Hamilton, Gene (OAG)

From: Hamilton, Gene (OAG)
Sent: Friday, November 3, 2017 2:20 PM
To: Cutrona, Danielle (OAG)
Subject: RE: (b) (5) [redacted]

Not at all

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

From: Cutrona, Danielle (OAG)
Sent: Friday, November 3, 2017 2:20 PM
To: Hamilton, Gene (OAG) < (b) (6) [redacted]
Subject: RE: (b) (5) [redacted]

Have you been talking to OPA on this?

(b) (5) [redacted]

Hamilton, Gene (OAG)

From:	Hamilton, Gene (OAG)
Sent:	Friday, November 3, 2017 6:54 PM
To:	Ehrsam, Lauren (OPA); Prior, Ian (OPA)
Subject:	RE: (b) (5)
Attachments:	Denaturalization Warsame Joint Press Release_draft 2017.11.3 LE SS OIL 254 pm - gph edits.docx

Here are some suggested edits. I'm not wedded to the last two sentences of the second paragraph, but something along those lines.

Thanks!

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

From: Ehrsam, Lauren (OPA)
Sent: Friday, November 3, 2017 4:35 PM
To: Prior, Ian (OPA) (b) (6) >; Hamilton, Gene (OAG) (b) (6)
Subject: RE: (b) (5)

Attached is the most up to date version from us.

From: Prior, Ian (OPA)
Sent: Friday, November 3, 2017 4:29 PM
To: Hamilton, Gene (OAG) < (b) (6)
Cc: Ehrsam, Lauren (OPA) (b) (6)
Subject: Re: (b) (5)

Nope go for it now then we'll get it approved once you've edited.

Just make sure Lauren is CC'd.

Thx

Ian D. Prior
Principal Deputy Director of Public Affairs
Office: (b) (6)
Cell: (b) (6)

For information on office hours, access to media events, and standard ground rules for interviews, please click here.

On Nov 3, 2017, at 4:27 PM, Hamilton, Gene (OAG) (b) (6) > wrote:

Should I hold off on making any edits until later?

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

From: Prior, Ian (OPA)
Sent: Friday, November 3, 2017 2:26 PM
To: Cutrona, Danielle (OAG) <(b) (6)>; Flores, Sarah Isgur (OPA) (b) (6)>; O'Malley, Devin (OPA) (b) (6)
Cc: Hamilton, Gene (OAG) (b) (6)>; Tucker, Rachael (OAG) (b) (6)>
Subject: RE: (b) (5)

We were made aware of complaints, but just received attached release today. Haven't run quote through approvals

Ian D. Prior
Principal Deputy Director of Public Affairs
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For information on office hours, access to media events, and standard ground rules for interviews, please click here.

From: Cutrona, Danielle (OAG)
Sent: Friday, November 3, 2017 2:22 PM
To: Flores, Sarah Isgur (OPA) (b) (6)>; Prior, Ian (OPA) (b) (6)>; O'Malley, Devin (OPA) (b) (6)>
Cc: Hamilton, Gene (OAG) (b) (6)>; Tucker, Rachael (OAG) <(b) (6)>
Subject: FW: (b) (5)

OPA—OIL says we've been coordinating but none of us were aware. Copying Gene and Rachael who are point. Please run any materials by them. Thanks.

Duplicative Material

No. _____

In the Supreme Court of the United States

JANICE K. BREWER, ET AL.,
Petitioners,
v.
ARIZONA DREAM ACT COALITION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in creating an immigration-specific rule under which state police power regulations that "arrang[e]" federal immigration classifications are preempted, even if preemption was not "the clear and manifest purpose of Congress"?

2. Did the Ninth Circuit err in assuming that the Deferred Action for Childhood Arrivals (DACA) program, an executive-branch policy of non-enforcement, was valid "federal law" capable of preempting a state police power regulation?

PARTIES TO THE PROCEEDING

Petitioners are Janice K. Brewer, the 22nd Governor of the State of Arizona; John S. Halikowski, Director of the Arizona Department of Transportation; and Stacey K. Stanton, Director of the Motor Vehicle Division of the Arizona Department of Transportation.

Respondents are the Arizona Dream Act Coalition, a non-profit organization, and the following individuals: Christian Jacobo, Alejandra Lopez, Ariel Martinez, Natalia Perez-Gallegos, Carla Chavarria, and Jose Ricardo Hinojos.

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PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit has now held that an executive branch memorandum can preempt state law. While the panel takes great pains to cloak its holding in the theory that Arizona impermissibly borrows federal law, App. 36, that theory is so plainly at odds with this Court's precedent and the decisions of other circuits that it merits little debate. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("The State may borrow the federal [immigration] classification."). In fact, the panel itself moves past its superficial holding to defend the presidential legislation at issue in this case. App. 44–47. And the dissenting opinion of six judges who favored rehearing en banc explains how the panel "holds that the enforcement decisions of the President are federal law." App. 4 (Kozinski, J., dissenting). This type of unilateral lawmaking usurps the role of Congress and permits too-easy preemption of state law. The Ninth Circuit's decision is therefore a threat to both the separation of powers and our federal system.

Like every State, Arizona regulates the "privilege of driving on state roads." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016). To that end, the Arizona Department of Transportation ("ADOT") issues driver's licenses to anyone who can meet certain criteria, including "submit[ting] proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). The present controversy asks whether ADOT *must* accept three types of Employment Authorization Documents ("EADs") issued by the Department of Homeland Security as proof that the EAD-holder's presence in the United States is

"authorized under federal law." *Id.* One of those EAD categories, labeled "(c)(33)," corresponds to the Deferred Action for Childhood Arrivals ("DACA") program.

The Secretary of Homeland Security created DACA in a June 2012 memorandum (the "DACA Memo"). The DACA Memo was not enacted by Congress or promulgated through any formal rulemaking procedures. Moreover, its benefits are justified as "prosecutorial discretion," App. 197, and revocable at any time in the sole discretion of the Department of Homeland Security.

A discretionary, revocable program of non-enforcement, which was created by executive action alone, cannot preempt state law regulating driver's licenses. Even the Ninth Circuit acknowledges that granting licenses is a traditional police power. App. 36. Where police powers are involved, this Court requires that Congress supply "clear and manifest" evidence of its intent to preempt state law. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 330 (1947)). The two statutory provisions identified by the Ninth Circuit as evidence of congressional intent are inadequate, which explains why that court rejected the "clear and manifest" standard entirely. App. 35; *see also* App. 6 (Kozinski, J., dissenting). The Ninth Circuit's rejection of the "clear and manifest" standard is a departure from 70 years of this Court's preemption jurisprudence. To protect the sovereignty of the States, this Court should grant review.

Additionally, the Ninth Circuit never explains how the DACA program can be federal law. The Constitution assigns authority over immigration to Congress. U.S. Const. art. I, § 8, cl. 4. Unlike the demanding test for preemption, the separation of powers requires only that Congress has exercised its Article I authority to regulate immigration—including sanctioning certain types of deferred action and assigning them unique EADs—to strip the President of power to create new law in this area. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The separation of powers thus forecloses any argument that the DACA Memo or EADs issued under DACA carry the force of law for purposes of the Supremacy Clause. *Alden v. Maine*, 527 U.S. 706, 731 (1999) ("[T]he Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design.").

Even if the Ninth Circuit were correct that non-enforcement under DACA is "a matter of discretion," App. 40, a memo designed to guide prosecutorial discretion cannot preempt Arizona's permissible incorporation of federal immigration classifications. *Plyler*, 457 U.S. at 226. The decision not to prosecute someone does not change that person's classification under federal law or establish presence authorized "under federal law." Ariz. Rev. Stat. § 28-3153(D). That insight is consistent with the holdings of this Court, which confirm that not every dispatch from the executive branch carries the force of law. Thus this Court recognizes a category of "Executive Branch communications that express federal policy but lack the force of law" and therefore "cannot render unconstitutional [a State's] otherwise valid [statute]."

Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 330 (1994); *see also, e.g., Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 339 (3d Cir. 2009). The Fifth Circuit, considering the same assertion of executive power at issue in this case, held that federal immigration law "flatly does not permit the [executive] reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). By assuming that DACA is sufficient to establish presence in the United States "authorized under federal law," the Ninth Circuit departs from precedent in this Court and numerous circuits.

While the executive branch is free to exercise prosecutorial discretion "on a case-by-case basis," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999), it cannot preempt state laws related to traditional state-provided benefits with blanket policies of non-enforcement. This formerly settled feature of the separation of powers demands this Court's vindication.

OPINIONS BELOW

The order from the U.S. Court of Appeals for the Ninth Circuit denying rehearing en banc appears at 2017 WL 461503. App. 1–2. Accompanying it are the panel's amended opinion, App. 14–51, Judge Berzon's concurring opinion, App. 52–63, and Judge Kozinski's dissenting opinion for himself and five other judges, App. 2–13. The order and permanent injunction issued by the U.S. District Court for the District of Arizona appear at 81 F. Supp. 3d 795. App. 104–41.

JURISDICTION

The Ninth Circuit denied rehearing en banc and issued its amended opinion on February 2, 2017. App. 1. That court's jurisdiction rested on 28 U.S.C. § 1291. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Take Care Clause requires that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The relevant portion of Arizona's statute governing driver's licenses appears at App. 207–08. Ariz. Rev. Stat. § 28-3153(D).

STATEMENT OF THE CASE

A. Statutory Background

1. **Deferred action.** Congress has plenary authority to regulate immigration, U.S. Const. art. I, § 8, cl. 4, and has done so through numerous statutes, including the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–07. For persons who have not

complied with the INA and would otherwise face deportation, "the Executive has discretion to abandon" removal proceedings in what has "come to be known as 'deferred action.'" *Reno*, 525 U.S. at 483–84. When initiated by the executive branch as a component of prosecutorial discretion, deferred action is a "case-by-case" decision. *Id.* at 484 n.8.

Congress can also authorize deferred action on a class-wide basis. In a memorandum outlining the legal argument for DACA and its later expansions, the Office of Legal Counsel cited four such occasions. *See* 8 U.S.C. § 1154(a)(1)(D) (self-petitioners under the Violence Against Women Act); Pub. L. No. 107–56, § 423(b), 115 Stat. 272, 361 (family members of permanent residents killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)–(2) (certain T- and U-visa applicants); *see also* Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney General at the Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (hereinafter "OLC Opinion") (Nov. 19, 2014). App. 133–94.

What Congress has not done is adopt one of the many versions of the Development, Relief, and Education for Alien Minors Act ("DREAM Act"). *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007). Across its various incarnations, the DREAM Act has aimed to provide

lawful presence to substantially the same class of beneficiaries covered by the DACA Memo. Indeed, Respondent's name—the Arizona *Dream Act* Coalition—recognizes the congruity of the unsuccessful legislation and the DACA program.

2. **Work authorizations**. In exercising its constitutional authority over immigration, Congress has also enacted detailed statutes addressing when aliens are authorized to work in the United States. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, is "a comprehensive scheme" that "forcefully made combating the employment of [unauthorized] aliens central to the policy of immigration law." *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal quotation and alterations omitted).

Among other things, Congress established penalties for employers who hire unauthorized aliens. 8 U.S.C. § 1324a(a),(f). The law defines "unauthorized alien" as an "alien [who] 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 Attorney General." *Id.* § 1324a(h)(3). This definitional subsection, however, does not give the executive branch a blank check to grant work authorizations.

To the contrary, Congress has separately demarcated the Executive's delegated authority to issue work permits. *E.g.*, 8 U.S.C. § 1101(i)(2) (human-trafficking victims); 8 U.S.C. §§ 1158(c)(1)(B),(d)(2) (asylum applicants); 8 U.S.C. §§ 1184(c)(2)(E),(e)(6), (p)(3),(p)(6),(q)(1)(A) (spouses of L- and E-visa holders; certain victims of crime; spouses and certain children of lawful permanent residents); 8 U.S.C.§ 1254a(a)(1)

(temporary-protected-status holders). Congress has also statutorily granted work permit eligibility to a few narrow classes of deferred-action recipients. *E.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II),(IV) (children of Violence Against Women Act self-petitioners). Additionally, certain nonimmigrant visas automatically provide work authorizations. *E.g.*, 8 U.S.C. § 1101(a)(15)(E), (H),(I),(L) (commercial workers); *id.* § 1101(a)(15)(A),(G) (foreign-government or international-organization workers); *id.* § 1101(a)(15)(P) (athletes or entertainers). Congress has taken no such action with respect to the group of aliens at issue in this case.

B. Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, the Department of Homeland Security issued the DACA Memo. Couched in language of prosecutorial discretion, the DACA Memo promised deferred action on two-year intervals and work authorizations for individuals who meet several criteria. App. 195.

The DACA Memo itself stressed that it "confers no substantive right, immigration status or pathway to citizenship." App. 199. The Office of Legal Counsel picked up the same theme two years later, explaining that DACA "does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion." App. 156. The reason DACA could reflect only the ephemeral "decision to openly tolerate an undocumented alien's continued presence . . . (subject to revocation at the agency's discretion)," App. 169, is that "[o]nly the Congress, acting through its legislative authority, can confer" substantive rights or a lawful

immigration status," App. 199. The executive branch acting alone was constrained by "the framework of existing law," which the DACA Memo purported not to change. *Id.*

Two years later, the Department of Homeland Security expanded the DACA program to encompass a broader range of persons who had illegally entered the United States as children and launched a parallel program for unauthorized aliens with children who had been born in the United States and were therefore citizens (DAPA). Around that time, the Office of Legal Counsel offered a memorandum attempting to fit these actions as well as the original DACA Memo within the scope of executive prerogative. App. 133–94. As the OLC memorandum illustrates, the legal justification for each of these initiatives was identical. It is therefore important for the present case that the Fifth Circuit struck down the 2014 expansions for exceeding the authority of the executive branch to change the law unilaterally, a decision affirmed by an equal division of this Court. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016)

Shortly after DACA was created, ADOT began reviewing its policies to determine whether DACA beneficiaries would qualify for Arizona driver's licenses. ER 181–84. The department came to the conclusion that "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), covered almost every category of alien created by the federal government: those with a formal immigration status, those on a path to obtaining formal immigration status,

and those with relief provided pursuant to the INA. ER 145; ER 147–51.

DACA, however, is not part of the INA or any other statute. Nor is it the product of agency rulemaking pursuant to a congressional delegation. Rather, DACA purports to be mere prosecutorial discretion. As such, it is not "federal law," and applicants for a driver's license could not rely on category (c)(33) EADs—the category created by the federal government specifically for DACA—to prove eligibility.[1]

C. Procedural History

Respondents filed suit, asserting that ADOT's interpretation of "presence in the United States . . . authorized under federal law" to exclude persons holding (c)(33) EADs violated both the Supremacy and Equal Protection Clauses of the United States Constitution.

Until its final chapter, this litigation focused on the Fourteenth Amendment. In fact, the district court used only one paragraph of a 40-page opinion to grant ADOT's motion to dismiss the Supremacy Clause claim. *Arizona Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1077–78 (D. Ariz. 2013), *rev'd and remanded*, 757 F.3d 1053 (9th Cir. 2014). The court explained that "even under the lenient Rule 12(b)(6) standard, the claim is not based on a cognizable legal theory." *Id.* Years later, the six judges dissenting from denial of rehearing en banc would note that the trial court

[1] Two other categories of EADs likewise fail to establish presence authorized under federal law. Identified by their federal category codes, they are (a)(11) (deferred enforced departure) and (c)(14) (generic deferred action). ER 145.

dismissed the preemption claim "with bemusement." App. 3 (Kozinski, J., dissenting).

In the meantime, Respondents appealed only the district court's denial of their motion for summary judgment on equal protection. The Ninth Circuit reversed the lower court's finding of no irreparable harm and proceeded to consider all four preliminary injunction factors in the first instance and to order the district court to "enter a preliminary injunction prohibiting [ADOT] from enforcing any policy by which the Arizona Department of Transportation refuses to accept Plaintiffs' Employment Authorization Documents, issued to Plaintiffs under DACA, as proof that Plaintiffs are authorized under federal law to be present in the United States." *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014).

Petitioners moved this Court for a stay pending the resolution of a petition for certiorari. Justice Kennedy referred that motion to the whole Court, which denied the stay with three Justices dissenting from the denial. *See* App. 132. Confident that they would prevail on remand and because discovery had continued in the district court for over a year, Petitioners did not seek certiorari.

The district court, believing itself bound by the earlier Ninth Circuit decision, entered a permanent injunction borrowed verbatim from the Ninth Circuit's opinion. *Ariz. Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795, 811 (D. Ariz. 2015) (also found at ER 7–26). Petitioners again appealed, and the case was assigned to the same Ninth Circuit panel. *See* Order,

Ariz. Dream Act Coalition v. Brewer, No. 15-15307 (9th Cir. June 2, 2015) (Pregerson, Berzon & Christen, JJ.).

At oral argument, the panel unexpectedly pivoted to the long-forsaken topic of preemption. Although Respondents abandoned their Supremacy Clause claims, App. 210–11, the panel called for supplemental briefing on that subject and on the constitutionality of DACA, App. 34.

On April 5, 2016, the Ninth Circuit panel affirmed the entry of a permanent injunction, this time based on preemption. App. 71, *as amended by* App. 21. While the panel recognized that driver's licenses are a traditional area of state regulation, App. 36, and that States may incorporate federal immigration classifications, *id.* (citing *Plyler*, 457 U.S. at 225–26), it nevertheless found preemption because "by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design," App. 39.

Petitioners sought rehearing en banc, which the Ninth Circuit denied over a six-judge dissent. App. 2–13 (Kozinski, J., dissenting). The dissent faults the panel opinion for declaring ADOT's policy preempted without identifying the federal laws that preempt it, App. 6–9, and for refusing to address the antecedent question of whether the DACA Memo could be described as either "law" or "lawful" before concluding that it is "part of the body of 'federal law' that imposes burdens and obligations on the sovereign states," App. 4. Because DACA is neither law nor lawful, Petitioners seek this Court's review.

REASONS FOR GRANTING THE PETITION

Since the Founding, the separation of powers has been "a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965). Preserving liberty "requires[] that the three great departments of power should be separate and distinct." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed. 1961). And just as the division of power among the branches of the federal government protects liberty, so too does the vertical separation of power between the federal government and the States. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.")). Thus, "the police power is controlled by 50 different States instead of one national sovereign," *id.*, and when States exercise that power, only the "'clear and manifest purpose of Congress'" will suffice to preempt those laws, *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The Ninth Circuit's decision in this case is remarkable for eroding both dimensions of the constitutional division of power. It diminishes the States by rejecting the "clear and manifest" standard that has existed since *Rice* in favor of an immigration-specific test. That holding contradicts decades of precedent from this Court and every circuit court of appeals. And after lowering the bar for preemption, the panel undermines this Court's allowance that a "State may borrow the federal classification" of aliens, *Plyler*, 457 U.S. at 226, by holding that Arizona was not

free to "arrange[]" those classifications—the EADs—in a manner that suits its regulatory task. In the absence of any evidence that Congress intended such a radical departure, this Court should restore the traditional sovereignty of the 50 States.

The Constitution's division of power among the federal branches fares no better. Specifically, the effect of the panel's decision is to hold "that the enforcement decisions of the President are federal law." App. 4 (Kozinski, J., dissenting). It does so by finding a conflict with Arizona's requirement of "presence . . . authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). But the only authorization for (c)(33) EADs is the DACA Memo, which must belong to one of two categories: either it announces a substantive change in the law by executive action alone, or it is a precatory enforcement guide without the force of law. Either option lacks preemptive force.

This Court should grant certiorari to bring the Ninth Circuit's outlier decision into harmony with precedent from this Court and courts around the nation. Along the way, it will restore the two-part separation of powers that guards against the consolidation of power in any individual.

I. The Ninth Circuit's Rejection of the "Clear and Manifest" Standard for Preempting State Law Is Contrary to Precedent from this Court and the Second and Fifth Circuits.

While purporting to avoid a host of issues, the Ninth Circuit decision comes to rest on the idea that Arizona's incorporation of federal classifications is preempted by federal law. App. 33. To do so, the lower court adopts an incorrect legal standard for finding preemption and, as a result, reaches a decision that is irreconcilable with precedent from this Court and others. This gossamer-thin appeal to constitutional avoidance is easy to expose, but would be devastating if left in place.

Preemption is a drastic outcome. While the federal government is one of limited and enumerated powers, the "States have vast residual powers" under the Tenth Amendment. *United States v. Locke*, 529 U.S. 89, 109 (2000). Mindful of this "fundamental" feature of "our federal structure," *id.*, this Court imposes a high threshold for preempting state laws. To wit, when "Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. at 565 (alterations in original, quotation omitted). This "clear and manifest" standard gives life to the bedrock principle that "it is Congress rather than the courts that preempts state law." *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quotation omitted).

Congress unquestionably has authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. This power "is essentially a determination of who should or should not be admitted to the country, and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 355 (1976), *superseded by statute in irrelevant part as recognized in Arizona*, 132 S. Ct. at 2503 (cited at App. 24). This federal field does not, however, preclude all state "act[ion] with respect to illegal aliens." *Plyler*, 457 U.S. at 225. In fact, the States' interest in illegal immigration includes "deter[ring]" the practice in service of traditional police-power interests. *Id.* at 228 n.23 ("Although the State has no direct interest in controlling entry into this country . . . we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law."). Thus, Arizona was within its rights to make mandatory the federal E-Verify system in "hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens." *Whiting*, 563 U.S. at 607. Short of determining who may enter and remain in the United States, each State has significant latitude to regulate in traditional areas of state concern.

The Ninth Circuit panel admits that regulating driver's licenses is within the States' police power. App. 38. That fact triggers the requirement that preemption be the "clear and manifest purpose of Congress." *Arizona*, 132 S. Ct. at 2501 (quotation omitted).

But the Ninth Circuit refused to apply this requirement. By misusing a quotation from a footnote

characterizing the dissent in *Toll v. Moreno*, 458 U.S. 1 (1982), the Ninth Circuit adopted a different test: "'neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with a specific congressional purpose' is required in order for federal law to preempt state regulations of immigrants." App. 35 (quoting *Toll*, 458 U.S. at 11 n.16). That is not correct. The *Toll* footnote did not address the presumption against preemption and, by its own admission, referred to a case decided under the Equal Protection Clause. Moreover, had the Ninth Circuit taken seriously this Court's more recent decisions involving the presumption against preemption in the immigration context, it would have seen that the "clear and manifest" threshold applies with full force. *E.g., Arizona*, 132 S. Ct. at 2501 (citing *Wyeth*).

In defense of the vertical separation of powers, this Court should grant certiorari for the purpose of extinguishing this error alone. Creating an immigration-specific rule is unnecessary and negates the logic of the presumption against preemption.

The Ninth Circuit's need for a special rule becomes apparent when considering the decision's two feeble tethers to congressional intent. The first is a provision defining "unlawful presence" for purposes of a single paragraph in the INA. App. 42; 8 U.S.C. § 1182(a)(9)(B)(ii). It explains that an alien is unlawfully present if he remains in the United States "after the expiration of the period of stay authorized by the Attorney General." *Id.* That fact does not, of course, imply that anyone who has not overstayed a period authorized by the Attorney General is, for all purposes including getting a driver's license in Arizona,

lawfully present. Second, the Ninth Circuit panel points to a provision of the REAL ID Act that permits but does not require States to give licenses to persons with deferred action. App. 42; Pub. L. No. 109-13, § 202(c)(2)(C)(i). That is all the panel has. As the dissenting judges point out, "[t]hat the panel can trawl the great depths of the INA . . . and return with this meager catch suggests exactly the opposite" of a clear and manifest congressional intent to preempt Arizona's law. App. 8 (Kozinski, J., dissenting).

Congressional disapproval is impossible to find because ADOT "borrows" federal classifications exactly as they are created by the federal government. *Plyler*, 457 U.S. at 226. Its policy awards driver's licenses to all classes of aliens holding an EAD except those with (a)(11), (c)(14), and (c)(33) EADs. These classifications are not ADOT's. Moreover, ADOT does not tamper with the federal classifications by, for example, dividing (c)(33) EAD-holders (DACA beneficiaries) brought to the United States before the age of five from those who entered the country after their fifth birthdays. Such conflicting re-classification would trigger preemption, but ADOT does no such thing.

While the panel acknowledges that States may "incorporate federal immigration classifications," App. 36, it strikes down Arizona's law for the sin of "arranging federal classifications in the way it prefers," App. 39. Its reasoning is self-contradictory: "by *arranging federal classifications* . . ., Arizona impermissibly assumes the federal prerogative of *creating* immigration classifications." App. 39 (emphasis added). The panel never explains how arranging classifications that are admittedly federal is

akin to creating classifications rather than borrowing them, as sanctioned in *Plyler*. Moreover, the panel identifies nothing to indicate that Congress clearly and manifestly intended to preempt States from arranging immigration classifications to further an exercise of state police powers.

This Court and others have recognized that States' ability to "borrow" classifications entails the flexibility to arrange them in response to the State's regulatory project. *Toll* is a prime example. Although the Court struck down the University of Maryland's policy excluding aliens with G-4 visas from paying in-state tuition, its reasoning had nothing to do with a State's ability to borrow visa classifications. 458 U.S. at 16–17 (discussing congressional intent specific to G-4 visas). To the contrary, the Court noted that other visa categories could be treated differently because Congress had not evinced the same intent that those immigrants make the United States their domicile. *Id.* at 7 n.8. If the Ninth Circuit were correct, *Toll* would have been a much shorter opinion: Maryland could not use visa-specific classifications, regardless of how congressional intent varied from visa to visa. This Court's contrary approach confirms that permissible "borrowing" of immigrant classifications does not depend on how fine the classifications are but rather on what the plaintiff can prove regarding congressional intent.

In *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), the Fifth Circuit upheld a Louisiana law that denied bar admission to aliens holding "nonimmigrant" visas. In concluding that the INA did not preempt Louisiana's regulation, the court explained that, "as with the alien

class in general, the sub-class of nonimmigrant aliens is itself heterogeneous, and the distinctions among them are relevant for preemption purposes." *Id.* at 424 (citing *Toll*'s distinctions based on type of visa). Because there was no conflict between the state law and what Congress clearly intended under federal law, Congress had not "unmistakably" preempted Louisiana's police power regulation of the legal profession. *Id.* at 423–25. The Ninth Circuit attempts to distinguish *LeClerc* because it is the federal government that classifies lawful aliens as either immigrant or non-immigrant. App. 43. But the federal government is also the source of the EAD classifications in the present case.

Further illustrating the point, the Second Circuit, in a decision that examined *LeClerc*, found fault with a professional licensing scheme that was insufficiently refined in its approach to visa classifications. *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012). The Second Circuit found a conflict between Congress's creation of H-1B and TN visas for pharmacists (including the plaintiffs) and New York's rule limiting pharmacy licenses to citizens and legal permanent residents, a blunt rule that excluded the plaintiffs. The Second Circuit found preemption based on a conflict specific to plaintiffs' type of visa: "Congress intended to allow [H-1B and TN visa-holders] to practice specialty occupations." *Id.* at 80. *Dandamudi*'s emphasis on congressional intent specific to pharmacists with two types of professional visas suggests that had New York adopted a *more* precise rule—one that carved out H-1B and TN pharmacists—it would have survived. Unlike the Ninth Circuit, the Second Circuit recognized that a more precise borrowing of federal classifications is

within a State's prerogative and can actually avoid conflict with congressional intent.

This Court has sanctioned States' borrowing federal immigration classifications. When they do so in exercising a traditional police power, the only question is whether Congress has clearly and manifestly expressed an intent to preempt the State's action. The Ninth Circuit panel has rejected this standard and created a division with other circuits in the process. Certiorari is necessary to extinguish this error and confirm that borrowed federal classifications do not offend the Supremacy Clause.

II. The Ninth Circuit Departed from Precedent in this Court and Six Circuits by Treating DACA as Federal Law.

It takes little squinting to see that the Ninth Circuit's core objection is with Arizona's conclusion that DACA fails to confer "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D). Thus it bemoans that the State "distinguishes between noncitizens based on its own definition of 'authorized presence,' one that neither mirrors nor borrows from the federal immigration classification scheme." App. 39. As the dissent points out, this is not a matter of borrowing EAD classifications, which Arizona does faithfully, but rather a question of what counts as "federal law." App. 4. The panel attempts to hide its equation of DACA with federal law by rewriting the state statute to require generic "authorized presence," *e.g.*, App. 39. This subtle change, which appears eleven times throughout the analysis but nowhere in the Arizona statute, omits the condition of "presence . . . authorized *under federal law*." That condition is at the

heart of the state statute and should be at the core of any preemption analysis.

As explained above, DACA can be one of two things: an amendment to immigration law or precatory guidance for prosecutors. If DACA is a substantive change in the law, as many circuits would hold (and one effectively has), then it must fail under *Youngstown*. If it is merely guidance for prosecutorial discretion, then the Ninth Circuit panel diverges from this Court and numerous others in finding preemption based on a document that lacks the force of law. Arizona has faithfully interpreted the boundaries of "federal law," and DACA does nothing to alter that conclusion.

A. DACA Is an Attempt to Change Substantive Law, which Is Unlawful Under *Youngstown* and Therefore Incapable of Preempting State Law.

DACA is an attempt by the executive branch to change federal immigration law without involving Congress. For preemption, however, a law must be "made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. The Ninth Circuit works hard to avoid answering how DACA can comply with the constitutional process for lawmaking: "We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question." App. 44. This position makes no sense because "the lawfulness of Arizona's policy" depends upon the lawfulness of DACA. After all, "only measures that are constitutional may preempt state law." *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 763 (11th Cir.

1991). Or, as the dissenting judges explained: "I am at a loss to explain how . . . [t]he President's policies may or may not be 'lawful' and may or may not be 'law,' but are nonetheless part of the body of 'federal law' that imposes obligations on the sovereign states." App. 4 (Kozinski, J., dissenting).

The Fifth Circuit has held that the legally-indistinguishable 2014 DACA expansion and the creation of DAPA are substantive changes in the law rather than an exercise of prosecutorial discretion. *Texas*, 809 F.3d at 174–78. Precedent from the Eighth and D.C. Circuits supports the same conclusion. If these courts are correct, then the Constitution's separation of powers demands more than an executive memorandum to enact the substantive policy change embodied in DACA.

1. **Not prosecutorial discretion.** The separation of powers allows Congress the luxury of inaction. The President, on the other hand, "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Prosecutorial discretion is an exception to that obligation, but this Court has limited that exception to avoid swallowing the rule. Prosecutors may therefore decide not to take action against a particular offender only "on a case-by-case basis." *Reno*, 525 U.S. at 484 n.8 (1999).

DACA, however, is more than a decision not to seek removal. It also awards affirmative benefits in contravention of the INA. Specifically, Congress has prohibited the employment of unauthorized aliens, 8 U.S.C. § 1324a(1), yet DACA provides EADs. This unlawful bonus takes DACA well beyond the boundaries of prosecutorial discretion. While Judge

Berzon views affirmative benefits as sanctioned by the INA's definition of "unauthorized alien," App. 52–53, a closer reading of the statute belies this theory. For purposes of employment, the INA defines unauthorized aliens as noncitizens not admitted as permanent residents or "authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). But the italicized language does not create any power. It merely reflects the fact that work authorization can come directly from a statute, *see, e.g.,* 8 U.S.C. § 1154(a)(1)(D)(i)(II), and other times must come from the Attorney General *pursuant to* a statute, *see, e.g.,* 8 U.S.C. §§ 1160(d)(1)(B), (d)(2)(B). Thus, nothing in the INA's definitional provisions allows the executive branch to confer affirmative benefits through an exercise of prosecutorial discretion.

In addition to extending benefits beyond non-enforcement, DACA is not discretionary. It is instead "a general policy" that contravenes the executive's "statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Over a span of 80 days, USCIS approved almost 103,000 DACA applications. ER 470. As a point of comparison, Secretary Napolitano testified that DHS approved a total of 900 applications for deferred action over the entire year of 2010. *Id.* The change from 2010 to the DACA Program reflects a 52,200% increase in approvals per day. Considering similar "evidence from DACA's implementation," the Fifth Circuit characterized the government's appeals to discretion as mere "pretext." *Texas*, 809 F.3d at 172. When asked, DHS had precisely zero examples of an individualized determination under DACA. *Id.* This result is

unsurprising given that the president of the USCIS workers' union reported that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria." *Id.* at 172–73.

Faced with similar evidence that individualized determinations are not occurring, other courts of appeals refuse to take the bait. The D.C. Circuit, for example, rejected EPA's claims of discretion when an agency model resolved 96 out of 100 applications. *McLouth Steel Prods. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988). With slightly more flourish, the Eighth Circuit rejected a federal agency's "pro forma reference to . . . discretion" as "Orwellian Newspeak." *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013).

The Ninth Circuit, on the other hand, ignores the limits of prosecutorial discretion. After citing several cases involving case-by-case discretion, the panel asserts that past practice also "includes 'general policy' non-enforcement." App. 46. Astonishingly, the panel quotes precisely the language this Court used in *Heckler* to identify *impermissible* forms of prosecutorial discretion that would violate the Take Care Clause. 470 U.S. at 832. By relying on a "history that includes" class-based deferred action, the panel also deepens its conflict with the Fifth Circuit, which considered the same examples and concluded that "historical practice . . . 'does not, by itself, create power.'" 809 F.3d at 184 (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)).

DACA is not prosecutorial discretion because it goes beyond non-enforcement and does not rely on prosecutors' case-by-case evaluation.

2. **Separation of Powers.** Because DACA attempts a substantive change in the law, the Ninth Circuit's assumption that DACA is constitutional is contrary to longstanding precedent from this Court and at least two courts of appeals.

In the arena of executive lawmaking, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952), is the rulebook. *Youngstown* announced a tripartite framework for evaluating how much freedom the executive enjoys to create law. The widest berth exists where "the President acts pursuant to an express or implied authorization of Congress." *Id.* at 635 (Jackson, J., concurring). Conversely, when acting contrary to a congressional pronouncement, the President's "power is at its lowest ebb . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 638 (Jackson, J., concurring). In between lies a "zone of twilight" characterized by "congressional inertia, indifference or quiescence." *Id.* at 637 (Jackson, J., concurring).

Congress has authority over immigration, U.S. Const. art. I, § 8, cl.4, and has exercised that authority on numerous occasions, including to provide class-based deferred action. *See, e.g.,* 8 U.S.C. § 1154(a)(1)(D) (self-petitioners under the Violence Against Women Act); Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (family members of permanent residents killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)–(2) (certain T- and U-visa applicants). As

a result of this tide of legislation, the President's power to create or amend immigration law is limited to "his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). Because the Constitution assigns Congress authority over immigration, the President has no authority to enact new policies like DACA. *See* App. 11–12 & n.7 (Kozinski, J., dissenting) (explaining that this case belongs to *Youngstown*'s third category).

In *Youngstown* itself, existing legislation on the topic of property seizure was sufficient to preclude President Truman from seizing steel mills under Article II's commander-in-chief authority. *Id.*, 343 U.S. at 639 & nn.6–8 (Jackson, J., concurring). In *Barclays*, the Court pointed to a history of failed legislation seeking to ban California's method of tax collection: "Congress has focused its attention on this issue, but has refrained from exercising its authority," thus "yield[ing] the floor" to the States, not the executive. 512 U.S. at 329; *see also id.* at 324–26 & nn.24–25 (tracing legislative proposals). Even more recently, the Court held that a "Memorandum of the Attorney General" could not make a non-self-executing treaty binding upon the States, notwithstanding the President's "plainly compelling" interests in the conduct of foreign affairs. *Medellin*, 552 U.S. at 524–26.

Like *Youngstown*, *Barclays*, and *Medellin*, the present case belongs in the third and most constrained *Youngstown* category. Congress has spoken specifically on the subject of class-wide deferred action, but has not extended such treatment to the group of noncitizens

covered by DACA. As in *Youngstown*, existing legislation on the same topic strips the executive of the ability to enact a parallel program unilaterally. Moreover, as in *Barclays*, Congress has considered and rejected legislation that would have accomplished what the executive attempted in response to legislative inaction. *See, e.g.,* DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007). The Ninth Circuit's decision is inconsistent with this body of precedent.

It is also inconsistent with the holdings of other circuits. Most notably, the Fifth Circuit held that "the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them eligible for a host of federal and state benefits." *Texas*, 809 F.3d at 184. The Eleventh Circuit likewise struck down a presidential effort to regulate immigration in an area where Congress has imposed a "statutory scheme." *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir. 1983). In *Frade*, the question was whether the President could punish cooperation with the Mariel boatlift, which he justified as encompassed within the Trading with the Enemy Act. The Eleventh Circuit rejected this argument because Congress had already provided a different mechanism for emergency actions, which meant that the President's power was at its "lowest ebb" under *Youngstown*. *Id.* Alternatively, if the regulation was indeed based on trade, then the Constitution had already assigned that power to Congress in Article I, § 8, cl. 3—the clause at issue in *Barclays* and immediately preceding the one at issue in this

case—with the same result in terms of unilateral presidential power. *Id*. at 329, 334.

In the present case, Congress has passed numerous laws governing immigration. It is therefore "the expressed and codified intent of Congress," *id.*, that immigration occur in accordance with the INA and other laws.

If the Ninth Circuit shared the Eleventh Circuit's recognition that "presidential power to exclude aliens . . . does not include the power to enact general immigration laws by executive order," *id.*, or the Fifth Circuit's specific conclusions regarding DACA, then a different result would have obtained in the present case. This Court should grant certiorari to reaffirm its existing precedent limiting the scope of presidential lawmaking and to confirm that the Fifth and Eleventh Circuits were correct to follow those precedents in the context of immigration.

B. Alternatively, if DACA Were Prosecutorial Discretion, This Court and Three Circuits Have Held that Executive Branch Policy Statements Lack the Force of Law.

The Supremacy Clause enthrones the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties" as the supreme law of the land. U.S. Const. art. VI, cl. 2. It does not extend the same significance to every missive that issues from a single branch of government.

This Court has refused to treat as law "Executive Branch actions [like] press releases, letters, and amicus briefs." *Barclays*, 512 U.S. at 329–30. The *Barclays*

Court reasoned that "[w]e need not here consider the scope of the President's power to preempt state law pursuant to authority delegated by a statute" because the "Executive Branch communications" before it merely "express federal policy but lack the force of law." *Id.* Communications of this sort "cannot render unconstitutional California's otherwise valid [statute]." *Id.* at 330.

The Third and Seventh Circuits have reached similar conclusions by following this Court's reasoning in *United States v. Mead Corp.*, 533 U.S. 218 (2001). While *Mead* itself is not a preemption case, it traces the clearest boundary between agency-made law and precatory guidance. *Mead* announces a straightforward standard: "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230. Part of the "force" attending agency action that satisfies the standard in *Mead* is the ability to preempt state laws.

In *Holk*, the Third Circuit began its preemption analysis by asking "whether the FDA has . . . taken actions that are capable of having preemptive effect." 575 F.3d at 340. The candidate actions in *Holk* included a request for public comments, an informal policy, and several letters from the FDA to food and beverage manufacturers telling them to remove the term "natural" from their labels. *Id.* at 340–41. Applying *Mead*, the Third Circuit concluded that the lack of a "formal, deliberative process" prevented the FDA's actions from creating federal law. *Id.* at 342.

Likewise, the Seventh Circuit explained that "[i]n order to preempt state authority," a federal agency "must establish rules with the force of law." *Wabash Valley Power Assn. v. Rural Elec. Admin.*, 903 F.2d 445, 453–54 (7th Cir. 1990). A mere letter from the agency was not nearly enough. *Id.* at 454. In fact, the *Wabash* court noted that "[w]e have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication." *Id.*

Regarding the specific executive branch communication at issue in this case, the Fifth Circuit has already held that DAPA and the 2014 DACA expansion were substantive rules requiring notice-and-comment rulemaking, which DHS did not do. *Texas*, 809 F.3d at 177–78. In the Seventh Circuit, this failure to comply with the requirements of the Administrative Procedure Act would mean that DACA cannot be the basis for federal preemption. *Wabash*, 903 F.2d at 453.

In the Ninth Circuit, however, a different result followed. Examining Arizona's statute that requires "presence in the United States . . . authorized under federal *law*," Ariz. Rev. Stat. § 28-3153(D) (emphasis added), the Ninth Circuit found preemption because DACA beneficiaries—a group defined by no statute and no formal rulemaking—were excluded. App. 36. In any other Circuit, the requirement of presence "authorized under federal law" would have excluded persons whose sole claim to "authorization" was an executive branch memorandum. As the dissenting opinion points out, "[t]he panel decision in effect holds that the enforcement decisions of the President are federal law." App. 4. In the Third, Fifth, and Seventh Circuits, that holding would be impossible.

Rather than expressly disagree, the panel opinion simply ignores unhelpful precedent regarding the boundaries of "law," especially when contrasted with precatory communications from the executive branch. Despite dozens of references in the briefs, *Barclays* appears nowhere in the Ninth Circuit's opinion. In fact, the panel goes so far as to assert in a footnote that the DACA Memo is immaterial to its holding, which purportedly relies instead on "federal authority under the INA to create immigration categories." App. 39–40 n.8. The panel does not, however, explain how the plaintiffs in this case would have a cause of action in the absence of that allegedly irrelevant memorandum.[2]

This Court and the circuits that follow it have spoken with one voice on the procedures that create federal law. That the DACA Memo could trigger a different result in the Ninth Circuit calls out for review. *See* Noah Feldman, *Obama's Wobbly Legal Victory on Immigration*, Bloomberg View (Apr. 6, 2016) (describing the Ninth Circuit's preemption holding as "vulnerable to reversal by the Supreme Court" because "[t]he legal authority for [DACA] deferred-action status isn't federal law").

[2] The opening sentence of Respondents' Complaint belies the Ninth Circuit's assertion that DACA is immaterial: "This lawsuit challenges . . . Arizona's practice of denying driver's licenses to immigrant youth whom the federal government has authorized to remain in the United States under the Deferred Action for Childhood Arrivals (DACA) program." ER 330, ¶ 1. Without DACA, there is no lawsuit.

III. The Importance of Defining Executive Power in the Context of Immigration Will Not Soon Diminish.

DACA threatens the separation of executive and legislative powers. This Court recognized as much by granting certiorari in *Texas*. *United States v. Texas*, 136 S. Ct. 906 (2016). In the same way, every finding of preemption affects the division of power between the federal government and the States. What makes this case remarkable is the coincidence of both attacks on divided government in a single event.

The Constitution is not agnostic about the division of power over immigration. The federal government has authority over "who should or should not be admitted to the country, and the conditions under which a legal entrant may remain;" other police powers that impact aliens belong to the States. *De Canas*, 424 U.S. at 355. Within the federal system, authority rests with Congress. U.S. Const. art. I, § 8, cl. 4. The Ninth Circuit's preemption holding upsets both of these divisions of power, consolidating from both horizontal and vertical directions in favor of the President.

This Court has long resisted such consolidation. Even when Congress willingly ceded its lawmaking authority to the executive, the Court would not participate. *Clinton v. City of New York*, 524 U.S. 417 (1998). DACA, taken to its logical limit, would create a type of de facto line-item veto, with the executive branch empowered to suspend enforcement of disagreeable provisions in the name of prosecutorial discretion. Indeed, DACA goes further than *Clinton*. It assumes that the executive branch may functionally veto portions of existing law without congressional

authorization and beyond the narrow universe of spending provisions at issue in *Clinton*. *See* Pub. L. 104-130, § 1021 (1996) (limiting the line-item veto to expenditures).

The division of power between the States and the federal government is no less important. *Arizona*, 132 S. Ct. at 2498 ("This Court granted certiorari to resolve important questions concerning the interaction of state and federal power[.]").

Because the Ninth Circuit panel switched its rationale from equal protection to preemption, this case now implicates both the horizontal and vertical separation of powers. As a result, the importance of certiorari is stronger now than when three Justices of this Court publicly noted their desire to stay the original panel decision pending certiorari. App. 132.

Either DACA is an exercise of prosecutorial discretion without the force of law, or it is a substantive legal change done outside and against the constitutional scheme. Under either option, the Ninth Circuit's decision finding preemption of an admitted police power is both wrong and at odds with numerous other circuits, including the Fifth Circuit's determination that DAPA and the 2014 DACA expansion are substantive changes in the law.

Judge Kozinski's dissent ends with a reminder: "Executive power favors the party, or perhaps simply the person, who wields it." App. 12. His concern mirrors James Madison's: the consolidation of power in any one person is the "very definition of tyranny." The Federalist No. 47 (Madison). Thus, the reason for concern over each successive President's ability to

suspend statutes, confer benefits, and preempt state laws is not a fear over policy tumult or distrust of a given President; the reason for concern is that this new power marks the arrival of an Imperial Presidency far more sweeping than any our nation has known.

This Court should grant certiorari to restore and clarify the relationship between the state and federal governments and among the three branches of the federal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 29, 2017

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307
D.C. No. 2:12-cv-02546-DGC
District of Arizona, Phoenix

[Filed February 2, 2017]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS,
Plaintiffs-Appellees,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,
Defendants-Appellants.

