
46	*Draft Processing Plan, Processing of Family Fairness Applications, Utilizing Direct Mail Procedures* (Feb. 8, 1990)	562 - 566

ATTACHMENT 10

NO. 1:14-cv-00254

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

STATE OF TEXAS, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

STATES' MOTION FOR LEAVE TO PARTICIPATE AS AMICI CURIAE AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

ROBERT W. FERGUSON
Attorney General of Washington

Noah G. Purcell, WSBA 43492
Solicitor General

Anne E. Egeler, WSBA 20258
Deputy Solicitor General
Attorney-In-Charge

Washington Office of Attorney General
PO Box 40100
Olympia, WA 98504-0100
360-753-6200 (office)
360-664-2963 (fax)
anneE1@atg.wa.gov

Additional Amici Listed On Signature Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPENDIX

The appendix is listed in the order the authorities are used, with an indication as to which footnote the authority first appears in:

INTRODUCTION

Unhappy with the federal government's recent immigration directives, Plaintiffs ask this Court to step in. They claim that the directives exceed the President's legal authority, will irreparably harm states, and that the equities and public interest weigh in their favor. None of these claims is true. In particular, Plaintiffs' speculative allegation that the directives will harm states is both unsupported and inaccurate. The truth is that the directives will substantially benefit states, will further the public interest, and are well within the President's broad authority to enforce immigration law. There is thus no legal basis for issuing a preliminary injunction. The amici States respectfully ask that the Court grant leave to file this brief and deny Plaintiffs' motion for preliminary injunction.

MOTION FOR LEAVE TO FILE AMICUS BRIEF

The States of Washington, California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, and Vermont, and the District of Columbia (the moving States) respectfully move, pursuant to the Court's inherent authority, for leave to file a brief as amicus curiae.

Whether to permit amicus participation lies within the Court's inherent authority.[1] "Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case," as evidenced by this Court's historic practice of permitting amici participation.[2] There are no prerequisites to qualify for amicus status; rather, one seeking to appear as amicus "must merely make a showing that his participation is useful to or otherwise desirable by the

[1] *See, e.g.*, *United States v. Bader*, No. 07-cr-00338-MSK, 2009 WL 2219258 (D. Colo. July 23, 2009); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D. D.C. 2008); *Sierra Club v. Fed. Emergency Mgmt. Agency*, No. H-07-0608, 2007 WL 3472851, at *3 (S.D. Tex. Nov. 14, 2007).

[2] *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990); *see, e.g.*, *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010); *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017 (S.D. Tex. 1998).

court."[3] An amicus brief may be of considerable help if it "brings to the attention of the Court relevant matter not already brought to its attention by the parties[.]"[4]

Applying these standards, the Court should accept this brief. The moving States are well-positioned to file an amicus brief because they have direct experience with and helpful evidence to add as to the impacts of immigration and federal immigration enforcement. Unfortunately, the Plaintiffs in this case have painted a distorted picture of the impacts of the federal government's recent immigration directives. In reality, those directives will substantially benefit states—not harm them. The proposed amicus brief will rebut Plaintiffs' speculative assertions of harm, providing specific information that will aid the Court in determining whether Plaintiffs have met their burden of persuasion on each element of the preliminary injunction standard.[5]

Counsel for amici has contacted the parties concerning the filing of the amicus brief. Neither Plaintiffs nor Defendants object to the filing of this amicus brief.

FACTUAL BACKGROUND

On November 20, 2014, the Department of Homeland Security released a series of directives announcing a shift in the focus of removal of undocumented immigrants. The directives expand the 2012 Deferred Action for Childhood Arrivals Program for persons who entered the United States as children and have been present in the United States since January 1, 2010, and create a new deferred immigration action program for undocumented parents of U.S. citizens and parents of lawful permanent residents who have been in the United States since January 1, 2010. To qualify, undocumented immigrants must come forward to register, submit biometric data, pass background checks, pay fees, and show that their child was born before the

[3] *Louisiana*, 751 F. Supp. at 620.

[4] *Maples v. Thomas*, No. 5:03-cv-2399-SLB-MHH, 2013 WL 5350669, *3 (N.D. Ala. Sept. 23, 2013).