ORDER

Before: PREGERSON, BERZON, and CHRISTEN, Circuit Judges.

The court's opinion filed on April 5, 2016, appearing at 818 F.3d 901 (9th Cir. 2016), is hereby amended. An amended opinion, including a concurrence by Judge Berzon, is filed herewith.

Judges Berzon and Christen voted to deny the petition for rehearing en banc, and Judge Pregerson so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**, and no further petitions for rehearing will be accepted.

Arizona Dream Act Coal. v. Brewer, No. 15-15307

Circuit Judge **KOZINSKI**, with whom Circuit Judges **O'SCANNLAIN**, **BYBEE**, **CALLAHAN**, **BEA** and **N.R. SMITH** join, dissenting from the denial of rehearing en banc:

At the crossroads between two presidents, we face a fundamental question of presidential power. President Obama created, by executive memorandum, a sweeping new immigration program that gives the benefit of "deferred action" to millions of illegal immigrants who came to the United States before the age of sixteen. Deferred action confers no formal

immigration status; it is simply a commitment not to deport. Arizona, like many states, does not issue drivers' licenses to unauthorized aliens, and therefore refuses to issue drivers' licenses to the program's beneficiaries.

Does the Supremacy Clause nevertheless force Arizona to issue drivers' licenses to the recipients of the President's largesse? There's no doubt that Congress can preempt state law; its power to do so in the field of immigration is particularly broad. But Congress never approved the deferred-action program: The President adopted it on his own initiative after Congress repeatedly declined to pass the DREAM Act—legislation that would have authorized a similar program. Undeterred, the panel claims that the President acted pursuant to authority "delegated to the executive branch" through the Immigration and Naturalization Act (INA). Amended op. at 27. According to the panel, Congress gave the President the general authority to create a sprawling new program that preempts state law, even though Congress declined to create the same program.

This puzzling new preemption theory is at odds with the Supreme Court's preemption jurisprudence; it is, instead, cobbled together out of 35-year-old Equal Protection dicta. It is a theory that was rejected with bemusement by the district court, see Ariz. Dream Act Coal. v. Brewer, 945 F. Supp. 2d 1049, 1057 (D. Ariz. 2013), only to be resurrected by the panel at the eleventh hour and buried behind a 3,000-word Equal Protection detour. It's a theory that puts us squarely at odds with the Fifth Circuit, which held recently that "the INA flatly does not permit the [executive]

reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271, 2272 (2016) (per curiam). And it's a theory that makes no mention of the foundational principle of preemption law: Historic state powers are not preempted "unless that was the clear and manifest purpose of Congress." Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (internal quotation omitted).

The opinion also buckles under the weight of its own ambiguities. The panel says repeatedly that Arizona has created "immigration classifications not found in federal law." Amended op. at 30 n.8; see also id. at 35, 42. But Arizona follows federal law to the letter—that is, all laws passed by Congress and signed by the President. Thus, when the panel uses the term "law," it means something quite different from what that term normally means: The panel in effect holds that the enforcement decisions of the President are federal law. Yet the lawfulness of the President's policies is an issue that the panel bends over backward not to reach. See id. at 35–39. I am at a loss to explain how this cake can be eaten and yet remain on the plate: The President's policies may or may not be "lawful" and may or may not be "law," but are nonetheless part of the body of "federal law" that imposes burdens and obligations on the sovereign states. While the panel suggests other reasons to doubt Arizona's response,[1]

[1] I have little to say about the panel's lengthy Equal Protection discussion. While this Equal Protection excursus eclipses the panel's terse and enigmatic discussion of preemption, the panel is

the opinion's slippery preemption theory simply isn't one of them. See, e.g., Noah Feldman, Obama's Wobbly Legal Victory on Immigration, Bloomberg (Apr. 6, 2016) (describing the panel's "precarious," "tricky" and "funky" reasoning that is "vulnerable to reversal by the Supreme Court").

* * *

In the summer of 2012, the President directed his officers not to remove certain illegal immigrants who came to the United States before age sixteen. The program, Deferred Action for Childhood Arrivals (DACA), did not clear any of the normal administrative-law hurdles; the memorandum announcing the program states that it "confers no substantive right, immigration status or pathway to citizenship" because "[o]nly the Congress, acting through its legislative authority, can confer these rights." DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012.

Arizona responded with an executive order of its own, stating, in apparent agreement with the DACA memorandum, that the new federal program "does not and cannot confer lawful or authorized status or

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nonetheless clear that "we do not ultimately decide the Equal Protection issue." Amended op. at 18. I note, however, that there are serious doubts about the coherence of the Supreme Court's Equal Protection jurisprudence as applied to aliens. See, e.g., Korab v. Fink, 797 F.3d 572, 585 (9th Cir. 2014) (Bybee, J., concurring) (describing this jurisprudence as "riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult," and suggesting an approach based solely on preemption).

presence upon the unlawful alien applicants." Ariz. Exec. Order 2012-06. Because Arizona law requires that applicants for a driver's license submit proof that their presence is "authorized under federal law," Ariz. Rev. Stat. § 28-3153(D)—and DACA "confers no substantive right [or] immigration status"—Arizona felt justified withholding licenses from illegal immigrants who happen to be DACA beneficiaries. Several DACA beneficiaries then sued Arizona, claiming, among other things, that the state's policy was preempted.

The panel agrees, holding that Arizona's policy "strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch." Amended op. at 27 (emphasis added); see also id. at 17. One might think that the panel would present especially strong evidence of congressional delegation, such as an express statement to that effect. After all, it's rare enough to find that Congress has kept an entire field to itself, much less ceded one to the executive. And the bar that preemption must clear is both well-established and high: The historic police powers of states are not preempted "unless that was the clear and manifest purpose of Congress." E.g., Arizona, 132 S. Ct. at 2501; Wyeth v. Levine, 555 U.S. 555, 565 (2009); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The panel doesn't bother showing that Congress evinced a "clear and manifest purpose" before forcing the states to accept immigration classifications invented entirely by the President. Indeed, the panel's

preemption analysis mentions only two small provisions of the INA, and this thin statutory evidence cannot possibly carry the heavy burden of field preemption.[2] The panel first notes that the INA refers to an alien's "period of stay authorized by the Attorney General," beyond which the alien is "deemed to be unlawfully present in the United States." Amended op. at 33 (quoting 8 U.S.C. § 1182(a)(9)(B)(ii)). But the panel has now corrected its opinion to explain that this provision actually contemplates the executive's ability to "authorize" a period of stay only for a tiny subset of aliens—those "previously removed"—and not, as its original opinion suggested, every class of immigrant covered by the statute.[3]

The panel's second claim is that the REAL ID Act identifies deferred-action immigrants "as being present in the United States during a 'period of authorized stay,' for the purpose of issuing state identification cards." Amended op. at 34 (citation omitted). This

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[2] The panel's only other analysis of the INA, in its non-precedential Equal Protection discussion, makes the rather unremarkable point that the executive branch has responsibility for executing the INA. See amended op. at 13–16. This does not in any way help establish whether Congress intended the INA to let the executive branch preempt the states.

[3] Compare Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 916 (9th Cir. 2016) with amended op. at 33 (adding "at least for purposes of § 1182(a)(9)(B)"). As the string of letters and numbers might suggest, § 1182(a)(9)(B) is not a large portion of the INA. This subsection also offers no support for a second reason: Even if it were true that an immigrant was "unlawfully present" if he stayed beyond a period approved by the Attorney General, this doesn't mean he would be "lawfully present" if he didn't stay beyond such a period. In formal logic, the inverse of a conditional cannot be inferred from the conditional.

narrow provision also can't be authority for the proposition that the INA "delegated to the executive branch" the wholesale authority to preempt state law by declaring immigrants legal when they are not. Nor does this narrow provision conflict with Arizona's policy: The provision actually says that a state "may only issue a temporary driver's license or temporary identification card" to deferred-action immigrants—a limit, not a requirement. REAL ID Act of 2005, Pub. L. No. 109–13, § 202(c)(2)(C)(i) (emphasis added).

Nevertheless, the panel insists that this evidence "directly undermines" Arizona's response to DACA. Amended op. at 33. That the panel can trawl the great depths of the INA—one of our largest and most complex statutes—and return with this meager catch suggests exactly the opposite conclusion: The INA evinces a "clear and manifest" intention not to cede this field to the executive. This is precisely the conclusion that the Fifth Circuit reached in Texas v. United States. Our sister circuit held that even if the President's policies were of the type to which Chevron deference was owed—which the circuit assumed only for the sake of argument—such deference would be unavailable because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." See Texas, 809 F.3d at 179. In other words, the INA has spoken directly to the issue and "flatly does not permit" executive supplementation like the DACA program. Id. at 184. If what the panel relies on evinces a "clear and manifest

purpose" to cede a field to the executive, it's hard to imagine what statute doesn't.[4]

* * *

Perhaps daunted by the lack of support in the statute it purports to interpret, the panel turns to Supreme Court precedent, but it doesn't fare much better here. The primary case on which the panel relies, Plyler v. Doe, might contain some impressive-sounding dicta—"The States enjoy no power with respect to the classification of aliens," 457 U.S. 202, 225 (1982)—but the reasons to reject this dicta are more impressive still. As the district court put it when it rebuffed the Plyler theory of preemption: "Plyler is not a preemption case." 945 F. Supp. 2d at 1057. Justice Brennan's 1982 majority opinion—a 5-4 opinion that garnered three individual concurrences and has been questioned continuously since publication—never once mentions preemption. See 457 U.S. at 205–30.[5]

The panel's search for support in the Supreme Court's actual preemption jurisprudence is equally misguided. The panel quotes De Canas v. Bica for the proposition that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."

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[4] And even if it were undeniably the case that Congress delegated the power of preemption to the President, I am skeptical that such a statute would be constitutional. The nondelegation doctrine is still waiting in the wings. See generally Whitman v. Am. Trucking Assocs., 531 U.S. 457 (2001).

[5] The case was also wrong ab initio and is due to be reconsidered. See, e.g., Eugene Volokh, Why Justices May Overrule 'Plyler' on Illegal Aliens, L.A. Daily J., Nov. 28, 1994, at 6 (describing objections to Plyler and reasons why it may be overruled).

Amended op. at 24 (quoting 424 U.S. 351, 354 (1976)). But the panel overlooks the very next sentence of De Canas, which notes that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." 424 U.S. at 355. So what's "a regulation of immigration" that would be preempted? The De Canas opinion tells us a couple of sentences later: It's "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Id. Denying a driver's license is not tantamount to denying admission to the country.[6] Like the state law upheld in De Canas—which prevented California businesses from hiring illegal immigrants—Arizona's control over its drivers' licenses is well "within the mainstream of [the state's] police power." Id. at 356.

Indeed, it's difficult to imagine a preemption case less helpful to the panel than De Canas. The De Canas majority states explicitly that it will "not presume that Congress, in enacting the INA, intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws." Id. at 357. That uncontroversial proposition simply raises once more the question the panel works hard to avoid: If Arizona

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[6] The more recent cases cited by the panel—Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013), Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013), and United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012)—are easily distinguishable for this reason. They involved what the courts held to be an actual regulation of immigration—that is, "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. at 355.

relies on the categories drawn by the INA, but not those of the executive branch, why isn't it operating consistently with "pertinent federal laws"? The panel never says.

* * *

Instead, we're left with the enigmatic holding we started with: Arizona "impermissibly strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch." Amended op. at 27. This conclusion finds no support in the actual text of the INA. It receives no help from the Court's preemption jurisprudence. And it is a brazen renegotiation of our federal bargain. If states must accept the complete policy classifications of the INA and also every immigration decision made by the President, then we've just found ourselves in a world where the President really can preempt state laws with the stroke of a pen.

The Constitution gives us a balance where federal laws "shall be the supreme law of the land," but powers not delegated to the federal government "are reserved to the states." U.S. Const., art. VI cl. 2; id. amend. X. The political branches of the federal government must act together to overcome state laws. Unison gives us clarity about what federal law consists of and when state law is subordinated. The vast power to set aside the laws of the sovereign states cannot be exercised by the President acting alone, with his power at its "lowest ebb." Cf. Youngstown Sheet & Tube Co. v.

Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).[7]

Presidential power can turn on and off like a spigot; what our outgoing President has done may be undone by our incoming President acting on his own. The judiciary might find itself, after years of litigation over a President's policy, page 12 faced with a change in administration and a case on the verge of mootness.[8] And our precedent may long outlive the DACA program: We may soon find ourselves with new conflicts between the President and the states. See, e.g., California and Trump Are on a Collision Course Over Immigrants Here Illegally, L.A. Times, Nov. 11, 2016; Cities Vow to Fight Trump on Immigration, Even if They Lose Millions, N.Y. Times, Nov. 27, 2016.

These looming conflicts should serve as a stark reminder: Executive power favors the party, or perhaps simply the person, who wields it. That power is the forbidden fruit of our politics, irresistible to those who possess it and reviled by those who don't. Clear and stable structural rules are the bulwark against that power, which shifts with the sudden vagaries of our

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[7] We are not in the "zone of twilight," Youngstown, 343 U.S. at 637, where the distribution of presidential and congressional power is uncertain. Congress has repeatedly declined to act—refusing time and time again to pass the DREAM Act—so the President is flying solo.

[8] Mootness concerns aren't theoretical. In Texas v. United States—the direct challenge to the Obama Administration's immigration policies over which the Supreme Court split 4-4—the parties filed a joint motion to stay the merits proceedings until one month after the presidential inauguration. See Joint Motion to Stay, No. 1:14-cv-00254, Doc. 430 (Nov. 18, 2016).

politics. In its haste to find a doctrine that can protect the policies of the present, our circuit should remember the old warning: May all your dreams come true.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307
D.C. No. 2:12-cv-02546-DGC

[Filed February 2, 2017]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS,
Plaintiffs-Appellees,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,
Defendants-Appellants.

AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted July 16, 2015
Pasadena, California

Before: Harry Pregerson, Marsha S. Berzon, and Morgan B. Christen, Circuit Judges.

Opinion by Judge Harry Pregerson, Senior Circuit Judge:

Plaintiffs are five individual recipients of deferred action under the Deferred Action for Childhood Arrivals ("DACA") program, and the Arizona DREAM Act Coalition ("ADAC"), an organization that advances the interests of young immigrants. DACA recipients are noncitizens who were brought to this country as children. Under the DACA program, they are permitted to remain in the United States for some period of time as long as they meet certain conditions. Authorized by federal executive order, the DACA program is administered by the Department of Homeland Security and is consistent with the Supreme Court's ruling that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens" under the Constitution. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

In response to the creation of the DACA program, Defendants—the Governor of the State of Arizona; the Arizona Department of Transportation ("ADOT") Director; and the Assistant Director of the Motor Vehicle Division—instituted a policy that rejected the Employment Authorization Documents ("EADs") issued to DACA recipients under the DACA program as proof of authorized presence for the purpose of obtaining a driver's license. Plaintiffs seek permanently to enjoin Defendants from categorically denying drivers' licenses

to DACA recipients. The district court ruled that Arizona's policy was not rationally related to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment. The district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. Defendants appealed.

We agree with the district court that DACA recipients are similarly situated to other groups of noncitizens Arizona deems eligible for drivers' licenses. As a result, Arizona's disparate treatment of DACA recipients may well violate the Equal Protection Clause, as our previous opinion indicated is likely the case. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). The district court relied on this ground when it issued the permanent injunction. Applying the principle of constitutional avoidance, however, we need not and should not come to rest on the Equal Protection issue, even if it "is a plausible, and quite possibly meritorious" claim for Plaintiffs, so long as there is a viable alternate, nonconstitutional ground to reach the same result. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1211 (9th Cir. 2005) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576–78 (1988)).

We conclude that there is. Arizona's policy classifies noncitizens based on Arizona's independent definition of "authorized presence," classification authority denied the states under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*. We therefore affirm the district court's order granting summary judgment and entry of a permanent injunction, on the basis that

Arizona's policy is preempted by the exclusive authority of the federal government to classify noncitizens. *See Weiser v. United States*, 959 F.2d 146, 147 (9th Cir. 1992) ("[This court] can affirm the district court on any grounds supported by the record.").

FACTUAL BACKGROUND

I. The DACA Program

On June 15, 2012, the Department of Homeland Security announced the DACA program pursuant to the DACA Memorandum. Under the DACA program, the Department of Homeland Security exercises its prosecutorial discretion not to seek removal of certain young immigrants. The DACA program allows these young immigrants, including members of ADAC, to remain in the United States for some period of time as long as they meet specified conditions.

To qualify for the DACA program, immigrants must have come to the United States before the age of sixteen and must have been under the age of thirty-one by June 15, 2012. *See* Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012). They must have been living in the United States at the time the DACA program was announced and must have continuously resided here for at least the previous five years. *Id.* Additionally, DACA-eligible immigrants must be enrolled in school, have graduated from high school, have obtained a General Educational Development certification, or have been honorably discharged from the U.S. Armed Forces or Coast Guard. *Id*. They must

not pose a threat to public safety and must undergo extensive criminal background checks. *Id.*

If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods. DACA recipients enjoy no formal immigration status, but the Department of Homeland Security does not consider them to be unlawfully present in the United States and allows them to receive federal EADs.

II. Arizona's Executive Order

On August 15, 2012, the Governor of Arizona issued Arizona Executive Order 2012–06 ("Arizona Executive Order"). Executive Order 2012–06, "Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program" (Aug. 15, 2012). A clear response to DACA, the Arizona Executive Order states that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants." *Id.* at 1. The Arizona Executive Order announced that "[t]he issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status and does not entitle them to any additional public benefit." *Id.* The Order directed Arizona state agencies, including ADOT, to "initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license." *Id.*

III. Arizona's Driver's License Policy

To implement the Arizona Executive Order, officials at ADOT and its Motor Vehicle Division initiated changes to Arizona's policy for issuing drivers' licenses. Under Arizona state law, applicants can receive a driver's license only if they can "submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28–3153(D). Prior to the Arizona Executive Order, ADOT Policy 16.1.2 included all federally issued EADs as "proof satisfactory" that an applicant's presence was "authorized under federal law." The Motor Vehicle Division therefore issued drivers' licenses to all individuals with such documentation.

After the Arizona Executive Order, the Motor Vehicle Division announced that it would not accept EADs issued to DACA recipients—coded by the Department of Homeland Security as (c)(33)—as proof that their presence in the United States is "authorized under federal law." The Motor Vehicle Division continued to accept federally issued EADs from all other noncitizens as proof of their lawful presence, including individuals who received deferred action outside of the DACA program and applicants coded (c)(9) (individuals who have applied for adjustment of status), and (c)(10) (individuals who have applied for cancellation of removal).

In 2013, ADOT revised its policy again. Explaining this change, ADOT Director John S. Halikowski testified that Arizona views an EAD as proof of presence authorized under federal law only if the EAD demonstrates: (1) the applicant has formal immigration

status; (2) the applicant is on a path to obtaining formal immigration status; or (3) the relief sought or obtained is expressly provided pursuant to the INA. Using these criteria, ADOT began to refuse driver's license applications that relied on EADs, not only from DACA recipients, but also from beneficiaries of general deferred action and deferred enforced departure. It continued to accept as proof of authorized presence for purposes of obtaining drivers' licenses EADs from applicants with (c)(9) and (c)(10) status. We refer to the policy that refuses EADs from DACA recipients as "Arizona's policy."

IV. Preliminary Injunction

On November 29, 2012, Plaintiffs sued Defendants in federal district court, alleging that Arizona's policy of denying drivers' licenses to DACA recipients violates the Equal Protection Clause and the Supremacy Clause of the U.S. Constitution. Plaintiffs sought declaratory relief and a preliminary injunction prohibiting Defendants from enforcing their policy against DACA recipients. On May 16, 2013, the district court ruled that Arizona's policy likely violated the Equal Protection Clause but it declined to grant the preliminary injunction because Plaintiffs had not shown irreparable harm. *ADAC v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013) ("*ADAC I*"), *reversed by ADAC v. Brewer*, 757 F.3d 1053 (9th Cir. ("*ADAC II*"). It also granted Defendants' motion to dismiss the Supremacy Clause claim. *Id.* at 1077–78. Plaintiffs appealed the district court's denial of a preliminary injunction.

V. Permanent Injunction

While Plaintiffs' appeal of the preliminary injunction ruling was pending, Plaintiffs sought a permanent injunction in district court on Equal Protection grounds and moved for summary judgment. Defendants also moved for summary judgment, arguing that DACA recipients are not similarly situated to other noncitizens who are eligible for drivers' licenses under Arizona's policy.

We reversed the district court's decision on the motion for preliminary injunction, agreeing with the district court that Arizona's policy likely violated the Equal Protection Clause and holding that Plaintiffs had established that they would suffer irreparable harm as a result of its enforcement. *See ADAC II*, 757 F.3d at 1064. In a concurring opinion, one member of our panel concluded that Plaintiffs also demonstrated a likelihood of success on their claim that Arizona's policy was preempted. *Id.* at 1069 (Christen, J., concurring). On January 22, 2015, the district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. *ADAC v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015) ("*ADAC III*"). We affirm the district court's order.

STANDARD OF REVIEW

We review the district court's grant or denial of motions for summary judgment *de novo*. *Besinga v. United States*, 14 F.3d 1356, 1359 (9th Cir. 1994). We determine whether there are any genuine issues of material fact and review the district court's application of substantive law. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). We "may affirm a

grant of summary judgment on any ground supported by the record." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014).

We review the district court's decision to grant a permanent injunction for abuse of discretion. *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014) (citing *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002)). We review questions of law underlying the district court's decision *de novo*. *See Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003). "If the district court 'identified and applied the correct legal rule to the relief requested,' we will reverse only if the court's decision 'resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

DISCUSSION

I. Equal Protection

A. Similarly Situated

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To prevail on an Equal Protection claim, plaintiffs must show "that a class that is similarly situated has been

treated disparately." *Christian Gospel Church, Inc. v. City & Cty. of S.F.*, 896 F.2d 1221, 1225 (9th Cir. 1990), *superseded on other grounds by* 42 U.S.C. § 2000e.

"The first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). In this instance, DACA recipients do not need to be similar in all respects to other noncitizens who are eligible for drivers' licenses, but they must be similar in those respects that are relevant to Arizona's own interests and its policy. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." (emphasis added)).

We previously held that DACA recipients and other categories of noncitizens who may rely on EADs are similarly situated with regard to their right to obtain drivers' licenses in Arizona. *See ADAC II*, 757 F.3d at 1064. The material facts and controlling authority remain the same from the preliminary injunction stage. Thus, we again hold that in all relevant respects DACA recipients are similarly situated to noncitizens eligible for drivers' licenses under Arizona's policy. Nonetheless, for clarity and completeness, we address once more Defendants' arguments.

Defendants assert that DACA recipients are not similarly situated to other noncitizens eligible for

drivers' licenses under Arizona's policy because DACA recipients neither received nor applied for relief provided by the INA, or any other relief authorized by federal statute. Particularly relevant here, Defendants note that eligible noncitizens under the categories of (c)(9) and (c)(10) are tied to relief expressly found in the INA: adjustment of status (INA § 245; 8 U.S.C. § 1255; 8 C.F.R. § 274a.12(c)(9)) and cancellation of removal (INA § 240A; 8 U.S.C. § 1229b; 8 C.F.R. § 274a.12(c)(10)), respectively. In contrast, Defendants contend that DACA recipients' presence in the United States does not have a connection to federal law but rather reflects the Executive's discretionary decision not to enforce the INA.

We continue to disagree. *See ADAC II*, 757 F.3d at 1061. As explained below, Arizona has no cognizable interest in making the distinction it has for drivers' licenses purposes. The federal government, not the states, holds exclusive authority concerning direct matters of immigration law. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute on other grounds as recognized in Arizona*, 132 S. Ct. at 2503–04. The states therefore may not make immigration decisions that the federal government, itself, has not made, *Plyler*, 457 U.S. at 225 (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). Arizona's encroachment into immigration affairs—making distinctions between groups of immigrants it deems not to be similarly situated, despite the federal government's decision to treat them similarly—therefore seems to exceed its authority to decide which aliens are similarly situated to others for Equal Protection purposes. In other words, the "similarly situated" analysis must focus on factors of similarity and distinction pertinent to the state's

policy, not factors outside the realm of its authority and concern.

Putting aside that limitation, the INA explicitly authorizes the Secretary of Homeland Security to administer and enforce all laws relating to immigration and naturalization. INA § 103(a)(1); 8 U.S.C. § 1103(a)(1). As part of this authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States.

The INA expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion. For example, INA § 237(d)(2); 8 U.S.C. § 1227(d)(2), allows a noncitizen who has been denied an administrative stay of removal to apply for deferred action. Certain individuals are also "eligible for deferred action" under the INA if they qualify under a set of factors. *See* INA § 204(a)(1)(D)(i)(II); 8 U.S.C. § 1154(a)(1)(D)(i)(II). Deferred action is available to individuals who can make a showing of "exceptional circumstances." INA § 240(e); 8 U.S.C. § 1229a(e). By necessity, the federal statutory and regulatory scheme, as well as federal case law, vest the Executive with very broad discretion to determine enforcement priorities.[1]

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[1] Pursuant to this discretion, the Department of Homeland Security and its predecessor, the Immigration and Naturalization Service ("INS"), established a series of general categorical criteria to guide enforcement. For example, the 1978 INS Operating Instructions outlined five criteria for officers to consider in exercising prosecutorial discretion, including "advanced or tender age." O.I. 103.1(a)(1)(ii); *see also Pasquini v. Morris*, 700 F.2d 658,

Congress expressly charged the Department of Homeland Security with the responsibility of "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). The Department of Homeland Security regulations describe deferred action as "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14). Additionally, the Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Supreme Court has explained that the Secretary has discretion to exercise deferred action at each stage of the deportation process, and has acknowledged the long history of the Executive "engaging in a regular practice . . . of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999); *see also id.* n.8; *Arizona*, 132 S. Ct. at 2499 (noting that "[a] principal

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661 (11th Cir. 1983). Discretion can also cut the other way. For example, the 2011 Morton Memo highlighted "whether the person poses national security or public safety concern," Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (June 17, 2011), and the 2014 Johnson Memo identifies the "highest [enforcement] priority" as noncitizens who might represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014).

feature of the removal system is the broad discretion exercised by" the Executive); *Texas v. United States,* 106 F.3d 661, 667 (5th Cir. 1997) (noting the State of Texas's concession that the INA "places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion").[2]

Defendants' argument fails because they attempt to distinguish categories of EAD-holders in a way that does not amount to any relevant difference. Like adjustment of status, (c)(9), and cancellation of removal, (c)(10), deferred action is a form of relief grounded in the INA. Moreover, the exercise of

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[2] In the past, the Department of Homeland Security and the INS have granted deferred action to different groups of noncitizens present in the United States. In 1977, the Attorney General granted stays of removal to 250,000 nationals of certain countries (known as "Silva Letterholders"). *Silva v. Levi*, No. 76-C4268 (N.D. Ill. 1977), *modified on other grounds sub nom. Silva v. Bell*, 605 F.2d 978 (7th Cir.1979). In 1990, the INS instituted the "Family Fairness" program that deferred the deportation of 1.5 million family members of noncitizens who were legalized through the Immigration Reform and Control Act. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, "Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens" (Feb. 2, 1990). In 1992, President Bush directed the Attorney General to grant deferred enforced departure to 190,000 Salvadorans. *See* Immigration Act of 1990 § 303, Public Law 101-649 (Nov. 29, 1990); https://www.gpo.gov/fdsys/pkg/FR1994-12-06/html/94-30088.htm. And nationals of Liberia were granted deferred enforced departure until September 30, 2016, http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure.

prosecutorial discretion in deferred action flows from the authority conferred on the Secretary by the INA.

Defendants provide two criteria to explain when they deem an EAD satisfactory proof of authorized presence: the applicant has formal immigration status, or the applicant is on the path to formal immigration status. Neither criteria suffices to render DACA recipients not similarly situated to other EAD-holders on any basis pertinent to Arizona's decision whether to grant them drivers' licenses. Like DACA recipients, many noncitizens who apply for adjustment of status and cancellation of removal—including individuals with (c)(9) and (c)(10) EADs—do not, and may never, possess formal immigration status. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011).

Additionally, "submission of an application does not connote that the alien's immigration status has changed." Thus, merely applying for immigration relief does not signal a clear path to formal immigration status. *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011) (quoting *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006)). Indeed, given how frequently these applications are denied, "the supposed 'path' may lead to a dead end." *ADAC II*, 757 F.3d at 1065. In this regard, noncitizens holding (c)(9) and (c)(10) EADs are no different from DACA recipients. And as discussed above, DACA recipients have a temporary reprieve—deferred action—that is provided for by the INA, pursuant to the prosecutorial discretion statutorily delegated to the Executive.

Therefore, in all relevant respects, DACA recipients are similarly situated to other categories of noncitizens

who may rely on EADs to obtain drivers' licenses under Arizona's policy.

B. State Interest

The next step in an Equal Protection analysis is to determine the applicable level of scrutiny. *Country Classic Dairies*, 847 F.2d at 596. Although we do not ultimately decide the Equal Protection issue, we remain of the view, articulated in our preliminary injunction opinion, that Arizona's policy may well fail even rational basis review. So, as before, we need not reach what standard of scrutiny applies.[3] *See ADAC II*, 757 F.3d at 1065.

Arizona's policy must be "rationally related to a legitimate state interest" to withstand rational basis review. *City of Cleburne*, 473 U.S. at 440. On appeal, Defendants advance six rationales for Arizona's policy, none of which persuade us that Plaintiffs' argument under the Equal Protection Clause is not at least sufficiently strong to trigger the constitutional avoidance doctrine we ultimately invoke.

First, Defendants argue that Arizona's policy is rationally related to the State's concern that it could face liability for improperly issuing drivers' licenses to DACA recipients. But as the district court observed,

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[3] In cases involving alleged discrimination against noncitizens authorized to be present in the United States, the Supreme Court has consistently applied strict scrutiny to the state action at issue. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Where the alleged discrimination targets noncitizens who are not authorized to be present, the Supreme Court applies rational basis review. *See Plyler*, 457 U.S. at 223–24.

the depositions of ADOT Director John S. Halikowski and Assistant Director of the Motor Vehicle Division Stacey K. Stanton did not yield support for this rationale. Neither witness was able to identify any instances in which the state faced liability for issuing licenses to noncitizens not authorized to be present in the country. *ADAC III*, 81 F. Supp. 3d at 807. So the record probably does not establish that there is a rational basis for this concern.

Second, Defendants contend that Arizona's policy serves the State's interest in preventing DACA recipients from making false claims for public assistance. As the district court noted, however, Director Halikowski and Assistant Director Stanton testified that they had no basis for believing that drivers' licenses could be used to access state and federal benefits. It follows that this concern is probably not a rational basis justifying Arizona's policy either. *Id.* (citing *ADAC II*, 757 F.3d at 1066).

Third, Defendants claim that Arizona's policy is meant to reduce the administrative burden of issuing drivers' licenses to DACA recipients, only to have to revoke them once the DACA program is terminated. The district court found this argument lacked merit, noting this court's observation that it is less likely that Arizona will need to revoke the licenses of DACA recipients than of noncitizens holding (c)(9) and (c)(10) EADs, because applications for adjustment of status or cancellation of removal are routinely denied.[4]

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[4] Defendants suggest "later-developed facts" indicate that noncitizens holding (c)(9) and (c)(10) EADs are on the path to permanent residency. We are not convinced that *achieving* certain forms of relief (adjustment of status or cancellation of removal)

ADAC III, 81 F. Supp. 3d at 807 (citing *ADAC II*, 757 F.3d at 1066–67). Indeed, noncitizens with (c)(10) EADs are already in removal proceedings, which means they are further along in the deportation process than are many DACA recipients. The administrative burden of issuing and revoking drivers' licenses for DACA recipients is not greater than the burden of issuing and revoking drivers' licenses for noncitizens holding (c)(9) and (c)(10) EADs. Certainly, the likelihood of having to do so does not distinguish these two classes of noncitizens, as (c)(9) and (c)(10) applications for relief are frequently denied.

Fourth, Defendants argue that Arizona has an interest in avoiding financial harm to individuals who may be injured in traffic accidents by DACA recipients. Defendants contend that individuals harmed by DACA recipients may be left without recourse when the DACA program is terminated and DACA recipients are removed from the country. But this rationale applies equally to individuals with (c)(9) and (c)(10) EADs. These noncitizens may find their applications for immigration relief denied and may be quickly removed from the country, leaving those injured in traffic accidents exposed to financial harm. Nevertheless, Arizona issues drivers' licenses to noncitizens holding (c)(9) and (c)(10) EADs.

Fifth, Defendants contend that denying licenses to DACA recipients serves the goal of consistently applying ADOT policy. But ADOT *in*consistently applies its own policy by denying licenses to DACA recipients while providing licenses to holders of (c)(9)

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alters the fact that applications for such relief are regularly denied in very great numbers.

and (c)(10) EADs. Arizona simply has no way to know what "path" noncitizens in any of these categories will eventually take. DACA recipients appear similar to individuals who are eligible under Arizona's policy with respect to all the criteria ADOT relies on. ADOT thus applies its own immigration classification with an uneven hand by denying licenses only to DACA recipients. *See, e.g.*, *Yick Wo. v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("[I]f [the law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

Sixth, Defendants claim that Arizona's policy is rationally related to ADOT's statutory obligation to administer the state's driver's license statute. ADOT's disparate treatment of DACA recipients pursuant to the driver's license statute relies on the premise that federal law does not authorize DACA recipients' presence in the United States. This rationale is essentially an assertion of the state's authority to decide whether immigrants' presence is authorized under federal law. Rather than evaluating that assertion as part of the Equal Protection analysis, we defer doing so until our discussion of our ultimate, preemption ground for decision, which we adopt as part of our constitutional avoidance approach.

Before proceeding to that discussion, it bears noting, once again, *see ADAC II*, 757 F.3d at 1067, that the record *does* suggest an additional reason for Arizona's policy: a dogged animus against DACA recipients. The

Supreme Court has made very clear that such animus cannot constitute a legitimate state interest, and has cautioned against sowing the seeds of prejudice. *See Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in the judgment in part, and dissenting in part) ("Prejudice, once let loose, is not easily cabined."). "The Constitution's guarantee of equality must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013) (citation omitted).

II. Preemption

We do not "decide federal constitutional questions where a dispositive nonconstitutional ground is available." *City of L.A. v. Cty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (quoting *Correa v. Clayton*, 563 F. 2d 396, 400 (9th Cir. 1977)). While preemption derives its force from the Supremacy Clause of the Constitution, "it is treated as 'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Prods.*, 431 U.S. 265, 271–72 (1977).[5] Given the formidable Equal Protection concerns Arizona's policy raises, we turn to a preemption analysis as an

[5] Though preemption principles are rooted in the Supremacy Clause, this court has previously applied the principle that preemption does not implicate a constitutional question for purposes of constitutional avoidance. *See Hotel Emps. & Rest. Emps. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512 (9th Cir. 1993) (holding that *Pullman* abstention was not warranted for preemption claims because "preemption is not a constitutional issue."); *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) (same).

alternative to resting our decision on the Equal Protection Clause.[6] Doing so, we conclude that Arizona's policy encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the INA.

The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas*, 424 U.S. at 354. The Supreme Court's immigration jurisprudence recognizes that the occupation of a regulatory field may be "inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Supreme Court has also indicated that the INA provides a pervasive framework with regard to the admission, removal, and presence of aliens. *See Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas*, 424 U.S. at 353, 359); *cf. Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex.").

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[6] In their opening brief, Defendants argue preemption is not properly before this court because Plaintiffs did not appeal the district court's dismissal of their preemption claim. But at oral argument, defense counsel offered to provide supplemental briefing on the issue. Separately, Plaintiffs noted that Defendants raised the Take Care argument for the first time on appeal and argued it ought not be considered because it was not presented to the district court. Following oral argument, we requested and the parties submitted supplemental briefing on both issues. Defendants' supplemental brief conceded that, in light of the considerations articulated in *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), we may properly consider preemption in this case.

Traditionally, federal law preempts state law when: (1) Congress expressly includes a preemption provision in federal law; (2) states attempt to "regulat[e] conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance"; or (3) state law conflicts with federal law, either because "compliance with both federal and state regulations is a physical impossibility" or "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

"The States enjoy no power with respect to the classification of aliens." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). The Supreme Court has also expressly recognized that the source of preemption in the immigration context is unique. The "[f]ederal authority to regulate the status of aliens derives" not from one specific federal law or network of laws, but "from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,'. . . its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs . . . ." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). Supreme Court precedent explains that "neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with a specific congressional purpose" is required in order for federal law to preempt state regulations of immigrants. *See id.* at 11 n.16 (internal quotation marks omitted). "Not surprisingly, . . . [Supreme Court] cases have also been

at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage." *Id.* at 10.

To be sure, not all state regulations touching on immigration are preempted. *See Chamber of Commerce*, 131 S. Ct. at 1974. But states may not directly regulate immigration, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013), and the power to classify aliens for immigration purposes is "committed to the political branches of the Federal Government." *Plyler*, 457 U.S. at 225 (quoting *Mathews*, 426 U.S. at 81). Arizona prohibits the issuance of drivers' licenses to anyone who does not submit proof that his or her presence in the United States is "authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), and then purports to create its own independent definition of "authorized under federal law," one that excludes DACA beneficiaries. Because Arizona created a new immigration classification when it adopted its policy regarding driver's license eligibility, it impermissibly strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch.

States can regulate areas of traditional state concern that might impact noncitizens. *See DeCanas*, 424 U.S. at 355. Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications. *Plyler*, 457 U.S. at 225-26. But a law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration.

For example, in *Takahashi v. Fish & Game Commission*, the Supreme Court observed that a state

regulation of entitlement to commercial fishing licenses based on immigration classifications conflicted with the "constitutionally derived federal power to regulate immigration." 334 U.S. 410, 419 (1948). In *Toll v. Moreno*, the Supreme Court held that preemption principles foreclosed a state policy concerning the imposition of tuition charges and fees at a state university on the basis of immigration status. 458 U.S. 1, 16-17 (1982). Similarly, the Third Circuit has held that municipal ordinances preventing unauthorized aliens from renting housing constituted an impermissible regulation of immigration and were preempted by the INA. *Lozano v. City of Hazleton*, 724 F.3d 297, 317 (3d Cir. 2013). Although the housing ordinances did not directly regulate immigration in the sense of dictating who could or could not be admitted into the United States, the Third Circuit concluded that they impermissibly "intrude[d] on the regulation of residency *and presence* of aliens in the United States." *Id.* (emphasis added).

Similarly, the Fifth Circuit held that an ordinance "allow[ing] state courts to assess the legality of a non-citizen's presence" in the United States was preempted because it "open[ed] the door to conflicting state and federal rulings on the question." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013). The Fifth Circuit's decision was based on its recognition that "[t]he federal government alone . . . has the power to classify non-citizens." *Id.* In accord with these decisions, the Eleventh Circuit held that a state law prohibiting courts from recognizing contracts involving unlawfully present aliens was preempted as "a thinly veiled attempt to regulate immigration under the guise of

contract law." *See United States v. Alabama*, 691 F.3d 1269, 1292–96 (11th Cir. 2012).

Cases involving the allocation of state resources on the basis of immigration classifications frequently raise both equal protection and preemption concerns. Some decisions applying preemption principles have ultimately rested on equal protection grounds, *see, e.g.*, *Takahashi*, 334 U.S. 410. In *Toll*, however, the Supreme Court noted commentators' observations "that many of the Court's decisions concerning alienage classifications, such as *Takahashi*, are better explained in pre-emption than in equal protection terms." 458 U.S. at 11 n.16.

Here, Arizona's policy ostensibly regulates the issuance of drivers' licenses, admittedly an area of traditional state concern. *See Chamber of Commerce*, 131 S. Ct. at 1983. But its policy necessarily "embodies the State's independent judgment that recipients of [DACA] are not 'authorized' to be present in the United States '*under federal law*.'" *ADAC II*, 757 F.3d at 1069 (Christen, J., concurring). Indeed, the Arizona Executive Order declared that "the Deferred Action program does not and cannot confer lawful or authorized . . . presence upon the unlawful alien applicants." Executive Order 2012–06 at 1. The Order also announced Arizona's view that "[t]he issuance of Deferred Action or Deferred Action . . . [EADs] to unlawfully present aliens does not confer upon them any lawful *or* authorized status." *Id.* (emphasis added). To implement the Order, ADOT initiated a policy of denying licenses to DACA recipients pursuant to Arizona's driver's license statute, which requires that applicants "submit proof satisfactory to the department

that the applicant's presence in the United States is *authorized under federal law*." Ariz. Rev. Stat. Ann. § 28–3153(D) (emphasis added).

Arizona points to three criteria to justify treating EAD recipients differently than individuals with (c)(9) and (c)(10) EADs,[7] even though the federal government treats their EADs the same in all relevant respects. But Arizona's three criteria—that an applicant: has formal status; is on a path to formal status; or has applied for relief expressly provided for in the INA—cannot be equated with "authorized presence" under federal law. DACA recipients and noncitizens with (c)(9) and (c)(10) EADs all lack formal immigration status, yet the federal government permits them to live and work in the country for an undefined period of time, provided they comply with certain conditions.

Arizona thus distinguishes between noncitizens based on its *own* definition of "authorized presence," one that neither mirrors nor borrows from the federal immigration classification scheme. And by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design,[8] thereby engaging in an "exercise of

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[7] As we have noted, recipients of (c)(9) and (c)(10) documents are noncitizens who have applied for adjustment of status and cancellation of removal, respectively. *See* 8 C.F.R. § 274a.12(c)(9)–(10).

[8] Defendants' continual insistence that Arizona's policy is not preempted because the DACA program lacks "the force of law" reflects a misunderstanding of the preemption question. Preemption is not a gladiatorial contest that pits the DACA

regulatory bricolage," *ADAC II*, 757 F.3d at 1072 (Christen, J., concurring), despite the fact that "States enjoy no power with respect to the classification of aliens," *Plyler*, 457 U.S. at 225.

That this case involves classes of aliens the Executive has, as a matter of discretion, placed in a low priority category for removal is a further consideration weighing against the validity of Arizona's policy. The Supreme Court has emphasized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. And the Court has specifically recognized that federal statutes contemplate and protect the discretion of the Executive Branch when making determinations concerning deferred action. *See Reno*, 525 U.S. at 484–86. The discretion built into statutory removal procedures suggests that auxiliary state regulations regarding the presence of aliens in the United States are particularly intrusive on the overall federal statutory immigration scheme.

Unable to point to any federal statute or regulation that justifies classifying individuals with (c)(9) and (c)(10) EADs as authorized to be present while excluding recipients of deferred action or deferred

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Memorandum against Arizona's policy. Nor does this opinion rely on the DACA Memorandum for its conclusion that Arizona's policy is preempted by federal law. Rather, Arizona's policy is preempted by the supremacy of federal authority under the INA to create immigration categories. Indeed, because Arizona's novel classification scheme includes not just DACA recipients but also recipients of regular deferred action and deferred enforced departure, our conclusion that Arizona's scheme impermissibly creates immigration classifications not found in federal law is not dependent upon the continued vitality of the DACA program.

enforced departure, Defendants argue that Arizona properly relied on statements by the U.S. Citizenship and Immigration Service that "make clear that deferred action does not confer a lawful immigration status." These statements take the form of an email from a local U.S. Citizenship and Immigration Service Community Relations Officer in response to an inquiry from ADOT. In the email, the officer notes that DACA recipients applying for work authorization should fill in category "C33" and not category "C14," which is the category for regular deferred action.

This email does nothing to further Defendants' argument. The officer's statement in no way suggests that federal law supports Arizona's novel classifications. And even if it did, an email from a local U.S. Citizenship and Immigration Services Officer is not a source of "federal law," nor an official statement of the government's position.[9]

The INA, indeed, directly undermines Arizona's novel classifications. For purposes of determining the admissibility of aliens other than those lawfully admitted for permanent residence, the INA states that if an alien is present in the United States beyond a "period of stay *authorized* by the Attorney General" or without being admitted or paroled, the alien is "deemed to be *unlawfully present* in the United States," at least

[9] In *ADAC II*, Defendants also argued that a "Frequently Asked Questions" section of the U.S. Citizenship and Immigration Services Website and a Congressional Research Service Memorandum demonstrated that Arizona's classification found support in federal law. *See* 757 F.3d at 1073. We understand Defendants to have abandoned these arguments. But even if they had not, neither source is a definitive statement of federal law.

for purposes of § 1182(a)(9)(B). INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B)(ii) (emphases added). The administrative regulations implementing this section of the INA, to which we owe deference, establish that deferred action recipients do not accrue "unlawful presence" for purposes of calculating when they may seek admission to the United States. 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Because such recipients are provisionally present without being admitted or paroled, their stay must be considered "authorized by the Attorney General," for purposes of this statute. INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B).