[5] *Id.* at *2-3.

deferral was announced. Up to 4.4 million people are expected to be eligible for these programs. Individuals who qualify for a temporary deferral will not obtain authority to remain in the United States permanently. Rather, they will be authorized to work for three years, subject to renewal, if they comply with all laws and pay their taxes.[6] The deferred immigration action will be coupled with focusing enforcement efforts on deportation of persons posing the highest threat to national security and public safety—including gang members, felons, and other serious criminals.[7]

The recent directives are consistent with a long pattern of presidential exercises of enforcement discretion within the bounds of immigration law to protect families and defer deportation. For example, following passage of the Immigration Reform and Control Act of 1986, President Reagan and President George H.W. Bush deferred deportations for family members of immigrants who were in the process of obtaining legal status.[8] These deferrals impacted over 40% of undocumented immigrants.[9] President Clinton similarly deferred action for immigrant women and children who have been abused by a U.S. citizen or legal permanent resident.[10]

---

[6] http://www.uscis.gov/immigrationaction (Executive Actions on Immigration).

[7] Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Thomas S. Winkowski, Acting Director of U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

[8] Pub. L. No. 99-603, 100 Stat. 3359; Memorandum from Gene McNary, INS Commissioner, to Regional Commissioners (Feb. 2, 1990), *available at* http://www.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf (*Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens*).

[9] American Immigration Council (Oct. 2014), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf (*Executive Grants of Temporary Immigration Relief, 1956-Present*).

[10] Memorandum from Paul W. Virtue, Acting Executive Associate INS Commissioner, to Regional Directors et al. (May 6, 1997), *available at* http://www.asistahelp.org/documents/resources/Virtue_Memo_97pdf_53DC84D782445.pdf (*Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues*).

ARGUMENT

To obtain a preliminary injunction, a plaintiff must establish a likelihood of irreparable harm in the absence of preliminary relief, likelihood of success on the merits, that the balance of equities tips in his or her favor, and that an injunction is in the public interest.[11]

Plaintiffs are unable to satisfy any of these elements. Contrary to Plaintiffs' speculation, the data show that allowing persons who are already in the country to work legally benefits, rather than harms, the states. The equities and public interest also support this approach. Moreover, Plaintiffs cannot succeed on the merits given the courts' consistent recognition of the executive branch's broad discretion to make decisions regarding immigration priorities.

A. Plaintiffs Have Shown No Irreparable Injury Because Deferred Immigration Action Will Benefit States, Not Cause Harm

To obtain a preliminary injunction, Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction."[12] Awarding a preliminary injunction "based only on a possibility of irreparable harm is inconsistent" with the Supreme Court's "characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[13]

Here, the only harm Plaintiffs assert from the immigration directives is speculative and unsupported. And the data show that allowing immigrants to work legally substantially benefits states. Plaintiffs are thus unable to show irreparable harm.

---

[11] *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

[12] *Id.* at 22.

[13] *Id.*

1. Allowing Immigrants to Work Legally Provides Economic and Social Benefits to the States

Although Plaintiffs speculate that the immigration directives will cause them "drastic injuries," their dire predictions directly conflict with available data. Programs deferring immigration action are not new. Past experience demonstrates that suspending deportation and providing work authorization benefits families and state economies by authorizing work, increasing earnings, and growing the tax base.

The most recent example of the benefits provided by allowing immigrants to work legally is the 2012 Deferred Action for Childhood Arrivals Program (DACA). DACA offered temporary relief to more than 2.1 million undocumented immigrants who came to the United States as children.[14] DACA participation resulted in almost 60% of respondents obtaining new jobs,[15] and surveys of DACA beneficiaries found that wages increased by over 240%.[16]

The statistics regarding DACA are consistent with findings on the economic impact of the Immigration Reform and Control Act of 1986 (IRCA), which provided legal status to 3 million undocumented immigrants.[17] Research has consistently shown that, as occurred with IRCA, when immigrants are able to work legally—even for a limited time—wages increase,

---

[14] Migration Policy Inst., Jeanne Batalova, Sarah Hooker & Randy Cappys, *DACA at the Two-Year Mark: A Nat'l and State Profile of Youth Eligible and Applying for Deferred Action* (Aug. 2014), *available at* http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action.