The REAL ID Act, which amended the INA, further undermines Arizona's interpretation of "authorized presence." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. The Real ID Act amendments provide that states may issue a driver's license or identification card to persons who can demonstrate they are "authorized [to] stay in the United States." *Id.* § 202(c)(2)(C)(i)–(ii). Persons with "approved deferred action status" are expressly identified as being present in the United States during a "period of authorized stay," for the purpose of issuing state identification cards. *Id.* § 202(c)(2)(B)(viii), (C)(ii). We point to these statutory definitions not as examples of all-encompassing congressionally authorized decisions about who may remain in the United States, but as examples of the federal government exercising its exclusive authority to classify immigrants.

Despite Arizona's clear departure from federal immigration classifications, Defendants argue Arizona's policy is not a "back-door regulation of

immigration." They compare it to the Louisiana Supreme Court policy the Fifth Circuit upheld in *LeClerc v. Webb*, which prohibited any alien lacking permanent resident status from joining the state bar. 419 F.3d 405, 410 (5th Cir. 2005). But the Louisiana Supreme Court did not create a novel immigration classification as Arizona does here. Rather, it permissibly borrowed from existing federal classifications, distinguishing "those aliens who have attained permanent resident status in the United States" from those who have not. *Id.* (quoting *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002)).

Defendants also argue that sections of the INA granting states discretion to provide public benefits to certain aliens, including deferred action recipients, suggest that Congress "has not intended to occupy a field so vast that it precludes all state regulations that touch upon immigration." *See* 8 U.S.C. §§ 1621, 1622. But we do not conclude that Congress has preempted all state regulations that touch upon immigration. Arizona's policy is preempted because, in determining which aliens shall be eligible to receive a state benefit, Arizona created new immigration classifications based on its independent view of who is authorized under federal law to be present in the United States.

Defendants offer no foundation for an interpretation of federal law that classifies individuals with (c)(9) and (c)(10) EADs as having "authorized presence," but DACA recipients as having no authorized presence. Arizona's policy of denying drivers' licenses to DACA recipients based on its own notion of "authorized presence" is preempted by the exclusive authority of

the federal government under the INA to classify noncitizens.

III. Constitutionality of the DACA Program

We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question.

We note, however, that the discussion above is quite pertinent to both of Defendants' primary arguments undergirding their challenge to the constitutionality of the DACA program. First, Defendants argue that the Executive has no power, independent of Congress, to enact the DACA program. But as we have discussed, the INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities. *See supra*, section II. Third parties generally may not contest the exercise of this discretion, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including in the immigration context, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).[10]

Second, Defendants contend that the DACA program amounts to a wholesale suspension of the

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[10] Congress's failure to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act does not signal the illegitimacy of the DACA program. The Supreme Court has admonished that an unenacted bill is not a reliable indicator of Congressional intent. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). Moreover, the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief (*i.e.*, the DREAM Act would have granted conditional residency that could lead to permanent residency, whereas the DACA program offers a more limited, temporary deferral of removal).

INA's provisions, which in turn violates the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3 ("the Take Care Clause"). But, according to an amicus brief filed by the Department of Justice, the Department of Homeland Security only has funding annually to remove a few hundred thousand of the 11.3 million undocumented aliens living in the United States. Constrained by these limited resources, the Department of Homeland Security must make difficult decisions about whom to prioritize for removal. Despite Defendants' protestations, they have not shown that the Department of Homeland Security failed to comply with its responsibilities to the extent its resources permit it to do so.[11]

For that reason, this case is nothing like *Train v. City of New York*, a case relied upon by Defendants, in which the Supreme Court affirmed an order directing a presidential administration to spend money allocated by Congress for certain projects. 420 U.S. 35, 40 (1975). Here, by contrast, the Department of Justice asserts that Congress has not appropriated sufficient funds to remove all 11.3 million undocumented aliens, and several prior administrations have adopted programs,

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[11] Indeed, the Department of Justice's brief reports that the administration has removed approximately 2.4 million noncitizens from the country from 2009 to 2014, a number the government states is "unprecedented." Prioritizing those removal proceedings for noncitizens who represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014), cannot fairly be described as abdicating the agency's responsibilities.

like DACA, to prioritize which noncitizens to remove. *See supra* n.2. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ." *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *see Arpaio v. Obama*, 797 F.3d 11, 18 (D.C. Cir. 2015).

Further, as we have noted, the Supreme Court has acknowledged the history of the Executive engaging in a regular practice of prosecutorial discretion in enforcing the INA. *See Reno*, 525 U.S. at 483–84 & n.8 ("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, . . . is now designated as deferred action." (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998))). This history includes "general policy" non-enforcement, such as deferred action granted to foreign students affected by Hurricane Katrina, U.S. Citizenship and Immigration Services, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005), and deferred action for certain widows and widowers of U.S. citizens, Memorandum for Field Leadership, U.S. Citizenship and Immigration Services, from Donald Neufeld, Acting Associate Director, U.S. Citizenship and Immigration Services, "Guidance Regarding Surviving

Spouses of Deceased U.S. Citizens and Their Children" at 1 (Sept. 4, 2009).[12]

We reiterate that, in the end, Arizona's policy is preempted not because the DACA program is or is not valid, but because the policy usurps the authority of the federal government to create immigrant classifications.

IV. Permanent Injunction

Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

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[12] The recent ruling in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) *petition for cert. granted sub nom. United States v. Texas*, — S. Ct. — , 2016 WL 207257 (U.S. Nov. 20, 2015) (mem.), is also inapposite to Defendants' constitutional claims. There, several states challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"), including DAPA recipients' eligibility for certain public benefits such as drivers' licenses and work authorization. *Id.* at 149. The court concluded that the states were likely to succeed on their procedural and substantive claims under the Administrative Procedure Act, and expressly declined to reach the Take Care Clause issue. *Id.* at 146 & n.3, 149.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 141 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

Plaintiffs have proven that they suffer irreparable injury as a result of Arizona's policy, and that remedies available at law are inadequate to compensate them for that injury. In particular, Plaintiffs have demonstrated that their inability to obtain drivers' licenses limits their professional opportunities. In Arizona, it takes an average of over four times as long to commute to work by public transit than it does by driving, and public transportation is not available in most localities. One ADAC member had to miss full days of work so that she could take her son to his doctors' appointments by bus. Another ADAC member finishes work after midnight but the buses by her workplace stop running at 9 p.m. And as the district court noted, another Plaintiff is a graphic designer whose inability to obtain a driver's license caused her to decline work from clients, while yet another Plaintiff wants to pursue a career as an Emergency Medical Technician but is unable to do so because the local fire department requires a driver's license for employment. *ADAC III*, 81 F. Supp. 3d at 809.

Plaintiffs' inability to obtain drivers' licenses hinders them in pursuing new jobs, attending work, advancing their careers, and developing business opportunities. They thus suffer financial harm and significant opportunity costs. And as we have previously found, the irreparable nature of this injury is exacerbated by Plaintiffs' young age and fragile socioeconomic status. *ADAC II*, 757 F.3d at 1068. Setbacks early in their careers can have significant

impacts on Plaintiffs' future professions. *Id.* This loss of opportunity to pursue one's chosen profession constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.,* 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 709–10 (9th Cir. 1988) (holding that plaintiff's transfer to a less satisfying job created emotional injury that constituted irreparable harm). Since irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages, *see Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991), Plaintiffs have also shown that remedies available at law are inadequate to compensate them.

Plaintiffs have also demonstrated that, after considering the balance of hardships, a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction. We conclude that Arizona's policy is preempted by federal law. "[I]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol*, 732 F.3d at 1029 (quoting *Arizona*, 641 F.3d at 366) (alterations omitted). The public interest and the balance of the equities favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

CONCLUSION

In sum, we find that DACA recipients are similarly situated in all relevant respects to other noncitizens eligible for drivers' licenses under Arizona's policy. And

Arizona's refusal to rely on EADs from DACA recipients for purposes of establishing eligibility for drivers' licenses may well violate the Equal Protection Clause for lack of a rational governmental interest justifying the distinction relied upon. Invoking the constitutional avoidance doctrine, we construe the INA as occupying the field of Arizona's classification of noncitizens with regard to whether their presence is authorized by federal law, and as therefore preempting states from engaging in their very own categorization of immigrants for the purpose of denying some of them drivers' licenses. Plaintiffs have shown that they suffer irreparable harm from Arizona's policy and that remedies at law are inadequate to compensate for that harm. Plaintiffs have also shown that a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction.

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of Plaintiffs. We also AFFIRM the district court's order entering a permanent injunction that enjoins Arizona's policy of denying the EADs issued under the DACA program as satisfactory proof of authorized presence under federal law in the United States.

AFFIRMED.

COUNSEL

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Arizona Dream Act Coalition v. Brewer, 15-15307

BERZON, Circuit Judge, Concurring in light of the Dissent from the denial of rehearing en Banc:

I join the panel opinion in full. I write in concurrence to further explain our holding in light of the dissent from denial of rehearing en banc.

I write first to emphasize that the "law" that has preemptive power over Arizona's policy is Congress' conferral of exclusive authority on the executive branch to defer removal of individuals who lack legal status and to authorize them to work while temporarily permitted to remain. Furthermore, I write to highlight that the preemption issues ultimately decided in this case can be viewed as embedded in the equal protection analysis, given the historical and conceptual overlap between equal protection and preemption concerns in cases involving state laws that affect immigrants. The serious equal protection concerns raised by Arizona's policy bolster our preemption holding, which was reached in a careful exercise of the principle of constitutional avoidance.

I.

As the panel opinion makes clear, it is the *authority* specifically conferred on the Attorney General by the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and the associated regulations, that is the body of federal law that preempts Arizona's policy, not any particular exercise of executive authority. The INA, as implemented by authorized regulations, affirmatively permits the Attorney General to decide whether undocumented immigrants should be removed from the country and when, and also whether they

should be authorized to stay and to work if they are not to be immediately removed. Contrary to the Dissent from the denial of rehearing en banc ("Dissent"), this conferral of authority is not limited to "only two small provisions of the INA." Dissent at 6. *See e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (indicating that certain visa applicants are "eligible for deferred action and work authorization"); *id.* § 1182(a)(9)(B)(ii) (providing that for purposes of determining inadmissibility, unlawful presence includes any time an alien "is present in the United States after the expiration of the period of stay authorized by the Attorney General"); *id.* § 1227(d)(2) (indicating that certain visa applicants who are denied an administrative stay of removal can apply for "a stay of removal, deferred action, or a continuance or abeyance of removal proceedings"); *id.* § 1229b (giving the Attorney General the discretion to cancel removal for certain inadmissable or removable aliens, including those who were never lawfully admitted); *id.* § 1324a(h)(3) (defining an "unauthorized alien" for purposes of employment as an alien who is neither "lawfully admitted for permanent residence" *nor* "authorized to be so employed by [statute] or by the Attorney General"); REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 202(c)(2)(B)(viii), (C)(ii), 119 Stat. 231, 313 (indicating that persons with "approved deferred action status" are present in the United States during a "period of authorized stay" for purposes of issuing state drivers' licenses and identification cards); 8 C.F.R. § 274a.12(c)(14) (indicating that an "alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority" may be granted work authorization upon application and a showing of economic necessity).

These various provisions, among others, make clear that Congress has expressly authorized the Attorney General, at his discretion, officially to defer removal of individuals who lack legal status, thereby temporarily authorizing their stay, and to authorize such individuals to work while temporarily permitted to remain.[1] *See Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012) ("[T]he removal process is entrusted to the discretion of the Federal Government.").

The Attorney General granted the plaintiffs in this case deferred action and furnished them with federal employment authorization documents.[2] Arizona's

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[1] Authorizing someone to work in the country is necessarily to authorize their presence. The Supreme Court, in *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 416 (1948), stated that "[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)). The obverse is also true: Authorizing an alien to work in the country is necessarily authorizing him to remain.

[2] I note that the Dissent at points treats this case as parallel to *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court,* 136 S. Ct. 2271 (2016) (per curiam). It decidedly is not. Arizona raised in the district court no affirmative challenge to the Deferred Action for Childhood Arrivals ("DACA") program, whether based on administrative law concepts or the scope of the executive's responsibility to enforce federal laws. *Compare id.* at 149. (Arizona is a plaintiff in the *Texas v. United States* litigation, which does raise such issues and is ongoing.). Instead, Arizona has asserted the authority to treat some undocumented individuals with deferred status and federal work authorization differently from others with the same federal dispensations. It is the validity of that *differential* treatment that is at the heart of this case.

denial of drivers' licenses to DACA recipients rests on the premise that their presence is *not* "authorized under federal law," even though the federal government has decided otherwise, exercising the powers delegated to it by Congress. Arizona has, therefore, intruded into an area of decisionmaking entrusted to the federal government.[3]

II.

Critically, our preemption holding reflects a careful exercise of constitutional avoidance, based on the serious equal protection concerns raised by Arizona's policy. Although we rest our decision on preemption grounds, the preemption and equal protection concerns raised in this case are overlapping rather than distinct. And because that is so, I am convinced that although we wisely did not decide the equal protection issue, were it necessary to decide the question I would have held that there was an equal protection violation.

Equal protection and preemption concerns have long been intertwined in cases dealing with state laws that classify immigrants. *See Plyler v. Doe*, 457 U.S. 202 (1982); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi*, 334 U.S. 410; *Truax*, 239 U.S. 33; *see also* Jenny-Brooke Condon, *The Preempting of Equal*

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[3] Arizona's driver's license statute turns upon whether an immigrant's presence is "authorized under federal law" not whether the presence is "lawful" in the sense of specifically condoned by statute. *See* Ariz. Rev. Stat. Ann. § 28–3153(D). If the statute turned on the latter, Arizona could not, as it does, issue licenses to many undocumented individuals who do not have lawful status but have been granted work authorization while in removal proceedings. *See* Amended op. 17.

Protection for Immigrants?, 73 Wash. & Lee L. Rev. 77 (2016); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069 (1979).

For example, in *Nyquist v. Mauclet*, the state asserted that one of its goals in excluding certain classes of aliens from eligibility for in-state tuition was to provide incentives for aliens to naturalize. 432 U.S. at 9-10. In holding the state law violated the Equal Protection Clause, the Court found that state purpose "not a permissible one for a State" because "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere." *Id.* at 10. Similarly in *Graham v. Richardson*, another decision that rested on equal protection grounds, the Court provided that "[s]tate alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a [state] right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." 403 U.S. at 380. *Takahashi v. Fish and Game Commission* likewise held that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] constitutionally derived federal power to regulate immigration." 334 U.S. at 419.

The overlap evident in these cases between the equal protection and preemption analyses where state laws that affect immigrants are at issue is no accident. As the equal protection analysis in the panel opinion illustrates, both the "similarly situated" and

"legitimate state interest" inquiries required for equal protection analysis necessarily incorporate recognition of the preeminent, although not exclusive, federal role in immigration matters, the same role distribution emphasized in immigration preemption cases.[4]

A.

The primacy of federal immigration law first informs the equal protection analysis when we are determining whether the groups being classified are "similarly situated." As the panel opinion states, the Equal Protection Clause prevents the government from "treating differently persons who are *in all relevant respects* alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). "*Relevant* respects" are only those respects that relate to the goals of the challenged state law.

Classifications adopted by states "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Accordingly, to adopt a federal immigration classification "as a criterion for its own discriminatory policy, the State must demonstrate that the

[4] Because preemption concerns are embedded in and addressed by equal protection decisions regarding state laws that affect immigrants, equal protection decisions like *Plyler v. Doe*, 457 U.S. 202, *are* relevant to our preemption holding. *See* Condon, *supra* pp. 5, at 83 ("[T]he Supreme Court has reinforced the principle that the federal government has exclusive responsibility for the regulation of immigration, as much through its equal protection jurisprudence as it has through preemption decisions.").

classification is reasonably adapted to *the purposes for which the state desires to use it*." *Plyler*, 457 U.S. at 226 (internal quotation marks and citations omitted) (emphasis in original). Those purposes do not properly include making decisions about who should remain in this country, who should be removed, or what are the conditions of stay for those temporarily authorized to be here.

For example, in *Graham v. Richardson*, the Court struck down on equal protection grounds a state law that denied welfare benefits to non-citizens whom the Court found similarly situated in all respects *relevant* to the state welfare law: non-citizens paid taxes, could be called into the armed forces, and worked in the state, thereby contributing to the state's economic welfare. 403 U.S. at 376. The groups of residents were "indistinguishable except with respect to whether they are or are not citizens of this country." *Id.* at 371. The two groups were not, of course, similarly situated in the latter respect — that is, as to whether they were citizens. And that difference entailed many embedded distinctions between the non-citizens and citizens, including the right to vote, to serve on juries, and to remain in the country even if engaged in criminal activities. But the citizen/non-citizen distinction was the one that the state had to *justify*, not a basis for declaring the two groups not similarly situated with regard to receiving welfare benefits.

Similarly, the immigration-related distinction between the plaintiffs and other undocumented immigrants has no role in this case at the "similarly

situated" juncture.[5] Rather, the pertinent comparisons at this stage concern the *other* requirements for obtaining drivers' licenses — Are the applicants old enough? Can they pass the written test? Can they pass the driving test? Have they violated driving laws in the past, as by driving without a license or while drunk? The immigration-related classification is the one the state must *justify* at the next stage of equal protection analysis, not the measure of whether the plaintiffs are *otherwise* similarly situated with regard to obtaining drivers' licenses.

B.

Preemption themes next surface in the equal protection analysis in the examination of *legitimate* state interests. A state interest is only legitimate for equal protection purposes when it lies within an area of concern within the state's authority. When the state law touches on immigration, the ambit of legitimate state concern is constrained by the federal government's preeminent power directly to regulate immigration — that is, to decide who will be admitted, who may remain, and who will be removed.

As stated in *Plyler v. Doe*, "[a]lthough it is a routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status and to take into account the character of the relationship between the alien and this country, only

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[5] The panel opinion makes this basic point, briefly. Amended op. at 11-13. It then goes on for completeness to answer the state's similarly situated argument on its own terms, which stressed immigration status differences between the plaintiffs and other aliens. Amended op. at 13-17.

rarely are such matters relevant to legislation by a State." 457 U.S. at 225 (internal quotation marks and citations omitted). Consistently with this view, *Mathews v. Diaz* explained that "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business." 426 U.S. 67, 85 (1976).

For this reason, the Supreme Court has long recognized that federal power over immigration constrains a state's *legitimate* interests in classifying groups of immigrants differently from one another and then disadvantaging one of the groups so classified. In *Truax v. Raich*, 239 U.S. at 42, for example, the Court admonished that "reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power." *Truax* involved an equal protection challenge, by an alien lawfully admitted into the United States, to an Arizona law that required certain employers to hire a majority of workers who were qualified electors or native-born United States citizens. *Id.* at 40. *Truax* rejected the argument that the state's prioritization of citizens for employment was justified by the state's power "to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction," because the state lacked "the authority to deal with that at which the legislation is aimed." *Id.* at 41, 43; *see also Takahashi*, 334 U.S. at 420 (noting the "tenuousness of the state's claim that it has power to

single out and ban its lawful alien inhabitants . . . from following a vocation simply because Congress has put some groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization.").

States assuredly *do* have authority to regulate employment, just as they have authority to regulate the distribution of drivers' licenses. The state authority lacking in *Truax*, and here, is the authority to justify discrimination as to areas *within* state power on grounds that are *beyond* state authority because exclusively within the authority of the federal government.

For these reasons, equal protection analysis with regard to state laws, like Arizona's, that disadvantage some aliens compared with others necessarily incorporates distribution-of-authority concerns that directly parallel those encountered in preemption analyses. It is in light of this overlap between preemption and equal protection analyses in the immigration context that the panel's equal protection analysis evaluated the proffered state interests said rationally to justify the denial of drivers' licenses to the plaintiffs. And it is in this light that we rejected any state justification for the classification in state law that suggested an intent to preclude or discourage the plaintiffs from remaining and working even though the federal government allowed them to do so. For the same reason, we rejected any justification that turned on immigration status distinctions with no connection to state-drivers'-license-related concerns (such as the distinction between aliens holding work authorization *while* in removal proceedings and DACA recipients

holding work authorization but *not* in the process of being removed). Amended op. at 17-18, 22, 26-27. We then concluded that the remaining rationales Arizona provided simply are not reasonable. Amended op. at 18-22.

In short, the preeminent federal role in immigration matters thus not only underlies our ultimate preemption holding, but also directly informs the equal protection analysis. Given the constraints on a state's *legitimate* interests in classifying groups of immigrants, we could, in my view, have rested our rejection of the challenged Arizona statute simply on a rational basis equal protection analysis (without reaching the question whether a more stringent standard of review applies). Were it necessary to reach the question, I would have held Arizona's application of its drivers' license statute invalid as a denial of equal protection to DACA recipients, as compared to other *undocumented* individuals to whom Arizona does provide drivers' licenses. *See* Amended op. at 18-23.

The Dissent brushes past these equal protection concerns, regarding them as an "excursus," and even suggesting that over a century of equal protection jurisprudence regarding state immigration regulations, beginning with *Truax* in 1915, be overturned. Dissent at 3 n.1, 9 n.5

But the panel's methodology — a careful analysis of the strength of a constitutional challenge, before turning to an alternative that avoids definitely deciding that constitutional question — is one with a long pedigree, grounded in judicial restraint. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690-96, 699 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &*

Const. Trades Council, 485 U.S. 568, 575-78 (1988).[6] To criticize the panel's preemption analysis in a vacuum, with little recognition of the constitutional avoidance rationale underlying it, is tantamount to lopping off the first five floors of a ten story building and then declaring that the building, thus truncated, is unstable.

Again, I concur fully in the panel opinion. In addition, in my view, as we held in the preliminary injunction appeal, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014), and as the district court held as the basis for the final injunction, *Arizona Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795, 808 (D. Ariz. 2015), the equal protection challenge is independently valid and, if we needed to reach it, would justify our conclusion that Arizona's denial of drivers' licenses to DACA recipients cannot stand.

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[6] This court has observed that *DeBartolo* reached a statutory holding only "[a]fter considering at some length, but not deciding, the [constitutional] arguments." *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1209 (9th Cir. 2005).

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307
D.C. No. 2:12-cv-02546-DGC

[Filed April 5, 2016]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS,
Plaintiffs-Appellees,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,
Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted July 16, 2015
Pasadena, California

Before: Harry Pregerson, Marsha S. Berzon, and Morgan B. Christen, Circuit Judges.

Opinion by Judge Harry Pregerson,
Senior Circuit Judge:

Plaintiffs are five individual recipients of deferred action under the Deferred Action for Childhood Arrivals ("DACA") program, and the Arizona DREAM Act Coalition ("ADAC"), an organization that advances the interests of young immigrants. DACA recipients are noncitizens who were brought to this country as children. Under the DACA program, they are permitted to remain in the United States for some period of time as long as they meet certain conditions. Authorized by federal executive order, the DACA program is administered by the Department of Homeland Security and is consistent with the Supreme Court's ruling that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens" under the Constitution. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

In response to the creation of the DACA program, Defendants—the Governor of the State of Arizona; the Arizona Department of Transportation ("ADOT") Director; and the Assistant Director of the Motor Vehicle Division—instituted a policy that rejected the

Employment Authorization Documents ("EADs") issued to DACA recipients under the DACA program as proof of authorized presence for the purpose of obtaining a driver's license. Plaintiffs seek permanently to enjoin Defendants from categorically denying drivers' licenses to DACA recipients. The district court ruled that Arizona's policy was not rationally related to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment. The district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. Defendants appealed.

We agree with the district court that DACA recipients are similarly situated to other groups of noncitizens Arizona deems eligible for drivers' licenses. As a result, Arizona's disparate treatment of DACA recipients may well violate the Equal Protection Clause, as our previous opinion indicated is likely the case. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). The district court relied on this ground when it issued the permanent injunction. Applying the principle of constitutional avoidance, however, we need not and should not come to rest on the Equal Protection issue, even if it "is a plausible, and quite possibly meritorious" claim for Plaintiffs, so long as there is a viable alternate, nonconstitutional ground to reach the same result. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1211 (9th Cir. 2005) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576–78 (1988)).

We conclude that there is. Arizona's policy classifies noncitizens based on Arizona's independent

definition of "authorized presence," classification authority denied the states under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*. We therefore affirm the district court's order that Arizona's policy is preempted by the exclusive authority of the federal government to classify noncitizens.

FACTUAL BACKGROUND

I. The DACA Program

On June 15, 2012, the Department of Homeland Security announced the DACA program pursuant to the DACA Memorandum. Under the DACA program, the Department of Homeland Security exercises its prosecutorial discretion not to seek removal of certain young immigrants. The DACA program allows these young immigrants, including members of ADAC, to remain in the United States for some period of time as long as they meet specified conditions.

To qualify for the DACA program, immigrants must have come to the United States before the age of sixteen and must have been under the age of thirty-one by June 15, 2012. *See* Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012). They must have been living in the United States at the time the DACA program was announced and must have continuously resided here for at least the previous five years. *Id.* Additionally, DACA-eligible immigrants must be enrolled in school, have graduated from high school, have obtained a General Educational Development certification, or have been honorably discharged from the U.S. Armed Forces or Coast Guard. *Id*. They must

not pose a threat to public safety and must undergo extensive criminal background checks. *Id.*

If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods. DACA recipients enjoy no formal immigration status, but the Department of Homeland Security does not consider them to be unlawfully present in the United States and allows them to receive federal EADs.

II. Arizona's Executive Order

On August 15, 2012, the Governor of Arizona issued Arizona Executive Order 2012–06 ("Arizona Executive Order"). Executive Order 2012–06, "Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program" (Aug. 15, 2012). A clear response to DACA, the Arizona Executive Order states that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants." *Id.* at 1. The Arizona Executive Order announced that "[t]he issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status and does not entitle them to any additional public benefit." *Id.* The Order directed Arizona state agencies, including ADOT, to "initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license." *Id.*

III. Arizona's Driver's License Policy

To implement the Arizona Executive Order, officials at ADOT and its Motor Vehicle Division initiated changes to Arizona's policy for issuing drivers' licenses. Under Arizona state law, applicants can receive a driver's license only if they can "submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28–3153(D). Prior to the Arizona Executive Order, ADOT Policy 16.1.2 included all federally issued EADs as "proof satisfactory" that an applicant's presence was "authorized under federal law." The Motor Vehicle Division therefore issued drivers' licenses to all individuals with such documentation.

After the Arizona Executive Order, the Motor Vehicle Division announced that it would not accept EADs issued to DACA recipients—coded by the Department of Homeland Security as (c)(33)—as proof that their presence in the United States is "authorized under federal law." The Motor Vehicle Division continued to accept federally issued EADs from all other noncitizens as proof of their lawful presence, including individuals who received deferred action outside of the DACA program and applicants coded (c)(9) (individuals who have applied for adjustment of status), and (c)(10) (individuals who have applied for cancellation of removal).

In 2013, ADOT revised its policy again. Explaining this change, ADOT Director John S. Halikowski testified that Arizona views an EAD as proof of presence authorized under federal law only if the EAD demonstrates: (1) the applicant has formal immigration

status; (2) the applicant is on a path to obtaining formal immigration status; or (3) the relief sought or obtained is expressly provided pursuant to the INA. Using these criteria, ADOT began to refuse driver's license applications that relied on EADs, not only from DACA recipients, but also from beneficiaries of general deferred action and deferred enforced departure. It continued to accept as proof of authorized presence for purposes of obtaining drivers' licenses EADs from applicants with (c)(9) and (c)(10) status. We refer to the policy that refuses EADs from DACA recipients as "Arizona's policy."

IV. Preliminary Injunction

On November 29, 2012, Plaintiffs sued Defendants in federal district court, alleging that Arizona's policy of denying drivers' licenses to DACA recipients violates the Equal Protection Clause and the Supremacy Clause of the U.S. Constitution. Plaintiffs sought declaratory relief and a preliminary injunction prohibiting Defendants from enforcing their policy against DACA recipients. On May 16, 2013, the district court ruled that Arizona's policy likely violated the Equal Protection Clause but it declined to grant the preliminary injunction because Plaintiffs had not shown irreparable harm. *ADAC v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013) ("*ADAC I*"), *reversed by ADAC v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) ("*ADAC II*"). It also granted Defendants' motion to dismiss the Supremacy Clause claim. *Id.* at 1077–78. Plaintiffs appealed the district court's denial of a preliminary injunction.

V. Permanent Injunction

While Plaintiffs' appeal of the preliminary injunction ruling was pending, Plaintiffs sought a permanent injunction in district court on Equal Protection grounds and moved for summary judgment. Defendants also moved for summary judgment, arguing that DACA recipients are not similarly situated to other noncitizens who are eligible for drivers' licenses under Arizona's policy.

We reversed the district court's decision on the motion for preliminary injunction, agreeing with the district court that Arizona's policy likely violated the Equal Protection Clause and holding that Plaintiffs had established that they would suffer irreparable harm as a result of its enforcement. *See ADAC II*, 757 F.3d at 1064. In a concurring opinion, one member of our panel concluded that Plaintiffs also demonstrated a likelihood of success on their claim that Arizona's policy was preempted. *Id.* at 1069 (Christen, J., concurring). On January 22, 2015, the district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. *ADAC v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015) ("*ADAC III*"). We affirm the district court's order.

STANDARD OF REVIEW

We review the district court's grant or denial of motions for summary judgment *de novo*. *Besinga v. United States*, 14 F.3d 1356, 1359 (9th Cir. 1994). We determine whether there are any genuine issues of material fact and review the district court's application of substantive law. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). We "may affirm a

grant of summary judgment on any ground supported by the record." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014).

We review the district court's decision to grant a permanent injunction for abuse of discretion. *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014) (citing *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002)). We review questions of law underlying the district court's decision *de novo*. *See Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003). "If the district court 'identified and applied the correct legal rule to the relief requested,' we will reverse only if the court's decision 'resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

DISCUSSION

I. Equal Protection

A. Similarly Situated

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To prevail on an Equal Protection claim, plaintiffs must show "that a class that is similarly situated has been

treated disparately." *Christian Gospel Church, Inc. v. City & Cty. of S.F.*, 896 F.2d 1221, 1225 (9th Cir. 1990), *superseded on other grounds by* 42 U.S.C. § 2000e.

"The first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). In this instance, DACA recipients do not need to be similar in all respects to other noncitizens who are eligible for drivers' licenses, but they must be similar in those respects that are relevant to Arizona's own interests and its policy. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." (emphasis added)).

We previously held that DACA recipients and other categories of noncitizens who may rely on EADs are similarly situated with regard to their right to obtain drivers' licenses in Arizona. *See ADAC II*, 757 F.3d at 1064. The material facts and controlling authority remain the same from the preliminary injunction stage. Thus, we again hold that in all relevant respects DACA recipients are similarly situated to noncitizens eligible for drivers' licenses under Arizona's policy. Nonetheless, for clarity and completeness, we address once more Defendants' arguments.

Defendants assert that DACA recipients are not similarly situated to other noncitizens eligible for

drivers' licenses under Arizona's policy because DACA recipients neither received nor applied for relief provided by the INA, or any other relief authorized by federal statute. Particularly relevant here, Defendants note that eligible noncitizens under the categories of (c)(9) and (c)(10) are tied to relief expressly found in the INA: adjustment of status (INA § 245; 8 U.S.C. § 1255; 8 C.F.R. § 274a.12(c)(9)) and cancellation of removal (INA § 240A; 8 U.S.C. § 1229b; 8 C.F.R. § 274a.12(c)(10)), respectively. In contrast, Defendants contend that DACA recipients' presence in the United States does not have a connection to federal law but rather reflects the Executive's discretionary decision not to enforce the INA.

We continue to disagree. *See ADAC II*, 757 F.3d at 1061. As explained below, Arizona has no cognizable interest in making the distinction it has for drivers' licenses purposes. The federal government, not the states, holds exclusive authority concerning direct matters of immigration law. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute on other grounds as recognized in Arizona*, 132 S. Ct. at 2503–04. The states therefore may not make immigration decisions that the federal government, itself, has not made, *Plyler*, 457 U.S. at 225 (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). Arizona's encroachment into immigration affairs—making distinctions between groups of immigrants it deems not to be similarly situated, despite the federal government's decision to treat them similarly—therefore seems to exceed its authority to decide which aliens are similarly situated to others for Equal Protection purposes. In other words, the "similarly situated" analysis must focus on factors of similarity and distinction pertinent to the

state's policy, not factors outside the realm of its authority and concern.

Putting aside that limitation, the INA explicitly authorizes the Secretary of Homeland Security to administer and enforce all laws relating to immigration and naturalization. INA § 103(a)(1); 8 U.S.C. § 1103(a)(1). As part of this authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States. The INA expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion. For example, INA § 237(d)(2); 8 U.S.C. § 1227(d)(2), allows a noncitizen who has been denied an administrative stay of removal to apply for deferred action. Certain individuals are also "eligible for deferred action" under the INA if they qualify under a set of factors. *See* INA § 204(a)(1)(D)(i)(II); 8 U.S.C. § 1154(a)(1)(D)(i)(II). Deferred action is available to individuals who can make a showing of "exceptional circumstances." INA § 240(e); 8 U.S.C. § 1229a(e). By necessity, the federal statutory and regulatory scheme, as well as federal case law, vest the Executive with very broad discretion to determine enforcement priorities.[1]

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[1] Pursuant to this discretion, the Department of Homeland Security and its predecessor, the Immigration and Naturalization Service ("INS"), established a series of general categorical criteria to guide enforcement. For example, the 1978 INS Operating Instructions outlined five criteria for officers to consider in exercising prosecutorial discretion, including "advanced or tender age." O.I. 103.1(a)(1)(ii); *see also Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983). Discretion can also cut the other way. For

Congress expressly charged the Department of Homeland Security with the responsibility of "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). The Department of Homeland Security regulations describe deferred action as "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14). Additionally, the Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Supreme Court has explained that the Secretary has discretion to exercise deferred action at each stage of the deportation process, and has acknowledged the long history of the Executive "engaging in a regular practice . . . of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999); *see also id.* n.8; *Arizona*, 132 S. Ct. at 2499 (noting that "[a] principal feature of the removal system is the broad discretion exercised by" the

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example, the 2011 Morton Memo highlighted "whether the person poses national security or public safety concern," Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (June 17, 2011), and the 2014 Johnson Memo identifies the "highest [enforcement] priority" as noncitizens who might represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014).

Executive); *Texas v. United States,* 106 F.3d 661, 667 (5th Cir. 1997) (noting the State of Texas's concession that the INA "places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion").[2]

Defendants' argument fails because they attempt to distinguish categories of EAD-holders in a way that does not amount to any relevant difference. Like adjustment of status, (c)(9), and cancellation of removal, (c)(10), deferred action is a form of relief grounded in the INA. Moreover, the exercise of prosecutorial discretion in deferred action flows from the authority conferred on the Secretary by the INA.

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[2] In the past, the Department of Homeland Security and the INS have granted deferred action to different groups of noncitizens present in the United States. In 1977, the Attorney General granted stays of removal to 250,000 nationals of certain countries (known as "Silva Letterholders"). *Silva v. Levi*, No. 76-C4268 (N.D. Ill. 1977), *modified on other grounds sub nom. Silva v. Bell*, 605 F.2d 978 (7th Cir.1979). In 1990, the INS instituted the "Family Fairness" program that deferred the deportation of 1.5 million family members of noncitizens who were legalized through the Immigration Reform and Control Act. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, "Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens" (Feb. 2, 1990). In 1992, President Bush directed the Attorney General to grant deferred enforced departure to 190,000 Salvadorans. *See* Immigration Act of 1990 § 303, Public Law 101-649 (Nov. 29, 1990); https://www.gpo.gov/fdsys/pkg/FR-1994-12-06/html/94-30088.htm. And nationals of Liberia were granted deferred enforced departure until September 30, 2016, http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure.

Defendants provide two criteria to explain when they deem an EAD satisfactory proof of authorized presence: the applicant has formal immigration status, or the applicant is on the path to formal immigration status. Neither criteria suffices to render DACA recipients not similarly situated to other EAD-holders on any basis pertinent to Arizona's decision whether to grant them drivers' licenses. Like DACA recipients, many noncitizens who apply for adjustment of status and cancellation of removal—including individuals with (c)(9) and (c)(10) EADs—do not, and may never, possess formal immigration status. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011).

Additionally, "submission of an application does not connote that the alien's immigration status has changed." Thus, merely applying for immigration relief does not signal a clear path to formal immigration status. *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011) (quoting *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006)). Indeed, given how frequently these applications are denied, "the supposed 'path' may lead to a dead end." *ADAC II*, 757 F.3d at 1065. In this regard, noncitizens holding (c)(9) and (c)(10) EADs are no different from DACA recipients. And as discussed above, DACA recipients have a temporary reprieve—deferred action—that is provided for by the INA, pursuant to the prosecutorial discretion statutorily delegated to the Executive.

Therefore, in all relevant respects, DACA recipients are similarly situated to other categories of noncitizens who may rely on EADs to obtain drivers' licenses under Arizona's policy.

B. State Interest

The next step in an Equal Protection analysis is to determine the applicable level of scrutiny. *Country Classic Dairies*, 847 F.2d at 596. Although we do not ultimately decide the Equal Protection issue, we remain of the view, articulated in our preliminary injunction opinion, that Arizona's policy may well fail even rational basis review. So, as before, we need not reach what standard of scrutiny applies.[3] *See ADAC II*, 757 F.3d at 1065.

Arizona's policy must be "rationally related to a legitimate state interest" to withstand rational basis review. *City of Cleburne*, 473 U.S. at 440. On appeal, Defendants advance six rationales for Arizona's policy, none of which persuade us that Plaintiffs' argument under the Equal Protection Clause is not at least sufficiently strong to trigger the constitutional avoidance doctrine we ultimately invoke.

First, Defendants argue that Arizona's policy is rationally related to the State's concern that it could face liability for improperly issuing drivers' licenses to DACA recipients. But as the district court observed, the depositions of ADOT Director John S. Halikowski and Assistant Director of the Motor Vehicle Division Stacey K. Stanton did not yield support for this

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[3] In cases involving alleged discrimination against noncitizens authorized to be present in the United States, the Supreme Court has consistently applied strict scrutiny to the state action at issue. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Where the alleged discrimination targets noncitizens who are not authorized to be present, the Supreme Court applies rational basis review. *See Plyler*, 457 U.S. at 223–24.

rationale. Neither witness was able to identify any instances in which the state faced liability for issuing licenses to noncitizens not authorized to be present in the country. *ADAC III*, 81 F. Supp. 3d at 807. So the record probably does not establish that there is a rational basis for this concern.

Second, Defendants contend that Arizona's policy serves the State's interest in preventing DACA recipients from making false claims for public assistance. As the district court noted, however, Director Halikowski and Assistant Director Stanton testified that they had no basis for believing that drivers' licenses could be used to access state and federal benefits. It follows that this concern is probably not a rational basis justifying Arizona's policy either. *Id.* (citing *ADAC II*, 757 F.3d at 1066).

Third, Defendants claim that Arizona's policy is meant to reduce the administrative burden of issuing drivers' licenses to DACA recipients, only to have to revoke them once the DACA program is terminated. The district court found this argument lacked merit, noting this court's observation that it is less likely that Arizona will need to revoke the licenses of DACA recipients than of noncitizens holding (c)(9) and (c)(10) EADs, because applications for adjustment of status or cancellation of removal are routinely denied.[4] *ADAC III*, 81 F. Supp. 3d at 807 (citing *ADAC II*, 757

[4] Defendants suggest "later-developed facts" indicate that noncitizens holding (c)(9) and (c)(10) EADs are on the path to permanent residency. We are not convinced that *achieving* certain forms of relief (adjustment of status or cancellation of removal) alters the fact that applications for such relief are regularly denied in very great numbers.

F.3d at 1066–67). Indeed, noncitizens with (c)(10) EADs are already in removal proceedings, which means they are further along in the deportation process than are many DACA recipients. The administrative burden of issuing and revoking drivers' licenses for DACA recipients is not greater than the burden of issuing and revoking drivers' licenses for noncitizens holding (c)(9) and (c)(10) EADs. Certainly, the likelihood of having to do so does not distinguish these two classes of noncitizens, as (c)(9) and (c)(10) applications for relief are frequently denied.

Fourth, Defendants argue that Arizona has an interest in avoiding financial harm to individuals who may be injured in traffic accidents by DACA recipients. Defendants contend that individuals harmed by DACA recipients may be left without recourse when the DACA program is terminated and DACA recipients are removed from the country. But this rationale applies equally to individuals with (c)(9) and (c)(10) EADs. These noncitizens may find their applications for immigration relief denied and may be quickly removed from the country, leaving those injured in traffic accidents exposed to financial harm. Nevertheless, Arizona issues drivers' licenses to noncitizens holding (c)(9) and (c)(10) EADs.

Fifth, Defendants contend that denying licenses to DACA recipients serves the goal of consistently applying ADOT policy. But ADOT *in*consistently applies its own policy by denying licenses to DACA recipients while providing licenses to holders of (c)(9) and (c)(10) EADs. Arizona simply has no way to know what "path" noncitizens in any of these categories will eventually take. DACA recipients appear similar to

individuals who are eligible under Arizona's policy with respect to all the criteria ADOT relies on. ADOT thus applies its own immigration classification with an uneven hand by denying licenses only to DACA recipients. *See, e.g.*, *Yick Wo. v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("[I]f [the law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

Sixth, Defendants claim that Arizona's policy is rationally related to ADOT's statutory obligation to administer the state's driver's license statute. ADOT's disparate treatment of DACA recipients pursuant to the driver's license statute relies on the premise that federal law does not authorize DACA recipients' presence in the United States. This rationale is essentially an assertion of the state's authority to decide whether immigrants' presence is authorized under federal law. Rather than evaluating that assertion as part of the Equal Protection analysis, we defer doing so until our discussion of our ultimate, preemption ground for decision, which we adopt as part of our constitutional avoidance approach.

Before proceeding to that discussion, it bears noting, once again, *see ADAC II*, 757 F.3d at 1067, that the record *does* suggest an additional reason for Arizona's policy: a dogged animus against DACA recipients. The Supreme Court has made very clear that such animus cannot constitute a legitimate state interest, and has cautioned against sowing the seeds of prejudice. *See*

Romer v. Evans, 517 U.S. 620, 634 (1996); *see also City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in the judgment in part, and dissenting in part) ("Prejudice, once let loose, is not easily cabined."). "The Constitution's guarantee of equality must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013) (citation omitted).

II. Preemption

We do not "decide federal constitutional questions where a dispositive nonconstitutional ground is available." *City of L.A. v. Cty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (quoting *Correa v. Clayton*, 563 F. 2d 396, 400 (9th Cir. 1977)). While preemption derives its force from the Supremacy Clause of the Constitution, "it is treated as 'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Prods.*, 431 U.S. 265, 271–72 (1977).[5] Given the formidable Equal Protection concerns Arizona's policy raises, we turn to a preemption analysis as an alternative to resting our decision on the Equal

[5] Though preemption principles are rooted in the Supremacy Clause, this court has previously applied the principle that preemption does not implicate a constitutional question for purposes of constitutional avoidance. *See Hotel Emps. & Rest. Emps. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512 (9th Cir. 1993) (holding that *Pullman* abstention was not warranted for preemption claims because "preemption is not a constitutional issue."); *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) (same).

Protection Clause.[6] Doing so, we conclude that Arizona's policy encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the INA.

The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas*, 424 U.S. at 354. The Supreme Court's immigration jurisprudence recognizes that the occupation of a regulatory field may be "inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Supreme Court has also indicated that the INA provides a pervasive framework with regard to the admission, removal, and presence of aliens. *See Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas*, 424 U.S. at 353, 359); *cf. Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex.").

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[6] In their opening brief, Defendants argue preemption is not properly before this court because Plaintiffs did not appeal the district court's dismissal of their preemption claim. But at oral argument, defense counsel offered to provide supplemental briefing on the issue. Separately, Plaintiffs noted that Defendants raised the Take Care argument for the first time on appeal and argued it ought not be considered because it was not presented to the district court. Following oral argument, we requested and the parties submitted supplemental briefing on both issues. Defendants' supplemental brief conceded that, in light of the considerations articulated in *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), we may properly consider preemption in this case.

To be sure, not all state regulations touching on immigration are preempted. *See Chamber of Commerce*, 131 S. Ct. at 1974. But states may not directly regulate immigration. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013). In particular, the power to classify aliens for immigration purposes is "committed to the political branches of the Federal Government." *Plyler*, 457 U.S. at 225 (quoting *Mathews*, 426 U.S. at 81). "The States enjoy no power with respect to the classification of aliens." *Plyler*, 457 U.S. at 225. Because Arizona created a new immigration classification when it adopted its policy regarding driver's license eligibility, it impermissibly strayed into the exclusive domain of the INA.

States can regulate areas of traditional state concern that might impact noncitizens. *See DeCanas*, 424 U.S. at 355. Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications. *Plyler*, 457 U.S. at 225–26. But a law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration.