[15] American Immigration Council, Roberto Gonzales & Angie Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA* (June 16, 2014), *available at* http://www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca.

[16] Dr. Raul Hinojosa-Ojeda, *From the Shadows to the Mainstream: Estimating the Economic Impact of Presidential Administrative Action and Comprehensive Immigration Reform* 17 (N. Am. Integration & Dev. Ctr., UCLA, Nov. 20, 2014), *available at* http://www.naid.ucla.edu/uploads/4/2/1/9/4219226/hinojosa_-_estimating_the_economic_impact_of_presidential_administrative_action_and_comprehensive_immigration_reform_-_ucla_naid_center.pdf.

[17] *Id.* at 9.

workers are encouraged to seek work compatible with their skill level, and workers receive incentive to increase their skills to obtain higher wages.[18]

Allowing immigrants to work legally and increase their wages has far-reaching, positive impacts on state and local economies. In Washington, for example, approximately 105,000 people are anticipated to be eligible for deferred immigration action.[19] Assuming that even a portion of the eligible undocumented immigrants register, request a reprieve from deportation, and obtain a temporary work permit, it is estimated that Washington's tax revenues will grow by $57 million over the next five years.[20] California's tax revenues are estimated to grow by $904 million over the next five years with an anticipated 1,214,00 people eligible for deferred immigration action. [21] The tax consequences for the Plaintiff States are similarly positive. For example, if the estimated 594,000 undocumented immigrants eligible for deferred action in Texas receive temporary work permits, it will lead to an estimated $338 million increase in the state tax base over five years.[22]

In addition to increasing state and local tax coffers, deferred immigration action has numerous social benefits. Many DACA beneficiaries, for example, used their increased wages to help support their families, many of which live in poverty.[23] Allowing parents of U.S. citizens and lawful permanent residents to increase their earnings by working legally will increase their

[18] Hinojosa-Ojeda at 9-10.

[19] Migration Policy Inst., *National and State Estimates of Populations Eligible for Anticipated Deferred Action and DACA Programs* (Nov. 2014) (Excel spreadsheet), *available at* http://www.migrationpolicy.org/sites/default/files/datahub/US-State-Estimates-unauthorized-populations-executive-action.xlsx.

[20] Center for American Progress, *Executive Action On Immigration Will Benefit Washington's Economy*, *available at* http://www.scribd.com/doc/247296801/Economic-Benefits-of-Executive-Action-in-Washington.

[21] Center for American Progress, *Topline Fiscal Impact of Executive Action Numbers for 28 States*, *available at* http://www.scribd.com/doc/248189539/Topline-Fiscal-Impact-of-Executive-Action-Numbers-for-28-States.

[22] *Id.*

[23] Gonzales & Bautista-Chavez at 5.

ability to support their U.S. citizen children, reducing the cost of state social service benefits. In addition, deferred deportation assists State social service agencies in keeping children with their families. When fit parents are deported, it can be difficult for the State to find the parents and reunite them with their children. The existence of fit parents—even if they have been deported—can also prevent the State from seeking alternative placement options for a child, such as a guardianship or adoption by another family member or third party.[24] Deferred deportation allows families to remain together, even if only temporarily.

If a preliminary injunction is granted, the States will be deprived of the demonstrated economic and social benefits of allowing established immigrants to remain with their families, seek legal work, and contribute to their communities.

2. Plaintiffs Have Failed to Show That Deferred Immigration Action Will Require Them to Increase Spending On Public Safety or Healthcare

Plaintiffs' contentions that they will be "forced" to expend large sums on public safety and health care as a result of "new waves of illegal immigration" are unsupported both legally and factually. *See* Pls.' Mot. at 26; Pls.' Compl. ¶ 65. As a matter of law, the Fifth Circuit has already held that "state expenditures on medical and correctional services for undocumented immigrants are not the result of federal coercion," but rather of state choice.[25] Moreover, as a factual matter, Plaintiffs' claims are refuted by the data.

Most generally, Plaintiffs claim that deferred immigration action will lead to an influx of undocumented immigrants is baseless. As the nation's experience with the DACA program shows, there is no reason to believe that deferring deportation for persons who have been in the

[24] *See, e.g.*, *In re Guardianship of D.S.*, 178 Wash. App. 681, 317 P.3d 489 (2013) (inability to return a child to a deported parent in the near future does not justify a guardianship if there are no other parental deficiencies).

[25] *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997).

country for five years will increase the number of new undocumented immigrants. In reality, the population of undocumented immigrants has remained stable since 2009, despite the DACA program.[26] Seeking to give a contrary impression, Plaintiffs misleadingly focus on one sub-category of undocumented immigrants—minor children—to claim that DACA has caused a surge of immigrants. But this is just untrue, as their own amici have acknowledged. The Cato Institute, which has submitted an amicus brief in support of the plaintiff States (ECF No. 61-2), has concluded: "Few facts of the unaccompanied children (UAC) surge are consistent with the theory that DACA caused the surge."[27] Moreover, there is no reason to expect the directives to significantly alter the number of undocumented immigrants who successfully remain present in the country, because those eligible under the directives were unlikely to be removed before. More than 95% of undocumented immigrants who were removed before the new directives were convicted of crimes, had disobeyed immigration court orders, or were recent arrivals.[28]

There is also no evidence that deferred immigration action will cause increased state spending. In considering a recent challenge to DACA, a Texas district court found that Mississippi was unable to provide evidence to back its allegations that immigration deferral resulted in fiscal injury to the State.[29] The Plaintiffs have similarly fallen short of establishing imminent harm here. For example, Plaintiffs claim that Texas "spends millions of dollars every

[26] Pew Research Ctr., Jeffrey S. Passel, et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* 4 (Sept. 3, 2014), *available at* http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/.

[27] Cato Inst., Alex Nowrasteh, *DACA Did Not Cause the Surge in Unaccompanied Children* (July 29, 2014), *available at* http://www.cato.org/blog/daca-did-not-cause-surge-unaccompanied-children.

[28] Migration Policy Inst., Marc R. Rosenblum & Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change* (Oct. 2014), *available at* http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change.

[29] *Crane v. Napolitano*, 920 F. Supp. 2d 724, 744-45 (N.D. Texas 2013).

year to provide uncompensated healthcare for undocumented immigrants." Pls.' Mot. at 26. But the only evidence cited is Plaintiffs' complaint, which says only that in 2014, "Texas counties reported over $23 million in indigent health care expenditures." Pls.' Compl. ¶ 65. Plaintiffs provide no evidence as to what portion of this indigent care went to undocumented immigrants, who make up a small fraction of the State's population.[30] Moreover, the data clearly show that allowing immigrants to work legally makes it significantly more likely that they will obtain healthcare via their employer or be able to pay for coverage themselves.[31] There is thus no plausible evidence that deferred immigration action will actually increase state expenditures on indigent health care.

There is also no data to suggest that State expenditures on public safety will increase as a result of deferred immigration action. The immigration directives specifically exclude those who pose a public safety risk.[32] Deferral applications will be assessed on a case-by-case basis, and applicants will be required to come out of the shadows and "undergo a thorough background check of all relevant national security and criminal databases, including [Homeland Security] and FBI databases."[33] If anything, public safety will be improved by focusing Homeland Security's limited resources on deportation of terrorists, felons, and other serious criminals.[34] Moreover, granting deferred action will reduce the fear and hesitation many undocumented immigrants have about reporting crimes, serving as witnesses, or cooperating with law

[30] Pew Research Ctr., Jeffrey S. Passel & D'Vera Cohn, *State Unauthorized Immigrant Populations* (Nov. 18, 2014), *available at* http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/#unauthorized-immigrant-population-share.

[31] Gonzales & Bautista-Chavez at 4.

[32] http://www.uscis.gov/immigrationaction (Executive Actions on Immigration).

[33] http://www.dhs.gov/immigration-action (Fixing Our Broken Immigration System).