For example, in *Toll v. Moreno*, the Supreme Court held that preemption principles foreclosed a state policy concerning the imposition of tuition charges and fees at a state university on the basis of immigration status. 458 U.S. 1, 16–17 (1982). Similarly, the Third Circuit has held that municipal ordinances preventing unauthorized aliens from renting housing constituted an impermissible regulation of immigration and were preempted by the INA. *Lozano v. City of Hazleton*, 724 F.3d 297, 317 (3d Cir. 2013) (emphasis added). Although the housing ordinances did not directly

regulate immigration in the sense of dictating who could or could not be admitted into the United States, the Third Circuit concluded that they impermissibly "intrude[d] on the regulation of residency *and presence* of aliens in the United States." *Id.* (emphasis added).

Similarly, the Fifth Circuit has held that an ordinance "allow[ing] state courts to assess the legality of a non-citizen's presence" in the United States was preempted because it "open[ed] the door to conflicting state and federal rulings on the question." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013). The Fifth Circuit's decision was based on its recognition that "[t]he federal government alone . . . has the power to classify non-citizens." *Id.* In accord with these decisions, the Eleventh Circuit held that a state law prohibiting courts from recognizing contracts involving unlawfully present aliens was preempted as "a thinly veiled attempt to regulate immigration under the guise of contract law." *See United States v. Alabama*, 691 F.3d 1269, 1292–96 (11th Cir. 2012).

Here, Arizona's policy ostensibly regulates the issuance of drivers' licenses, admittedly an area of traditional state concern. *See Chamber of Commerce*, 131 S. Ct. at 1983. But its policy necessarily "embodies the State's independent judgment that recipients of [DACA] are not 'authorized' to be present in the United States '*under federal law*.'" *ADAC II*, 757 F.3d at 1069 (Christen, J., concurring). Indeed, the Arizona Executive Order declared that "the Deferred Action program does not and cannot confer lawful or authorized . . . presence upon the unlawful alien applicants." Executive Order 2012–06 at 1. The Order

also announced Arizona's view that "[t]he issuance of Deferred Action or Deferred Action . . . [EADs] to unlawfully present aliens does not confer upon them any lawful *or* authorized status." *Id.* (emphasis added). To implement the Order, ADOT initiated a policy of denying licenses to DACA recipients pursuant to Arizona's driver's license statute, which requires that applicants "submit proof satisfactory to the department that the applicant's presence in the United States is *authorized under federal law*." Ariz. Rev. Stat. Ann. § 28–3153(D) (emphasis added).

Arizona points to three criteria to justify treating EAD recipients differently than individuals with (c)(9) and (c)(10) EADs,[7] even though the federal government treats their EADs the same in all relevant respects. But Arizona's three criteria—that an applicant: has formal status; is on a path to formal status; or has applied for relief expressly provided for in the INA—cannot be equated with "authorized presence" under federal law. DACA recipients and noncitizens with (c)(9) and (c)(10) EADs all lack formal immigration status, yet the federal government permits them to live and work in the country for some period of time, provided they comply with certain conditions.

Arizona thus distinguishes between noncitizens based on its *own* definition of "authorized presence," one that neither mirrors nor borrows from the federal immigration classification scheme. And by arranging

[7] As we have noted, recipients of (c)(9) and (c)(10) documents are noncitizens who have applied for adjustment of status and cancellation of removal, respectively. *See* 8 C.F.R. § 274a.12(c)(9)–(10).

federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design.[8] Arizona engages in this "exercise of regulatory bricolage," *ADAC II*, 757 F.3d at 1072 (Christen, J., concurring), despite the fact that "States enjoy no power with respect to the classification of aliens," *Plyler*, 457 U.S. at 225.

That this case involves classes of aliens the Executive has, as a matter of discretion, placed in a low priority category for removal is a further consideration weighing against the validity of Arizona's policy. The Supreme Court has emphasized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. And the Court has specifically recognized that federal statutes contemplate and protect the discretion of the Executive Branch when making determinations concerning deferred action. *See Reno*, 525 U.S. at 484–86. The discretion built into statutory removal procedures suggests that auxiliary state regulations regarding the presence of aliens in the United States

[8] Defendants' continual insistence that Arizona's policy is not preempted because the DACA program lacks "the force of law" reflects a misunderstanding of the preemption question. Preemption is not a gladiatorial contest that pits the DACA Memorandum against Arizona's policy. Rather, Arizona's policy is preempted by the supremacy of federal authority under the INA to create immigration categories. Additionally, because Arizona's novel classification scheme includes not just DACA recipients but also recipients of regular deferred action and deferred enforced departure, our conclusion that Arizona's scheme impermissibly creates immigration classifications not found in federal law is not dependent upon the continued vitality of the DACA program.

are particularly intrusive on the overall federal statutory immigration scheme.

Unable to point to any federal statute or regulation that justifies classifying individuals with (c)(9) and (c)(10) EADs as authorized to be present while excluding recipients of deferred action or deferred enforced departure, Defendants argue that Arizona properly relied on statements by the U.S. Citizenship and Immigration Service that "make clear that deferred action does not confer a lawful immigration status." These statements take the form of an email from a local U.S. Citizenship and Immigration Service Community Relations Officer in response to an inquiry from ADOT. In the email, the officer notes that DACA recipients applying for work authorization should fill in category "C33" and not category "C14," which is the category for regular deferred action.

This email does nothing to further Defendants' argument. The officer's statement in no way suggests that federal law supports Arizona's novel classifications. And even if it did, an email from a local U.S. Citizenship and Immigration Services Officer is not a source of "federal law," nor an official statement of the government's position.[9]

The INA, indeed, directly undermines Arizona's novel classifications. For purposes of determining the

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[9] In *ADAC II*, Defendants also argued that a "Frequently Asked Questions" section of the U.S. Citizenship and Immigration Services Website and a Congressional Research Service Memorandum demonstrated that Arizona's classification found support in federal law. *See* 757 F.3d at 1073. We understand Defendants to have abandoned these arguments. But even if they had not, neither source is a definitive statement of federal law.

admissibility of aliens other than those lawfully admitted for permanent residence, the INA states that if an alien is present in the United States beyond a "period of stay *authorized* by the Attorney General" or without being admitted or paroled, the alien is "deemed to be *unlawfully present* in the United States." INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B)(ii) (emphases added). The administrative regulations implementing this section of the INA, to which we owe deference, establish that deferred action recipients do not accrue "unlawful presence" for purposes of calculating when they may seek admission to the United States. 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Because such recipients are present without being admitted or paroled, their stay must be considered "authorized by the Attorney General," for purposes of this statute. INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B).

The REAL ID Act, which amended the INA, further undermines Arizona's interpretation of "authorized presence." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. The Real ID Act amendments provide that states may issue a driver's license or identification card to persons who can demonstrate they are "authorized [to] stay in the United States." *Id.* § 202(c)(2)(C)(i)–(ii). Persons with "approved deferred action status" are expressly identified as being present in the United States during a "period of authorized stay," for the purpose of issuing state identification cards. *Id.* § 202(c)(2)(B)(viii), (C)(ii).

Despite Arizona's clear departure from federal immigration classifications, Defendants argue Arizona's policy is not a "back-door regulation of

immigration." They compare it to the Louisiana Supreme Court policy the Fifth Circuit upheld in *LeClerc v. Webb*, which prohibited any alien lacking permanent resident status from joining the state bar. 419 F.3d 405, 410 (5th Cir. 2005). But the Louisiana Supreme Court did not create a novel immigration classification as Arizona does here. Rather, it permissibly borrowed from existing federal classifications, distinguishing "those aliens who have attained permanent resident status in the United States" from those who have not. *Id.* (quoting *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002)).

Defendants also argue that sections of the INA granting states discretion to provide public benefits to certain aliens, including deferred action recipients, suggest that Congress "has not intended to occupy a field so vast that it precludes all state regulations that touch upon immigration." *See* 8 U.S.C. §§ 1621, 1622. But we do not conclude that Congress has preempted all state regulations that touch upon immigration. Arizona's policy is preempted not because it denies state benefits to aliens, but because the classification it uses to determine which aliens receive benefits does not mirror federal law.

In sum, Defendants offer no foundation for an interpretation of federal law that classifies individuals with (c)(9) and (c)(10) EADs as having "authorized presence," but not DACA recipients. Arizona's policy of denying drivers' licenses to DACA recipients based on its own notion of "authorized presence" is preempted by the exclusive authority of the federal government under the INA to classify noncitizens.

III. Constitutionality of the DACA Program

We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question.

We note, however, that the discussion above is quite pertinent to both of Defendants' primary arguments undergirding their challenge to the constitutionality of the DACA program. First, Defendants argue that the Executive has no power, independent of Congress, to enact the DACA program. But as we have discussed, the INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities. *See supra*, section II. Third parties generally may not contest the exercise of this discretion, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including in the immigration context, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).[10]

Second, Defendants contend that the DACA program amounts to a wholesale suspension of the INA's provisions, which in turn violates the President's obligation to "take Care that the Laws be faithfully

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[10] Congress's failure to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act does not signal the illegitimacy of the DACA program. The Supreme Court has admonished that an unenacted bill is not a reliable indicator of Congressional intent. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). Moreover, the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief (*i.e.*, the DREAM Act would have granted conditional residency that could lead to permanent residency, whereas the DACA program offers a more limited, temporary deferral of removal).

executed." U.S. Const. art. II, § 3 ("the Take Care Clause"). But, according to an amicus brief filed by the Department of Justice, the Department of Homeland Security only has funding annually to remove a few hundred thousand of the 11.3 million undocumented aliens living in the United States. Constrained by these limited resources, the Department of Homeland Security must make difficult decisions about whom to prioritize for removal. Despite Defendants' protestations, they have not shown that the Department of Homeland Security failed to comply with its responsibilities to the extent its resources permit it to do so.[11]

For that reason, this case is nothing like *Train v. City of New York*, a case relied upon by Defendants, in which the Supreme Court affirmed an order directing a presidential administration to spend money allocated by Congress for certain projects. 420 U.S. 35, 40 (1975). Here, by contrast, the Department of Justice asserts that Congress has not appropriated sufficient funds to remove all 11.3 million undocumented aliens, and several prior administrations have adopted programs, like DACA, to prioritize which noncitizens to remove. *See supra* n.2. "The power to decide when to

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[11] Indeed, the Department of Justice's brief reports that the administration has removed approximately 2.4 million noncitizens from the country from 2009 to 2014, a number the government states is "unprecedented." Prioritizing those removal proceedings for noncitizens who represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014), cannot fairly be described as abdicating the agency's responsibilities.

investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ." *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *see Arpaio v. Obama*, 797 F.3d 11, 18 (D.C. Cir. 2015).

Further, as we have noted, the Supreme Court has acknowledged the history of the Executive engaging in a regular practice of prosecutorial discretion in enforcing the INA. *See Reno*, 525 U.S. at 483–84 & n.8 ("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, . . . is now designated as deferred action." (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998))). This history includes "general policy" non-enforcement, such as deferred action granted to foreign students affected by Hurricane Katrina, U.S. Citizenship and Immigration Services, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005), and deferred action for certain widows and widowers of U.S. citizens, Memorandum for Field Leadership, U.S. Citizenship and Immigration Services, from Donald Neufeld, Acting Associate Director, U.S. Citizenship and Immigration Services, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children" at 1 (Sept. 4, 2009).[12]

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[12] The recent ruling in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) *petition for cert. granted sub nom. United States v. Texas*, — S. Ct. — , 2016 WL 207257 (U.S. Nov. 20, 2015) (mem.),

We reiterate that, in the end, Arizona's policy is preempted not because the DACA program is or is not valid, but because the policy usurps the authority of the federal government to create immigrant classifications.

IV. Permanent Injunction

Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 141 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

Plaintiffs have proven that they suffer irreparable injury as a result of Arizona's policy, and that remedies

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is also inapposite to Defendants' constitutional claims. There, several states challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"), including DAPA recipients' eligibility for certain public benefits such as drivers' licenses and work authorization. *Id.* at 149. The court concluded that the states were likely to succeed on their procedural and substantive claims under the Administrative Procedure Act, and expressly declined to reach the Take Care Clause issue. *Id.* at 146 & n.3, 149.

available at law are inadequate to compensate them for that injury. In particular, Plaintiffs have demonstrated that their inability to obtain drivers' licenses limits their professional opportunities. In Arizona, it takes an average of over four times as long to commute to work by public transit than it does by driving, and public transportation is not available in most localities. One ADAC member had to miss full days of work so that she could take her son to his doctors' appointments by bus. Another ADAC member finishes work after midnight but the buses by her workplace stop running at 9 p.m. And as the district court noted, another Plaintiff is a graphic designer whose inability to obtain a driver's license caused her to decline work from clients, while yet another Plaintiff wants to pursue a career as an Emergency Medical Technician but is unable to do so because the local fire department requires a driver's license for employment. *ADAC III*, 81 F. Supp. 3d at 809.

Plaintiffs' inability to obtain drivers' licenses hinders them in pursuing new jobs, attending work, advancing their careers, and developing business opportunities. They thus suffer financial harm and significant opportunity costs. And as we have previously found, the irreparable nature of this injury is exacerbated by Plaintiffs' young age and fragile socioeconomic status. *ADAC II*, 757 F.3d at 1068. Setbacks early in their careers can have significant impacts on Plaintiffs' future professions. *Id.* This loss of opportunity to pursue one's chosen profession constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.,* 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 709–10 (9th Cir. 1988)

(holding that plaintiff's transfer to a less satisfying job created emotional injury that constituted irreparable harm). Since irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages, *see Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991), Plaintiffs have also shown that remedies available at law are inadequate to compensate them.

Plaintiffs have also demonstrated that, after considering the balance of hardships, a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction. We conclude that Arizona's policy is preempted by federal law. "[I]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol*, 732 F.3d at 1029 (quoting *Arizona*, 641 F.3d at 366) (alterations omitted). The public interest and the balance of the equities favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

CONCLUSION

In sum, we find that DACA recipients are similarly situated in all relevant respects to other noncitizens eligible for drivers' licenses under Arizona's policy. And Arizona's refusal to rely on EADs from DACA recipients for purposes of establishing eligibility for drivers' licenses may well violate the Equal Protection Clause for lack of a rational governmental interest justifying the distinction relied upon. Invoking the constitutional avoidance doctrine, we construe the INA

as occupying the field of Arizona's classification of noncitizens with regard to whether their presence is authorized by federal law, and as therefore preempting states from engaging in their very own categorization of immigrants for the purpose of denying some of them drivers' licenses. Plaintiffs have shown that they suffer irreparable harm from Arizona's policy and that remedies at law are inadequate to compensate for that harm. Plaintiffs have also shown that a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction.

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of Plaintiffs. We also AFFIRM the district court's order entering a permanent injunction that enjoins Arizona's policy of denying the EADs issued under the DACA program as satisfactory proof of authorized presence under federal law in the United States.

AFFIRMED.

COUNSEL

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Dale Wilcox, Washington, D.C. for Amicus Curiae Immigration Reform Law Institute.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307

D.C. No. 2:12-cv-02546-DGC
District of Arizona, Phoenix

[Filed July 17, 2015]

ARIZONA DREAM ACT COALITION; et al., Plaintiffs - Appellees,	)
v.	)
JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; et al., Defendants - Appellants.	)

ORDER

Before: PREGERSON, BERZON, and CHRISTEN, Circuit Judges.

Plaintiffs-Appellees' complaint in this litigation contained two claims for relief: (1) a preemption claim, and (2) an equal protection claim. At oral argument on July 16, 2015, the parties appeared to agree that there is significant overlap between these two claims, but the district court order presently on appeal only addresses

the equal protection claim. Plaintiffs did not appeal an earlier order dismissing their preemption claim, but argued that our court may affirm the district court on any ground. The State requested an opportunity to brief the preemption claim if it is to be addressed by our court.

The State argued on appeal that the DACA program violates the separation of powers doctrine and the Take Care Clause of the U.S. Constitution. Plaintiffs' position is that these arguments were waived because they were not raised in the district court.

In light of the foregoing, the parties are ordered to file simultaneous supplemental briefs within fourteen (14) days of the date of this order, addressing:

(1) Whether any issue of preemption is properly before this court, if so, what it is, and how it should be resolved, and whether it is appropriately addressed as a threshold matter before reaching Plaintiffs' equal protection claim, to avoid ruling on constitutional grounds; and

(2) Whether the DACA program violates the separation of powers doctrine and/or the Take Care Clause.

The panel invites the United States to file an amicus curiae brief expressing its views on these issues. The amicus brief should be filed no later than seven (7) days after the parties have filed their supplemental briefs. *See* Fed. R. App. P. 29. In the event the United States chooses not to file an amicus brief, the court requests that the United States notify the Clerk, in writing, as soon as that decision is made.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV 12-02546-PHX DGC

[Filed February 18, 2015]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLAGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS,
Plaintiffs,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; and STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,
Defendants.

FINAL JUDGMENT

For the reasons set out in the Order and Permanent Injunction (Doc. 306) entered January 22, 2015:

1. Plaintiffs' motion for summary judgment and a permanent injunction (Doc. 251) is **granted**.

2. Defendants' motion for summary judgment (Doc. 247) is **denied**.

3. Defendants and their officials, agents, and employees, and all persons acting in concert or participating with them, are permanently enjoined from enforcing any policy or practice by which the Arizona Department of Transportation refuses to accept Employment Authorization Documents, issued under the DACA program announced by Secretary Napolitano's June 15, 2012 memorandum, as proof that the document holders are authorized under federal law to be present in the United States for purposes of obtaining a driver's license or state identification card.

4. The Clerk is directed to terminate this action.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT, pursuant to Federal Rule of Civil Procedure 58(a), is entered in favor of the Plaintiffs and against the Defendants.

Dated this 18th day of February, 2015.

/s/_____
David G. Campbell
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 12-02546 PHX DGC

[Filed January 22, 2015]

Arizona Dream Act Coalition; Jesus Castro-Martinez; Christian Jacobo; Alejandra Lopez; Ariel Martinez; Natalia Perez-Gallagos; Carla Chavarria; and Jose Ricardo Hinojos, Plaintiffs,	)
v.	)
Janice K. Brewer, Governor of the State of Arizona, in her official capacity; John S. Halikowski, Director of the Arizona Department of Transportation, in his official capacity; and Stacey K. Stanton, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity, Defendants.	)

ORDER AND PERMANENT INJUUNCTION

This case concerns the constitutionality of the State of Arizona's denial of driver's licenses to persons

commonly known as "DREAMers."[1] On June 15, 2012, the Secretary of the Department of Homeland Security ("DHS") announced the Deferred Action for Childhood Arrivals ("DACA") program, which provides deferred action for a period of two years to certain eligible DREAMers (referred to here as "DACA recipients"). Deferred action constitutes a discretionary decision by law enforcement authorities to defer legal action that would remove an individual from the country. The DACA program provides that DACA recipients may work during the period of deferred action and may obtain employment authorization documents, generally known as "EADs," from the United States Citizenship and Immigration Services ("USCIS").

Under Arizona law, the Arizona Department of Transportation ("ADOT") "shall not issue to or renew a driver license . . . for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." A.R.S. § 28-3153(D). Before the announcement of the DACA program, the Motor Vehicle Division ("MVD") of ADOT accepted all federally-issued EADs as sufficient evidence that a person's presence in the United States was authorized under federal law, and therefore granted driver's

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[1] Plaintiffs generally refer to themselves as "DREAMers" based on proposed federal legislation known as the Development, Relief, and Education for Alien Minors Act (the "DREAM Act"). Doc. 1, ¶ 2. The DREAM Act would grant legal status to certain undocumented young adults. Congress has considered the DREAM Act several times, but no version has been enacted. *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3962, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007).

licenses to these individuals. After announcement of the DACA program, MVD revised its policy to provide that EADs issued to DACA recipients did not constitute sufficient evidence of authorized presence, even though the MVD continued to accept all other EADs, including those issued to persons who had received other forms of deferred action. MVD later revised its policy so that two other categories of deferred action recipients – those with (a)(11) and (c)(14) deferrals – could not use EADs to obtain driver's licenses.

Plaintiffs are the Arizona Dream Act Coalition (the "Coalition"), which is an immigrant youth-led community organization, and six individual DACA recipients. They allege that Defendants' driver's license policy violates the Equal Protection Clause of the United States Constitution.[2] Plaintiffs sought a preliminary injunction barring Defendants from enforcing their policy. Doc. 29. The Court found that Defendants were likely to succeed on the merits of their equal protection claim, but that they had not shown a likelihood of irreparable harm sufficient to justify preliminary injunctive relief. Doc. 114. The Ninth Circuit reversed, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) ("*ADAC*"), and the Court entered a preliminary injunction on remand. Doc. 295.

The parties have filed and briefed motions for summary judgment. Docs. 247, 251, 259-2, 261, 267-1, 273, 278-1. At the Court's request, the parties also filed memoranda addressing the effect of *ADAC* on the

[2] Plaintiffs also claim that Defendant's policy is preempted by federal law. *See* Doc. 1. The Court granted Defendants' motion to dismiss this claim. Doc. 114.

merits of this case. Docs. 287, 289. The Court heard oral argument on January 7, 2015. For the reasons that follow, the Court will grant summary judgment to Plaintiffs and enter a permanent injunction.

BACKGROUND

I. Deferred Action and DACA.

The federal government has broad and plenary powers over the subject of immigration and the status of aliens. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *see also* U.S. Const. art. I, § 8, cl. 4. Through the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*., Congress has created a complex and detailed federal immigration scheme governing the conditions under which foreign nationals may be admitted to and remain in the United States, *see, e.g.*, *id.* §§ 1181, 1182, 1184, and providing for the removal and deportation of aliens not lawfully admitted to this country, *see, e.g.*, *id.* §§ 1225, 1227-29, 1231. *See generally United States v. Arizona*, 703 F. Supp. 2d 980, 987-88 (D. Ariz. 2010) (describing the federal immigration scheme). The INA charges the Secretary of Homeland Security with the administration and enforcement of all laws relating to immigration and naturalization. 8 U.S.C. § 1103(a)(1). Under this delegation of authority, the Secretary may exercise a form of prosecutorial discretion and decide not to pursue the removal of a person unlawfully in the United States. This exercise of prosecutorial discretion is commonly referred to as deferred action. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (recognizing the practice of "deferred action" where the Executive exercises

discretion and declines to institute proceedings for deportation).

On June 15, 2012, the DHS Secretary issued a memorandum announcing that certain young persons not lawfully present in the United States will be eligible to obtain deferred action if they meet specified criteria under the newly instituted DACA program. Doc. 259-5 at 131-33. Eligible persons must show that they (1) came to the United States under the age of 16; (2) continuously resided in the United States for at least five years preceding the date of the memorandum and were present in the United States on the date of the memorandum; (3) currently attend school, have graduated from high school or obtained a general education development certificate, or have been honorably discharged from the Coast Guard or Armed Forces of the United States; (4) have not been convicted of a felony offense, a significant misdemeanor, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and (5) are not older than 30. *See id.* at 131-33, 208-13. Eligible persons could receive deferred action for two years, subject to renewal, and could obtain an EAD for the period of the deferred action. *Id.* at 132-33. The DHS memorandum makes clear that it "confers no substantive right, immigration status or pathway to citizenship[,]" and that "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 133.

II. Defendants' Driver's License Policy.

As noted above, A.R.S. § 28-3153(D) states that non-citizens may obtain Arizona driver's licenses by presenting proof that their presence in the United States is authorized under federal law. MVD policies

identify the documentation deemed sufficient to show federal authorization. *See* Doc. 259-6 at 13. Before DACA, MVD accepted EADs as satisfactory evidence. Doc. 259-3, ¶ 31; Doc. 267-2, ¶ 31. Between 2005 and 2012, MVD issued tens of thousands of driver's licenses to persons who submitted EADs to prove their lawful presence in the United States. Doc. 259-6 at 8-11.

The announcement of the DACA program prompted ADOT Director John S. Halikowski to review the program's potential impact on ADOT's administration of the State's driver's license laws. Doc. 248-1 at 48. After Director Halikowski initiated the ADOT policy review, but before the review had been concluded, Governor Brewer issued Executive Order 2012-06 on August 15, 2012 (the "Executive Order"). Doc. 259-5 at 231-32. The Executive Order concluded that "issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status and does not entitle them to any additional public benefit." *Id*. The Executive Order directed state agencies to "conduct a full statutory, rule-making and policy analysis and . . . initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license[.]" *Id.* On September 17, 2012, ADOT formally revised its policy to conform to the Governor's order. *Id.* at 254-57.

III. 2013 Revision.

After the 2012 revision and during the pendency of this lawsuit, Director Halikowski continued to review ADOT's driver's license policy. *See* Doc. 248, ¶¶ 28-33. He was concerned about possible inconsistencies in ADOT's treatment of EAD holders. *See* Doc. 248-1 at 65-67. To resolve these inconsistencies, ADOT developed three criteria for determining which EADs would be deemed sufficient proof that the EAD holder had authorized presence under federal law. *Id.* Under these criteria, an EAD is sufficient proof of authorized presence if the EAD demonstrates: "(1) that the applicant has formal immigration status, (2) that the applicant is on a path to obtaining a formal immigration status, or (3) that the relief sought or obtained is expressly provided for in the INA." Doc. 248, ¶ 31 (citing Doc. 248-1 at 67). Applying these criteria, ADOT revised its policy on September 16, 2013. Doc. 172-1 at 3-6. The newly revised policy continued to deny driver's licenses to DACA recipients, who have EADs with a category code of (c)(33). *Id.* at 6. The revised policy also refused to accept EADs with a category code of (c)(14), which are issued to recipients of other forms of deferred action, and (a)(11), which are issued to recipients of deferred enforced departure. *Id.*; *see also* 8 CFR § 274a.12 (listing category codes of EAD holders). The revised policy continued to accept EADs with other category codes as sufficient proof of authorized presence under federal law. *See* Doc. 172-1 at 6. Defendants argue that, as revised, the 2013 policy does not violate the Equal Protection Clause. Doc. 247. The Ninth Circuit considered the revised policy and found, at the preliminary injunction stage, a likelihood

that the policy violates the Equal Protection Clause. *ADAC*, 757 F.3d at 1063-67.

IV. Present Position of Case.

Plaintiffs and Defendants have filed motions for summary judgment. Docs. 247, 251. Defendants' motion rests entirely on their argument that DACA recipients are not similarly situated to other EAD holders who may obtain driver's licenses under Arizona's revised policy. Plaintiffs' motion argues that DACA recipients are similarly situated to other EAD holders who may obtain driver's licenses. Plaintiffs also argue that although a heightened scrutiny should apply to Arizona's denial of driver's licenses to DACA recipients, Defendants' driver's license policy fails under any standard of review. Plaintiffs seek summary judgment in their favor and a permanent injunction.

The parties filed and briefed these motions before the Ninth Circuit had ruled on Plaintiffs' motion for a preliminary injunction. Although the Ninth Circuit's *DACA* decision does not control the outcome of the motions for summary judgment where new facts or evidence are presented, it does control questions of law:

> [T]he district court should abide by 'the general rule' that our decisions at the preliminary injunction phase do not constitute the law of the case. Any of our conclusions on pure issues of law, however, are binding. The district court must apply this law to the facts anew with consideration of the evidence presented in the merits phase.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr., 499 F.3d

1108, 1114 (9th Cir. 2007) (citations omitted); *see also S. Oregon Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004).

MOTIONS FOR SUMMARY JUDGMENT

I. Plaintiffs Are Similarly Situated.

To prevail on their equal protection claim, Plaintiffs "must make a showing that a class that is similarly situated has been treated disparately." *Christian Gospel Church, Inc. v. City and Cnty. of S.F.*, 896 F.2d 1221, 1225-26 (9th Cir. 1990). "The first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. State of Mont., Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2012). The question is not whether DACA recipients are identical in every respect to other noncitizens who are eligible for a driver's license, but whether they are the same in respects relevant to the driver's license policy. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").[3]

[3] Plaintiffs argue that the Equal Protection Clause does not require the Court to find that DACA recipients are similarly situated to other EAD holders who are eligible to receive driver's licenses. Doc. 261 at 20. It is true that identification of a "similarly situated class" is not always a requirement in Equal Protection cases. For example, in cases challenging statutes on the basis of their discriminatory purpose the Supreme Court has not discussed the

Defendants' policy initially prevented only DACA recipients from receiving driver's licenses. All other holders of EADs, including other deferred action recipients, could use their EADs to obtain licenses. Defendants subsequently amended their policy to bar two additional classes of EAD holders from receiving driver's licenses – persons in the (c)(14) category who had also received deferred action, albeit for reasons other than the DACA program, and persons in the (a)(11) category who had received deferred enforced departures. *See* Doc. 172-1 at 6; *see also* 8 CFR § 274a.12.

Defendants argue that DACA recipients are not similarly situated to the remaining EAD holders who are entitled to obtain driver's licenses because those persons either have lawful status in the United States, are on a path to lawful status, or have EADs that are tied to relief provided under the INA. Doc. 247 at 10-14. Defendants also argue that DACA recipients are not similarly situated because their authorization to stay – unlike the authorization of other EAD holders who may obtain a driver's license – is the result of prosecutorial discretion. *Id.*

"similarly situated" requirement. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *see also* Giovanna Shay, *Similarly Situated*, 18 Geo. Mason L. Rev. 581, 598 (2011) (noting that the 'similarly situated' requirement "has never been viewed by the U.S. Supreme Court as a threshold hurdle to obtaining equal protection review on the merits"). The Court need not decide whether these cases control Plaintiffs' challenge, however, because the Court finds that DACA recipients are similarly situated to other EAD holders who are eligible to receive driver's licenses.

The Court does not agree. DACA recipients have been authorized by the federal government to remain in the United States for two years and have been granted the right to work through the issuance of EADs. Other noncitizens are in similar positions. For example, applicants for adjustment of status receive a (c)(9) code and applicants for suspension of deportation and cancellation of removal receive a (c)(10) code. 8 C.F.R. §§ 274a.12(c)(9)-(10). These persons have not been granted citizenship or lawful residence, but they have been permitted to remain and work in the United States while their applications are considered. These individuals may present their EADs to ADOT and obtain driver's licenses, while DACA recipients cannot. It is not a material difference that DACA recipients receive their authorization from an act of prosecutorial discretion and other EAD holders receive their authorization through a statutory provision. The fact remains that they all receive a form of authorization, and documents entitling them to work, from the federal government.

The Ninth Circuit provided this explanation about (c)(9) and (c)(10) recipients, with which the Court agrees:

> DACA recipients are similarly situated to other categories of noncitizens who may use [EADs] to obtain driver's licenses in Arizona. Even under Defendants' revised policy, Arizona issues driver's licenses to noncitizens holding [EADs] with category codes (c)(9) and (c)(10). These (c)(9) and (c)(10) [EADs] are issued to noncitizens who have applied for adjustment of

status and cancellation of removal, respectively. See 8 C.F.R. § 274a.12(c)(9)-(10). . . .

Defendants look to the statutory and regulatory availability of immigration relief for the (c)(9) and (c)(10) groups as a point of distinction. But individuals with (c)(10) employment authorization, for example, are not in the United States pursuant to any statutory provision while their applications are pending. With regard to adjustment of status, we have noted that "the submission of an application does not connote that the alien's immigration status has changed, as the very real possibility exists that the INS will deny the alien's application altogether." *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011) (quoting *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006)).

In sum, like DACA recipients, many noncitizens who have applied for adjustment of status and cancellation of removal possess no formal lawful immigration status, and may never obtain any. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011). Like DACA recipients, noncitizens who have applied for adjustment of status and cancellation of removal often have little hope of obtaining formal immigration status in the foreseeable future. Indeed, those with (c)(10) documents are already in removal proceedings, while many DACA recipients are not – suggesting that individuals in the (c)(10) category are more, not less, likely to be removed in the near future than are DACA recipients. In the relevant respects, then, noncitizens with

> (c)(9) and (c)(10) employment authorization documents are similarly situated to DACA recipients.
>
> Unlike DACA recipients, however, noncitizens holding (c)(9) and (c)(10) [EADs] may use those documents when applying for Arizona driver's licenses to prove — to the satisfaction of the Arizona Department of Transportation — that their presence in the United States is authorized under federal law. As the district court found, these two groups of noncitizens account for more than sixty-six percent of applicants who obtained Arizona driver's licenses using [EADs] during the past seven years. Although DACA recipients are similarly situated to noncitizens holding (c)(9) and (c)(10) [EADs], they have been treated disparately.

ADAC, 757 F.3d at 1064.[4]

Other categories of noncitizens who receive driver's licenses under Defendants' current policy are also similarly situated to DACA recipients. For example, individuals who receive a discretionary grant of parole are authorized to be present in the United States and are eligible for EADs (coded (c)(11)) although they lack formal immigration status, are not necessarily eligible for obtaining such a status, and are not even

[4] Defendants argue that the Ninth Circuit's decision is not binding at this summary judgment stage. Defendants also argue, however, that Plaintiffs' "similarly situated" claim "fails as a matter of law." Doc. 273 at 11; *see also* Doc. 269 at 2. Defendants thus concede that the "similarly situated" issue in this case is a question of law, on which the Ninth Circuit's decision does control. *Ranchers Cattlemen*, 499 F.3d at 1114.

considered admitted. *See* 8 U.S.C. § 1182(d)(5)(A). Parolees lack any avenue for obtaining lawful immigration status, and yet they may obtain an Arizona driver's license on the basis of their EADs.[5]

Defendants argue that DACA recipients are still in the country illegally because the Secretary of DHS lacked the authority to grant them deferred status. Doc. 247 at 12-14. Defendants rely on a district court decision in *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013). In *Crane*, immigration enforcement agents argued that the DACA program forced them to violate 8 U.S.C. § 1225, which requires immigration officers to initiate removal proceedings when they determine that "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." *Id.* at *5. In response to the plaintiffs' motion for a preliminary injunction, the district court addressed whether the plaintiffs were likely to succeed on the merits of their claim that the DACA program conflicts with § 1225 by forbidding immigration officers from initiating removal proceedings against certain unauthorized aliens. *Id.* at *13. Although the district court found that the

[5] The relevant statute on the status of parolees provides: "The Attorney General may, . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A).

plaintiffs were likely to succeed on this claim, it did not grant a preliminary injunction because of concerns over whether it had subject matter jurisdiction. *Id.* at *19. After additional briefing, the court dismissed the case for lack of subject-matter jurisdiction. *See Crane v. Napolitano*, No. 3:12-CV-03247-O, 2013 WL 8211660 (N.D. Tex. July 31, 2013).

Crane did not hold the DACA program invalid. It concluded that the plaintiffs were likely to succeed on the merits of their DACA-related arguments, but then found that it lacked subject matter jurisdiction to address the issue at all. *Crane* is less than dictum from a fellow district court – it is a preliminary conclusion from a court that lacked subject matter jurisdiction to reach even a preliminary conclusion. Furthermore, *Crane*'s holding was limited to a finding that the DHS lacked the "discretion to refuse to initiate removal proceedings when the requirements of Section 1225(b)(2)(A) are satisfied." *Crane*, 2013 WL 1744422, at *13. Defendants do not address whether the requirements of that section are satisfied by any Plaintiffs in this case. Finally, although *Crane* preliminarily concluded that DHS was required to initiate removal proceedings against DACA recipients, it also expressly noted that DHS could then exercise its discretion to terminate the proceedings and permit the unauthorized aliens to remain in the United States. *See id.* at *24.

Other authorities have recognized that noncitizens on deferred action status are lawfully permitted to remain in the United States. *See*, *e.g.*, *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258-59 (11th Cir. 2012) (a noncitizen "currently

classified under 'deferred action' status . . . remains permissibly in the United States"); *In re Pena-Diaz*, 20 I.&N. Dec. 841, 846 (B.I.A. 1994) (deferred action status "affirmatively permit[s] the alien to remain"); 8 C.F.R. § 1.3(a)(4)(vi) (persons "currently in deferred action status" are "permitted to remain in" and are "lawfully present in the United States").

The Court concludes that DACA recipients are similarly situated in all relevant respects to noncitizens who are permitted by the State to obtain driver's licenses on the basis of EADs. DACA recipients are treated differently for purposes of equal protection.

II. Level of Scrutiny.

Although it implied that strict scrutiny should apply (757 F.3d at 1065 n.4), the Ninth Circuit in *ADAC* elected not to address the level of scrutiny applicable to Defendants' driver's license policy: "we need not decide what standard of scrutiny applies to Defendants' policy: as the district court concluded, Defendants' policy is likely to fail even rational basis review." *ADAC*, 757 F.3d at 1065 (citation omitted). The Ninth Circuit went on to assess whether "Defendants' disparate treatment of DACA recipients [was] 'rationally related to a legitimate state interest.'" *Id.* (citation omitted). The Ninth Circuit did not state that it was applying a more rigorous form of rational basis of review, as had this Court in its preliminary injunction decision. *See* Doc. 114 at 24-27.

The Ninth Circuit examined each of the justifications proffered by Defendants in support of their policy, considered whether the justifications were supported by evidence or consistent with Defendants'

other actions, and found "no legitimate state interest that is rationally related to Defendants' decision to treat DACA recipients disparately from noncitizens holding (c)(9) and (c)(10) [EADs]." 757 F.3d at 1065-67. This form of rational basis review appears to be more rigorous than the traditional approach, under which "a classification . . . is accorded a strong presumption of validity. . . . [A] classification 'must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*.'" *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (emphasis added; citations omitted). Because the rigorousness of equal protection review is a question of law, the Court feels bound to apply the form of rational basis scrutiny applied in *ADAC*. *See Ranchers Cattlemen*, 499 F.3d at 1114.[6]

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[6] In ruling on the preliminary injunction, this Court applied a more rigorous form of rational basis review after concluding that the reason for Defendants' policy was Governor Brewer's political disagreement with the Obama Administration's DACA program. *See* Doc. 114 at 24-28. Defendants have now presented evidence that the State may have adopted the new policy for a different reason – ADOT's conclusion that DACA recipients do not have authorized presence under federal law. *See* Docs. 270-3 at 50; 270-4 at 59, 93. Although this evidence might create a question of fact as to why Defendants adopted their policy, that reason appears to be irrelevant under the Ninth Circuit's rational basis scrutiny. *ADAC* did not base the rigorousness of its review on Defendants' reason for adopting the policy. 757 F.3d at 1065. Defendants' evidence on this issue, therefore, does not preclude summary judgment. *See* Fed. R. Civ. P. 56(a) (summary judgment is warranted if "there is no genuine dispute as to any *material* fact and the movant is entitled to judgment as a matter of law") (emphasis added).

III. Application.

Defendants rely on four rational bases for their policy: (1) DACA recipients may not have authorized presence under federal law, and ADOT therefore could face liability for issuing up to 80,000 driver's licenses to unauthorized aliens or for not cancelling those licenses quickly enough if the DACA program is subsequently determined to be unlawful; (2) issuing driver's licenses to DACA recipients could allow those individuals to access federal and state benefits to which they are not entitled; (3) ADOT could be burdened by having to process a large number of driver's licenses for DACA recipients and then cancel those licenses if DACA were revoked; and (4) if DACA were revoked or if DHS commenced removal proceedings against any DACA recipient, as it could at any time, then the DACA recipient would be subject to immediate deportation or removal and that individual could escape financial responsibility for property damage or personal injury caused in automobile accidents. Doc. 269 at 17-20. The Ninth Circuit considered each of these justifications and found that none of them satisfies rational basis review. 757 F.3d at 1066-67.[7]

As their first justification, Defendants argue that they had uncertainty about whether DACA recipients

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[7] Defendants present no new evidence in support of these justifications, arguing instead that a "government actor need not have specific evidence to validate a reasonable concern for the purposes of rational basis analysis." Doc. 270, ¶ 176; *see also id.*, ¶¶ 152, 160-161, 171, 177-78. As noted above, however, the *ADAC* did not apply this deferential level of review. Because Defendants have presented no new evidence on these justifications, the decision in *ADAC* controls. *See Ranchers Cattlemen*, 499 F.3d at 1114.

have an authorized presence in the United States under federal law and were concerned that they might face liability if they issued licenses to unauthorized persons. Doc. 269 at 18. In their depositions, however, ADOT Director Halikowski and Assistant Director Stanton could identify no instances where ADOT faced liability for issuing licenses to individuals who lacked authorized presence. Docs. 259-3, ¶¶ 152-53; 270, ¶¶ 152-53. Halikowski provided only one example of potential state liability – when ADOT had improperly issued a driver's license to a person convicted of driving under the influence of alcohol (Doc. 270, ¶ 152; Doc. 270-4 at 62) – an instance quite unrelated to the prospect of issuing a license to a person presenting a federally-issued EAD as proof of lawful presence under federal law. Stanton could provide no examples. Doc. 259-6 at 298. Thus, the evidence does not support Defendants' first justification. *See ADAC*, 757 F.3d at 1066.

Second, Defendants express concern that issuing driver's licenses to DACA recipients could lead to improper access to federal and state benefits. But as the Ninth Circuit recognized, "Defendant Halikowski . . . and Defendant Stanton . . . testified that they had *no* basis whatsoever for believing that a driver's license alone could be used to establish eligibility for such benefits. It follows that Defendants have no *rational* basis for any such belief." *Id.* at 1066 (emphasis in original); *see also* Doc. 259-6 at 262, 302. Furthermore, although Defendants no longer issue driver's licenses to (a)(11) and (c)(14) EAD holders, they have made no attempt to revoke licenses previously issued to these types of EAD holders. Doc. 259-6 at 283, 316.

Third, Defendants assert that because the DACA program might be canceled, ADOT might be burdened by having to process a large number of driver's licenses for DACA recipients and then cancel those licenses. But the depositions of Halikowski and Stanton show a general lack of knowledge regarding any revocation process. *See* Doc. 254-2 at 266, 300-01. Also, as the Ninth Circuit recognized, "it is *less* likely that Arizona will need to revoke DACA recipients' driver's licenses, compared to driver's licenses issued to noncitizens holding (c)(9) and (c)(10) [EADs]. While Defendants' concern for DACA's longevity is purely speculative, applications for adjustment of status or cancellation of removal are routinely denied." *ADAC*, 757 F.3d at 1066-67 (emphasis in original).

Fourth, Defendants argue that DACA recipients may have their status revoked at any time and may be removed quickly from the country, leaving those they have injured in accidents with no financial recourse. The Ninth Circuit responded:

> Here too, however, Defendants' professed concern applies with equal force to noncitizens holding (c)(9) and (c)(10) [EADs]. Noncitizens who have applied for adjustment of status or cancellation of removal may find their applications denied at any time, and thereafter may be quickly removed from the United States, leaving those they may have injured in automobile accidents with no financial recourse. Nevertheless, Defendants' policy allows noncitizens holding (c)(9) and (c)(10) [EADs] to obtain driver's licenses, while prohibiting DACA recipients from doing the same.

ADAC, 757 F.3d at 1067. If Defendants were genuinely concerned about persons being removed from the country and leaving those injured in accidents without financial recourse, they would not allow (c)(9) and (c)(10) EAD holders to obtain driver's licenses.

Although not directly argued, Defendants have suggested two additional rational bases for their policy. Defendants argue that their concern about "consistent application of ADOT policy" provides a rational basis. *See* Docs. 269 at 19-20; 270, ¶ 151. They point to ADOT's three criteria for determining whether an EAD is sufficient proof of authorized presence – criteria that supposedly treat equally those who have formal immigration status, are on a path to obtaining formal immigration status, or who receive relief expressly provided for in the INA. Doc. 248, ¶ 31. But the same policy grants driver's licenses to (c)(9) and (c)(10) applicants even though they do not appear to satisfy these requirements. As the Ninth Circuit noted in *ADAC*, "we are unconvinced that Defendants have defined a 'path to lawful status' in any meaningful way. After all, noncitizens' applications for adjustment of status or cancellation of removal [(c)(9) and (c)(10) holders] are often denied, so the supposed 'path' may lead to a dead end." 757 F.3d at 1065.

Defendants also argue that their driver's license policy is "rationally related to ADOT's statutory obligation in administering A.R.S. § 28-3153(D)." Doc. 269 at 17. But as noted above, Defendants' granting of driver's licenses to (c)(9) and (c)(10) applicants who present EADs does not appear to be more consistent with § 28-3153(D) – which requires that the applicant's presence be authorized by federal law – than granting

of licenses to similarly situated DACA recipients who presents EADs.

In summary, the Court concludes that Defendants' distinction between DACA recipients and other EAD holders does not satisfy rational basis review. While Defendants have articulated concerns that may be legitimate state interests, they have not shown that the exclusion of DACA recipients is rationally related to those interests. The Court is not saying that the Constitution requires the State of Arizona to grant driver's licenses to all noncitizens. But if the State chooses to confer licenses on some individuals who have been temporarily authorized to stay by the federal government, it may not deny them to similarly situated individuals without a rational basis for the distinction.

REQUEST FOR A PERMANENT INJUNCTION

I. Legal Standard.

An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a permanent injunction must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006). "While '[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court,' the 'traditional principles of equity' demand a

fair weighing of the factors listed above, taking into account the unique circumstances of each case." *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014) (quoting *eBay*, 547 U.S. at 391, 394).