[34] *Cf. Crane*, 920 F. Supp. 2d at 745 (rejecting Plaintiff's claim that DACA would have no public safety benefits).

enforcement generally, further improving public safety and benefitting states.[35] If there is an increase in state spending on correctional expenses, it will "stem from [the State's] enforcement of its own penal laws, not federal laws . . . ."[36]

Finally, Plaintiffs' contention that provision of unemployment benefits, driver's licenses, and professional licenses will cause irreparable injury is also meritless. Pls.' Mot. at 26-27. The immigration directives do not require States to provide state benefits, even for immigrants who obtain authorization to work legally. The States retain full authority to make or amend their laws to limit the availability of State benefits and licenses.[37] The plaintiff States argue, misleadingly, that they will be forced to provide benefits like driver's licenses under *Arizona Dream Act Coalition*[38] (Reply Mem. ECF No. 64, at 45-47). But that case merely held that when a state gives driver's licenses to one group of deferred-action recipients, it cannot—without a rational basis—deny the same licenses to recipients of other kinds of deferred action.[39] Having to comply with the constitutional prohibition against irrational discrimination cannot be considered an irreparable injury.

In short, Plaintiffs have failed to show irreparable injury. In reality, the evidence shows that Plaintiffs and other states will benefit—not suffer—from deferred immigration action.

---

[35] Angela S. Garcia & David G. Keyes, *Life as an Undocumented Immigrant: How Restrictive Local Immigration Policies Affect Daily Life* (Mar. 26, 2012), *available at* https://www.americanprogress.org/issues/immigration/report/2012/03/26/11210/life-as-an-undocumented-immigrant/.

[36] *Texas*, 106 F.3d at 666 (rejecting claim for reimbursement of State expenses allegedly caused by inadequate federal enforcement of immigration laws).

[37] 8 U.S.C. § 1621.

[38] *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014).

[39] *Id.*

B. The Equities and Public Interest Weigh In Favor of Denying Injunctive Relief

Plaintiffs treat the equity and public interest prongs of the preliminary injunction test as virtual afterthoughts, providing not a single citation to a case or reference to other authority in addressing them. Pls.' Mot. at 28-33. But these prongs are important. The Court must weigh the competing claims of injury and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[40] Here, the equities and public interest tip decisively in favor of denying the preliminary injunction.

As to the equities, the United States has already explained in detail the harms it will suffer if the Court grants injunctive relief. U.S. Br. at 50-54. Forcing the Department of Homeland Security to spend resources processing and deporting immigrants who pose no public safety or other risk wastes scarce resources that could and should be devoted to targeting those undocumented immigrants who do pose risks.[41] On the other side of the balance, Plaintiffs cite nothing whatsoever, instead quoting page after page of statements by the President. Pls.' Mot. at 28-31. Plaintiffs' apparent anger at the President is not a relevant equity. Instead, Plaintiffs have to demonstrate real harms they will suffer if an injunction is denied, and they have utterly failed, as explained above.

As to the public interest, Plaintiffs' argument is even less persuasive. Their primary argument is that if injunctive relief is denied, "future presidents will be able to remake the United States code" through various hypothetical enforcement decisions. Pls.' Mot. at 32-33. Even if that absurd claim were true, it would not justify preliminary relief. There is more than enough

[40] *Winter*, 555 U.S. at 24 (internal quotation marks omitted).

[41] *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime.").

time for this Court to issue a final ruling on the merits (and even for subsequent appeals) before any "future president" could begin "remaking" the law.

In any event, Plaintiffs ignore the massive public interests weighing on the other side. As detailed above, states stand to benefit substantially from the directives at issue as immigrants are allowed to come out of the shadows, pursue legal work, and pay more in taxes. States also will not face as many difficult decisions about what to do with U.S. citizen children whose parents have been deported, and will benefit from the federal government's increased focus on deporting undocumented immigrants who commit crimes or otherwise threaten public safety. Additionally, state economies will benefit substantially from the temporary reprieve the directives grant. Undocumented immigrants are a sizable portion of the workforce in many industries, including in the Plaintiff states.[42] In agriculture and construction, for example, undocumented immigrants make up a large share of the workforce,[43] and many states—including plaintiff states—depend on these industries. It is at best specious and at worst hypocritical for Plaintiffs to complain about granting temporary relief from deportation for workers on whom their economies depend.

Also to be considered is the public interest of the families who will benefit from deferred action. The millions of people who will be eligible to remain in the United States temporarily under the immigration directives are mothers and fathers, sons and daughters. Many have been here for decades—the median length of residence for undocumented immigrants in the United

[42] *See, e.g.*, Pew Research, Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (Apr. 14, 2009), *available at* http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/ (showing that undocumented immigrants make up roughly 10% of the workforce in Arizona and 8% in Florida and Texas).

[43] *See, e.g.*, *id.*; https://naws.jbsinternational.com/3/3status.php (graph from the Nat'l Agric. Workers Survey, Dep't of Labor, Emp't & Training Admin.).

States is 13 years[44]—and have been working hard, paying taxes, and contributing to their communities. Deporting such individuals harms their families, their communities, and their states. These are real public interests weighing against injunctive relief, not the speculative hyperbole offered by Plaintiffs.

In short, the equities and public interest weigh heavily in favor of denying preliminary relief. The Plaintiffs' claims of injury are at best speculative, while the amici States have shown real benefits of the immigration directives. And as the agency charged with balancing the factors that must be considered in making immigration enforcement decisions, Homeland Security is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[45] The Court should not intervene.

C. Plaintiffs Are Unlikely to Succeed On the Merits

The United States has detailed at length why Plaintiffs' claims are unlikely to succeed on the merits, and the amici States will not rehash those compelling arguments here. Amici add only that, as the chief law enforcement officers for their various states, the Attorneys General who have prepared this brief are deeply familiar with the notion of enforcement discretion. No government agency has the resources to pursue every violation within its purview. Decisions must be made and priorities adopted. In the immigration realm, federal law decisively places those decisions in the hands of the executive branch.[46] And the U.S. Supreme Court has repeatedly held that it is not the place of courts to second guess these sorts of enforcement

[44] Pew Research Ctr., Jeffrey S. Passel, et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* 4 (Sept. 3, 2014), *available at* http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/.

[45] *Heckler v. Chaney*, 470 U.S. 821, 831-32, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

[46] *See, e.g.*, *Arizona*, 132 S. Ct. at 2499; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S. Ct. 309, 94 L. Ed. 317 (1950) (stating that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program") (internal quotation marks omitted).

decisions, which are "generally committed to an agency's absolute discretion."[47] This Court should reject Plaintiffs' invitation to ignore this long line of decisions and insert itself into the executive branch's lawful exercise of enforcement discretion.

CONCLUSION

Granting a preliminary injunction will prevent no harm to Plaintiffs but will hurt the amici States and the broader public. There is no legal basis to do so. The amici States ask that the Court accept their amicus brief and deny Plaintiffs' motion for preliminary injunction.

RESPECTFULLY SUBMITTED this 12th day of January 2015.

ROBERT W. FERGUSON
Attorney General of Washington

Noah G. Purcell, WSBA 43492
Solicitor General

/s Anne E. Egeler

Anne E. Egeler, WSBA 20258
Deputy Solicitor General
Attorney-In-Charge

Washington Office of Attorney General
PO Box 40100
Olympia, WA 98504-0100
360-753-6200 (office)
360-664-2963 (fax)
anneE1@atg.wa.gov

KAMALA D. HARRIS
California Attorney General
1300 I Street
Sacramento, CA 95814

George Jepsen
Connecticut Attorney General
55 Elm Street
Hartford, Ct 06106

[47] *Heckler*, 470 U.S. at 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114, 123-24, 99 S. Ct. 2198, 60 L. Ed .2d 755 (1979); *United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)).

Russell A. Suzuki
Hawai‘i Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Hector H. Balderas
New Mexico Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508

Lisa Madigan
Illinois Attorney General
100 W Randolph Street 12th Floor
Chicago, IL 60601

Eric T. Schneiderman
New York Attorney General
The Capitol
Albany, NY 12224

Thomas J. Miller
Iowa Attorney General
1305 E Walnut Street
Des Moines, IA 50319

Ellen F. Rosenblum
Oregon Attorney General
1162 Court Street NE
Salem, Oregon 97301

Brian E. Frosh
Maryland Attorney General
200 Saint Paul Place
Baltimore, MD 21202

William H. Sorrell
Vermont Attorney General
109 State Street
Montpelier, VT 05609-1001

Martha Coakley
Massachusetts Attorney General
One Ashburton Place
Boston, MA 02108

Karl A. Racine
District of Columbia Attorney General
One Judiciary Square
441 4th Street NW Suite 1145 North
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Amicus Brief Of The States Of Washington, California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, and Vermont, and the District of Columbia In Support Of Defendants will be delivered electronically January 12, 2015, to counsel for plaintiffs and defendants through the District's Electronic Case Filing system.