II. Irreparable Harm and Adequacy of Legal Remedies.

A. Harm to Individual Plaintiffs.

The Ninth Circuit found that the individual Plaintiffs are suffering irreparable harm as a result of Defendants' policy:

> Plaintiffs in this case have produced ample evidence that Defendants' policy causes them to suffer irreparable harm. In particular, Plaintiffs' inability to obtain driver's licenses likely causes them irreparable harm by limiting their professional opportunities. Plaintiffs' ability to drive is integral to their ability to work – after all, eighty-seven percent of Arizona workers commute to work by car. It is unsurprising, then, that Plaintiffs' inability to obtain driver's licenses has hurt their ability to advance their careers. Plaintiffs' lack of driver's licenses has prevented them from applying for desirable entry-level jobs, and from remaining in good jobs where they faced possible promotion. Likewise, one Plaintiff – who owns his own business – has been unable to expand his business to new customers who do not live near his home. Plaintiffs' lack of driver's licenses has, in short, diminished their opportunity to pursue their chosen professions. This "loss of opportunity to

> pursue [Plaintiffs'] chosen profession[s]" constitutes irreparable harm.

ADAC, 757 F.3d at 1068.

In their summary judgment briefing, Plaintiffs have presented uncontradicted evidence that their inability to obtain a driver's license has caused a "loss of opportunity to pursue [their] chosen profession." *Id*. One Plaintiff is a self-employed graphic designer. Doc. 259-6 at 333. Because she is unable to obtain a driver's license, she relies on public transportation. Doc. 259-7 at 421. Using public transportation instead of a car causes her to spend roughly the same amount of time working on her clients' projects as she does travelling to meet those clients. Doc. 259-6 at 334. Plaintiff's inability to drive has forced her to decline work from clients. *Id.* at 342-45; Doc. 259-7 at 423. Another Plaintiff is interested in becoming an Emergency Medical Technician. Doc. 259-7 at 34. He has been unable to pursue this career because the local fire department requires a driver's license for employment. *Id*. at 35. A third Plaintiff turned down a job opportunity partly because she was unable to drive with a driver's license. *Id.* at 155-56. Other Plaintiffs have been unable to pursue new jobs or develop business opportunities because of their inability to drive. *See, e.g.*, Doc. 259-3, ¶¶ 264-77.

The Court finds that the denial of driver's licenses has caused Plaintiffs irreparable harm. Although Defendants dispute the extent and details of Plaintiffs' harm (Doc. 269 at 25-31), they have not shown that there is a genuine issue as to whether the individual Plaintiffs have lost employment opportunities. The Court finds that monetary damages cannot fully

compensate Plaintiffs for their harm and that legal remedies are inadequate. *See Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (finding that an alternate job that did not use plaintiff's "skills, training or experience [was a] non-monetary deprivation" and a "substantial injury").

B. Harm to Coalition Members.

The Arizona Dream Act Coalition has brought suit both on its own behalf and on behalf of its members. Doc. 173, ¶ 18. The Coalition claims that Defendants' policy has irreparably harmed its members by depriving them of employment opportunities. Doc. 259-2 at 37-38. The Court agrees. One Coalition member currently works in a temporary position. Doc. 259-7 at 3. She has been unable to acquire a permanent position at her place of work because such a position requires a driver's license. *Id.* Another member works as a nutritionist, although she has been trained as a diet technician. *Id.* at 199-202, 225-26. She was not able to pursue a job opportunity as a diet technician because her employer required that she have a driver's license. *Id.* at 236-37. As with the individual plaintiffs, the Coalition has shown that Defendants' policy has caused its members to lose opportunities to pursue their chosen professions. The Court finds this to be an irreparable harm that is not compensable by legal remedies. *ADAC*, 757 F.3d at 1068.[8]

[8] Because of this conclusion, the Court finds it unnecessary to address whether the Coalition as an organization has suffered irreparable harm to its organizational mission. *See* Doc. 259-2 at 38 (citing *Valle del Sol v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).

III. Balance of Hardships and the Public Interest.

In deciding whether to grant a permanent injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. . . [and] should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation marks and citations omitted); *see Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) (finding that the standards for a permanent injunction are "essentially the same" as for a preliminary injunction). Addressing these factors, the Ninth Circuit held:

> [B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction. It is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available. On the contrary, the public interest and the balance of the equities favor prevent[ing] the violation of a party's constitutional rights.

ADAC, 757 F.3d at 1069 (quotation marks and citations omitted).

The Court agrees. The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). And the public has little interest in

Defendants' continuing a policy that violates the Equal Protection Clause.

IV. Scope of Injunction.

The parties disagree on whether the Court should enter an injunction that applies to all DACA recipients, as opposed to applying merely to the named plaintiffs in this action. Docs. 288, 290. The Ninth Circuit has held that an injunction should be limited to the named plaintiffs unless the court has certified a class. *Zepeda v. I.N.S.*, 753 F.2d 719, 727-28 & n.1 (9th Cir. 1983). The Ninth Circuit has also held, however, that an injunction is not overbroad because it extends benefits to persons other than those before the Court "if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)). Because the Coalition seeks relief on behalf of its members, the Court concludes that the permanent injunction should apply to all DACA recipients. Requiring state officials at driver's license windows to distinguish between DACA recipients who are members of the Coalition and those who are not is impractical, and granting an injunction only with respect to the named plaintiffs would not grant the Coalition the relief it seeks on behalf of its members.

IT IS ORDERED:

1. Plaintiffs' motion for summary judgment and a permanent injunction (Doc. 251) is **granted.**
2. Defendants' motion for summary judgment (Doc. 247) is **denied.**

3. Defendants and their officials, agents, and employees, and all persons acting in concert or participating with them, are permanently enjoined from enforcing any policy or practice by which the Arizona Department of Transportation refuses to accept Employment Authorization Documents, issued under DACA, as proof that the document holders are authorized under federal law to be present in the United States for purposes of obtaining a driver's license or state identification card.

4. The Clerk is directed to terminate this action.

Dated this 22nd day of January, 2015.

/s/_____
David G. Campbell
United States District Judge

APPENDIX F

(ORDER LIST: 574 U.S.)

WEDNESDAY, DECEMBER 17, 2014

ORDER IN PENDING CASE

14A625 BREWER, GOV. OF AZ, ET AL. V. ARIZONA DREAM ACT COALITION, ET AL.

The application for stay presented to Justice Kennedy and by him referred to the Court is denied.

Justice Scalia, Justice Thomas, and Justice Alito would grant the application for stay.

APPENDIX G

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)(l4) (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]

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[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

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*

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).

of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

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

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

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

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 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]

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[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

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 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

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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).

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]

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[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 stales 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

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)

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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 benefitting 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").

(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]

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[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)(1) 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.

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, 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%20Situati ons/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]

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[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be

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").

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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," users 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).

Successful DACA applicants receive deferred action for a 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

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[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

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 Violence Protection Act of

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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.

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.

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[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).

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 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 requires the

[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

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

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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 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").

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 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.

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[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").

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 (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]

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[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

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

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"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.

cancellation of removal provision, moreover, offers the prospect of receiving such status 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 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

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[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 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.

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

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[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.

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 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

APPENDIX H

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
/s/_____

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 defining 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.

/s/_____
Janet Napolitano

APPENDIX I

Executive Order 2012-46

Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program

WHEREAS, United States Citizenship and Immigration Services (USCIS) plans to issue employment authorization documents to certain unlawfully present aliens who are granted Deferred Action under federal immigration laws; and

WHEREAS, the USCIS has confirmed that the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants; and

WHEREAS, unless otherwise made available under applicable law, 8 United States Code § 1621 provides that aliens unlawfully present in the United States are not eligible for any state or local public benefit – as defined in both federal and Arizona law; and

WHEREAS, 8 United States Code § 1622 authorizes states to determine eligibility for any state public benefits for most classes of aliens, including unlawfully present aliens with Deferred Action; and

WHEREAS, the Deferred Action program is purportedly an act of prosecutorial discretion and the program does not provide for any additional public benefit to unlawfully present aliens beyond the delayed

enforcement of United States immigration laws and the possible provision of employment authorization; and

WHEREAS, Arizona Revised Statutes § 1-501 and § 1-502 limit access to public benefits to persons demonstrating lawful presence in the United States; and

WHEREAS, Arizona Revised Statutes § 28-3153 prohibits the Arizona Department of Transportation (ADOT) from issuing a drivers license or nonoperating identification license unless an applicant submits proof satisfactory to ADOT that the applicant's presence in the United States is authorized under federal law; and

WHEREAS, the federal executive's policy of Deferred Action and the resulting federal paperwork issued could result in some unlawfully present aliens inappropriately gaining access to public benefits contrary to the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification; and

WHEREAS, allowing more than an estimated 80,000 Deferred Action recipients improper access to state or local public benefits, including state issued identification, by presenting a USCIS employment authorization document that does not evidence lawful, authorized status or presence will have significant and lasting impacts on the Arizona budget, its health care system and additional public benefits that Arizona taxpayers fund.

NOW THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, by virtue of the authority vested in me by the Constitution and laws of the State of Arizona, do hereby order and direct as follows:

1. The issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status and does not entitle them to any additional public benefit.

2. State agencies that provide public benefits, as defined in 8 United States Code § 1621 shall conduct a full statutory, rule-making and policy analysis and, to the extent not prohibited by state or federal law, initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license, so that the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification are enforced.

3. All state agencies that confer taxpayer-funded public benefits and state issued identification shall undergo emergency rule making to address this issue if necessary.

[Seal] **IN WITNESS WHEREOF**, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona.

/s/_____
GOVERNOR

DONE at the Capitol in Phoenix on this 15th day of August in the Year Two Thousand Twelve and of the Independence of the United States of America the Two Hundred and Thirty-Seventh.

ATTEST:

/s/_____
SECRETARY OF STATE

APPENDIX J

A.R.S. § 28-3153

§ 28-3153. Driver license issuance; prohibitions

Effective: September 26, 2008

A. The department shall not issue the following:

1. A driver license to a person who is under eighteen years of age, except that the department may issue:

(a) A restricted instruction permit for a class D or G license to a person who is at least fifteen years of age.

(b) An instruction permit for a class D, G or M license as provided by this chapter to a person who is at least fifteen years and six months of age.

(c) A class G or M license as provided by this chapter to a person who is at least sixteen years of age.

2. A class D, G or M license or instruction permit to a person who is under eighteen years of age and who has been tried in adult court and convicted of a second or subsequent violation of criminal damage to property pursuant to § 13-1602, subsection A, paragraph 1 or convicted of a felony offense in the commission of which a motor vehicle is used, including theft of a motor vehicle pursuant to § 13-1802, unlawful use of means of transportation pursuant to § 13-1803 or theft of means of transportation pursuant to § 13-1814, or who has been adjudicated delinquent for a second or subsequent act that would constitute criminal damage to property pursuant to § 13-1602, subsection A,

paragraph 1 or adjudicated delinquent for an act that would constitute a felony offense in the commission of which a motor vehicle is used, including theft of a motor vehicle pursuant to § 13-1802, unlawful use of means of transportation pursuant to § 13-1803 or theft of means of transportation pursuant to § 13-1814, if committed by an adult.

3. A class A, B or C license to a person who is under twenty-one years of age, except that the department may issue a class A, B or C license that is restricted to only intrastate driving to a person who is at least eighteen years of age.

4. A license to a person whose license or driving privilege has been suspended, during the suspension period.

5. Except as provided in § 28-3315, a license to a person whose license or driving privilege has been revoked.

6. A class A, B or C license to a person who has been disqualified from obtaining a commercial driver license.

7. A license to a person who on application notifies the department that the person is an alcoholic as defined in § 36-2021 or a drug dependent person as defined in § 36-2501, unless the person successfully completes the medical screening process pursuant to § 28-3052 or submits a medical examination report that includes a current evaluation from a substance abuse counselor indicating that, in the opinion of the counselor, the condition does not affect or impair the person's ability to safely operate a motor vehicle.

8. A license to a person who has been adjudged to be incapacitated pursuant to § 14-5304 and who at the

time of application has not obtained either a court order that allows the person to drive or a termination of incapacity as provided by law.

9. A license to a person who is required by this chapter to take an examination unless the person successfully passes the examination.

10. A license to a person who is required under the motor vehicle financial responsibility laws of this state to deposit proof of financial responsibility and who has not deposited the proof.

11. A license to a person if the department has good cause to believe that the operation of a motor vehicle on the highways by the person would threaten the public safety or welfare.

12. A license to a person whose driver license has been ordered to be suspended pursuant to § 25-518.

13. A class A, B or C license to a person whose license or driving privilege has been canceled until the cause for the cancellation has been removed.

14. A class A, B or C license or instruction permit to a person whose state of domicile is not this state.

15. A class A, B or C license to a person who fails to demonstrate proficiency in the English language as determined by the department.

B. The department shall not issue a driver license to or renew the driver license of the following persons:

1. A person about whom the court notifies the department that the person violated the person's written promise to appear in court when charged with

a violation of the motor vehicle laws of this state until the department receives notification in a manner approved by the department that the person appeared either voluntarily or involuntarily or that the case has been adjudicated, that the case is being appealed or that the case has otherwise been disposed of as provided by law.

2. If notified pursuant to § 28-1601, a person who fails to pay a civil penalty as provided in § 28-1601, except for a parking violation, until the department receives notification in a manner approved by the department that the person paid the civil penalty, that the case is being appealed or that the case has otherwise been disposed of as provided by law.

C. The magistrate or the clerk of the court shall provide the notification to the department prescribed by subsection B of this section.

D. Notwithstanding any other law, the department shall not issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law. For an application for a driver license or a nonoperating identification license, the department shall not accept as a primary source of identification a driver license issued by a state if the state does not require that a driver licensed in that state be lawfully present in the United States under federal law. The director shall adopt rules necessary to carry out the purposes of this subsection. The rules shall include procedures for:

1. Verification that the applicant's presence in the United States is authorized under federal law.

2. Issuance of a temporary driver permit pursuant to § 28-3157 pending verification of the applicant's status in the United States.

APPENDIX K

IN THE NINTH CIRCUIT COURT OF APPEALS

No. 15-15307
D.C. No. 2:12-cv-02546-DGC

[July 16, 2015]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS, Plaintiffs-Appellees,	)
v.	)
JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity, Defendants-Appellants.	)

Pasadena, California
July 16, 2015

BEFORE THE HONORABLE HARRY PREGERSON
BEFORE THE HONORABLE MARSHA S. BERZON
BEFORE THE HONORABLE MORGAN B. CHRISTEN

TRANSCRIPT OF PROCEEDINGS

Oral Argument

Proceedings recorded by electronic sound recording; transcript produced by AVTranz, an eScribers, LLC company.

REGINA WITTKOWSKE
Transcriptionist

* * *

[p.32]

* * *

JUDGE CHRISTEN: But, counsel -- counsel, if I might? Counsel, if I might? This is why this begs of preemption analysis, it seems to me. And the record is now pretty schizophrenic about what your position is on preemption, if I might. And I don't mean to be disrespectful, but I am struggling to figure out what you're doing here because we have the DOJ analysis, right, and that's certainly not a secret. It's right out there filed in the public record. There was a brief filed by your team in the District Court that dropped a footnote asking the District Court to rule on preemption if it didn't rule in your favor on Equal Protection. And then I think that's the last we've heard of it. Is that right?

MS. TUMLIN: Well, that's right, Your Honor. We did not formally cross-appeal the preemption here.

* * *

[p.73]

CERTIFICATE

AVTranz has a current transcription contract with the Maricopa County Superior Court under contract # 13010-RFP, as such, AVTranz is an "authorized Transcriber."

I, Cindy Ferguson, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): REGINA WITTKOWSKE

_____/s/_____ March 9, 2017
CINDY FERGUSON
Proofreader

MEMORANDUM

To: Hon. Jeffrey Wall, Acting Solicitor General of the United States

From: Dominic E. Draye, Solicitor General of Arizona

Date: August 15, 2017

Regarding: CVSG in *Brewer v. Arizona Dream Act Coalition*, No. 16-1180

The United States has weighed in several times on the Deferred Action for Childhood Arrivals (DACA) program. In each of those instances, the government has been clear that persons covered by DACA are present in the United States "in violation of the immigration laws." Reply Brief for Petitioners at 2, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). That conclusion is identical to Petitioners' view. Thus, when Arizona law prohibits the issuance of licenses to persons who cannot establish that their "presence in the United States is authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), the obvious conclusion is that DACA beneficiaries are not entitled to obtain licenses. Judge Kozinski surveyed this straightforward landscape and concluded that "Arizona follows federal law to the letter." App. 4 (Kozinski, J., dissenting). In the absence of a conflict with federal law and without any "clear and manifest" evidence of congressional intent to oust the States from their historical authority over driver's licenses, *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012), the Ninth Circuit's decision cannot stand.

But error is just the beginning of why the United States should support certiorari in this case. The Ninth Circuit's holding produces numerous splits in the lower courts. Pet. 19-20, 25, 28-29, 30-32. It also threatens to transform DACA into "federal law," which the government has resisted as recently as its Supreme Court argument in *United States v. Texas*. The rationale for that resistance is clear: if DACA attempts to confer presence "authorized under federal law" by unilateral executive action, then the program must be unconstitutional under *Youngstown*. Although Arizona makes this point at length in its Petition and believes that the federal government should join that position, it remains possible for the Court to avoid the separation-of-powers question by assuming that DACA is a mere

guideline for prosecutorial discretion (and thus incapable of preempting state law). That modest reading of DACA also alleviates the threat that the Ninth Circuit decision poses to the separation of powers.

In its current form, the Ninth Circuit's decision imperils both the powers of Congress and the division of power between the States and the federal government. Even where an attack on federalism appears to "favor" the United States, the latter has historically defended the vertical division of power in the Constitution. In *Wisconsin Department of Health v. Blumer*, 534 U.S. 473 (2002), for example, the Court called for the views of the Solicitor General, and the government urged certiorari in order to reject a claim of federal preemption. The same commitment to federalism weighs in favor of certiorari in the present case, especially when it comes at no cost to the interests of the federal government properly understood.

I. The Ninth Circuit's Theory of Preemption

Making sense of the Ninth Circuit's preemption holding is difficult, due in part to its refusal to apply the "clear and manifest" standard, App. 35, even in a conceded area of "traditional state concern," App. 36. The invention of a new immigration-specific standard for preemption is alone sufficient to warrant certiorari. Moreover, in its effect, the Ninth Circuit's finding of preemption is more sweeping than anything the United States has advocated in this case or elsewhere.

The Ninth Circuit attributes its holding to the federal government's exclusive authority to create immigration classifications. *E.g.,* App. 26. But that field is uncontroversial. The United States endorsed it as *amicus curiae*, explaining that States may not "establish[] novel alien classifications." Brief for United States as Amici Curiae Supporting Appellees at 2, *Ariz. Dream Act Coal v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307). Arizona has likewise eschewed any prerogative to "tamper with the federal classifications." Pet. 18. Indeed, even the six dissenting judges on the Ninth Circuit had no quibble with the idea that States would be preempted from creating their own alien classifications. App. 4 (Kozinski, J., dissenting). This level of agreement can only mean that someone has missed the point.

The panel's error is distorting federal authority over immigration in two ways. First, it transforms "federal" into "executive" by assuming that Congress has delegated its power to the President through the Immigration and Nationality Act (INA). App. 27, 38. As the dissenting judges pointed out, this remarkable delegation (assuming the non-delegation doctrine would even allow it) would require an unequivocal statement from Congress. App. 6 (Kozinski, J., dissenting).

No such statement exists. In fact, the panel's feint toward identifying a statutory foundation consists of just two minor provisions. *See* Pet. 17-18. Unsurprisingly, neither of them establishes that Congress ceded its authority over immigration to the executive branch. *Id.*; App. 8 (Kozinski, J., dissenting) ("That the panel can trawl the great depths of the INA—one of our largest and most complex statutes—and return with this meager catch suggests exactly the opposite conclusion: the INA evinces a 'clear and manifest' intention not to cede this field to the executive.").

Second, the Ninth Circuit panel stretches federal authority over immigration to forbid a State from "borrow[ing]" and then "arranging federal classifications in the way it prefers." App. 39. Not only is this rule contrary to Supreme Court precedent, which provides that "[t]he State may borrow the federal [immigration] classification," *Plyler v. Doe*, 457 U.S. 202, 226 (1982), but it also has no connection to the expressed views of Congress, which remain "the ultimate touchstone in every pre-emption case," *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The panel attempts to conceal this weakness by suggesting that Arizona has invented its own alien classifications, but a brief review of Arizona law reveals that to be inaccurate. Arizona's statute allows the issuance of licenses for anyone whose "presence in the United States is authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). The implementing regulation from the Arizona Department of Transportation speaks entirely in terms of federal classifications, specifically the classifications among employment authorization documents (EADs). ER 374-77. That policy lists "a USCIS Employment Authorization Card (EAC) with one of the following category codes," including DACA's (c)(33) code, as "not acceptable" to prove presence authorized under federal law. ER 377. Arizona does nothing to alter these classifications, which come exclusively from the federal government. To reuse an example from the Petition, the State does not have a separate policy of, for example, favoring persons brought to the United States before the age of five, such that ADOT divides (c)(33) EADs into new categories of its own making. *See* Pet. 20. This unaltered "borrowing" of federal classifications has long enjoyed the Supreme Court's sanction. *Plyler*, 457 U.S. at 226.

Here emerges the one oddity in the federal government's *amicus* brief in the Ninth Circuit. That brief explained that a "State might distinguish between aliens who have been accorded deferred action and those who have not," before faulting Arizona for distinguishing among aliens on a slightly more fine criterion. Brief for U.S. as Amici Curiae at 9, *Arizona Dream Act. Coal. v. Brewer,* (No. 15-15307). It does not explain why a classification at the level of deferred action is permissible while a classification at the level of EADs is not. Nor could it. For purposes of

preemption, the only question is whether Congress has clearly and manifestly ousted States from some behavior. There is nothing in the Ninth Circuit's opinion or the *amicus* brief from the United States to establish that intent in the very specific way the brief suggests. In the interest of candor, this is the single topic on which the federal government will need to clarify its views in order to support the Petition; opposing the Petition would require a much larger revamping, including rejecting the position that States can distinguish on the basis of deferred action.

Importantly, the United States's *amicus* brief in this case rejects the theory that Arizona's law is "conflict-preempted because it interferes with the federal government's decisions regarding the ability of aliens to work in the United States." Brief for U.S. as Amici Curiae at 11 n.1, *Ariz. Dream Act Coal. v. Brewer* (No. 15-15307). This recognition—wholly correct—confirms that preemption in this case turns on the field of creating alien classifications. *Id.* at 8. That field is not in dispute, but the Ninth Circuit stretches it to find preemption where Arizona has merely "arrang[ed] *federal* classifications," App. 39 (emphasis added). The United States has never endorsed this expansion and should support certiorari to insist on clear and manifest evidence of congressional intent before upsetting the relationship between the federal government and the States.

II. DACA as Federal Law

If Arizona's borrowing of federal classifications does not offend federal supremacy, then something else must justify preemption. Permeating the panel's decision is the barely-veiled view that DACA not only created a federal immigration classification but also imbued that classification with legal status. The Petition addresses this assumption at some length. Pet. 21-32. The United States should share this view, but even if the government does not want to comment on whether DACA is federal law (and, if federal law, then also lawful), it can and should nevertheless support the Petition.

The Ninth Circuit's preemption fig leaf, based on the idea that borrowing federal classifications is not permitted, fails to conceal the panel's view that DACA is federal law with the power to authorize recipients' presence in the United States. Nowhere is this assumption more apparent than in the final sentence of the opinion, in which the court repeats language from the first appeal declaring "EADs issued under the DACA program" to be "proof of authorized presence under federal law." App. 50; *see also* App. 38-39 (concluding that ADOT's criteria for identifying presence authorized under federal law "cannot be equated with 'authorized

presence' under federal law").[1] Far from the pretext of invalidating Arizona's statute for creating novel classifications, this language parrots the state provision but rejects the *substance* of ADOT's conclusion regarding whether DACA beneficiaries meet the requirement of Ariz. Rev. Stat. § 28-3153(D).

The Ninth Circuit's substantive conclusion that Arizona is incorrect in its view of what constitutes federal law, which doctrinally must be a form of conflict preemption, is inconsistent with the position of the federal government itself. In *Texas*, the United States argued that the conferral of deferred action does not work any change in the legality of beneficiaries' presence in the United States; those individuals "remain in violation of the immigration laws." Reply Brief for Petitioners at 2, *United States v. Texas,* (No. 15-674); *see also id.* at 17 ("the alien . . . is present in violation of law"); Joint Appendix at 75. In fact, the government went to considerable lengths to explain that even a reference to "lawfully present" in the memorandum expanding DACA and creating the Deferred Action for Parents of Americans (DAPA) did not effect a substantive change in the law. *E.g., id.* at 37 ("'[L]awful presence' simply describes the result of notifying an alien that DHS has made a non-binding decision to forbear from pursuing his removal . . . ."); Transcript of Oral Argument at 32:5, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (inviting the Court to "put a red pencil through" DAPA's language about lawful presence). This insistence that persons with deferred action are "present in violation of the law," Reply Brief for the Petitioner at 17, *United States v. Texas,* (No. 15-674), is incompatible with the Ninth Circuit's view that Arizona was wrong. If the question is whether DACA recipients' "presence in the United States is authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), then the federal government and the State answer that question in unison. *Accord* App. 4 (Kozonski, J., dissenting) ("Arizona follows federal law to the letter"). Preemption therefore cannot rest on the theory that Arizona wrongly concluded that DACA beneficiaries are not authorized by federal law to be in the United States.

By maintaining that persons covered by DACA are present in violation of federal law, the United States need not comment on whether the President *could* unilaterally authorize an alien's presence "under federal law." Arizona and the

---

[1] This portion of the opinion appears borrowed from the panel's prior equal-protection holding, which focused on the different treatment of various EADs—all of which the court had no trouble identifying by unadulterated federal classifications, incidentally. For preemption purposes, the only question is the presence or absence of clear and manifest congressional intent with respect to (c)(33) EADs, the only group plaintiffs claim to represent.

amici States are certain that such power lies beyond the executive's unilateral reach, at least with respect to the group of persons at issue in the present case. That issue only becomes live, however, if the Court concludes that DACA did, in fact, seek to make lawful what Congress declared to be unlawful. At that point, Arizona contends that DACA exceeded the President's authority under *Youngstown*. And, as a result, it cannot have preemptive force. *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). But if the Supreme Court accepts the government's position that DACA does not, in fact, authorize anyone's presence as a matter of federal law, then preemption based on a State's "*own* definition of 'authorized presence,'" App. 39 (emphasis original), becomes irrelevant.

The United States's description of DACA in prior litigation militates in favor of certiorari and ultimate reversal in the present case. As long as individuals covered by DACA are "present in violation of law," Reply Brief for Petitioners at 2, *United States v. Texas*, (No. 15-674), they cannot claim "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D). The Ninth Circuit's assumption to the contrary, which is necessary for accusing Arizona of running a conflicting immigration system, cannot stand.

* * *

The United States has defended DACA as a non-binding form of "guidance" regarding prosecutorial priorities. If that view is correct, then the Ninth Circuit's preemption holding is wrong and upsets the relationship between the federal government and the States. More dangerous still is the Ninth Circuit's implicit holding that DACA has the force of federal law. That position threatens the separation of powers at the federal government's constitutional core and demands repudiation by the Supreme Court.

The Ninth Circuit panel would alter both the structure of the federal government and the relationship between that government and the States for the myopic purpose of obtaining a policy outcome by any means necessary. This same feverish motive drove the panel to pivot from the analytically appropriate (if ultimately misguided) equal protection rationale of its original opinion to the current holding based on preemption. While neither decision was persuasive, the more recent theory poses a greater threat to the structure of American government. The United States should support the Petition in order to preserve the Constitution's balance of powers.

Hamilton, Gene (OAG)

From:	Hamilton, Gene (OAG)
Sent:	Wednesday, November 15, 2017 2:11 PM
To:	Mizelle, Chad (ODAG); Stewart, Scott G. (CIV); Cutrona, Danielle (OAG); Tucker, Rachael (OAG); Troester, Robert J. (ODAG); Panuccio, Jesse (OASG); Bylund, Jeremy (OASG); Percival, James (OASG)
Cc:	Readler, Chad A. (CIV); Flentje, August (CIV); Belsan, Timothy M. (CIV); Flores, Sarah Isgur (OPA); Prior, Ian (OPA)
Subject:	RE: (b) (5)

(b) (5)

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

From: Mizelle, Chad (ODAG)
Sent: Wednesday, November 15, 2017 2:06 PM
To: Stewart, Scott G. (CIV) (b) (6); Cutrona, Danielle (OAG) (b) (6); Hamilton, Gene (OAG) (b) (6); Tucker, Rachael (OAG) (b) (6); Troester, Robert J. (ODAG) (b) (6); Panuccio, Jesse (OASG) (b) (6); Bylund, Jeremy (OASG) (b) (6); Percival, James (OASG) (b) (6)
Cc: Readler, Chad A. (CIV) (b) (6); Flentje, August (CIV) (b) (6); Belsan, Timothy M. (CIV) (b) (6); Flores, Sarah Isgur (OPA) (b) (6); Prior, Ian (OPA) (b) (6)
Subject: RE: (b) (5)

Scott,

Thanks for the heads up. I'm copying OPA, since we think this is going to make headlines. (b) (5)

Scott—I know the days right before Thanksgiving are tough in terms of getting good coverage of big announcements, (b) (5) (b) (5) ?

Best,
Chad

Duplicative Material

Hamilton, Gene (OAG)

From:	Hamilton, Gene (OAG)
Sent:	Monday, November 20, 2017 9:53 PM
To:	Readler, Chad A. (CIV)
Cc:	O'Malley, Devin (OPA); Shumate, Brett A. (CIV); Flentje, August (CIV); Mooppan, Hashim (CIV); Haas, Alex (CIV)
Subject:	Re: Court rules Trump's sanctuary executive order is unconstitutional

Missed the link—sorry, and thanks. [redacted] (b) (5)

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

On Nov 20, 2017, at 9:50 PM, Readler, Chad A. (CIV) [redacted] (b) (6) wrote:

> Sure. Although you can get the decision from the link at the bottom. And we won't have much to add as this just repeats an earlier ruling. [redacted] (b) (5)
>
> Sent from my Verizon, Samsung Galaxy smartphone
>
> -------- Original message --------
> From: "Hamilton, Gene (OAG)" [redacted] (b) (6)
> Date: 11/20/17 9:48 PM (GMT-05:00)
> To: "Readler, Chad A. (CIV)" [redacted] (b) (6) >
> Cc: "O'Malley, Devin (OPA)" < [redacted] (b) (6) "Shumate, Brett A. (CIV)" [redacted] (b) (6), "Flentje, August (CIV)" [redacted] (b) (6) >, "Mooppan, Hashim (CIV)" [redacted] (b) (6) >, "Haas, Alex (CIV)" < [redacted] (b) (6)
> Subject: Re: Court rules Trump's sanctuary executive order is unconstitutional
>
> When y'all have the latest from our team, would you mind sending along?
>
> Thank you!
>
> Gene P. Hamilton
> Counselor to the Attorney General
> U.S. Department of Justice
>
> On Nov 20, 2017, at 9:22 PM, Readler, Chad A. (CIV) [redacted] (b) (6) wrote:
>
> I will. Had not seen this actually.

I will. Had not seen this actually.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "O'Malley, Devin (OPA)" <(b) (6)>
Date: 11/20/17 9:17 PM (GMT-05:00)
To: "Readler, Chad A. (CIV)" (b) (6), "Shumate, Brett A. (CIV)" <(b) (6)>, "Flentje, August (CIV)" (b) (6)>, "Mooppan, Hashim (CIV)" (b) (6)>, "Haas, Alex (CIV)" (b) (6)>, "Hamilton, Gene (OAG)" (b) (6)>
Subject: Fwd: Court rules Trump's sanctuary executive order is unconstitutional

Can someone call me on this?

(b) (6)

Sent from my iPhone

Begin forwarded message:

> **From:** "Lazo, Alejandro" <alejandro.lazo@wsj.com>
> **Date:** November 20, 2017 at 9:14:57 PM EST
> **To:** "O'Malley, Devin (OPA)" (b) (6)>
> **Subject: Fwd: Court rules Trump's sanctuary executive order is unconstitutional**
>
> Hi Devin. Here is that release I was referencing in our chat. At the very bottom of the page there is a link to the court filing itself.
>
> Alejandro Lazo
> REPORTER • SAN FRANCISCO BUREAU
>
> M: (b) (6) O: +1 415 765 6109
> E: Alejandro.Lazo@WSJ.Com
> T: @AlejandroLazo
>
> ---------- Forwarded message ----------
> From: **S.F. City Attorney's Office** <john.cote@sfgov.org>
> Date: Mon, Nov 20, 2017 at 5:55 PM

Subject: Court rules Trump's sanctuary executive order is unconstitutional
To: alejandro.lazo@wsj.com

For Immediate Release:
Nov. 20, 2017
Contact: John Coté
(415) 554-4662

Court rules Trump's sanctuary execut

order is unconstitutional

After earlier victories brought a temporary reprieve, Herrera wins perma ruling that removes threat to federally funded programs across the cou

SAN FRANCISCO (Nov. 20, 2017) — City Attorney Dennis Herrera today released following statement on the U.S. District Court issuing a permanent injunction prohil the federal government from enforcing President Donald Trump's unconstitutional executive order that sought to strip federal funding from sanctuary jurisdictions:

"This is a victory for the American people and the rule of law. This executive orc was unconstitutional before the ink on it was even dry.

We live in a democracy. No one is above the law, including the president. Presi Trump might be able to tweet whatever comes to mind, but he can't grant himse new authority because he feels like it. When you have a president who describ our judicial system as 'a joke,' the value of three equal branches of government becomes even clearer. This case is a check on the president's abuse of power, which is exactly what the framers of the Constitution had in mind.

The only way to stop a bully is to stand up to him. That's what San Francisco ha done.

I'm grateful that we've been able to protect billions of dollars that help some of t most vulnerable Americans. We're talking about low-income families, seniors, fc children and people with disabilities. This is money that helps provides food, he care and a roof over their heads. It's money that pays for bridges and public tra Those are the programs this administration targeted in its misguided attempt to immigrants.

Let me be clear. San Francisco follows federal immigration law. The federal government has always been free to enforce immigration law in San Francisco, like it can anywhere else in the country. We do not harbor criminals. The feder government knows who is in our jails. If they think someone is dangerous, all th need is a criminal warrant.

But our teachers, doctors and police officers cannot be conscripted into becom immigration agents. San Francisco's sanctuary policies make our city safer by encouraging anyone who has been a victim or witness to a crime to tell police. W are a safer community when people can report a crime, bring a loved one to the doctor or take their kids to school without worrying it could lead to a family mem being deported.

This president and his administration have been trying to twist facts, stoke fear, and demonize immigrants to score cheap political points. The American people too smart for that. From the framers of our Constitution to the hardworking fami in our cities and towns, we are a nation of immigrants. People come here to hel build America and build a better life for their families. They're fighting for the American dream. It's time for this administration to stop trying to divide our scho our neighborhoods and our country. The federal immigration system has been broken for a long time. Building a wall is not the answer. It's time for bipartisan reform that recognizes the contributions immigrants make to our communities a our economy. They have built families, businesses and homes here. Tearing th apart doesn't make sense for anyone."

Background

San Francisco on Jan. 31, 2017 became the first entity to sue Trump over his exe order to strip federal funding from "sanctuary jurisdictions." Santa Clara County ar

local governments soon followed. San Francisco had about $2 billion at stake. Th included $1.2 billion in annual operating funds, or about 13 percent of San Franci budget; and another $800 million in multi-year federal grants that are not part of t annual operating budget and used primarily for large infrastructure projects, like b roads and public transportation.

That lawsuit is the first of two that Herrera has brought against the Trump admini over federal funding for sanctuary cities. The second lawsuit, filed Aug. 11, 2017, to invalidate grant conditions that U.S. Attorney General Jefferson B. Sessions III separately sought to place on a group of U.S. Department of Justice grants for loc enforcement. Those conditions came after the court preliminarily enjoined enforce the executive order in April. San Francisco's case that challenged the executive o about limits on what the president can do. San Francisco's case challenging the g conditions is about limits on what the attorney general can do. That case is ongoir

Today's order also addressed San Francisco's claim for relief that its sanctuary la comply with federal law. The court did not rule on the merits of this claim, and inst invited the city to bring that claim in the Sessions lawsuit.

The cases are: *City and County of San Francisco v. Donald J. Trump, et al.*, U.S. Court for the Northern District of California Case No. 3:17-cv-00485, filed Jan. 31, *City and County of San Francisco v. Jefferson B. Sessions III*, U.S. District Court f Northern District of California Case No. 3:17-cv-04642, filed Aug. 11, 2017. Additi documentation from the case is available on the City Attorney's website at: sfcityattorney.org

Order granting motion: https://gallery.mailchimp.com/561c7fcf27d46702f57bdf30b/files/40215e68-fe5c-49ce-a6cc-d8be9303df01/Order_Granting_Motion.pdf

###

Our mailing address is:
Office of the City Attorney
City Hall Room 234
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

Hamilton, Gene (OAG)

From:	Hamilton, Gene (OAG)
Sent:	Monday, November 20, 2017 10:11 PM
To:	O'Malley, Devin (OPA)
Cc:	Flentje, August (CIV); Readler, Chad A. (CIV); Shumate, Brett A. (CIV); Mooppan, Hashim (CIV); Haas, Alex (CIV)
Subject:	Re: Court rules Trump's sanctuary executive order is unconstitutional

Works here

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

On Nov 20, 2017, at 10:09 PM, O'Malley, Devin (OPA) (b) (6) wrote:

(b) (5) I'll go with Brett and Chad's edits.

Sent from my iPhone

On Nov 20, 2017, at 10:08 PM, Flentje, August (CIV) < (b) (6) wrote:

(b) (5)

(b) (5)

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "O'Malley, Devin (OPA)" (b) (6)
Date: 11/20/17 10:03 PM (GMT-05:00)
To: "Readler, Chad A. (CIV)" (b) (6)
Cc: "Shumate, Brett A. (CIV)" (b) (6) >, "Flentje, August (CIV)" (b) (6) >, "Mooppan, Hashim (CIV)" (b) (6) >, "Haas, Alex (CIV)" (b) (6) "Hamilton, Gene (OAG)" (b) (6)
Subject: Re: Court rules Trump's sanctuary executive order is unconstitutional

(b) (5)

(b) (5)

Sent from my iPhone

On Nov 20, 2017, at 9:58 PM, Readler, Chad A. (CIV)
(b) (6) wrote:

(b) (5)

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "O'Malley, Devin (OPA)" (b) (6) >
Date: 11/20/17 9:54 PM (GMT-05:00)
To: "Readler, Chad A. (CIV)" (b) (6)
Cc: "Shumate, Brett A. (CIV)"
(b) (6) >, "Flentje, August (CIV)"
(b) (6) >, "Mooppan, Hashim (CIV)"
(b) (6) >, "Haas, Alex (CIV)"
(b) (6) , "Hamilton, Gene (OAG)"
(b) (6)
Subject: Re: Court rules Trump's sanctuary executive order is unconstitutional

Ah yes forgot the existing appeal.

(b) (5)

?

Sent from my iPhone

On Nov 20, 2017, at 9:49 PM, O'Malley, Devin (OPA)
(b) (6) v> wrote:

DRAFT statement for REVIEW:

(b) (5)

(b) (5)

Sent from my iPhone

On Nov 20, 2017, at 9:22 PM, Readler, Chad A. (CIV) (b) (6) wrote:

Duplicative Material

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
(b) (6) (b) (6),	)	File No: (b) (6)
	)	
Respondent.	)	December 1, 2015
	)	

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "Act")

APPLICATIONS: Asylum, Withholding of Removal, and protection under the United Nations Convention Against Torture

ON BEHALF OF RESPONDENT:
Andres Lopez, Esq.

ON BEHALF OF THE GOVERNMENT:
Cori White, Esq.
Office of the Chief Counsel
U.S. Department of Homeland Security

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is (b) (6) female citizen of El Salvador who entered the United States on July 6, 2014 and was encountered by Customs and Border Protection agents. On August 19, 2014, the Department of Homeland Security ("DHS") served the respondent with a Notice to Appear ("NTA") charging her with removability pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "Act"). Exhibit 1. At a master calendar hearing on December 15, 2014, the respondent, through counsel, admitted the allegations set forth in the NTA, conceded the charge, and El Salvador was designated as the country of removal. The Court, therefore, finds by clear and convincing evidence that the respondent is removable as charged to the country of El Salvador. INA § 240(c)(3)(A).

On March 30, 2015, the respondent submitted an application for asylum, withholding of removal under the Act, and protections under the United Nations Convention Against Torture. Exhibit 2. On September 1, 2015, the Court held an individual hearing on the respondent's applications for relief and reserved for entry of this written decision.

II. Evidence Presented

The court has reviewed and considered all evidence submitted by the parties, whether it is expressly referred to in this decision or not.

A. Documentary Evidence

Exhibit 1: Notice to Appear
Exhibit 2: Respondent's Application for Asylum, Withholding of Removal, and protections under the Convention Against Torture (Form I-589) with supporting documents (tabs A through C) filed March 30, 2015
Exhibit 3: Respondent's supporting documents (with tabs D through J) filed August 4, 2015

The Court takes administrative notice of the country conditions as described in the 2014 U.S. Department of State Human Rights Practices Report for El Salvador, available at http://www.state.gov/documents/organization/236900.pdf (hereinafter "2014 El Salvador Country Report"). 8 C.F.R. § 1208.12(a); *Quitanilla v. Holder*, 758 F.3d 570, 574 n. 6 (4th Cir. 2014); *Ai Hua Chen v. Holder*, 742 F.3d 171, 179 (4th Cir. 2014).

B. Testimonial Evidence

The testimony of the respondent is summarized as follows:

The respondent testified she was born in El Salvador o [redacted], and has a high school diploma. Sometime i [redacted] the respondent marrie [redacted] (hereinafter [redacted]"). They have three children in common, and divorced i [redacted].

At the beginning of her testimony, the respondent adopted her sworn statement submitted in support of her Form I-589 application. Exhibit 2, tab B at 12-14; *see Matter of E-F-H-L-*, 26 I&N Dec. 319, 322 n.3 (BIA 2014) (citing *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989)).

In addition to her sworn statement, the respondent testified about a conversation she had i [redacted]. On that occasion [redacted]

Betwee [redacted] the respondent spoke t [redacted]. Occasionall [redacted]. The respondent testified her [redacted].

The responde [redacted] The respondent wa [redacted]

The respondent claims sh [redacted]. The respondent reported the [redacted]. The responden [redacted]

The respondent testifie [redacted] [1] The respondent contend [redacted]

The respondent testified tha [redacted]

Other aspects of the respondent's testimony are reflected in the Court's analysis below. The remainder of the respondent's testimony is contained in the verbatim transcript of the individual hearing held on September 1, 2015.

III. Asylum

A. Burden of Proof

Any individual who is physically present in the United States, irrespective of status, may receive asylum, in the exercise of discretion, provided she filed a timely application and qualifies as a refugee within the meaning of section 101(a)(42)(A) of the Act. INA § 208. An alien bears the burden of proving eligibility for asylum. *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006); INA § 208(b)(1)(B)(i); 8 C.F.R. § 1208.13(a). To establish asylum eligibility under the Act, the applicant must show that she was subjected to past persecution or that she has a "well-founded" fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. §1208.13(b)(1). An alien who establishes past persecution is entitled to a rebuttable presumption that she has a well-founded fear of future persecution. *Id.* Absent past persecution, an applicant may independently establish a well-founded fear of persecution. *Ngarurih v. Ashcroft*, 371 F.3d 182, 187 (4th Cir. 2004).

[1] The Court notes this Spanish name translates [redacted] in English.

B. One Year Time Bar

An alien applying for asylum must show "by clear and convincing evidence that the application has been filed within one year after the date of the alien's arrival in the United States." INA §208(a)(2)(B). The DHS concedes, and the Court finds, that the respondent entered the United States on July 6, 2014, and her asylum application was timely filed on March 30, 2015.

C. Credibility

An alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under section 208 of the Act. *See* INA § 208(b)(1)(B)(i); 8 C.F.R. § 1208.13(a); *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010). For any application for asylum filed after May 11, 2005, certain provisions of the REAL ID Act of 2005 regarding corroboration and credibility are applicable. INA § 208(b)(1)(B)(iii). An applicant's own testimony is sufficient to meet the burden of proving their asylum claim, if it is believable, consistent, and sufficiently detailed to provide a plausible and consistent account of the basis of their fear. 8 C.F.R. § 1208.13(a).

An immigration judge must provide specific, cogent reasons for making an adverse credibility determination. *Djadjou v. Holder,* 662 F.3d 265, 273 (4th Cir. 2011). In evaluating an asylum applicant's testimony, "omissions, inconsistencies, contradictory evidence and inherently improbable testimony are appropriate bases for making an adverse credibility determination." *Id.* Even the existence of only a few such inconsistencies can support an adverse credibility determination. *Id.* Following passage of the REAL ID Act of 2005, an inconsistency can serve as a basis for an adverse credibility determination "without regard to whether [it] goes to the heart of the applicant's claim. *Qing Hua Lin,* 736 F.3d 343, 352-53 (4th Cir. 2013) (citing INA § 208(b)(1)(B)(iii)).

Considering the totality of the circumstances and all relevant factors, the Court may base a credibility determination on any of the following: (1) the applicant's demeanor, candor, or responsiveness; (2) the inherent plausibility of the applicant's account; (3) the consistency between the applicant's or witness's written and oral statements, the internal inconsistencies of each statement, and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim; (4) consistency of the applicant's statements with other evidence of record, including the reports of the Department of State on country conditions; or (5) any other relevant factor. INA §§ 208(b)(1)(B)(iii); 241(b)(3)(c); *see also Singh v. Holder*, 699 F.3d 321, 328 (4th Cir. 2012).

Where the Court determines that the applicant should provide evidence corroborating the alien's testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain it. INA § 208(b)(1)(B)(ii); *see Jian Tao Lin v. Holder,* 611 F.3d 228, 237 (4th Cir. 2010) (even for credible testimony, "corroboration may be required when it is reasonable to expect such proof and there is no reasonable explanation for its absence") (internal citation and quotation marks omitted). Lack of corroborative evidence is not necessarily fatal to an asylum application, however, as "[a]n individual can, without

corroboration, satisfy this standard simply by presenting credible testimony about specific facts that would cause a similarly situated person to likewise fear persecution." *Jian Tao Lin,* 611 F.3d at 236 (internal citation omitted); see also 8 C.F.R. § 1208.13(a); 8 C.F.R. §1208.16(b)(2)(i).

Based on the respondent's testimony and the documentary evidence provided, the Court finds that the respondent is not credible for several cogent and specific reasons. First, the respondent testified (by way of adoption of her written statement) that th (b) (6) . On cross-examination, the respondent was asked to explain why she told an asylum officer during her credible fear interview that th (b) (6) . Exhibit 1, credible fear worksheet at 4. The respondent explained the omission on the fact she only gave summary statements to the asylum officer, and th (b) . The Court finds the respondent's explanation to be unpersuasive, and notes she bears the burden of proof and corresponding risk of an inconclusive record. *Salem v. Holder,* 647 F.3d 111, 116 (4th Cir. 2011). The Court finds this inconsistency relates to a material fact that is central to the respondent's claim, and therefore does not support her credibility.

Second, the respondent testified tha (b) . On cross-examination, the respondent was asked to explain why her sworn statement filed in support of her asylum application makes no reference (b) (6) . Exhibit 2, tab C at 14. Again, the respondent failed to provide a persuasive explanation for this omission other than to sa (b) (6) The omission in the respondent's declaration is significant as it goes to the heart of her claim as one of the precipitating events that led her to flee El Salvador. The Court finds this inconsistency does not support her credibility.

Third, the respondent was asked on cross-examination why her sworn statement makes no reference to her clai (b) (6) . The respondent explained tha (b) (6) , but conceded this fact was not in her sworn statement becaus (b) (6) The respondent failed to provide an explanation for the absence of this important evidence, and the Court finds the omission does not support her credibility.

In light of these inconsistencies and omissions in her testimony, the Court finds that the respondent is not credible. Upon consideration of the record as a whole and the totality of the circumstances, the Court makes an adverse credibility determination and therefore denies the respondent's application for asylum. *Ilunga v. Holder,* 777 F.3d. 199, 207 (4th Cir. 2015) (citations omitted); *Hui Pan v. Holder,* 737 F.3d 921, 930 (4th Cir. 2013) (citing *Rusu v. United States*, 296 F.3d 316, 323 (4th Cir. 2002) ("an unfavorable credibility determination is likely to be fatal to such a claim")).

As an alternative finding, the Court will address whether the respondent has sufficiently corroborated her claim despite her lack of credibility. 208(b)(1)(B)(ii); *Hui Pan v. Holder,* 737 F.3d at 930; *Matter of L-A-C-*, 26 I&N Dec. 516, 518 (BIA 2015).

D. Corroboration

The REAL ID Act altered the INA's requirement regarding corroborating evidence. *Singh v. Holder*, 699 F.3d 321, 328 (4th Cir. 2012). Pursuant to the REAL ID Act, "when a trier of fact is not fully satisfied with the credibility of an applicant's testimony standing alone, the trier of fact may require the applicant to provide corroborating evidence 'unless the applicant does not have the evidence and cannot reasonably obtain the evidence.'" *Id.* at 329 (citing 8 U.S.C. § 1158(b)(1)(B)(ii) [INA § 208(b)(1)(B)(ii)] and *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007) ("The amendments to the [REAL ID] Act continue to allow an alien to establish eligibility for asylum through credible testimony alone, but they also make clear that where a trier of fact requires corroboration, the applicant bears the burden to provide corroborative evidence, or a compelling explanation for its absence.")). The method of authentication that the party submitting the evidence utilizes may affect the weight of the evidence, and the Court "retain[s] broad discretion to accept a document as authentic or not based on the particular factual showing presented." *See Lin v. Holder*, 771 F.3d 177, 186-87 (4th Cir. 2014); *Matter of D-R*, 25 I&N Dec. 445, 458 (BIA 2011).

The respondent produced several documents as corroborative evidence to establish her marriage t (b) (6), and several domestic violence protective orders she obtained against him betwee (b) (6). Exhibit 3, tab H at 46-63. The first protective order of (b) (6) states at the time of her complaint the respondent wa (b) (6). *Id.* at 46. By contrast, a marriage certificate o (b) (6) produced by the respondent reflects the respondent i (b) (6). *Id.* at 69. To some extent, this discrepancy calls into question the veracity of the respondent's foreign documents to establish her marriage t (b) (6), the Court finds corroborating evidence establishing he (b) (6) is especially important.

The respondent produced a birth certificate o (b) (6) for her daughte (b) (6) which list (b) (6) as the father, and the respondent by her maiden name. Exhibit 3, tab F at 21. A birth certificate for the respondent' (b) (6) also list (b) (6) as the father, and the respondent by her maiden name. *Id.* at 24. A third birth certificate for the respondent's so (b) (6) also list (b) (6) as the father, and the respondent by her maiden name. *Id.* at 27. While these documents tend to establis (b) (6) as the father of the respondent's children, they do not corroborate her clai (b) (6). This fact does not corroborate the respondent's testimony tha (b) (6) because her legal name wa (b) (6). Exhibit 2, tab C at 14 (emphasis in original).

The Court reviewed sworn statements from the respondent's friends and neighbors generally attesting to her relationshi (b) (6) and past abuse by him. Exhibit 3, tab J at 89-114. All of these documents were prepared in May 2015 after the respondent was placed in removal proceedings, and a merits hearing scheduled to receive evidence on her application for asylum. These statements rely mainly on hearsay statements made by the respondent to the declarants, although some of them provided eyewitne (b) (6).

The Court finds these statements do not substantially corroborate the respondent's claim as they were not prepared contemporaneously with the incidents they recount. Moreover, the statements were prepared by witnesses not subject to cross-examination, such that the trustworthiness of the declarants cannot be adequately determined. *Djadjou v. Holder*, 662 F.3d 265, 276-77 (4th Cir. 2011); *Matter of H-L-H & Z-Y-Z-*, 25 I&N Dec. 209, 214 n.5 (BIA 2010), *abrogated on other grounds by Huang v. Holder*, 677 F.3d 130 (2d Cir.2012); *accord Hui Pan v. Holder*, 737 F.3d 921, 930-31 (4th Cir. 2013). The Court affords these documents little probative weight.

The Court has reviewe (b) (6) . Exhibit 3, tab G at 33. (b) (6) , almost one year after she was caught by immigration officials and placed in removal proceedings. *Id.* at 30. (b) (6) . It appears the (b) (6) *Id.* at 31. The Court gives this evidence limited probative weight and finds it does not sufficiently corroborate the respondent's claim of past domestic abuse by (b) (6)

The respondent did not submit any country condition evidence regarding El Salvador. The Court has considered the most recent Department of State country report regarding the treatment of women and government response to domestic violence. 2014 El Salvador Country Report at 1, 15-18. The Court recognizes that El Salvador experiences significant societal problems related to domestic violence, public safety resources, and widespread criminal activity. This observation is clearly reflected in the country conditions report considered by administrative notice. Although this evidence indicates that domestic violence, ineffective law enforcement efforts, and human rights abuses exist in El Salvador, it does not corroborate the respondent's specific claim of mistreatment by her alleged former husband (b) (6) *Matter of L-A-C-*, 26 I&N Dec. at 524-25.

Upon consideration of all the evidence of record and the totality of the circumstances, the Court finds that the respondent has not provided sufficient evidence to corroborate her claim. INA § 208 (b)(1)(B)(ii); *Singh v. Holder*, 699 F.3d at 330; *Matter of L-A-C-*, 26 I&N Dec. at 522.

As an alternative holding, the Court will analyze the statutory basis of the respondent's asylum claim.

E. Analysis

To satisfy the statutory test for asylum, an applicant must make a two-fold showing. She must demonstrate the presence of a protected ground, and must link the feared persecution, at least in part, to it. *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005). An alien qualifies for asylum if they were persecuted "on account of ... membership in a particular

social group." *Temu v. Holder,* 740 F.3d 887, 891 (4th Cir. 2014) (citing INA § 101(a)(42)(A)).

Under the REAL ID Act, an alien's membership in a particular social group must be "*at least one central reason* for persecuting the applicant" to establish their eligibility for one of the five protected grounds for asylum. INA § 208(b)(1)(B)(i) (emphasis added); *Crespin-Valladares v. Holder,* 632 F.3d 117, 127 (4th Cir. 2011). Incidents of harm that are consistent with acts of private violence, or merely show a person has been the victim of criminal activity, do not constitute evidence of persecution based on a statutorily protected ground. *Huaman-Cornelio v. BIA,* 979 F.2d 995, 1000 (4th Cir.1992).

Even if the Court found the respondent's testimony was credible, which it does not, she has not established that her life or freedom would be threatened on account of a protected ground if she returns to El Salvador. The respondent seeks asylum due to her membership in a particular social group she defines as "El Salvadoran women who are unable to leave their domestic relationships where they have children in common" with their partners.[2]

An applicant seeking asylum based on her membership in a "particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 210 (BIA 2014); *Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014). "Any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question." *Matter of A-R-C-G-,* 26 I&N Dec. 388, 392 (BIA 2014).

The Courts notes that in *Matter of A-R-C-G-*, the DHS conceded the particular social group defined as "married women in Guatemala who are unable to leave their relationship" met the statutory requirement for asylum relief. 26 I&N Dec. at 392-93. However, the Board's particular social group analysis in *A-R-C-G-* lacks clarity as to exactly what "belief or characteristic" the alien victim possessed "that [her] persecutor seeks to overcome in others by means of punishment of some sort." *Matter of Mogharrabi,* 19 I&N Dec. 439, 446 (BIA 1987) (citing *Matter of Acosta*, 19 I&N Dec. at 226); *see also Matter of N-M-*, Dec. 25 I&N Dec. 526, 532 (BIA 2011) (persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed for clear error).

The Court acknowledges the Fourth Circuit Court of Appeals has held "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" could form a cognizable particular social group. *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011); *see also Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015). In

[2] While the respondent makes reference to [redacted (b) (6)], she has not presented sufficient facts to support a cognizable clai [redacted (b) (6)] Exhibit 2, tab C at 14; INA § 101(a)(42)(A). *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir.2005) (citing *Camara v. Ashcroft,* 378 F.3d 361, 364 (4th Cir.2004) (a political opinion may be shown "by evidence of verbal or openly expressive behavior by the applicant in furtherance of a particular cause").

Crespin-Valladares, the Fourth Circuit remanded the alien's proceedings for further fact finding to determine whether the harm alleged by the alien was in fact on account of his family ties. *Id.* at 129.

Based upon the evidence of record, the Court finds that the respondent's relationship with her former spous (b) (6) is insufficient to meet the criteria to establish a cognizable particular social group as required under controlling case law, including *Matter of A-R-C-G-*, *Crespin-Valladares*, and their progeny.

a. Immutability

The Board's "interpretation of the phrase 'membership in a particular social group' incorporates the common immutable characteristic standard set forth in *Matter of Acosta*[.]" *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237-38 (BIA 2014). The shared characteristic of the particular social group must be one that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985); *accord Martinez v. Holder*, 740 F.3d 902, 910-11 (4th Cir. 2014). The shared or immutable characteristic should be the characteristic that makes the group (1) generally recognizable in the community and (2) sufficiently particular to define the group's membership. *Matter of A–M–E & J–G–U*, 24 I&N Dec. 69, 74 (BIA 2007).

An asylum applicant's gender is clearly an immutable characteristic in a proposed group comprised of only women. *Matter of A-R-C-G-*, 26 I&N Dec. at 392. The Board has held that marital status can be an immutable characteristic where the individual is unable to leave the marital relationship. *Id.* at 392-93. Determination of this issue, however, is fact-dependent taking into account the applicant's own experiences, as well as more objective evidence such as background country information. *Id.* at 393.

The Court finds that the respondent has not met her burden to show a common immutable characteristic despite her female gender and Salvadoran nationality. *Matter of A-R-C-G-*. 26 I&N Dec. at 392-93.

Assuming without deciding the respondent was in fact married to and had children with (b) (6), her testimony and documentary evidence demonstrate (b) (6) . Exhibit 2, tab C at 13-14. The respondent left for the United States on June 16, 2014. *Id.* at 12.

The respondent's ability to leave her abuser's hom (b) (6) and travel to the United States five or six years later indicates the relationship with her estranged husband was subject to change, and therefore not immutable. *Matter of A-R-C-G-*. 26 I&N Dec. at 393. Accordingly, the Court finds that the respondent's evidence does not support the immutability requirement for a cognizable social group. *Martinez v. Holder*, 740 F.3d at 910.

b. Particularity

The Board's requirement of particularity chiefly addresses the "group's boundaries" or "outer limits." *Matter of M-E-V-G-*, 26 I&N Dec.at 241. More specifically, a particular social

group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 76. In some circumstances, terms used to describe the group can combine to create a group with discrete and definable boundaries. *Matter of A-R-C-G-*, 26 I&N Dec. at 393. For example, "a *married* woman's inability to leave [a] relationship may be informed by societal expectations about gender and subordination, as well as *legal constraints* such as *divorce and separation*." *Id.* (citing *Matter of W-G-R-*, 26 I&N Dec. at 214) (emphasis added). "The group must also be discrete and have definable boundaries -- it must not be amorphous, overbroad, diffuse, or subjective." *Matter of M-E-V-G-*, 26 I&N Dec.at 239 (citation omitted); *see also Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012) (group must have "particular and well-established boundaries"). A social group does not have to be defined with strict homogeneity, but the group cannot be "too loosely defined." *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74; *Matter of C-A-*, 23 I&N Dec. at 957.

A cognizable particular social group is not defined with particularity by the fact that the applicant is subject to domestic violence. *Matter of A-R-C-G-*, 26 I&N Dec. at 393 n.14 (citing *Matter of W-G-R-*, 26 I&N Dec. at 215) (recognizing that a social group must have "defined boundaries" or a "limiting characteristic" other than the risk of persecution).

The Court finds the respondent has not met her burden to show particularity of her proposed social group that can be described with discrete or definable boundaries. First, the respondent's proposed particular social group is overly broad. The respondent proposes that she belongs to a group consisting of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common." Thus, the respondent defines her group by both a domestic relationship and children in common with her abuser. In *Matter of A-R-C-G-*, the Board noted that a cognizable particular social group is not defined with particularity by the fact that the applicant is subject to domestic violence. *Matter of A-R-C-G-*, 26 I&N Dec. at 393 n.14 (citing *Matter of W-G-R-*, 26 I&N Dec. at 215) (recognizing that a social group must have "defined boundaries" or a "limiting characteristic" other than the risk of persecution). The Court finds that the respondent's proposed social group is impermissibly broad.

Second, El Salvador is inhabited by many women who suffer from the scourge of violence against women, and the country experiences widespread incidents including violent deaths of women. Although Salvadoran law affords protection to victims of domestic violence, including shelter, there were insufficient facilities for this purpose during the most recent reporting period. 2014 El Salvador Country Report at 21. Given the number of women who experience domestic violence in El Salvador, the group lacks discrete boundaries.

Third, unlike the alien in *Matter of A-R-C-G*, the respondent's evidence does not support her claim that she was married to a man and in a relationship she was unable to leave. In *Matter of A-R-C-G-*, the particular social group at issue incorporated the terms "married," "women," and "unable to leave the relationship." 26 I&N Dec. at 393. The Board stated, "[i]n some circumstances, the terms can combine to create a group with discrete and definable boundaries." *Id.* The Board stated a "married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination." *Id.*

In this case, the Court finds the respondent has not provided sufficient evidence to show she was unable to leave the relationship with he (b) (6) because of any "social expectations about gender and subordination, as well legal constraints regarding divorce and separation." *Id.* (citing *Matter of W-G-R-*, 26 I&N Dec. at 214). To the contrary, the respondent's evidence reflects she separated from hi (b) (6) and obtained a divorce from him i (b) (6) . Given the prevalence of domestic violence in El Salvador, the respondent is unable to show tha (b) (6) makes her particular.

Fourth, the Court finds that the respondent has not sufficiently narrowed her group as it was in *Crespin-Valladares v. Holder*. In *Crespin*, the social group was not comprised of every member in the alien's family, but rather centered on just two specific family members: "The family unit -- centered here around the relationship between an uncle and his nephew -- possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum." 632 F.3d at 125 (citations omitted). More specifically, the Fourth Circuit observed that the group consisted of family members who agreed to be prosecutorial witnesses:

> For example, we have recently found that the "group consisting of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" qualifies as a particular social group. Each component of the group in *Crespin–Valladares* might not have particular boundaries. "Prosecutorial witnesses" might reach too broad a swath of individuals; "those who actively oppose gangs" might be too fuzzy a label for a group. Our case law is clear, however, that the group as a whole qualifies.

Temu v. Holder, 740 F.3d 887, 895-96 (4th Cir. 2014)(citations omitted).

The respondent's case is factually distinguishable from *Crespin-Valladares v. Holder.* The alien in *Crespin* was targeted for his familial relationship to his uncle who testified in court about the murder of his cousin. It was not the family relationship alone that made the alien a target for persecution, but the additional fact that Crespin and his uncle publically cooperated with the prosecution as witnesses to identify his cousin's murderers. *Crespin-Valladares v. Holder*, 632 F.3d at 125. They took public steps of cooperation when they described the gang members to the police by going to the police station to participate in an identification line-up, and when the uncle testified as a witness in court against two of the identified gang members. *Id.* at 120. Though Crespin himself did not testify at trial it was his familial relationship to his uncle, coupled with his own public cooperation with the El Salvadoran police investigators, which made the Crespin family a target for the MS-13 gang. Thus, it was Crespin's status as the relative of a witness, and not just his status as relative alone, that specifically made his kinship ties a cognizable particular social group. *Matter of M-E-V-G-*, 26 I&N Dec. at 239; *Crespin-Valladares v. Holder*, 632 F.3d at 125.

By contrast, the respondent in this case has not shown that her group is defined by discrete boundaries beyond the familial relationship with her former spous (b) (6). *Matter of M-E-V-G-*, 26 I&N Dec.at 241. The particular social group proposed by the respondent

includes women who suffer retaliation from their abusive former domestic partners. Again, the respondent's proposed group includes a wide swath of Salvadoran society which the Court determines is overbroad and diffuse.

The Court is simply unable to determine some specific characteristic of the respondent that would place her in a group with "particular and well-established boundaries" that is not "overbroad, diffuse, or subjective" given the prevalence of violence against women in El Salvador. *Temu v. Holder,* 740 F.3d at 895 (social group must have identifiable boundaries to meet the particularity element). Accordingly, the Court finds that the respondent's proposed social group fails the particularity requirement.

c. Social Distinction

The proposed group must also be socially distinct within the society in question, based upon "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of A-R-C-G-,* 26 I&N Dec. at 393-94 (citing *Matter of M-E-V-G-,* 26 I&N Dec. at 240, and *Matter of W-G-R-,* 26 I&N Dec. at 217). The group's recognition is determined by the perception of the society in question, rather than by the perception of the persecutor. *Id.* at 394 (citations and quotations omitted); *see also Temu v. Holder,* 740 F.3d at 894. Sociopolitical factors such as the existence of criminal laws designed to protect domestic abuse victims, and the effectiveness of governmental efforts at enforcement of those laws are relevant evidence to determine whether the applicant's country recognizes the need to protect victims of domestic violence. *Id.* (citation omitted). "[E]ven within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information." *Id.* at 394-95.

As noted in the particularity analysis *supra,* El Salvador has significant and troubling issues related to domestic violence and crimes against women and children. However, unlike the married alien in *Matter of A-R-C-G-,* the respondent lacks an identifiable trait like inability to seek assistance from authority that distinguishes her from other women in Salvadoran society. Thus, she fails to meet the very definition of her proposed social group of Salvadoran women "who are unable to leave their domestic relationships."

Consistent with its immutability and particularity analysis *supra,* the Court finds the respondent is an unfortunate victim of violence against women and children like far too many in El Salvador, and thereby renders her past harm indistinct by comparison. For these reasons, the Court finds the respondent has not met her burden to show the requisite social distinction necessary for membership in a particular social group. *Zelaya v. Holder*, 668 F.3d at 165-66 (a particular social group can "not be defined exclusively by the fact that its members have been targeted for persecution") (citation omitted); *Matter of M-E-V-G-*, 26 I&N Dec.at 240; *Matter of C-A-*, 23 I&N Dec. at 960.

In sum, the Court finds the respondent's evidence does not demonstrate her membership in a particular social group that satisfies the Board's requirements of immutability, particularity, or social distinction. The Act does not extend protection to all individuals who

are victims of persecution. *Matter of M-E-V-G-*, 26 I&N Dec. at 234. "Asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions." *Id.* The asylum statute was not intended as a panacea for the numerous personal altercations that invariably characterize economic and social relationships. *Saldarriaga v. Gonzales,* 402 F.3d 461, 467 (4th Cir. 2005) (citation omitted). Accordingly, the Court finds that the respondent's asylum application must be denied.

2. Nexus/ "On Account of"

Assuming without deciding the respondent is able to establish membership in a particular social group, the respondent has not established such membership was "at least one central reason" for her persecution. *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014) (citing *Crespin-Valladares v. Holder*, 632 F.3d at 127). "A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by [the Board] for clear error." *Matter of N-M-*, Dec. 25 I&N Dec. 526, 532 (BIA 2011) (citing *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007), 8 C F. R. § 1003.1(d)(3)(i)).

Seriousness of conduct is not dispositive of past persecution for purposes of determining asylum eligibility. "Instead, the critical issue is whether a reasonable inference may be drawn from the evidence to find that the motivation for the conduct was to persecute the asylum applicant on account of race, religion, nationality, membership in a particular social group, or political opinion." *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997); *see* INA § 101(a)(42)(A). While the applicant need not show conclusively what the motive for the persecution would be, or that the persecutor would be motivated solely by a protected ground, the applicant must produce evidence from which it is reasonable to conclude that the harm would be motivated, at least in part, by an actual or imputed ground. *INS v. Elias-Zacarias*, 502 U.S. at 483; *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000); *Matter of S-V-*, 22 I&N Dec. 1306, 1309 (BIA 2000); *Matter of S-P-*, 21 I&N Dec. 486, 489-90 (BIA 1996).

The respondent's evidence reflects that her former spouse [redacted (b) (6)] abuse of her was related t [redacted (b) (6)]. The respondent testified tha [redacted (b) (6)]. Exhibit 2, tab C at 12-13. Based upon the respondent's testimony, it appears th [redacted (b) (6)].

Thus, the abuse suffered by the respondent appears related to the violent and criminal tendencies of her abusive former spouse, rather than conclusive evidence she was targeted on account of her membership in a particular social group. The evidence in this case is more consistent with acts of general violence and therefore does not constitute evidence of persecution based on a statutorily protected ground. *Huaman-Cornelio v. BIA*, 979 F.2d at 1000; *Quinteros-Mendoza v. Holder,* 556 F.3d 159, 164-65 (4th Cir. 2009). The Court finds that the respondent has not established her former spouse targeted her due to her membership in a particular social group, which is required to prove the requisite nexus for asylum relief. INA § 208(b)(1)(B)(i).

Accordingly, the Court finds that the respondent is not eligible for asylum based on past persecution because she has not established membership in a particular social group, or that a nexus exists between the harm she experienced and her membership in that group. *Saldarriaga v. Gonzales*, 402 F.3d at 466 (stating that, "quite apart from the question of petitioner's apprehensions of reprisal, his asylum claim founders on more fundamental grounds" where an applicant was unable to demonstrate a protected ground or that the harm he feared would be *on account of* that protected ground).

Where an alien has not met his or her burden of establishing past persecution, he or she may establish a well-founded fear of future persecution on account of a statutorily protected ground if he or she demonstrates "that (1) a reasonable person in the circumstances would fear persecution; and (2) that the fear has some basis in the reality of the circumstances and is validated with specific, concrete facts." *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010) (internal quotation marks and citation omitted). "In other words, an asylum applicant must demonstrate a subjectively genuine and objectively reasonable fear of future persecution on account of a statutorily protected ground." *Id.* (internal quotation marks and citation omitted). An alien's own speculations and conclusory statements, unsupported by independent corroborative evidence, will not suffice. *Yi Ni v. Holder*, 613 F.3d 415, 429 (4th Cir. 2010) (citing *Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005)). An applicant is not required to show that he or she has been singled out individually for persecution if he or she establishes a pattern or practice in her country of persecution of groups of persons similarly situated to the applicant on account of the protected ground. 8 C.F.R. § 1208.13(b)(2)(i).

The respondent has not established past persecution on account of a protected ground. Thus, the Court finds she is not entitled to a rebuttable presumption of having a well-founded fear of future persecution.

The Court acknowledges the respondent's fear of returning to El Salvador is subjectively reasonable. The Court acknowledges that the respondent may have experienced significant abuse by her former husban (b) (6), and is sympathetic to her plight. The Court recognizes the respondent ha (b) (6), and does not doubt her subjective fear of returning to El Salvador.

The Court, however, finds the respondent has not established that her fear of returning to El Salvador is objectively reasonable. The respondent was able to leave the home she shared wi (b) (6), and live apart from him until their divorce i (b) (6). Exhibit 2, tab C at 13-14. The respondent has (b) (6).

In *Matter of A-R-C-G-*, the alien "contacted the police several times but was told they would not interfere in a marital relationship." 26 I&N Dec. at 389, 393. By contrast, the authorities in El Salvador did not refuse to help the respondent. The evidence of record reflects that in 2001 the respondent reported her abuse to the police who responded, arreste (b) (6) and detained him for three days. Exhibit 2, tab C at 12. However, the respondent testified (b) (6). *Id.* She claims tha (b) (6).

[redacted] (b) (6) [redacted]. *Id.*

The respondent's evidence does sugges [redacted] (b) (6) [redacted] Exhibit 3, tab H at 46-68.

The Court recognizes that police reports and court proceedings are not always effective in protecting Salvadoran women and children from violence. However, the respondent's evidence does not support a factual conclusion by the Court that local law enforcement authorities were unwilling or unable to protect her. *Mulyani v. Holder*, 771 F.3d 190, 199 (4th Cir. 2014). Despite these generalized reports, the Court is left to speculate if the respondent's efforts to obtain law enforcement assistance in the future will be ignored or otherwise ineffective. Speculation does not satisfy the burden of establishing a well-founded fear of future persecution that is objectively reasonable. *Mirisawo v. Holder,* 599 F.3d at 396; *Jian Wen Wang v. BCIS*, 437 F.3d at 278; *see also Jian Xing Huang v. INS*, 421 F.3d at 129. After considering all the evidence of record, the Court finds the respondent has not established a well-founded fear of future persecution.

IV. Withholding of Removal

To establish eligibility for withholding of removal under INA § 241(b)(3), an applicant must "show[] that it is more likely than not that her life or freedom would be threatened in the country of removal because of her race, religion, nationality, membership in a particular social group, or political opinion." *Gomis v. Holder*, 571 F.3d 353, 359 (4th Cir. 2009) (internal quotation marks and citations omitted). While withholding of removal has "a more stringent standard than that for asylum," if an alien demonstrates eligibility for withholding of removal, such relief must be granted. *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 353-54 (4th Cir. 2006) (internal citations omitted). "An applicant who has failed to establish the less stringent well-founded fear standard of proof required for asylum relief is necessarily also unable to establish an entitlement to withholding of removal." *Anim v. Mukasey*, 535 F.3d 243, 253 (4th Cir. 2008) (internal quotation marks and citation omitted).

Since the respondent has not otherwise met the standard of proof for asylum, she has necessarily failed to meet the higher standard for withholding of removal under the Act. *Mulanyi v. Holder,* 771 F.3d 190, 198 (4th Cir. 2014). Accordingly, the Court finds the respondent has not demonstrated by a clear probability that her life or freedom would be threatened on account of a protected ground if she were returned to El Salvador.

IV. Withholding of Removal under CAT

To establish withholding of removal under the United Nations Convention Against Torture ("CAT") an applicant must establish that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2); *Gandziami-Mickhou v. Gonzalez*, 445 F.3d at 354. For persecution to qualify as torture, it must

be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1).

The respondent has presented no credible evidence of a clear probability that she would be tortured by, or at the instigation of, or with the consent or acquiescence of, a public official. *Suarez-Valenzuela v. Holder,* 714 F.3d 241, 245-46 (4th Cir. 2013) (citations omitted); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); 8 C.F.R. § 1208.18(a)(7). The respondent has not alleged she was ever tortured by a government official. The Court does not attribute to the Salvadoran government the actions or inaction of the respondent' (b) (6) [redacted]. Based upon the record before the Court, the Court finds that the respondent has not established her former spous (b) (6) was a government official, or abused her at the direction of a government agent.

In this case, the evidence does not establish that the Salvadoran government exhibits a "willful blindness" towards the violence committed by the respondent's former husband (b) (6) or acquiesced to his abuse of her. 8 C.F.R. §§ 1208.16(c)(2), (3) and (4). The Court therefore finds the respondent has not met her burden to demonstrate eligibility for protection of withholding of removal under the United Nations Convention Against Torture. The respondent's fear of harm requires a chain of assumptions and speculations to reach any possibility of torture, and thus she has not established it is more likely than not she would be tortured in the future. *Matter of W-G-R-*, 26 I&N Dec. 208, 225-26 (BIA 2014) (citations omitted).

Accordingly, the Court enters the following:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for asylum is DENIED.

IT IS FURTHER ORDERED that Respondent's application for withholding of removal is DENIED.

IT IS FURTHER ORDERED that Respondent is not eligible for withholding of removal under the United Nations Convention Against Torture.

IT IS FURTHER ORDERED that Respondent shall be REMOVED from the United States to El Salvador based on the charges contained in the Notice to Appear.

12/1/2015
Date

V. Stuart Couch
V. STUART COUCH
United States Immigration Judge
Charlotte, North Carolina

Hamilton, Gene (OAG)

From:	Hamilton, Gene (OAG)
Sent:	Wednesday, December 6, 2017 12:14 PM
To:	McHenry, James (EOIR)
Subject:	RE: EOIR Morning Briefing for Wednesday, December 6, 2017

Please, if you don't mind.

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

From: McHenry, James (EOIR)
Sent: Wednesday, December 6, 2017 12:13 PM
To: Hamilton, Gene (OAG) [redacted (b) (6)]
Subject: FW: EOIR Morning Briefing for Wednesday, December 6, 2017

Do you want to be added to our morning media bulletin distribution list?

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EOIR Morning Briefing

TO: THE DIRECTOR AND SENIOR LEADERSHIP

DATE: WEDNESDAY, DECEMBER 6, 2017

TODAY'S TABLE OF CONTENTS

Not Responsive

Not Responsive

Policy and Legislative News

Not Responsive

Not Responsive

[redacted]

Australian Authorities Reportedly Telling Refugees To Separate From Families In Order To Resettle In US.

The Guardian (UK) (12/5, Doherty, 3.9M) reports, "Australian Border Force officials are telling refugees on Nauru they must separate from their wives and children – and face never seeing them again – in order to apply for resettlement in the US. Recordings of phone conversations and an email chain confirm the ABF is encouraging permanent family separation, in contravention of international law, and directly contradicting evidence given to the...Senate by the department secretary, Mike Pezzullo."

Not Responsive

[redacted]

Mixed-Status Families Face Difficult Options After Deportation Of Loved One.

The Chicago Tribune (12/5, Max, 2.23M) discusses the options available to mixed-status families after the deportation of a loved one. The Tribune says, "They can separate, with some members moving to the deportee's native country while others stay in the U.S. The undocumented family member can also seek sanctuary. Or, the entire family can leave the country together." Sociologist Cecilia Menjívar is quoted saying, "The way the entire system operates today, it's disruptive – not for all immigrants, but for certain immigrants, especially those who have entered the country without inspection and for those who have undocumented immigrants in the family."

Not Responsive

[redacted]

Hamilton, Gene (OAG)

From:	Hamilton, Gene (OAG)
Sent:	Monday, December 18, 2017 11:58 AM
To:	John Zadrozny; Julia Hahn
Subject:	Fwd: JUSTICE DEPARTMENT SETTLES U.S. WORKER DISCRIMINATION CLAIMS AGAINST COLORADO AGRICULTURAL COMPANY

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

Begin forwarded message:

> **From:** USDOJ-Office of Public Affairs <USDOJ-OfficeofPublicAffairs@public.govdelivery.com>
> **Date:** December 18, 2017 at 11:43:07 AM EST
> **To:** [redacted] (b) (6)
> **Subject: JUSTICE DEPARTMENT SETTLES U.S. WORKER DISCRIMINATION CLAIMS AGAINST COLORADO AGRICULTURAL COMPANY**
> **Reply-To:** <USDOJ-OfficeofPublicAffairs@public.govdelivery.com>

FOR IMMEDIATE RELEASE

MONDAY, DECEMBER 18, 2017

NOTE: The settlement agreement can be found here.

JUSTICE DEPARTMENT SETTLES U.S. WORKER DISCRIMINATION CLAIMS AGAINST COLORADO AGRICULTURAL COMPANY

WASHINGTON – The Justice Department announced today that it has reached a settlement agreement with Crop Production Services Inc. (Crop Production), an agricultural company headquartered in Loveland, Colorado. The settlement resolves a lawsuit the Justice Department filed against the company on Sept. 28, 2017, alleging that the company discriminated against U.S. citizens because of a preference for foreign visa workers, in violation of the Immigration and Nationality Act (INA).

The Department's lawsuit alleged that in 2016, Crop Production discriminated against at least three United States citizens by refusing to employ them as seasonal technicians at its El Campo, Texas, location because the company preferred to employ temporary foreign workers under the H-2A visa program. According to the Department's complaint, Crop Production imposed more burdensome requirements on U.S. citizens than it did on H-2A visa workers to discourage U.S. citizens from working at the facility. For instance, the complaint alleges that although U.S. citizens had to complete a background check and a drug test before being permitted to start work, H-2A visa workers were allowed to begin working without completing them and, in some cases, never completed them. The complaint also alleged that Crop Production refused to consider a limited-English proficient U.S. citizen for employment yet hired H-2A visa workers with limited-English proficiency. Ultimately, all of Crop Production's 15 available seasonal technician jobs in 2016 went to H-2A visa workers instead of U.S. workers.

Under the INA, it is unlawful for employers to intentionally discriminate against U.S. workers because of their citizenship status or to otherwise favor the employment of temporary foreign visa workers over available, qualified U.S. workers. In addition, the H-2A visa program allows employers to hire foreign visa workers only if there is not a sufficient number of qualified and available U.S. workers to fill the jobs.

The settlement agreement requires Crop Production to pay civil penalties of

$10,500.00 to the United States, undergo department-provided training on the anti-discrimination provision of the INA, and comply with departmental monitoring and reporting requirements. In a separate agreement with workers represented by Texas RioGrande Legal Aid, Crop Production agreed to pay $18,738.75 in lost wages to affected U.S. workers.

"There will be zero tolerance for companies that violate the Immigration and Nationality Act by hiring foreign visa holders over U.S. workers," said Acting Assistant Attorney General John Gore of the Civil Rights Division. "The Division's Protecting U.S. Workers Initiative is committed to fighting discriminatory hiring practices that prevent qualified U.S. workers from obtaining jobs, and we commend Texas RioGrande Legal Aid for bringing this matter to our attention."

The settlement is part of the Division's Protecting U.S. Workers Initiative, an initiative aimed at targeting, investigating, and bringing enforcement actions against companies that discriminate against U.S. workers in favor of foreign visa workers.

The Division's Immigrant and Employee Rights Section (IER), formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices, is responsible for enforcing the anti-discrimination provision of the INA. The statute prohibits, among other things, citizenship status and national origin discrimination in hiring, firing, or recruitment or referral for a fee; unfair documentary practices; retaliation; and intimidation.

For more information about protections against employment discrimination under immigration laws, call IER's worker hotline at 1-800-255-7688 (1-800-237-2515, TTY for hearing impaired); call IER's employer hotline at 1-800-255-8155 (1-800-237-2515, TTY for hearing impaired); sign up for a free webinar; email IER@usdoj.gov; or visit IER's English and Spanish websites.

Applicants or employees who believe they were subjected to: different documentary requirements based on their citizenship, immigration status, or national origin; or discrimination based on their citizenship, immigration status or national origin in hiring, firing, or recruitment or referral, should contact IER's worker hotline for assistance.

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EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF DANIEL H. RAGSDALE

Pursuant to 28 U.S.C. § 1746, I, Daniel H. Ragsdale, declare and state as follows:

1. I am the Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security (DHS). I have served in this position since January 2010. Before that, I served as a Senior Counselor to ICE's Assistant Secretary from November 2008 until October 2009, and, prior to that, as the Chief of the ICE Enforcement Law Division from October 2006 until November 2008. From September 1999 until September 2006, I served in several positions in ICE's Office of Chief Counsel in Phoenix, Arizona. I also was designated as a Special Assistant U.S. Attorney (SAUSA), which allowed me to prosecute immigration crimes.

2. Under the supervision of ICE's Assistant Secretary, I have direct managerial and supervisory authority over the management and administration of ICE. I am closely involved in the management of ICE's human and financial resources, matters of significance to the agency, and the day-to-day operations of the agency. I make this declaration based on personal

knowledge of the subject matter acquired by me in the course of the performance of my official duties.

Overview of ICE Programs

3. ICE consists of two core operational programs, Enforcement and Removal Operations (ERO), which handles civil immigration enforcement, and Homeland Security Investigations (HSI), which handles criminal investigations. I am generally aware of the operational activities of all offices at ICE, and I am specifically aware of their activities as they affect and interface with the programs I directly supervise.

4. HSI houses the special agents who investigate criminal violations of the federal customs and immigration laws. HSI also primarily handles responses to calls from local and state law enforcement officers requesting assistance, including calls requesting that ICE transfer aliens into detention. However, because of the policy focus on devoting investigative resources towards the apprehension of criminal aliens, the responsibility of responding to state and local law enforcement is shared with, and is increasingly transitioning to, ERO to allow HSI special agents to focus more heavily on criminal investigations. On an average day in FY 2009, HSI special agents nationwide arrested 62 people for administrative immigration violations, 22 people for criminal immigration offenses, and 42 people for criminal customs offenses.

5. ERO is responsible for detaining and removing aliens who lack lawful authority to remain in the United States. On an average day, ERO officers nationwide arrest approximately 816 aliens for administrative immigration violations and remove approximately 912 aliens, including 456 criminal aliens, from the United States to countries around the globe. As of June 2, 2010, ICE had approximately 32,313 aliens in custody pending their removal proceedings or removal from the United States.

6. In addition to HSI and ERO, ICE has the Office of State and Local Coordination (OSLC) which focuses on outreach to state, local, and tribal law enforcement agencies to build positive relationships with ICE. In addition, OSLC administers the 287(g) Program, through which ICE enters into agreements with state, local, and tribal law enforcement agencies for those agencies to perform certain federal immigration enforcement functions under the supervision of federal officials. Each agreement is formalized through a Memorandum of Agreement (MOA) and authorized pursuant to Section 287(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g).

7. Consistent with its policy of focusing enforcement efforts on criminal aliens, ICE created the Secure Communities program to improve, modernize, and prioritize ICE's efforts to identify and remove criminal aliens from the United States. Through the program, ICE has leveraged biometric information-sharing to ensure accurate and timely identification of criminal aliens in law enforcement custody. The program office arranges for willing jurisdictions to access the biometric technology so they can simultaneously check a person's criminal and immigration history when the person is booked on criminal charges. When an individual in custody is identified as being an alien, ICE must then determine how to proceed with respect to that alien, including whether to lodge a detainer or otherwise pursue the alien's detention and removal from the United States upon the alien's release from criminal custody. ICE does not lodge detainers or otherwise pursue removal for every alien in custody, and has the discretion to decide whether lodging a detainer and / or pursuing removal reflects ICE's policy priorities.

ICE Initiatives and Activities in Arizona and at the Southwest Border

8. ICE has devoted substantial resources to increasing border security and combating smuggling of contraband and people. Indeed, 25 percent of all ICE special agents are stationed in the five Southwest border offices. Of those, 353 special agents are stationed in Arizona to investigate crimes, primarily cross-border crimes. ERO currently has 361 law enforcement officers in Arizona. Further, the ICE Office of the Principal Legal Advisor (OPLA) has 147 attorneys stationed in the areas of responsibility on the Southwest border, including 37 attorneys in Arizona alone to prosecute removal cases and advise ICE officers and special agents, as well as one attorney detailed to the U.S. Attorney's Office for the District of Arizona to support the prosecution of criminals identified and investigated by ICE agents. Two additional attorneys have been allocated and are expected to enter on duty as SAUSAs in the very near future.

9. ICE's attention to the Southwest Border has included the March 2009 launch of the Southwest Border Initiative to disrupt and dismantle drug trafficking organizations operating along the Southwest border. This initiative was designed to support three goals: guard against the spillover of violent crime into the United States; support Mexico's campaign to crack down on drug cartels in Mexico; and reduce movement of contraband across the border. This initiative called for additional personnel, increased intelligence capability, and better coordination with state, local, tribal, and Mexican law enforcement authorities. This plan also bolstered the law enforcement resources and information-sharing capabilities between and among DHS and the Departments of Justice and Defense. ICE's efforts on the Southwest border between March 2009 and March 2010 have resulted in increased seizures of weapons, money, and narcotics along the Southwest border as compared to the same time period between 2008 and 2009. ICE also

increased administrative arrests of criminal aliens for immigration violations by 11 percent along the Southwest border during this period.

10. ICE has focused even more closely on border security in Arizona. ICE is participating in a multi-agency operation known as the Alliance to Combat Transnational Threats (ACTT) (formerly the Arizona Operational Plan). Other federal agencies, including the Department of Defense, as well as state and local law enforcement agencies also support the ACTT. To a much smaller degree, ACTT receives support from the Government of Mexico through the Merida initiative, a United States funded program designed to support and assist Mexico in its efforts to disrupt and dismantle transnational criminal organizations, build capacity, strengthen its judicial and law enforcement institutions, and build strong and resilient communities.

11. The ACTT began in September 2009 to address concerns about crime along the border between the United States and Mexico in Arizona. The primary focus of ACTT is conducting intelligence-driven border enforcement operations to disrupt and dismantle violent cross-border criminal organizations that have a negative impact on the lives of the people on both sides of the border. The ACTT in particular seeks to reduce serious felonies that negatively affect public safety in Arizona. These include the smuggling of aliens, bulk cash, and drugs; document fraud; the exportation of weapons; street violence; homicide; hostage-taking; money laundering; and human trafficking and prostitution.

12. In addition to the ACTT, the Federal Government is making other significant efforts to secure the border. On May 25, 2010, the President announced that he will be requesting $500 million in supplemental funds for enhanced border protection and law enforcement activities, and that he would be ordering a strategic and requirements-based

deployment of 1,200 National Guard troops to the border. This influx of resources will be utilized to enhance technology at the border; share information and support with state, local, and tribal law enforcement; provide intelligence and intelligence analysis, surveillance, and reconnaissance support; and additional training capacity.

13. ICE also is paying increasing attention to alien smuggling, along with other contraband smuggling, with the goal of dismantling large organizations. Smuggling organizations are an enforcement priority because they tend to create a high risk of danger for the persons being smuggled, and tend to be affiliated with the movement of drugs and weapons. ICE has had success of late in large operations to prosecute and deter alien smugglers and those who transport smuggled aliens. During recent operations in Arizona and Texas, ICE agents made a combined total of 85 arrests, searched 18 companies, and seized more than 100 vehicles and more than 30 firearms.