/s Anne E. Egeler

Anne E. Egeler
Deputy Solicitor General

APPENDIX

APPENDIX

The appendix is listed in the order the authorities are used, with an indication as to which footnote the authority first appears in:

ATTACHMENT 11

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

STATE OF TEXAS, ET AL., Plaintiffs,	§ §	
V.	§	CIVIL NO. B-14-254
UNITED STATES OF AMERICA, ET AL., Defendants.	§ §	

ORDER

The Plaintiff States filed a Motion for Early Discovery on March 5, 2015, [Doc. No. 183]. Due to the seriousness of the matters discussed therein, the Court will not rule on any other pending motions until it is clear that these matters, if true, do not impact the pending matters or any rulings previously made by this Court.

A hearing on the States' Motion is set for **March 19, 2015** at **1:30 p.m.**

In addition to being prepared to respond to the States' Motion, the Defendants shall be prepared to fully explain to this Court all of the matters addressed in and circumstances surrounding the Defendants' Advisory filed on March 3, 2015, [Doc. No. 176].

Signed this 9th day of March, 2015.

Andrew S. Hanen
United States District Judge

ATTACHMENT 12

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

STATE OF TEXAS, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 1:14-cv-254

DEFENDANTS' SUPPLEMENT TO EMERGENCY EXPEDITED MOTION TO STAY

Defendants file this supplement to their Emergency Expedited Motion to Stay the Court's February 16, 2015 Order Pending Appeal ("stay motion") [ECF No. 150], to inform the Court that today they will seek a stay of this Court's preliminary injunction before the Fifth Circuit in light of the urgent circumstances and critical federal interests at issue, including Defendants' need to protect national security, public safety, and the integrity of the border. Defendants also wish to assure the Court that they take very seriously the Court's March 9, 2015 Order and will be prepared to address fully the issues identified therein at the hearing scheduled for March 19, 2015.

Defendants understand that the Court has questions about Defendants' March 3 Advisory, which notified the Court that, between November 24, 2014, and the entry of the preliminary injunction on February 16, 2015, U.S. Citizenship and Immigration Services ("USCIS") approved three-year terms of deferred action and employment authorization for requests submitted pursuant to the 2012 Deferred Action for Childhood Arrival ("DACA") policy, which has not been challenged in this case. The 2014 Deferred Action Guidance at issue in this case

principally expands the classes of individuals who are eligible for deferred action beyond those covered by the 2012 DACA policy. It also provides for a three-year duration of deferred action, including for individuals applying for deferred action under the 2012 DACA guidelines.

The November 24, 2014 effective date of the three-year period, including for individuals applying for DACA under the 2012 guidelines, is set forth in the Secretary's Deferred Action Guidance, which states on page 3 that the change from two- to three-year grants would be "effective November 24, 2014." Deferred Action Guidance at 3 [ECF No. 38-7; ECF No. 1, Ex. A]; *see id.* at 3-4 ("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."). On January 30, 2014, Defendants also submitted a declaration stating that "[t]he 2012 Napolitano Memo directed USCIS to issue two-year periods of deferred action under DACA. Pursuant to the November 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA requests and requests for renewal now receive a three-year period of deferred action." Decl. of Donald W. Neufeld ("Neufeld Decl.") ¶ 12 n.6 [ECF No. 130-11]. In addition, the "frequently asked questions" (FAQs) on USCIS's public website regarding the 2012 DACA program stated that grants of deferred action under 2012 DACA would be issued for a term of three years following issuance of the November Guidance. *See* Ex. B to Neufeld Decl. at 2 ("If USCIS renews its exercise of discretion under [2012] DACA for your case, you will receive deferred action for another three years.").

Defendants also informed the Court that USCIS "does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015, and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at*

least until March 4, 2015." Mot. for Extension at 3 [ECF No. 90] (emphasis in original). These and similar statements reflected that USCIS would not consider or grant DACA to the expanded class of individuals eligible under the challenged 2014 Deferred Action Guidance (hereinafter, "2014 DACA") before these dates. The claims of irreparable harm in this case pertained to the expansion of deferred action to individuals newly eligible under 2014 DACA. Defendants' statements thus addressed the effective dates for 2014 DACA – *i.e.*, when a larger group of individuals would be eligible to apply for and receive DACA – not the effective date for the change in duration of deferred action grants pursuant to the unchallenged 2012 DACA, an issue that was not the subject of Defendants' focus at the time those statements were made.

Because the Court's preliminary injunction bars implementation of the 2014 Deferred Action Guidance in full, and because that Guidance provided for three-year grants of deferred action as of November 24, 2014, to 2012 DACA requestors, Defendants ceased providing three-year grants of deferred action to such requestors immediately after entry of the injunction on February 16, 2015. *See* ECF No. 176. Defendants filed the March 3 Advisory to ensure that prior filings had not created inadvertent confusion about the three-year grants to 2012 DACA recipients and so that the facts were abundantly clear to the Court, as well as to provide the approximate number of three-year grants issued before the injunction. *See* ECF No. 176.

Defendants note that the three-year, rather than two-year, grants of deferred action under the 2012 DACA eligibility guidelines have no immediate effect, because the individuals receiving three-year grants of deferred action would in any event have received two-year grants under the 2012 DACA policy. In addition, the vast majority of individuals who received the three-year grants applied for deferred action before the Guidance was issued, and all of the requests were filed under the 2012 DACA guidelines. Those individuals also are only in the first

year of the deferred action period; it will be nearly two years before the third year of the grant period is even implicated.

Defendants recognize that this Court has deferred a ruling on their stay motion in light of the matters referred to in the Court's March 9, 2015 Order, including Plaintiffs' discovery motion. Defendants respectfully maintain that Defendants' March 3 Advisory and Plaintiffs' discovery motion do not bear on the resolution of Defendants' motion for a stay of the preliminary injunction order. Specifically, the pre-injunction three-year grants of deferred action to requestors under the 2012 DACA policy are immaterial to whether Plaintiffs have standing, whether they are likely to prevail on the merits, whether they stand to suffer irreparable injury during the pendency of the appeal if a stay is granted, and whether the balance of equities supports a stay. All the individuals identified in Defendants' March 3 Advisory received deferred action under the eligibility criteria established in the 2012 DACA policy, which Plaintiffs do not challenge in this case. Further, the three-year (as opposed to two-year) pre-injunction grants of deferred action have no present effect under Plaintiffs' theories of harm (and will not have any differential effect for nearly two years), and are thus irrelevant to the preliminary injunction and stay analyses.

Defendants assure the Court that they will be ready to address fully the Court's Order regarding the March 3 Advisory and Plaintiffs' motion for discovery at the hearing on March 19. Defendants in no way intended to obscure the fact that DHS already was implementing the three-year duration of deferred action for individuals applying under 2012 DACA, pursuant to the Secretary's Guidance, and submitted the March 3 Advisory to the Court to ensure clarity on that point. Defendants regret any confusion that may have resulted from their focus on the February 18, 2015 and March 4, 2015 dates in their statements to the Court. Nevertheless, because any

further delay in reaching a final resolution of their stay request will compromise the significant government interests set forth in Defendants' stay papers, including Defendants' efforts to protect national security, public safety, and the integrity of the border, Defendants have concluded that they must now seek emergency relief in the Fifth Circuit to protect those interests.

Dated: March 12, 2015

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

DANIEL DAVID HU
Assistant United States Attorney
Deputy Chief, Civil Division

BENJAMIN C. MIZER
Acting Assistant Attorney General

KATHLEEN R. HARTNETT
Deputy Assistant Attorney General

DIANE KELLEHER
Assistant Branch Director

/s/ Kyle R. Freeny
KYLE R. FREENY (Cal. Bar No. 247857)
Attorney-in-Charge
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883, Washington, D.C. 20044
Tel.: (202) 514-5108 / Fax: (202) 616-8470
Kyle.Freeny@usdoj.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplement to Emergency Expedited Motion to Stay has been delivered electronically on March 12, 2015, to counsel of record via the District's ECF system.

/s/ Kyle R. Freeny
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on March 12, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ William E. Havemann
WILLIAM E. HAVEMANN
Attorney, Civil Division