14. This summer, ICE launched a surge in its efforts near the Mexican border. This surge was a component of a strategy to identify, disrupt, and dismantle cartel operations. The focus on cartel operations is a policy priority because such cartels are responsible for high degrees of violence in Mexico and the United States—the cartels destabilize Mexico and threaten regional security. For 120 days, ICE will add 186 agents and officers to its five Southwest border offices to attack cartel capabilities to conduct operations; disrupt and dismantle drug trafficking organizations; diminish the illicit flow of money, weapons, narcotics, and people into and out of the U.S.; and enhance border security. The initiative, known as Operation Southern Resolve, is closely coordinated with the Government of Mexico, as well as Mexican and U.S. federal, state and local law enforcement to ensure maximum impact. The initiative also includes

targeting transnational gang activity, targeting electronic and traditional methods of moving illicit proceeds, and identifying, arresting, and removing criminal aliens present in the region.

15. Although ICE continues to devote significant resources to immigration enforcement in Arizona and elsewhere along the Southwest border, ICE recognizes that a full solution to the immigration problem will only be achieved through comprehensive immigration reform (CIR). Thus, ICE, in coordination with DHS and the Department's other operating components, has committed personnel and energy to advancing CIR. For example, ICE's Assistant Secretary and other senior leaders have advocated for comprehensive immigration reform during meetings with, and in written letters and statements to, advocacy groups, non-governmental organizations, members of the media, and members of Congress. Other ICE personnel have participated in working groups to develop immigration reform proposals to include in CIR and to prepare budget assessments and projections in support of those proposals.

ICE Enforcement Priorities

16. DHS is the federal department with primary responsibility for the enforcement of federal immigration law. Within DHS, ICE plays a key role in this enforcement by, among other functions, serving as the agency responsible for the investigation of immigration-related crimes, the apprehension and removal of individuals from the interior United States, and the representation of the United States in removal proceedings before the Executive Office for Immigration Review within the Department of Justice. As the department charged with enforcement of federal immigration laws, DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities. This discretion also allows ICE to forego criminal prosecutions or removal proceedings in individual cases, where such forbearance will further federal immigration priorities.

17. ICE's priorities at a national level have been refined to reflect Secretary Napolitano's commitment to the "smart and tough enforcement of immigration laws." Currently, ICE's highest enforcement priorities—meaning, the most important targets for apprehension and removal efforts—are aliens who pose a danger to national security or a risk to public safety, including: aliens engaged in or suspected of terrorism or espionage; aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; certain gang members; and aliens subject to outstanding criminal warrants.

18. Other high priorities include aliens who are recent illegal entrants and "fugitive aliens" (*i.e.*, aliens who have failed to comply with final orders of removal). The attention to fugitive aliens, especially those with criminal records, recognizes that the government expends significant resources providing procedural due process in immigration proceedings, and that the efficacy of removal proceedings is undermined if final orders of removal are not enforced. Finally, the attention to aliens who are recent illegal entrants is intended to help maintain control at the border. Aliens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority. And aliens who meet certain humanitarian criteria may not be an "enforcement" priority at all—in such humanitarian cases, federal immigration priorities may recommend forbearance in pursuing removal.

19. ICE bases its current priorities on a number of different factors. One factor is the differential between the number of people present in the United States illegally—approximately 10.8 million aliens, including 460,000 in Arizona—and the number of people ICE is resourced to remove each year—approximately 400,000. This differential necessitates prioritization to ensure that ICE expends resources most efficiently to advance the goals of protecting national security,

protecting public safety, and securing the border. Another factor is ICE's consideration of humanitarian interests in enforcing federal immigration laws, and its desire to ensure aliens in the system are treated fairly and with appropriate respect given their individual circumstances. Humanitarian interests may, in appropriate cases, support a conclusion that an alien should not be removed or detained at all. And yet another factor is ICE's recognition that immigration detainees are held for a civil purpose—namely, removal—and not for punishment. Put another way, although entering the United States illegally or failing to cooperate with ICE during the removal process is a crime, being in the United States without authorization is not itself a crime. ICE prioritizes enforcement to distinguish between aliens who commit civil immigration violations from those commit or who have been convicted of a crime.

20. Consequently, ICE is revising policies and practices regarding civil immigration enforcement and the immigration detention system to ensure the use of its enforcement personnel, detention space, and removal resources are focused on advancing these priorities. For example, ICE has two programs within ERO designed to arrest convicted criminal aliens and alien fugitives. These are the Criminal Alien Program (CAP) and the National Fugitive Operations Program (fugitive operations). ICE officers assigned to CAP identify criminal aliens who are incarcerated within federal, state, and local prisons and jails, as well as aliens who have been charged or arrested and remain in the custody of the law enforcement agency. ICE officers assigned to fugitive operations seek to locate and arrest aliens with final orders of removal. These officers also seek to locate, arrest, and remove convicted criminal aliens living at large in communities and aliens who previously have been deported but have returned unlawfully to the United States. They also present illegal reentry cases for prosecution in federal courts to deter such recidivist conduct.

21. Likewise, in keeping with the Secretary's policy determination that immigration enforcement should be "smart and tough" by focusing on specific priorities, ICE issued a new strategy regarding worksite enforcement. This strategy shift prioritized the criminal investigation and prosecution of employers and de-emphasized the apprehension and removal of illegal aliens working in the United States without authorization. Although Federal law does not make it a distinct civil or criminal offense for unauthorized aliens merely to seek employment in the U.S., such aliens may be removed for being in the U.S. illegally. ICE's new strategy acknowledges that many enter the United States illegally because of the opportunity to work. Thus, the strategy seeks to address the root causes of illegal immigration and to do the following: (i) penalize employers who knowingly hire illegal workers; (ii) deter employers who are tempted to hire illegal workers; and (iii) encourage all employers to take advantage of well-crafted compliance tools. At the same time, the policy recognizes that humanitarian concerns counsel against focusing enforcement efforts on unauthorized workers. The strategy permits agents to exercise discretion and work with the prosecuting attorney to assess how to best proceed with respect to illegal alien witnesses. One of the problems with Arizona Senate Bill 1070 (SB 1070) is that it will divert focus from this "smart and tough" focus on employers to responses to requests from local law enforcement to apprehend aliens not within ICE's priorities.

22. In addition to refocusing ICE's civil enforcement priorities, ICE has also refocused the 287(g) program so that state and local jurisdictions with which ICE has entered into agreements to exercise federal immigration authority do so in a manner consistent with ICE's priorities. The mechanism for this refocusing has been a new MOA with revised terms and conditions. Jurisdictions that already had agreements were required to enter into this revised MOA in October of 2009. Also, ICE opted not to renew 287(g) agreements with task force

officers with the Maricopa County Sheriff's Office and officers stationed within the Los Angeles County Sheriff's Office's jail. These decisions were based on inconsistency between the expectations of the local jurisdiction and the priorities of ICE.

23. ICE communicates its enforcement priorities to state and local law enforcement officials in a number of ways. With respect to the 287(g) program, the standard MOA describes the focus on criminals, with the highest priority on the most serious offenders. In addition, when deploying interoperability technology through the Secure Communities program, local jurisdictions are advised of ICE's priorities in the MOA and in outreach materials.

24. In addition to the dissemination of national civil enforcement priorities to the field, the refocusing of existing ICE programs, and other efforts to prioritize immigration enforcement to most efficiently protect the border and public safety, the Assistant Secretary and his senior staff routinely inform field locations that they have the authority and should exercise discretion in individual cases. This includes when deciding whether to issue charging documents, institute removal proceedings, release or detain aliens, place aliens on alternatives to detention (*e.g.,* electronic monitoring), concede an alien's eligibility for relief from removal, move to terminate cases where the alien may have some other avenue for relief, stay deportations, or defer an alien's departure.

25. The Assistant Secretary has communicated to ICE personnel that discretion is particularly important when dealing with long-time lawful permanent residents, juveniles, the immediate family members of U.S. citizens, veterans, members of the armed forces and their families, and others with illnesses or special circumstances.

26. ICE exercises prosecutorial discretion throughout all the stages of the removal process—investigations, initiating and pursuing proceedings, which charges to lodge, seeking

termination of proceedings, administrative closure of cases, release from detention, not taking an appeal, and declining to execute a removal order. The decision on whether and how to exercise prosecutorial discretion in a given case is largely informed by ICE's enforcement priorities. During my tenure at ICE as an attorney litigating administrative immigration cases, as well as my role as a SAUSA prosecuting criminal offenses and in my legal and management roles at ICE headquarters, I am aware of many cases where ICE has exercised prosecutorial discretion to benefit an alien who was not within the stated priorities of the agency or because of humanitarian factors. For example, ICE has released an individual with medical issues from detention, terminated removal proceedings to allow an alien to regularize her immigration status, declined to assert the one year filing deadline in order to allow an individual to apply for asylum before the immigration judge, and terminated proceedings for a long-term legal permanent resident who served in the military, among numerous other examples.

27. ICE's exercise of discretion in enforcement decisions has been the subject of several internal agency communications. For example, Attachment A is a true and accurate copy of a November 7, 2007 memorandum from ICE Assistant Secretary Julie Myers to ICE Field Office Directors and ICE Special Agents in Charge. Pursuant to this memorandum, ICE agents and officers should exercise prosecutorial discretion when making administrative arrests and custody determinations for aliens who are nursing mothers absent any statutory detention requirement or concerns such as national security or threats to public safety. Attachment B is a true and accurate copy, omitting attachments thereto, of an October 24, 2005 memorandum from ICE Principal Legal Advisor William J. Howard to OPLA Chief Counsel as to the manner in which prosecutorial discretion is exercised in removal proceedings. Attachment C is a true and accurate copy of a November 17, 2000 memorandum from Immigration and Naturalization

Service (INS) Commissioner Doris Meissner to various INS personnel concerning the exercise of prosecutorial discretion. The Assistant Secretary also outlined in a recent memorandum to all ICE employees the agency's civil immigration enforcement priorities relating to the apprehension, detention, and removal of aliens (available at http://www.ice.gov/doclib/civil_enforcement_priorities.pdf).

28. In sum, ICE does not seek to arrest, detain, remove, or refer for prosecution, all aliens who may be present in the United States illegally. ICE focuses its enforcement efforts in a manner that is intended to most effectively further national security, public safety, and security of the border, and has affirmative reasons not to seek removal or prosecution of certain aliens.

International Cooperation with ICE Enforcement

29. ICE cooperates with foreign governments to advance our criminal investigations of transnational criminal organizations (such as drug cartels, major gangs, and organized alien smugglers) and to repatriate their citizens and nationals who are facing deportation. With respect to our criminal investigations, ICE's Office of International Affairs has 63 offices in 44 countries staffed with special agents who, among other things, investigate crime. In Mexico alone, ICE has five offices consisting of a total of 38 personnel. Investigators in ICE attaché offices investigate cross-border crime, including crime that affects Arizona and the rest of the Southwest. In addition, they work with foreign governments to secure travel documents and clearance for ICE to remove aliens from the United States. ICE negotiates with foreign governments to expedite the removal process, including negotiating electronic travel document arrangements. International cooperation for ICE is critical.

30. International cooperation advances ICE's goal of making the borders more secure. To address cross-border crime at the Southwest border, ICE is cooperating very closely with the

Government of Mexico in particular. Two prime examples of ICE and Mexican cooperation include Operation Armas Cruzadas, designed to improve information sharing and to identify, disrupt, and dismantle criminal networks engaged in weapons smuggling, and Operation Firewall, as part of which Mexican customs and ICE-trained Mexican Money Laundering-Vetted Units target the illicit flow of money out of Mexico on commercial flights and in container shipments.

31. Also to improve border security and combat cross-border crime, ICE is engaged in other initiatives with the Government of Mexico. For instance, ICE is training Mexican customs investigators. ICE also provides Mexican law enforcement officers and prosecutors training in human trafficking, child sexual exploitation, gang investigations, specialized investigative techniques, and financial crimes. ICE has recruited Mexican federal police officers to participate in five of the ICE-led Border Enforcement Security Task Forces (BESTs). The BEST platform brings together multiple law enforcement agencies at every level to combat cross-border crime, including crime touching Arizona. Sharing information and agents is promoting more efficient and effective investigations. ICE has benefited from the Government of Mexico's increased cooperation, including in recent alien smuggling investigations that resulted in arrests in Mexico and Arizona.

32. In addition to the importance of cooperation from foreign governments in criminal investigations, ICE also benefits from good relationships with foreign governments in effecting removals of foreign nationals. Negotiating removals, including country clearance, to approvals and securing travel documents, is a federal matter and often one that requires the cooperation of the country that is accepting the removed alien. ICE removes more nationals of Mexico than of any other country. In FY 2009, ICE removed or returned approximately 275,000

Mexican nationals, which constitutes more than 70 percent of all removals and returns. Not all countries are equally willing to repatriate their nationals. Delays in repatriating nationals of foreign countries causes ICE financial and operational challenges, particularly when the aliens are detained pending removal. Federal law limits how long ICE can detain an alien once the alien is subject to a final order of removal. Therefore, difficulties in persuading a foreign country to accept a removed alien runs the risk of extending the length of time that a potentially dangerous or criminal alien remains in the United States. Thus, the efficient operation of the immigration system relies on cooperation from foreign governments.

Reliance on Illegal Aliens in Enforcement and Prosecution

33. ICE agents routinely rely on foreign nationals, including aliens unlawfully in the United States, to build criminal cases, including cases against other aliens in the United States illegally. Aliens who are unlawfully in the United States, like any other persons, may have important information about criminals they encounter—from narcotics smugglers to alien smugglers and beyond—and routinely support ICE's enforcement activities by serving as confidential informants or witnesses. When ICE's witnesses or informants are illegal aliens who are subject to removal, ICE can exercise discretion and ensure the alien is able to remain in the country to assist in an investigation, prosecution, or both. The blanket removal or incarceration of all aliens unlawfully present in Arizona or in certain other individual states would interfere with ICE's ability to pursue the prosecution or removal of aliens who pose particularly significant threats to public safety or national security. Likewise, ICE can provide temporary and long-term benefits to ensure victims of illegal activity are able to remain in the United States.

34. Tools relied upon by ICE to ensure the cooperation of informants and witnesses include deferred action, stays of removal, U visas for crime victims, T visas for victims of human

trafficking, and S visas for significant cooperators against other criminals and to support investigations. These tools allow aliens who otherwise would face removal to remain in the United States either temporarily or permanently, and to work in the United States in order to support themselves while here. Many of these tools are employed in situations where federal immigration policy suggests an affirmative benefit that can only be obtained by not pursuing an alien's removal or prosecution. Notably, utilization of these tools is a dynamic process between ICE and the alien, which may play out over time. An alien who ultimately may receive a particular benefit—for example, an S visa—may not immediately receive that visa upon initially coming forward to ICE or other authorities, and thus at a given time may not have documentation or evidence of the fact that ICE is permitting that alien to remain in the United States.

35. Although ICE may rely on an illegal alien as an informant in any type of immigration or custom violation it investigates, this is particularly likely in alien smuggling and illegal employment cases. Aliens who lack lawful status in the United States are routinely witnesses in criminal cases against alien smugglers. For example, in an alien smuggling case, the smuggled aliens are in a position to provide important information about their journey to the United States, including how they entered, who provided them assistance, and who they may have paid. If these aliens were not available to ICE, special agents would not be positioned to build criminal cases against the smuggler. ICE may use a case against the smuggler to then build a larger case against others in the smuggling organization that assisted the aliens across the border.

36. ICE also relies heavily on alien informants and witnesses in illegal employment cases. In worksite cases, the unauthorized alien workers likewise have important insight and

information about the persons involved in the hiring and employment process, including who may be amenable to a criminal charge.

37. ICE also relies heavily on alien informants and cooperators in investigations of transnational gangs, including violent street gangs with membership and leadership in the United States and abroad. Informants and cooperating witnesses help ICE identify gang members in the United States and provide information to support investigations into crimes the gang may be committing. In some cases, this includes violent crime in aid of racketeering, narcotics trafficking, or other crimes.

38. During my years at ICE, I have heard many state and local law enforcement and immigration advocacy groups suggest that victims and witnesses of crime may hesitate to come forward to speak to law enforcement officials if they lack lawful status. The concern cited is that, rather than finding redress for crime, victims and witnesses will face detention and removal from the United States. To ensure that illegal aliens who are the victims of crimes or have witnessed crimes come forward to law enforcement, ICE has a robust outreach program, particularly in the context of human trafficking, to assure victims and witnesses that they can safely come forward against traffickers without fearing immediate immigration custody, extended detention, or removal. If this concern manifested itself—and if crime victims became reluctant to come forward—ICE would have a more difficult time apprehending, prosecuting, and removing particularly dangerous aliens.

Potential Adverse Impact of SB 1070 on ICE's Priorities and Enforcement Activities

39. I am aware that the State of Arizona has enacted new immigration legislation, known as SB 1070. I have read SB 1070, and I am generally familiar with the purpose and

provisions of that legislation. SB 1070 will adversely impact ICE's operational activities with respect to federal immigration enforcement.

40. I understand that section two of SB 1070 generally requires Arizona law enforcement personnel to inquire as to the immigration status of any individual encountered during "any lawful stop, detention or arrest" where there is a reasonable suspicion to believe that the individual is unlawfully present in the United States. I also understand that section two contemplates referral to DHS of those aliens confirmed to be in the United States illegally.

41. As a federal agency with national responsibilities, the burdens placed by SB 1070 on the Federal Government will impair ICE's ability to pursue its enforcement priorities. For example, referrals by Arizona under this section likely would be handled by either the Special Agent in Charge (SAC) Phoenix (the local HSI office), or the Field Office Director (FOD) Phoenix (the local ERO office). Both offices currently have broad portfolios of responsibility. Notably, SAC Phoenix is responsible for investigating crimes at eight ports of entry and two international airports. FOD Phoenix is responsible for two significant detention centers located in Florence and Eloy, Arizona, and a large number of immigration detainees housed at a local county jail in Pinal County, Arizona. FOD Phoenix also has a fugitive operations team, a robust criminal alien program, and it manages the 287(g) programs in the counties of Maricopa, Yavapai, and Pinal, as well as at the Arizona Department of Corrections.

42. Neither the SAC nor the FOD offices in Phoenix are staffed to assume additional duties. Inquiries from state and local law enforcement officers about a subject's immigration status could be routed to the Law Enforcement Support Center in Vermont or to agents and officers stationed at SAC or FOD Phoenix. ICE resources are currently engaged in investigating criminal violations and managing the enforcement priorities and existing enforcement efforts,

and neither the SAC nor FOD Phoenix are scheduled for a significant increase in resources to accommodate additional calls from state and local law enforcement. Similarly, the FOD and SAC offices in Arizona are not equipped to respond to any appreciable increase in requests from Arizona to take custody of aliens apprehended by the state.

43. Moreover, ICE's detention capacity is limited. In FY 2009, FOD Phoenix was provided with funds to detain no more than approximately 2,900 detention beds on an average day. FOD Phoenix uses that detention budget and available bed space not only for aliens arrested in Arizona, but also aliens transferred from Los Angeles, San Francisco, and San Diego. Notably, the President's budget for FY 2011 does not request an increase in money to purchase detention space. And with increasing proportions of criminal aliens in ICE custody and static bed space, the detention resources will be directed to those aliens who present a danger to the community and the greatest risk of flight.

44. Thus, to respond to the number of referrals likely to be generated by enforcement of SB 1070 would require ICE to divert existing resources from other duties, resulting in fewer resources being available to dedicate to cases and aliens within ICE's priorities. This outcome is especially problematic because ICE's current priorities are focused on national security, public safety, and security of the border. Diverting resources to cover the influx of referrals from Arizona (and other states, to the extent similar laws are adopted) could, therefore, mean decreasing ICE's ability to focus on priorities such as protecting national security or public safety in order to pursue aliens who are in the United States illegally but pose no immediate or known danger or threat to the safety and security of the public.

45. An alternative to responding to the referrals from Arizona, and thus diverting resources, is to largely disregard referrals from Arizona. But this too would have adverse

consequences in that it could jeopardize ICE's relationships with state and local law enforcement agencies (LEAs). For example, LEAs often request ICE assistance when individuals are encountered who are believed to be in the United States illegally. Since ICE is not always available to immediately respond to LEA calls, potentially removable aliens are often released back into the community. Historically, this caused some LEAs to complain that ICE was unresponsive. In September 2006, to address this enforcement gap, the FOD office in Phoenix created the Law Enforcement Agency Response (LEAR) Unit, a unit of officers specifically dedicated to provide 24-hour response, 365 days per year. ICE's efforts with this project to ensure better response to LEAs would be undermined if ICE is forced to largely disregard referrals from Arizona, and consequently may result in LEAs being less willing to cooperate with ICE on various enforcement matters, including those high-priority targets on which ICE enforcement is currently focused.

46. In addition to section two of SB 1070, I understand that the stated purpose of the act is to "make attrition through enforcement the public policy of all state and local government agencies in Arizona," and that the "provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." To this end, I understand that section three of SB 1070 authorizes Arizona to impose criminal penalties for failing to carry a registration document, that sections four and five, along with existing provisions of Arizona law, prohibit certain alien smuggling activity, as well as the transporting, concealing, and harboring of illegal aliens, and that section six authorizes the warrantless arrest of certain aliens believed to be removable from the United States.

47. The Arizona statute does not appear to make any distinctions based on the circumstances of the individual aliens or to take account of the Executive Branch's determination with respect to individual aliens, such as to not pursue removal proceedings or grant some form of relief from removal. Thus, an alien for whom ICE deliberately decided for humanitarian reasons not to pursue removal proceedings or not to refer for criminal prosecution, despite the fact that the alien may be in the United States illegally, may still be prosecuted under the provisions of the Arizona law. DHS maintains the primary interest in the humane treatment of aliens and the fair administration of federal immigration laws. The absence of a federal prosecution does not necessarily indicate a lack of federal resources; rather, the Federal Government often has affirmative reasons for not prosecuting an alien. For example, ICE may exercise its discretionary authority to grant deferred action to an alien in order to care for a sick child. ICE's humanitarian interests would be undermined if that alien was then detained or arrested by Arizona authorities for being illegally present in the United States.

48. Similarly, certain aliens who meet statutory requirements may seek to apply for asylum in the United States, pursuant to 8 U.S.C. § 1158, based on their having been persecuted in the past or because of a threat of future persecution. The asylum statute recognizes a policy in favor of hospitality to persecuted aliens. In many cases, these aliens are not detained while they pursue protection, and they do not have the requisite immigration documents that would provide them lawful status within the United States during that period. Under SB 1070, these aliens could be subjected to detention or arrest based on the state's priorities, despite the fact that affirmative federal policy supports not detaining or prosecuting the alien.

49. Additionally, some aliens who do not qualify for asylum may qualify instead for withholding of removal under 8 U.S.C. § 1231(b)(3). Similar to asylum, withholding of removal

provides protection in the United States for aliens who seek to escape persecution. Arizona's detention or arrest of these aliens would not be consistent with the Government's desire to ensure their humanitarian treatment.

50. Further, there are many aliens in the United States who seek protection from removal under the federal regulatory provisions at 8 C.F.R. § 208.18 implementing the Government's non-*refoulement* obligations under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In many cases, these aliens are not detained while they pursue CAT protection. Under SB 1070, these aliens could be subjected to detention or arrest based on the state's priorities. The detention or arrest of such aliens would be inconsistent with the Government's interest in ensuring their humane treatment, especially where such aliens may have been subject to torture before they came to the U.S.

51. Application of SB 1070 also could undermine ICE's efforts to secure the cooperation of confidential informants, witnesses, and victims who are present in the United States without legal status. The stated purpose of SB 1070, coupled with the extensive publicity surrounding this law, may lead illegal aliens to believe, rightly or wrongly, that they will be subject to immigration detention and removal if they cooperate with authorities, not to mention the possibility that they may expose themselves to sanctions under Arizona law if they choose to cooperate with authorities. Consequently, SB 1070 very likely will chill the willingness of certain aliens to cooperate with ICE. Although ICE has tools to address those concerns, SB 1070 would undercut those efforts, and thus risks ICE's investigation and prosecution of criminal activity, such as that related to illegal employment, the smuggling of contraband or people, or human trafficking.

52. Moreover, just as the ICE offices in Arizona are not staffed to respond to additional inquiries about the immigration status of individuals encountered by Arizona, or to and arrest or detain appreciably more aliens not within ICE's current priorities, the offices are not staffed to provide personnel to testify in Arizona state criminal proceedings related to a defendant's immigration status, such as a "Simpson Hearing" where there is indication that a person may be in the United States illegally and the prosecutor invokes Arizona Revised Statute § 13-3961(A)(a)(ii) (relating to determination of immigration status for purposes of bail). In some federal criminal immigration cases, Assistant United States Attorneys call ICE special agents to testify to provide such information as a person's immigration history or status. If ICE agents are asked to testify in a significant number of state criminal proceedings, as contemplated under SB 1070, they will be forced either to divert resources from federal priorities, or to refuse to testify in those proceedings, thus damaging their relationships with the state and local officials whose cooperation is often of critical importance in carrying out federal enforcement priorities.

53. Enforcement of SB 1070 also threatens ICE's cooperation from foreign governments. For example, the Government of Mexico, a partner to ICE in many law enforcement efforts and in repatriation of Mexican nationals, has expressed strong concern about Arizona's law. On May 19, 2010, President Barack Obama and Mexican President Felipe Calderón held a joint news conference, during which President Calderón criticized the Arizona immigration law, saying it criminalized immigrants. President Calderón reiterated these concerns to a joint session of the United States Congress on May 20, 2010. Any decrease in participation and support from the Government of Mexico will hinder ICE efforts to prioritize and combat cross-border crime.

54. The Government of Mexico is not the only foreign nation that has expressed concern about SB 1070. Should there be any decreased cooperation from foreign governments in response to Arizona's enforcement of SB 1070, the predictable result of such decreased cooperation would be an adverse impact on the effectiveness and efficiency of ICE's enforcement activities, which I have detailed above.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed the 1st day of July 2010 in Washington, D.C.

Daniel H. Ragsdale
Executive Associate Director
Management and Administration
U.S. Immigration and Customs Enforcement

ATTACHMENT A

Office of the Assistant Secretary

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

U.S. Immigration and Customs Enforcement

NOV - 7 2007

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

FROM: Julie L. Myers
Assistant Secretary

SUBJECT: Prosecutorial and Custody Discretion

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

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

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

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

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

Attachment

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 7 2000

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

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

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

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

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

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

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[1] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

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

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

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

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

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

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

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

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

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

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

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

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

ATTACHMENT B

Office of the Principal Legal Advisor

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

U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

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

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

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

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

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

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

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

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

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

* * * * * * * * * *

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

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

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

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

Examples:

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

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

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

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

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

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

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

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

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

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

Example:

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

3) Prosecutorial Discretion after NTA Issuance and Filing:

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

Examples:

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

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

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

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

4) **Post-Hearing Actions**:

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

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

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

Examples:

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

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

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

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

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

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

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

Examples:

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

* * * * * * * * * *

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

Official Use Disclaimer:

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

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

ATTACHMENT C

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

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

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

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

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

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

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

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

Legal and Policy Background

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

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

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

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

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

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

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

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

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

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

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

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

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

Investigations

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

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

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

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

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

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

Initiating and Pursuing Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Process for Decisions

Identification of Suitable Cases

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

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

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

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

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

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

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

Documenting Decisions

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

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

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

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

Future Impact

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

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

Legal Liability and Enforceability

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

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

Training and Implementation

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

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The United States of America,

Plaintiff,

v.

The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity,

Defendants.

No. 2:10-cv-1413-NVW

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

ORAL ARGUMENT REQUESTED

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Pursuant to Federal Rule of Civil Procedure 65, the United States hereby moves this Court to preliminarily enjoin enforcement of Arizona's S.B. 1070 (Laws 2010, Chapter 113), as amended by H.B. 2162, to preserve the status quo until this matter can be adjudicated.

INTRODUCTION

In our constitutional system, the power to regulate immigration is exclusively vested in the federal government. The immigration framework set forth by Congress and administered by federal agencies reflects a careful and considered balance of national law enforcement, foreign relations, and humanitarian concerns – concerns that belong to the nation as a whole, not a single state. The Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country. Although a state may adopt regulations that have an indirect or incidental effect on aliens, a state may *not* establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration law.

The State of Arizona has crossed this constitutional line. In acknowledged disagreement with the manner in which the federal government has regulated immigration and in contravention of these constitutional principles, Arizona recently enacted S.B. 1070[1] – a comprehensive set of immigration provisions explicitly designed to "work together" to "discourage and deter the unlawful entry and presence of aliens" by making "attrition through enforcement the public policy" of Arizona. To carry out Arizona's "public policy," S.B. 1070 creates new state crimes that penalize an alien's failure to meet federal registration requirements, an alien's unauthorized attempt to solicit work, and the commercial transportation of unlawfully present aliens. And to achieve maximum enforcement of its new immigration policy, S.B. 1070 establishes a new state-wide mandatory immigration status-verification system to be employed whenever practicable by every law enforcement officer who, during the course of a stop, has reasonable suspicion of a person's "unlawful presence." Further, any private citizen of Arizona may sue a local law enforcement agency

[1] Throughout this memorandum, the term "S.B. 1070" refers to the statute as amended by H.B. 2162.

for money damages if that agency fails to enforce immigration laws to the fullest extent possible.

Both separately and in concert, S.B. 1070's provisions would subvert and interfere with federal immigration laws and objectives; the law is therefore preempted. *First*, Arizona impermissibly seeks to create a state-specific "attrition through enforcement" policy that is expressly designed to supplant the federal government's immigration policy. As such, Arizona's immigration policy does not simply provide legitimate assistance to the federal government but instead exceeds a state's role with respect to aliens, interferes with the federal government's balanced administration of the immigration laws, and critically undermines U.S. foreign policy objectives. S.B. 1070 therefore exceeds constitutional boundaries. The states are not permitted to set their own independent immigration policies, with varying and potentially conflicting enforcement systems and priorities. Were a number of states to act as Arizona has and strike out on their own, federal immigration policy and enforcement efforts would be crippled. *Second*, individual provisions of S.B. 1070 separately conflict with federal law and are therefore preempted. S.B. 1070's new state-wide mandatory immigration status verification scheme and warrantless arrest provision will result in the harassment and incarceration of foreign nationals and lawful resident aliens – and even U.S. citizens who will not have readily available documentation to demonstrate their citizenship. In addition, this scheme will divert and burden federal immigration resources that are needed to target high-priority aliens. The federal government has prioritized enforcement against dangerous aliens who pose a threat to national security and public safety, but Arizona's indiscriminate approach will stand in the way of the federal government's focused efforts to get the most dangerous aliens off the streets. And S.B. 1070's criminal provisions are preempted because they each conflict with congressional objectives underlying specific federal immigration laws.

A preliminary injunction against S.B. 1070 is necessary to preserve the status quo, because the United States is likely to prevail on the merits of this case, and absent injunctive relief, the United States will continue to suffer irreparable harm. Enforcement of S.B. 1070

will disrupt the constitutional order by undermining the federal government's control over the regulation of immigration and immigration policy and by interfering with its ability to balance the purposes and objectives of federal law and to pursue its chosen enforcement priorities. Moreover, S.B. 1070 will result in the harassment of lawfully present aliens and even U.S. citizens. Implementation of the law will damage the United States' ability to speak with a single and authoritative voice to foreign governments on immigration matters and is already having negative effects on long-standing and vital international relationships. S.B. 1070 will also impede the federal government's ability to provide measured enforcement of criminal sanctions so as to accommodate the many other objectives that Congress enacted into the immigration laws. As a matter of law and in the public interest, this Court should enter a preliminary injunction to prevent S.B. 1070 from going into effect.

BACKGROUND

I. FEDERAL STATUTORY & REGULATORY FRAMEWORK GOVERNING IMMIGRATION

The Constitution vests the political branches with exclusive and plenary authority to establish the nation's immigration policy. *See* U.S. Const., art. I § 8, cl. 4 (Congress has the authority to "establish an uniform Rule of Naturalization"); U.S. Const., art. I § 8, cl. 3 (Congress has the authority to "regulate Commerce with foreign Nations"); *see also* U.S. Const., art. II § 3 (vesting the President with the authority to "take Care that the Laws be faithfully executed"). Pursuant to this authority, over several decades, Congress has enacted and refined a detailed statutory framework governing immigration – a task that has involved reconciling the complex and often competing interests of national security and public safety, foreign relations, and humanitarian concerns. *See, e.g.*, Declaration of James B. Steinberg, Deputy Secretary of State (attached as Exhibit 1), ¶¶ 5-6. The federal immigration scheme, largely enacted as part of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*, empowers the Department of Homeland Security ("DHS"), the Department of Justice ("DOJ"), and the Department of State, among other federal agencies, to administer and enforce the immigration laws, and it provides for the considerable exercise of discretion to

direct enforcement in a manner consistent with federal policy objectives.

A. Federal Laws and Discretion Regarding the Entry, Removal, and Treatment of Aliens Within the United States

The INA sets forth the conditions under which a foreign national may be admitted to and remain in the United States. As part of these conditions, Congress created a comprehensive alien registration system for monitoring the entry and movement of aliens within the United States. *See* 8 U.S.C. §§ 1201(b), 1301-1306; *see also* 8 C.F.R. Part 264. If an alien enters the United States without inspection, presents fraudulent documents at entry, violates the conditions of his admission, or engages in certain proscribed conduct, the federal government (through DHS) may place him in removal proceedings. *See* 8 U.S.C. §§ 1225, 1227, 1228, 1229, 1229c, 1231. In addition to removal, DHS and DOJ may employ civil and criminal sanctions against the alien for particular violations of the federal immigration laws.[2] *See, e.g.,* 8 U.S.C. §§ 1325, 1306, 1324c.

To prevent the unlawful entry of aliens into the United States, Congress further criminalized certain activities of third parties, such as the smuggling of unlawfully present aliens into the country, and the facilitation of unlawful immigration within the nation's borders. *See* 8 U.S.C. § 1324. Critically, Congress provided for the civil removal of unlawfully present aliens, but did not criminally penalize their mere presence or movement within the country absent other factors. Nor did Congress impose criminal penalties on aliens for solely seeking or obtaining employment in the country without authorization, *see* H.R. Rep. No. 99-682(I) at 46, electing instead to prohibit employers from hiring unauthorized aliens. *See* 8 U.S.C. § 1324a(a)(1).

Under this framework, administering agencies are empowered to exercise their

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[2] Under federal law, an alien's mere unlawful presence in the United States is not a crime, although it may subject the alien to removal from the United States. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1) (B)&(C). Unlawful presence becomes an element of a criminal offense, however, when an alien is found in the United States after having been formally removed or after voluntarily departing from the United States pending execution of a final removal order. *See* 8 U.S.C. § 1326. Unlawful *entry* into the United States is a crime. *See* 8 U.S.C. § 1325.

discretion not to apply a specific sanction to an alien who has unlawfully entered or remained in the United States. For example, DHS has authority to permit aliens, including those who would otherwise be inadmissible, to temporarily enter and remain the United States (*i.e.*, "parole") for "urgent humanitarian reasons" or "significant public benefit." 8 U.S.C. § 1182(d)(5)(A). In addition, DHS and DOJ may withhold or cancel the removal of an alien under a variety of special circumstances, including those relating to family unity and domestic abuse. *See* 8 U.S.C. § 1227(a)(1)(E)(iii); 8 U.S.C. §§ 1229b (providing DOJ discretion to cancel the removal of an otherwise inadmissible or removable alien under certain circumstances); *see also* 8 U.S.C. § 1182(a)(6)(A) (excluding from inadmissibility certain aliens who have been subjected to battery or extreme cruelty). Further, both DHS and DOJ may grant an otherwise unlawfully present or removable alien relief from removal – and potentially adjust that alien's immigration status – if the alien meets certain conditions. If an alien has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, he may be eligible for asylum in the United States, "irrespective of [his] status." *See* 8 U.S.C. § 1158.[3] Similarly, an alien may be afforded temporary protected status and remain in the United States if he is an eligible national of a country that DHS has designated as experiencing ongoing armed conflict, natural disaster, or another extraordinary circumstance. *See* 8 U.S.C. § 1254a. Under certain circumstances, moreover, an alien may be provided employment authorization while the federal government evaluates his immigration status. *See, e.g.*, 8 C.F.R. § 274a.12(c)(14); Declaration of Michael Aytes, Senior Advisor to the Director of U.S.

[3] The United States is likewise bound by international treaty obligations not to remove, with limited exceptions, a refugee to any country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (*see* 1967 Protocol relating to the Status of Refugees, incorporating by reference Art. 33(1) of the 1951 Convention relating to the Status of Refugees), and not to remove or extradite any individual to a country where it is more likely than not that he would be tortured (*see* Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Citizenship & Immigration Services (attached as Exhibit 2), ¶¶ 6, 12, 14, 15, 18.[4]

Although not an exhaustive description of the complex and detailed federal immigration framework, these provisions reflect that the federal immigration laws do not focus on one, singular interest but instead seek to further multiple competing objectives.

B. Federal Immigration Enforcement and the Cooperation of States and Localities

DHS is the federal agency primarily tasked with enforcing the immigration laws, mainly through its components, U.S. Immigration and Customs Enforcement ("ICE"), U.S. Customs and Border Protection ("CBP"), and U.S. Citizenship and Immigration Services ("USCIS"). *See* 6 U.S.C. §§ 251–52, 271; 8 U.S.C. § 1103. DHS receives state and local cooperation. *See, e.g.*, 8 U.S.C. § 1103(a)(10) (authorizing DHS to empower state or local law enforcement with immigration enforcement authority when an "actual or imminent mass influx of aliens . . . presents urgent circumstances"). In addition, Congress prescribed by statute a number of ways in which states may assist the federal government in its enforcement of the immigration laws. 8 U.S.C. § 1357(g) (1)–(9) (enabling DHS to enter into agreements to authorize appropriately trained and supervised state and local officers to perform enumerated immigration related functions); 8 U.S.C. § 1373(a)-(b); 8 U.S.C. § 1252c (authorizing state and local law enforcement to arrest aliens who are unlawfully present in the United States because they were previously removed after being convicted of a felony in the United States). DHS works cooperatively with states and localities through a variety of programs. For example, ICE administers the Law Enforcement Support Center ("LESC"), which serves as a national enforcement operations center that promptly provides

[4] In addition to formal policies that provide exceptions from removal, federal authorities have discretion not to remove certain unlawfully present aliens where the exercise of discretion would further one of the INA's policy objectives. For example, in the wake of the recent earthquake in Haiti – and before the institution of a formal Temporary Protected Status program for Haiti – the federal government exercised discretion to suspend the removal of Haitian nationals. Similarly, the President's foreign affairs authority allows for "deferred enforced departure," pursuant to which the executive branch may use its discretion to suspend removal proceedings where doing so would further humanitarian, foreign policy, or other law enforcement goals. *See, e.g.,* http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Deferred-Enforced-Departure-for-Liberians.

immigration status and identity information to local, state, and federal law enforcement agencies regarding aliens suspected of, arrested for, or convicted of criminal activity. Declaration of David C. Palmatier, Unit Chief for LESC (attached as Exhibit 3), ¶¶ 3-6. Further, ICE and CBP respond to requests from state and local law enforcement officers on a variety of immigration matters.[5] Palmatier Decl. ¶ 3; Declaration of David V. Aguilar, Deputy Commissioner, CBP (attached as Exhibit 5), ¶ 22.

II. ARIZONA'S S.B. 1070

On April 23, 2010, Governor Janice Brewer signed into law S.B. 1070, a comprehensive and unprecedented state effort to regulate immigration. Expressly intended to make trition through enforcement the public policy of all state and local government agencies in Arizona," S.B. 1070 is a set of mostly criminal provisions governing police procedures, immigration enforcement, alien registration, transportation, and employment – all of which are intended to "work together to discourage and deter the unlawful entry and presence of aliens." S.B. 1070 § 1. One week later, Governor Brewer signed H.B. 2162, which amended S.B. 1070 for the purpose of responding to those who "expressed fears that the original law would somehow allow or lead to racial profiling." Statement by Governor Jan Brewer (Apr. 30, 2010), at http://azgovernor.gov/dms/upload/PR_043010_StatementGovBrewer.pdf. The law will go into effect on July 29, 2010.

A. Section 2 – Arizona's Mandatory Alien Inspection Scheme

The first pillar of Arizona's new immigration policy is a mandatory alien inspection scheme. As amended by H.B. 2162, Section 2 of S.B. 1070 (adding Ariz. Rev. Stat. 11-1051) mandates that for any lawful "stop, detention or arrest made by a law enforcement official or . . . agency" in the enforcement of any state or local law (including civil ordinances) where reasonable suspicion exists that an individual is an "unlawfully present"

[5] Another one of these programs is the Law Enforcement Agency Response program ("LEAR"), an Arizona-specific program that is operational 24 hours a day, 7 days a week, for responding to requests for assistance from ICE regarding suspected unlawfully present aliens. Declaration of Daniel H. Ragsdale, Executive Associate Director for Management & Administration, ICE (attached as Exhibit 4), ¶ 45.

alien in the United States, the officer must make a reasonable attempt to determine the individual's immigration status when practicable.[6] The officer is required to verify the person's status, either through the federal government pursuant to 8 U.S.C. § 1373(c) or through a federally qualified law enforcement officer.[7] S.B. 1070 § 2. Section 2 also requires that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Id.* § 2. Because this clause does not depend on "reasonable suspicion" of unlawful presence, it requires Arizona law enforcement to verify the immigration status of every person who is arrested in the state.

Section 2 further provides that any legal resident of Arizona may bring a civil action in a state court to challenge any official or agency that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law." S.B. 1070 § 2.

B. Section 3 – Arizona's Alien Registration Crime

Going beyond the mandatory inspection scheme in Section 2, Section 3 of S.B. 1070 (adding Ariz. Rev. Stat. 13-1509), makes it a new state criminal offense for an alien in Arizona to violate 8 U.S.C. § 1304(e), which requires every alien to "at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him," or 8 U.S.C. § 1306(a), which penalizes the willful failure to apply for registration when required. S.B. 1070 § 3. Section 3 provides a state penalty of up to $100 and twenty days imprisonment for a first offense and thirty days

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[6] On the same day that she signed S.B. 1070 into law, Governor Brewer issued an executive order requiring law enforcement training to "provide clear guidance to law enforcement officials regarding what constitutes reasonable suspicion," and to "make clear that an individual's race, color or national origin alone cannot be grounds for reasonable suspicion to believe any law has been violated." Arizona State Executive Order 2010-09 (Apr. 23, 2010).

[7] Section 2(B) excuses law enforcement from determining a person's immigration status where the determination may hinder or obstruct an investigation. S.B. 1070 2(B). Under Section 2, a person is presumed not to be "unlawfully present" upon showing a valid Arizona driver's license, non-operating identification license, tribal identification, or any other state, federal, or local identification that is only issued upon proof of legal presence in the United States. *Id.*

imprisonment for any subsequent violation. *Id.* Section 3 may be enforced through an immigration status determination that is triggered by Section 2. *See id.*, §§ 1-3. Section 3's focus on criminalizing unlawful presence is revealed by an exception which renders the section's criminal penalties inapplicable "to a person who maintains authorization from the federal government to remain in the United States." S.B. 1070 § 3(F).

C. Section 4/Ariz. Rev. Stat. 13-2319 – Arizona's Alien Smuggling Crime

Section 4 of S.B. 1070 amends Ariz. Rev. Stat. 13-2319 (collectively, Arizona's "alien smuggling prohibition"). S.B. 1070 § 4. Arizona's alien smuggling prohibition makes it a felony for "a person to intentionally engage in the smuggling of human beings for profit or commercial purpose." Ariz. Rev. Stat. 13-2319. The statute defines "smuggling of human beings" as the "transportation, procurement of transportation or use of property . . . by a person or an entity that knows or has reason to know that the person or persons transported . . . are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law." *Id.* § 13-2319(F)(3). A violation of Arizona's alien smuggling prohibition constitutes at least a class 4 felony, with a presumptive sentence of 2.5 years imprisonment. *See* Ariz. Rev. Stat. 13-2319(B); Ariz. Rev. Stat. 13-702(D). This provision, in conjunction with Arizona's conspiracy statute, allows for an alien to be prosecuted for "smuggl[ing] oneself." *State v. Barragan Sierra*, 196 P.3d 879, 888 (Ariz. App. Div. 2008).

D. Section 5 – Arizona's Alien Work Crime

Arizona's new immigration policy also regulates the employment of unlawfully present aliens. Section 5 of S.B. 1070 adds Ariz. Rev. Stat. 13-2928, which makes it a new state crime for any person who is "unauthorized" and "unlawfully present" in the United States to solicit, apply for, or perform work. S.B. 1070 § 5(C)-(E). A violation of this provision is a class 1 misdemeanor, with a sentence of up to six months imprisonment. S.B. 1070 (Ariz. Rev. Stat. 13-2928), § 5(F); Ariz. Rev. Stat. 13-707(A).

E. Section 5 – Arizona's Alien Transporting and Harboring Crime

Section 5 of S.B. 1070 also adds Ariz. Rev. Stat. 13-2929, which makes it a new state

crime for a person committing any criminal offense to (1) "transport . . . an alien . . . , in furtherance of the illegal presence of the alien in the United States, . . . if the person knows or recklessly disregards" that the alien is here unlawfully; (2) "conceal, harbor or shield an alien from detection . . . if the person knows or recklessly disregards the fact that the alien" is here unlawfully; or (3) "encourage or induce an alien to come to or reside in [Arizona] if the person knows or recklessly disregards the fact that such . . . entering or residing in [Arizona] is or will be in violation of law." S.B. 1070 § 5.

F. Section 6 – Arizona's Warrantless Arrest of "Removable" Aliens

Section 6 of S.B. 1070, in keeping with S.B. 1070's focus on "attrition through enforcement," further augments the authority of law enforcement officials to enforce immigration law. Section 6 amends a preexisting Arizona criminal statute (Ariz. Rev. Stat. 13-3883) governing the circumstances under which law enforcement officers can make a warrantless arrest, by allowing the arrest of anyone whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." S.B. 1070 § 6. This new warrantless arrest authority applies to persons who have committed an offense in another state when an Arizona law enforcement official believes that offense would make the person removable from the United States. *See* Ariz. Rev. Stat. 13-105(26).

LEGAL STANDARD

A preliminary injunction is warranted where, as here, the movant has established that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009); *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009); *see* Fed. R. Civ. P. 65.

ARGUMENT

I. THE UNITED STATES IS LIKELY TO PREVAIL ON THE MERITS

A. Relevant Principles of Preemption

The Supremacy Clause of the U.S. Constitution provides that federal laws and treaties are "the supreme Law of the Land." U.S. Const., art. VI, cl. 2. In some cases, the Constitution – through its own force – can preempt state action in a field exclusively reserved for the federal government. *See De Canas v. Bica*, 424 U.S. 351, 356 (1976). Statutes enacted by Congress may also preempt – either expressly or impliedly – otherwise permissible state action. *See Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). The Supreme Court has recognized two bases by which state or local laws may be impliedly preempted. "Field preemption" exists when a "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room to supplement it" because "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (internal quotations marks omitted). "Conflict preemption" occurs when a party cannot comply with both state and federal law, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also Kobar v. Novartis Corp.*, 378 F. Supp. 2d 1166, 1169 (D. Ariz. 2005) (Bolton, J.). These bases for preemption are not "rigidly distinct," however, and "field pre-emption may be understood as a species of conflict pre-emption." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal citations omitted).

Moreover, "that the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by authors of The Federalist in 1787, and has since been

given continuous recognition by [the Supreme] Court." *Hines*, 312 U.S. at 62. Although this federal power does not preclude "every state enactment which in any way deals with aliens," *De Canas v. Bica*, 424 U.S. at 355, or *bona fide* state cooperation in the enforcement of the federal immigration laws, *see, e.g.*, 8 U.S.C. § 1357(g)(10); *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), it has long been recognized that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *De Canas*, 424 U.S. at 354; *see also Toll v. Moreno*, 458 U.S. 1, 11 (1982) ("determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization" are matters exclusively reserved to the federal government); *Mathews v. Diaz*, 426 U.S. 67, 84 (1976) ("[I]t is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."). Further, a state exceeds its power to enact regulations touching on aliens generally if the regulation is not passed pursuant to state "police powers" that are "focuse[d] directly upon" and "tailored to combat" what are "essentially local problems." *De Canas*, 424 U.S. at 356–57.

B. The Overall Statutory Scheme of S.B. 1070[8] is Preempted Because it Sets a State-Level Immigration Policy That Interferes with Federal Administration and Enforcement of the Immigration Laws

As explained in detail in the next section, individual provisions of S.B. 1070 are invalid under the Supremacy Clause because each separately conflicts with federal immigration law and policy. But the statute, taken as a whole, also suffers from a fundamental, overarching defect: It impermissibly attempts to set immigration policy at the

[8] Sections 7-9 of S.B. 1070 amend preexisting provisions of Arizona law at issue in *Chamber of Commerce of the United States of America v. Candelaria*, 130 S. Ct. 534, *cert. granted*, 78 U.S.L.W. 3065 (U.S. June 28, 2010) (No. 09-115). The instant motion does not seek to enjoin those provisions of S.B. 1070; the views of the United States regarding those provisions are reflected in the Government's brief to the Supreme Court. *See* Brief for the United States as Amicus Curiae, 2010 WL 2190418 (May 28, 2010). Section 10 is preempted insofar as it is based on the state law violations identified in Sections 4 and 5, which are preempted for the reasons discussed herein. Sections 11-14 are administrative provisions which are not the subject of this dispute.

state level and is therefore preempted.

Dissatisfied with the federal government's response to illegal immigration,[9] Arizona has sought, through S.B. 1070, to override the considered judgment of Congress regarding the formulation of immigration policy, and the judgment of the executive branch regarding how to balance competing objectives in implementing the federal immigration laws. Arizona's monolithic "attrition through enforcement" policy pursues only one goal of the federal immigration system – maximum reduction of the number of unlawfully present aliens – to the exclusion of all other objectives. To make matters worse, even in pursuing that goal, Arizona's policy will disrupt federal enforcement priorities and divert federal resources needed to target dangerous aliens. S.B. 1070 is therefore preempted, because (1) it is an unlawful attempt to set immigration policy at the state level, (2) the policy it advances conflicts with federal objectives animating federal administration and enforcement of the INA, and (3) it interferes with U.S. foreign policy objectives and foreign relations more broadly. Standing alone, Arizona's state-level immigration policy is intolerable under the Constitution and federal law. But the court should also consider the consequences that would follow were Arizona's approach to be allowed. The Supremacy Clause protects the federal system against the chaos that would result were states and localities across the country allowed to fashion their own immigration schemes according to their own (potentially conflicting) policy choices and subject the federal government to the demands of multiple enforcement priorities.

1. S.B. 1070 Represents an Unlawful Attempt to Set Immigration Policy at the State Level

Only the federal government may establish immigration policy – namely, the process of "determin[ing] who should or should not be admitted into the country, " *De Canas,* 424 U.S. at 355, and the "conditions lawfully imposed by Congress upon . . . residence of aliens," *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948). *See also Ferreira v.*

[9] *See* Signing Statement by Governor Jan Brewer, April 23, 2010, available at http://www.azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf (stating that S.B. 1070 was motivated by what Arizona referred to as the federal government's "misguided policy" and its "refus[al] to fix" immigration problems).

Ashcroft, 382 F.3d 1045, 1050 (9th Cir. 2004) ("In the immigration context . . . the need for national uniformity is paramount."); *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 815 (7th Cir. 2003) ("Federal immigration power is not just superior to that of the states; it is exclusive of any state power over the subject. Illinois is not entitled to have a policy on the question [of] what precautions should be taken to evaluate the credentials of aliens.").

This prohibition on state formulations of immigration *policy* does not preclude a state from cooperating with the federal government on immigration matters, nor does it restrict a state from adopting state laws that have incidental effects on aliens. *See De Canas*, 424 U.S. at 355-56 ("local regulation" with only a "purely speculative and indirect impact on immigration" is not "a constitutionally proscribed regulation of immigration"). Indeed, state participation in cooperative immigration enforcement is specifically contemplated by federal law. *See, e.g.*, 8 U.S.C. § 1357(g). No mechanical test defines the limit of state power to promulgate, under their police powers, regulations incidentally affecting immigration. But at a minimum, a state is generally barred from enacting a "comprehensive scheme" for immigration, *i.e.*, a system of state laws that affects "a direct and substantial impact on immigration." *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769–70 (C.D. Cal 1995).[10] S.B. 1070 falls on the prohibited side of this line because, as discussed below, the statute (i) explicitly refers to itself as creating "public policy" for the State of Arizona on immigration issues and was intended to rival or supplant federal immigration policy, (ii) establishes interlocking regulations to further the State's policy, and (iii) effectuates the "policy" through the criminal and procedural sections of the statute, which include a private right of action to ensure the maximum state enforcement of immigration laws. S.B. 1070 § 2(H); *see also* Part I.C, *infra*.

According to the statute's statement of "intent," S.B. 1070 is not meant to exercise

[10] *See also De Canas*, 424 U.S. at 356-59; *Hines*, 312 U.S. at 66; *League of United Latin Am. Citizens*, 908 F. Supp. at 769-71; *Pennsylvania v. Nelson*, 350 U.S. 497, 507 (1956) ("Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. . . . [T]he [state] Statute presents a peculiar danger of interference with the federal program."); *cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419& n.11 (2003).

traditional state police powers but rather seeks to establish an Arizona-specific immigration "public policy." S.B. 1070 § 1.[11] The substantive provisions of S.B. 1070 effectuate Section 1's statement of intent, establishing various bases for detaining and incarcerating aliens in Arizona in order to achieve the overarching goal of regulating immigration through "attrition through enforcement." Sections 2 and 6 expand the set of suspected aliens whose immigration status will be verified by Arizona officials. Sections 3, 4, and 5 provide several means of criminally sanctioning any alien who is unlawfully present in the state – a status which is not a federal crime but which is the focus of Sections 2 and 6. And the private right of action embodied in Section 2 ensures, on pain of a private lawsuit for money damages, that state and local officials in Arizona maximally enforce the provisions of S.B. 1070, thereby establishing an Arizona immigration policy that promotes sanctions to the exclusion of other interests that animate the federal immigration laws and that disrupts federal enforcement priorities, including the focus on dangerous aliens. In stated purpose and necessary operation, therefore, the provisions of S.B. 1070 demand that Arizona pursue at all costs a policy designed to deter unlawfully present aliens from moving into the state and to inspect, investigate, detain, and in some cases criminally sanction those already in the state. For these reasons, S.B. 1070 is a comprehensive and aggressive effort to set state-specific immigration policy that will have a "direct and substantial impact" on immigration, and it is therefore preempted as a matter of law. *See League of United Latin Am. Citizens*, 908 F. Supp. at 769–70.

2. S.B. 1070's Policy of "Attrition Through Enforcement" Conflicts with the Federal Immigration Framework

The Supreme Court has made clear that state laws may be preempted where they fail to account for, or seek to countermand, the considered balance between competing interests

[11] Legislative history confirms that S.B. 1070 was animated by the belief that "citizens have a constitutional right to expect the immigration laws to be enforced" – resulting in a statute in which maximal "enforcement" is the solitary concern. *See* Minutes of Meeting of Committee on Military Affairs and Public Safety, Consideration of S.B. 1070, March 31, 2010, at 3.

struck by Congress in enacting a statute,[12] or by the executive branch in enforcing that statute. S.B. 1070 falls squarely within this prohibited category.

In *Crosby v. National Foreign Trade Council*, for example, the Court held that a Massachusetts law restricting purchases from companies doing business with Burma interfered with the executive branch's authority over economic sanctions against that country. 530 U.S. at 376. The Court determined that Congress had not only given the executive branch the authority to impose certain sanctions against Burma, but that in doing so, it provided the discretion and flexibility to levy and relieve those sanctions in a manner that would advance human rights and democracy in Burma and be consistent with the national security interests of the United States. *Id.* at 374-75. Massachusetts's "sanction" on Burma was preempted because it would have permitted the state to effectively second-guess the specific balance of sanctions (whether levied or withheld) that was available to and employed by the United States. *Id.* at 376. Notably, even though many aspects of the Massachusetts sanction regime nominally could have been pursued by the executive branch under existing law, the state law was still deemed invalid because the state's imposition of sanctions necessarily impeded executive discretion as to the appropriate balance of interests to be reflected in U.S. policy towards Burma.[13]

Buckman Co. v. Plaintiffs' Legal Committee supports the same conclusions. In *Buckman*, the Court determined that the Food, Drug, and Cosmetic Act (FDCA) empowered the FDA with a "variety of enforcement options that allow it to make a measured response

[12] *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) ("[S]tate regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws. . . . Where it is clear how the patent laws strike that balance in a particular circumstance, that is not a judgment the States may second-guess."); *Felder v. Casey*, 487 U.S. 131, 143 (1988) ("[H]owever understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it.").

[13] In fact, the Supreme Court treated the very grant of discretion as evidence that Congress impliedly preempted state actions that would interfere with the executive branch's exercise of enforcement discretion. *Id.* at 376 ("It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.").

to suspected fraud," and that under the statutory scheme, the "FDA pursues difficult (and often competing) objectives," such as ensuring that medical devices are reasonably safe, while allowing devices on the market as soon as possible, and regulating medical devices without interfering with the practice of medicine. 531 U.S. 341, 349 (2001). The *Buckman* Court held that the FDCA's enforcement scheme preempted state law tort claims premised on fraud committed against the FDA, noting that the relationship between the federal government and those it regulates is a matter for the federal government and not part of the states' traditional police powers. The Court further reasoned that because the FDA pursues a particular balance of competing objectives, states are precluded from taking action that could skew the "balance sought by the Administration" through its calibrated enforcement policies. *Id.* at 348. This Court has likewise interpreted *Buckman* as cautioning against the "inherent difficulty" that arises when states try to "substitute their judgment for that of the" federal government. *Kobar*, 378 F. Supp. 2d at 1173–74 (Bolton, J.).

Those principles are dispositive here. To begin with, it is beyond question that the federal immigration regime established by Congress, no less than the regulatory regimes at issue in *Crosby* and *Buckman*, is complex, and requires a balance among multiple and sometimes competing objectives. *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (immigration control and management is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program").[14] It is certainly a primary objective of federal law to prevent aliens from

[14] *See also New Jersey v. United States*, 91 F.3d 463, 470 (3d Cir. 1996) ("Decisions about how best to enforce the nation's immigration laws in order to minimize the number of illegal aliens crossing our borders patently involve policy judgments about resource allocation and enforcement methods. Such issues fall squarely within a substantive area committed by the Constitution to the political branches."); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (finding state restrictions on employment of nonresident alien workers preempted by federal law, because although the state and federal laws "share some common purposes" of "assur[ing] an adequate labor force on the one hand and [ ] protect[ing] the jobs of citizens on the other," the "conflict arises because the Virgin Islands and the United States strike the balance between these two goals differently"); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 527 (M.D. Pa. 2007) (several laws that (continued...)

unlawfully entering and residing in the United States, and Congress has empowered DHS and DOJ with a range of enforcement options to this end. *See, e.g.*, 8 U.S.C. §§ 1182, 1225, 1227, 1229, 1306, 1324, 1324c, 1325. But the federal immigration laws also take into account other uniquely national interests and priorities, such as facilitating trade and commerce; welcoming foreign nationals who visit or immigrate lawfully and ensuring their fair and equitable treatment wherever they reside; and responding to humanitarian and foreign affairs concerns at the global and individual levels. Consequently, there are situations in which other congressional policy objectives weigh against removal or incarceration of certain unlawfully present aliens.[15] Similarly, the federal government prioritizes its enforcement efforts by targeting highly threatening aliens who pose a danger to national security and public safety.

As a result of the complexities inherent in the enforcement of the federal immigration scheme, DHS and DOJ necessarily must (i) establish global policy objectives that attempt to strike a balance between employing criminal sanctions and other immigration values, and (ii) exercise their authority and discretion on a case-by-case basis consistent with those global objectives. *See* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002); 8 U.S.C. § 1103; 8 U.S.C. § 1252(g); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (describing deferred action as a "commendable exercise

[14] (...continued)
turned on immigration status held to be preempted because they "strike a different balance" than that reflected in federal immigration policy).

[15] For example, Congress has clearly anticipated circumstances in which an alien may have unlawfully entered the United States or violated the conditions of his admission, but for whom the United States nonetheless has an interest in providing humanitarian relief. *See, e.g.*, 8 U.S.C. § 1158 (asylum); § 1254a (temporary protected status); § 1227(a)(1)(E)(iii) (humanitarian waiver of deportability to assure family unity); § 1229b (cancellation of removal); § 1182 (d)(5) (parole); *see also* Ragsdale Decl. ¶¶ 18, 26, 47–50 (describing humanitarian aspect to immigration enforcement policy). These humanitarian programs demonstrate that one of many objectives of federal immigration policy is to welcome such individuals to the United States, notwithstanding possible temporary unlawful presence. It would therefore violate federal policy to prosecute or detain these types of aliens for unlawful presence – a situation often known to the federal government and, for affirmative policy reasons, not used as the basis for a removal proceeding or criminal prosecution.

in administrative discretion, developed without express statutory authorization"); Ragsdale Decl. ¶¶ 7, 16.

In enacting a state policy of "attrition through enforcement," Arizona's S.B. 1070 ignores every objective of the federal immigration system, save one: the immediate apprehension and criminal sanction of all unlawfully present aliens. *See* S.B. 1070 § 1. Arizona's one-size-fits-all approach to immigration policy and enforcement undermines the federal government's ability to balance the variety of objectives inherent in the federal immigration system, including the federal government's focus on the most dangerous aliens. By requiring local police officers to engage in maximum inquiry and verification (on pain of civil suit) and by providing for the conviction and incarceration of certain foreign nationals in Arizona for their failure to register, for entering or traveling throughout the state using commercial transportation, or for soliciting work, the "balance" struck by S.B. 1070 is not only different from that of the federal government, but it will *interfere* with the federal government's ability to administer and enforce the immigration laws in a manner consistent with the aforementioned concerns that are reflected in the INA. Despite the statute's self-serving claim that it "shall be implemented in a manner consistent with federal laws regulating immigration," S.B. 1070 § 12, the act mandates a conflicting, Arizona-specific immigration policy – "attrition through enforcement" – and prescribes various provisions that implement that policy in conflict with federal priorities. To permit a hodgepodge of state immigration policies, such as the one Arizona has attempted in S.B. 1070, would impermissibly interfere with the federal government's balance of uniquely national interests and priorities in a number of ways.

First, Arizona's across-the-board "attrition through enforcement" policy will interfere with federal enforcement priorities. The federal government, which exercises significant enforcement discretion, has prioritized for arrest and detention those "aliens who pose a danger to national security or a risk to public safety" (Ragsdale Decl. ¶ 17), principally targeting "aliens engaged in or suspected of terrorism or espionage; aliens convicted of

crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; certain gang members; and aliens subject to outstanding criminal warrants . . . [and] fugitive aliens, especially those with criminal records." *Id.* ¶¶ 17-18 (discussing need for prioritization); *Id.* ¶ 27 (discussing memorandum from Assistant Secretary John Morton outlining enforcement priorities) . But S.B. 1070, which requires Arizona law enforcement officials to target any and all suspected aliens without regard to dangerousness, will "divert existing [federal] resources from other duties, resulting in fewer resources being available to dedicate to cases and aliens" that the federal government has identified as posing the greatest immediate threats to the United States. *Id.* ¶ 44. "Diverting resources to cover the influx of referrals from Arizona (and other states, to the extent similar laws are adopted) could, therefore, mean decreasing [the federal government's] ability to focus on priorities such as protecting national security or public safety in order to pursue aliens who are in the United States illegally but pose no immediate or known danger or threat to the safety and security of the public." *Id.*; *see also* Part I.C.1. *infra*. S.B. 1070 is therefore preempted because it will force a diversion of federal resources away from federal priorities. *See Kobar*, 378 F. Supp. 2d at 1170, 1173–74 (Bolton, J.) (finding Arizona statute preempted, in part, because it would result in "deluge" of information to the FDA, thereby interfering with other FDA priorities); *see also Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006) (acknowledging serious concerns regarding the city's use of federal authorities to determine the immigration status of tenants because the process would "likely place burdens on the Departments of Justice and Homeland Security that will impede the functions of those federal agencies").

Second, Arizona's new immigration policy will substantially interfere with the federal government's ability to administer and enforce the immigration laws in a manner consistent with congressional objectives. Congress has clearly anticipated circumstances in which an alien may have unlawfully entered the United States or violated the conditions of his admission, but for whom the United States nonetheless has an interest in providing what it calls humanitarian relief. *See, e.g.*, 8 U.S.C. § 1158 (asylum); § 1254a (temporary protected

status); § 1227(a)(1)(E)(iii) (humanitarian waiver of deportability to assure family unity); § 1229b (cancellation of removal); § 1182 (d)(5) (parole); *see also* Ragsdale Decl. ¶¶ 18, 26, 47–50 (describing humanitarian aspect to immigration enforcement policy). For example, were DHS to come into contact with a foreign national from a specially designated country (such as Nicaragua, Honduras, or El Salvador), or one who has survived the earthquake in Haiti, or is a victim of trafficking or persecution, DHS might choose not to detain or penalize the alien for immigration violations incidental to his entry into the United States and instead permit that alien to stay in the United States under a variety of programs. *See* Ragsdale Decl. ¶¶ 26, 28, 47-50. These programs demonstrate that one aspect of federal immigration policy is to assist and welcome such victims in the United States, notwithstanding their possible temporary unlawful presence. By contrast, under S.B. 1070, any other potential immigration concern falls away in favor of Arizona's decision to pursue "attrition through enforcement," which, as implemented through the remainder of the statute, promotes the incarceration and arrest of all unlawfully present aliens, no matter what other congressionally mandated concern might be implicated or whether the person's status is known to the federal government. In that way, S.B. 1070 will interfere with established federal immigration priorities concerning the treatment of aliens who may be eligible for humanitarian relief. *See* Declaration of Mariko Silver, Acting Assistant Secretary for International Affairs and Deputy Assistant Secretary for International Policy, DHS (attached as Exhibit 6), ¶ 10.

Third, Arizona's focus on criminal sanctions is at odds with the federal policy of channeling certain unlawfully present aliens into civil removal proceedings or permitting them to leave the country without criminal penalty or incarceration. *See* 8 U.S.C. § 1229c (voluntary departure); § 1225(a)(4) (withdrawal of application for admission); Ragsdale Decl. ¶ 19. There are numerous reasons why it is in the national interest not to exact criminal penalties on every alien who attempts to enter or enters the country without a visa or other necessary documentation. *See* Ragsdale Decl. ¶¶ 7, 16, 19 (describing DHS discretion to opt for civil enforcement rather than criminal penalties where doing so would promote fair

consideration of appropriate treatment of aliens). For example, the application of criminal sanctions to a particular alien who was a victim of trafficking or labor abuse may prevent federal authorities from obtaining evidence against other aliens who pose a greater threat to public safety or national security. *See* Ragsdale Decl. ¶ 33-34 (discussing reliance on unlawfully present aliens in prosecutions). Similarly, the United States may deem it unduly harsh or counterproductive to its humanitarian efforts or foreign relations to incarcerate a woman with young children who has attempted to cross the border for the first time. *See generally* Ragsdale Decl. ¶ 47.[16] In addition, there may be times when civil removal is a more appropriate enforcement tool because criminal sanctions would have immigration consequences that would interfere with the United States' ability to provide a particular immigration benefit in the future. *See*, *e.g.,* 8 U.S.C. § 1254a(c)(2)(B). S.B. 1070 recognizes no such nuance. As such, the law undoubtedly strikes "a different balance" than the policy advanced by federal law and thereby "stands as an 'obstacle' to the accomplishment of . . . federal law." *See Lozano*, 496 F. Supp. 2d at 527–28; *see also Crosby*, 530 U.S. at 378. And even if S.B. 1070 could be said to promote federal immigration policy in some abstract sense, the methodology chosen by Arizona conflicts with that chosen by the federal government, and is therefore preempted. *See Gade*, 505 U.S. at 103; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).[17]

3. S.B. 1070 Interferes with U.S. Foreign Relations and U.S. Foreign Policy Objectives That Inform Federal Administration and Enforcement of the Immigration Laws

S.B. 1070 is independently preempted because it impermissibly conflicts with U.S. foreign policy. Immigration policy is intimately connected with U.S. foreign affairs and

[16] On the other hand, it may be appropriate to exact the full panoply of federal sanctions against a repeat offender, or the leader of a smuggling ring. *See* DHS Model 287(g) MOA, *available at* http://www.ice.gov/doclib/foia/media-requests/09foia4646moutemplate.pdf.

[17] Indeed, although S.B. 1070's conflict with federal immigration policies and objectives is palpable and sharp, the Supremacy Clause would nullify S.B. 1070 even for less substantial conflict with federal law in light of the strong interest of the federal government in the immigration context. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-08 (1988) ("[In] an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption").

diplomacy. *See Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875); *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997); *see also* Steinberg Decl. ¶¶ 5–6 ("U.S. federal immigration law incorporates foreign relations concerns . . . . [and] is designed to accommodate a range of complex and important U.S. foreign relations priorities that are implicated by immigration policy."); Silver Decl. ¶ 4. The Supreme Court has recognized the "Nation's need to 'speak with one voice' in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001); *Garamendi*, 539 U.S. at 424. Because the immigration laws are deeply imbued with foreign policy significance, a state immigration law can, in certain situations, be preempted if it interferes with U.S. foreign policy. As the Ninth Circuit has explained, "'foreign policy' . . . may carry . . . preemptive force . . . . 'where . . . there is evidence of clear conflict between the policies adopted by'" a state and the federal government." *Movsesian v. Victoria Versicherung AG,* 578 F.3d 1052, 1056 (9th Cir. 2009) (quoting *Garamendi*, 539 U.S. at 421).

In addition, individual immigration enforcement decisions can have profound implications for U.S. foreign policy interests. *See, e.g.*, *Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1259 (11th Cir. 2008) ("[I]mmigration cases often involve complex public and foreign policy concerns with which the executive branch is better equipped to deal."); *Francis v. Immigration & Naturalization Service*, 532 F.2d 268, 272 (2d Cir. 1976) ("Enforcement of the immigration laws is often related to considerations . . . of foreign policy."); Steinberg Decl. ¶¶ 6, 12, 17-20. These decisions directly implicate foreign relations and demand federal control because, as the Supreme Court has explained, where a state inserts itself into immigration enforcement, "a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung*, 92 U.S. at 280; *Hines*, 312 U.S. at 64 ("Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."). Foreign governments properly understand the federal government to have a range of civil and criminal enforcement authorities available to it in the administration of the immigration laws, and, indeed, they often raise concerns about the administration and

enforcement of immigration laws in bilateral and multilateral diplomatic discussions. *See* Steinberg Decl. ¶¶ 22, 32.

S.B. 1070 is preempted under these principles because it undermines the ability of the United States to speak with one voice in the immigration context and wrests primacy over immigration enforcement away from the federal government.[18] By imposing a mandatory criminal sanctions regime against certain aliens – necessarily without any mechanism for accounting for the foreign policy consequences of such criminal enforcement – S.B. 1070 interferes with the federal government's ability to exercise prosecutorial discretion based on diplomatic and foreign policy concerns. *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408-09 (9th Cir. 1983) (recognizing necessity of executive control of prosecutions under the Foreign Corrupt Practices Act, because "any prosecution under the Act entails risks to our relations with the foreign governments involved" such that "any governmental enforcement" should only result from "a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs"); *see also United States v. Delgado-Garcia*, 374 F.3d 1337, 1351 (D.C. Cir. 2004) ("The executive's expert exercise of prosecutorial discretion and foreign diplomacy" will serve as crucial safeguards for "avoid[ing the] conflicts" with other nations that might arise out of the extraterritorial enforcement of the federal alien smuggling laws).

Here, the State Department has concluded that S.B. 1070's interference with the federal government's exclusive control over the foreign policy implications of an area of law unquestionably imbued with foreign policy significance "runs counter to American foreign policy interests" and, if uninterrupted, "would further undermine American foreign policy." Steinberg Decl. ¶ 58. S.B. 1070 represents an impediment to U.S. foreign policy and U.S. diplomatic interests – both with Mexico and with other countries. *Id.* ¶¶ 36-51. And the law "poses a risk of provoking retaliatory treatment against U.S. nationals by other states." *Id.*

[18] Although not all state laws that touch upon aliens or immigration implicate these principles, S.B. 1070 – especially when taken as a whole – represents an unparalleled and explicit effort to establish a state policy that intensifies the enforcement of particular federal immigration laws, while ignoring key goals of others, thereby contravening federal foreign policy prerogatives.

¶ 57. This assessment of the effect of S.B. 1070 on U.S. foreign policy is worthy of deference. *See Holder v. Humanitarian Law Project*, 2010 U.S. LEXIS 5252, at *58 (2010); *see also Movesian*, 578 F.3d at 1061; *In re Assicurazioni Generali*, 592 F.3d 113, 119 (2d Cir. 2010).

Indeed, the impact of S.B. 1070 on U.S. foreign policy has been immediate and negative. As discussed in greater detail in Part II, *infra*, the mere passage of S.B. 1070 has resulted in numerous, specific, and serious diplomatic reactions that threaten multiple United States interests – both in the immigration field and elsewhere. *See* Steinberg Decl. ¶¶ 34–58. This substantial effect on U.S. foreign policy interests is not surprising. In enacting (out of disagreement with existing federal policy) a comprehensive, novel, and aggressive set of immigration provisions, Arizona has predictably provoked the ire of those foreign nations whose citizens are being targeted for detention and criminalization – and has thereby damaged the United States' broader set of diplomatic relations with those same nations. *See* Steinberg Decl. ¶ 57 ("S.B. 1070 . . . threatens ongoing adverse consequences for important and sensitive bilateral relationships with U.S. allies."). S.B. 1070 is therefore preempted.

C. The Individual Sections of S.B. 1070 Are Preempted By Federal Law

1. Sections 2 and 6 Are Preempted Because Their Mandatory Requirements for Determining Immigration Status Conflict with Federal Law and Priorities

S.B. 1070 effectively creates an immigration status verification scheme that is unprecedented in breadth, mandatory in nature, and necessarily works toward the singular goal of criminally prosecuting aliens suspected of being unlawfully present. Before passage of S.B. 1070, Arizona police had the same discretion to decide whether to verify immigration status during the course of a lawful stop as any other state or federal law enforcement officer. Sections 2 and 6, however, do not merely authorize state officers to assist in the federal enforcement of the immigration laws. Instead, these new provisions *mandate* that state and local law enforcement officers effectuate an immigration status verification scheme as the first step toward arrest, detention, incarceration (utilizing Sections 3, 4, and 5), or removal, in a manner that is indifferent to the federal government's enforcement priorities (such as

prioritizing dangerous aliens). And these provisions are likewise indifferent to the risk of harassment of lawful aliens (and even citizens) and the burdens placed on the federal government that inevitably follow from S.B. 1070's regime of unrestrained enforcement of particular criminal provisions.[19]

a. Section 2 of S.B. 1070 Will Result in the Harassment of Lawfully Present Aliens and is Therefore at Odds with Congressional Objectives

Section 2 effectively removes the existing discretion of law enforcement officers by requiring that they verify immigration status whenever "reasonable suspicion" that a person is unlawfully present arises during a stop and it is practicable to do so; they must also verify status during any arrest. This unprecedented mandatory verification scheme conflicts with federal law because it necessarily imposes substantial burdens on lawful immigrants in a way that frustrates the concern of Congress for nationally-uniform rules governing the treatment of aliens throughout the country – rules designed to ensure "our traditional policy of not treating aliens as a thing apart." *Hines*, 312 U.S. at 73-74. As the Court held in *Hines*, Congress has "plainly manifested a purpose to . . . protect the personal liberties of law-abiding aliens . . . and to *leave them free from the possibility of inquisitorial practices and police surveillance* that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against." *Id.* at 74 (emphasis added). It is for the federal government, not the individual states, to determine the relationship between the Nation and aliens, and the federal government has long rejected a system by which aliens' papers are routinely demanded and checked. Section 2 is at odds with this longstanding federal policy and practice.

Although the intent of Arizona's new statute may be to deter unauthorized aliens from entering or remaining in Arizona, Section 2 necessarily places lawfully present aliens (and even U.S. citizens) in continual jeopardy of having to demonstrate their lawful status to non-federal officials, and having their liberty restricted while their status is verified. There are

[19] The discussion herein is not meant to foreclose state authority to verify immigration status in a manner that is consistent with federal priorities and that will not unduly burden either federal resources or the interests of lawfully present aliens.

numerous categories of individuals who will be lawfully present but who will not have readily available documentation to demonstrate that fact. For example, some lawful foreign travelers visiting from countries participating in the Visa Waiver Program will not have a form of identification sufficient to demonstrate lawful presence under Section 2. *See* Aytes Decl. ¶¶ 2, 20-21. Several categories of individuals who have applied for asylum, temporary protected status, U or T non-immigrant visas for victims of crimes who are providing assistance to law enforcement,[20] or abused women petitioning for immigration relief under the Violence Against Woman Act, will also not have a form of identification sufficient to demonstrate lawful presence under Section 2. *Id.* ¶¶ 2, 5, 9, 13, 17, 19; *see also* S.B. 1070 § 2(B). Moreover, United States citizens are of course not required to carry proof of citizenship and some will not have easy access to documents that readily satisfy Arizona. Many U.S. citizens do not have or carry a government-issued photo identification, such as minor children and others who do not have a driver's license.[21] And if Arizona officers contact DHS about a citizen's immigration status, DHS may not be able to confirm the person's citizenship, as many citizens have no entries in DHS databases. *See* Palmatier Decl. ¶ 19.

Lawfully present individuals will inevitably be swept within Section 2's broad "reasonable suspicion" provision and subject to the state's inquisitorial burdens. While Section 2 is triggered by an officer's "reasonable suspicion" of unlawful presence, "the requirement of reasonable suspicion is not a requirement of absolute certainty," *N.J. v. T.L.O.*, 469 U.S. 325, 346 (1985), meaning that many lawful aliens will be directly subjected

[20] U and T visas are available for victims of certain enumerated crimes – such as trafficking and other violent crimes – and their families. *See* Aytes Dec. ¶¶ 14-17.

[21] Arizona does not necessarily accept out-of-state drivers licenses as proof of lawful residency. For example, New Mexico does not require proof of citizenship to obtain a driver's license. *See* N.M. STAT. ANN. § 66-5-9(B). So if a U.S. citizen from New Mexico is stopped while driving in Arizona, that citizen might be subject to lengthy detention while Arizona seeks to verify the citizen's "immigration status." Estrada Decl. ¶¶ 7, 14 (discussing categories of aliens and citizens who likely will not be able to produce documentation necessary to avoid detention, including minors and visitors from other states).

to Section 2.[22] What is more, many factors used to support a "reasonable suspicion" that an alien is unlawfully present could also apply to lawfully present aliens. *See* Declaration of Tony Estrada, Sheriff of Santa Cruz County (attached as Exhibit 8), ¶ 7.[23]

The breadth of Arizona's mandatory immigration verification scheme is unparalleled and serves to exacerbate the conflict with federal law. The constant threat of police inquisition is not limited to persons who are suspected of serious criminal offenses because S.B. 1070 mandates immigration status inquiries, when practicable, for *every* lawful stop where there is "reasonable suspicion" of unlawful presence – regardless of the seriousness of the underlying alleged state offense. Immigration status verifications accordingly are mandated even for suspected minor, non-criminal infractions of state or local law – such as a minor traffic offense, jaywalking, *see* Ariz. Rev. Stat. 28-793, failing to have a dog on a leash, *see* Ariz. Rev. Stat. 11-1012, or riding a bicycle on a sidewalk, *see* City of Flagstaff Ord. 9-05-001-0013 – or suspected violations of Sections 3-5 of S.B. 1070. A lawfully present alien may also be subjected to an immigration status inquiry where he is lawfully stopped, but the underlying justification for the initial stop has ceased, or when the alien is merely a passenger in a car whose driver is stopped for a traffic offense. *See* S.B. 1070 § 2.

The substantial impact on lawfully present aliens is compounded by the fact that S.B. 1070 provides no assurance that the duration for which a lawfully present alien may be detained during the pendency of an immigration status verification will be limited. S.B. 1070, standing alone, does not suggest that the alien will be released, or that any detention would be of only minimal duration; indeed, the only assurance that is provided is that a

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[22] *See also Safford Unified School Dist. No. 1 v. Redding*, 129 S.Ct. 2633, 2647 (2009) ("[R]easonable suspicion does not deal with hard certainties, but with probabilities. To satisfy this standard, more than a mere hunch of wrongdoing is required, but considerably less suspicion is needed than would be required to satisf[y] a preponderance of the evidence standard." (internal citations omitted)).

[23] Even under Arizona's own training standards, factors that apply equally to lawfully- and unlawfully-present aliens would bring them within the ambit of Section 2's "reasonable suspicion" standard. *See, e.g.*, Arizona Peace Officers Standards & Training Board, Arizona S.B. 1070 Training Video, available at http://www.azpost.state.az.us/SB1070infocenter.htm (stating that inability to speak English and dress can be factors in determining reasonable suspicion).

private citizen of Arizona can sue a local law enforcement agency for money damages if that agency *fails* to enforce the immigration laws to the fullest extent possible.[24] Thus, if forced to decide between holding and releasing a lawfully present alien during the pendency of a status verification, the statute is clearly designed to encourage Arizona police authorities to opt for continued detention. *See, e.g.*, Estrada Decl. ¶¶ 4, 6. There is also no assurance that if a lawfully present alien is subjected to an immigration status verification under Section 2, he will not be subjected to another inspection the very next time he is stopped by the police for any reason – raising the specter that the same lawfully present residents will be subject to repeated police intrusion.[25] Moreover, if a lawfully present alien is arrested for any reason, S.B. 1070 forbids his release – irrespective of whether he has been cleared of any wrongdoing – until *state and local authorities* are satisfied as to his immigration status.

Section 2 will therefore necessarily increase police intrusion into the lives of lawfully present aliens and compel them to prove their lawful status to the satisfaction of state or local authorities, which is exactly the type of inquisition and special burden cautioned against by *Hines.*[26] *See also De Canas*, 424 U.S. at 358 n.6 ("Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress").

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[24] Indeed, DHS advises that there will be times where it will be unable to verify whether an individual is unlawfully present in the United States without taking significant time to consult a variety of databases and even paper files. *See* Palmatier Decl. ¶¶ 11, 19; Declaration of Dominick Gentile, Division Chief, USCIS (attached as Exhibit 7), ¶¶ 6–7.

[25] Some of the criteria that would support a "reasonable suspicion" would not fluctuate over time. *See* Estrada Decl. ¶ 7 ("[F]actors that we might consider in a 'reasonable suspicion' determination with respect to immigration status. . . . are likely to apply both to lawfully present aliens and unlawfully present aliens.").

[26] *See Hines*, 312 U.S. 65-66 ("Legal imposition[s] . . . upon aliens – such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials – thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one."); *see also Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976); *League of United Latin Am. Citizens*, 908 F. Supp. at 769.

b. Section 2 of S.B. 1070 Will Burden Federal Resources and Impede Federal Enforcement and Policy Priorities

A state law is preempted where it imposes a burden on a federal agency's resources that impedes the agency's functions. *See, e.g., Buckman*, 531 U.S. at 349-51 (preempting state law cause of action in part because it would encourage third parties to submit a deluge of unnecessary information to the FDA, thereby burdening the agency's ability to evaluate drug applications in a timely fashion); *Garrett*, 465 F. Supp. at 1057 (acknowledging serious concerns regarding the city's use of federal authorities in determining immigration status); *Kobar*, 378 F. Supp. 2d at 1170, 1173–74. S.B. 1070 is preempted under this standard because it will create an unprecedented quantity of verification demands directed to the federal government (or federally qualified officials) and will impermissibly shift the allocation of federal resources away from federal priorities.

Section 2 requires local law enforcement officers to obtain immigration status information from the federal government, which will primarily be accomplished by making a request to LESC under 8 U.S.C. § 1373(c).[27] *See* Palmatier Decl. ¶¶ 3, 6, 15. Because Arizona has imposed an across-the-board requirement that its law enforcement officers verify the immigration status of *every* person stopped who is reasonably suspected to be unlawfully present and *every* person arrested in the state, the number of requests made to DHS will undoubtedly be significant. *See* Estrada Decl. ¶ 6; Declaration of Jack Harris, Phoenix Police Chief (attached as Exhibit 10), at 6. But LESC resources are currently dedicated in part to critical national security and law enforcement functions. Palmatier Decl. ¶ 4. LESC's mission is broad. It includes processing FBI requests for immigration-related background information on individuals seeking to purchase firearms, U.S. Secret Service requests for individuals seeking access to a protected area (*e.g.*, the White House Complex), and requests related to employment issues at sensitive locations that could be vulnerable to sabotage,

[27] 8 U.S.C. § 1373(c) provides that DHS "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status . . . for any purpose authorized by law, by providing the requested verification or status information."

attack, or exploitation. *Id.* LESC also analyzes information received from the public about suspicious or criminal activity and then disseminates that information to ICE field offices for investigation. *Id.* ¶ 14. With respect to inquiries from law enforcement agencies, "the LESC prioritizes its efforts in order to focus on criminal aliens and those most likely to pose a threat to their communities." *Id.* ¶ 7. DHS has advised that "SB 1070 will inevitably result in a significant increase in the number of" immigration verification queries, and that such an increase will "reduc[e] [LESC's] ability to provide timely responses to law enforcement on serious criminal aliens." Palmatier Decl. ¶¶ 15–16, 7. This increase in requests therefore creates a significant risk that the federal government will be forced to shift resources away from its chosen priorities. *See id.* ¶¶ 15–18; Ragsdale Decl. ¶ 44. DHS's resources will further be strained by increased demands for testimony by DHS officials at criminal proceedings implicating immigration status. *See* Gentile Decl. ¶ 9. In light of DHS's fixed resources, this dramatic surge in verification requests as a result of Section 2 (as well as some of the other provisions of S.B. 1070) will necessitate a shift away from other federal priorities so as to accommodate the workload generated by Section 2. *See* Palmatier Decl. ¶¶ 15-16; Ragsdale Decl. ¶ 44.[28]

In assessing the scope of the conflict between Section 2 and federal priorities, moreover, the Court must consider the impact that would result if other states follow suit with similar laws. *See, e.g., North Dakota v. United States*, 495 U.S. 423, 458 (1990) (Brennan, J., concurring in the judgment in part and dissenting in part) (considering that the difficulties presented by state requirement would "increase exponentially if additional States adopt[ed] equivalent rules," and noting that such a nation-wide consideration was "dispositive" in *Public Utility Commission of the State of California v. United States*, 355 U.S. 534, 546 (1958)). In this case, this aggregation of effects is not purely speculative:

[28] Additionally, under the terms of the statute, Arizona will not release those arrested while the immigration status check is ongoing. Accordingly, Arizona's new law places DHS in the impossible dilemma of choosing between prioritizing Arizona's § 1373(c) requests over the various law enforcement requests of other states and federal entities or risking that aliens (and even U.S. citizens) in Arizona will be subjected to prolonged detentions.

several states have already begun considering similar measures.[29] Enactments by additional states of Section 2-like mandates will only further burden DHS's ability to pursue its immigration policy objectives and other law enforcement objectives. Palmatier Decl. ¶ 20; Ragsdale Decl. ¶ 44; *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 863 (2000) (granting deference to expert agency's views on conflict between state law and statutory objectives); *Chae v. SLM Corp.*, 593 F.3d 936, 948-49 (9th Cir. 2010) (similar).

Accordingly, as informed by DHS's determination that S.B. 1070's mandatory verification requirement will "reduc[e DHS's] ability to provide timely responses to law enforcement on serious criminal aliens," thereby potentially allowing "very serious violators [to] escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the [unlawfully present] alien they have encountered," (Palmatier Decl. ¶ 17), this Court should hold that Section 2 of S.B. 1070 represents an impermissible burden on federal resources.

c. Section 6 of S.B. 1070 Extends Arizona's Warrantless Arrest Authority to Out-of-State "Removable" Offenses and is Preempted Because it Will Lead to the Harassment of Aliens

Section 6 is similarly preempted under the principles articulated in *Hines*, because Section 6 will also lead to further harassment of lawfully present aliens. Section 6 expands the circumstances under which law enforcement officers can make warrantless arrests by allowing Arizona peace officers to arrest anyone whom they have probable cause to believe "has committed any public offense that makes the person removable from the United States." Arizona law defines "public offense" to mean "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred." Ariz. Rev. Stat. § 13-105(26). Because, prior to the enactment of Section 6, Arizona law already allowed for warrantless arrests for misdemeanors and felonies committed in Arizona, the

[29] *See, e.g.*, Kirk Adams, *The Truth Behind the Arizona Law*, Wash. Post, May 28, 2010 (Bus. Sec.) ("[A]t least 18 other states are considering adopting similar immigration laws."); Ginger Rough, *Arizona Immigration Law: Other States Mull Over Versions of Migrant Law*, May 13, 2010, *available at* http://www.azcentral.com/arizonarepublic/news/articles/2010/05/13/20100513arizona-immigration-law-followers.html.

effect of Section 6 is to allow warrantless arrests based on (i) out-of-state crimes which (ii) the police officer determines would subject the alien to removal. Notably, warrantless arrest authority under Section 6 does not depend on coordination with DHS to verify removability.

This provision is preempted because it will result in the arrest and harassment of lawfully present aliens. Section 6 depends on a threshold determination of whether a "public offense makes [a] person removable," S.B. 1070 § 6, a determination that requires expertise regarding a complex corpus of immigration law. As Justice Alito has explained, the removability consequences "for a particular offense . . . [are] often quite complex" in that "determining whether a particular crime" will potentially render an alien removable "is not an easy task." *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring). For this reason, the federal government has exclusive authority to determine whether the commitment of a crime by a lawfully present alien – state or federal – would render the alien removable from the United States. *See* 8 U.S.C. § 1182(a)(2) (setting forth certain criminal convictions as grounds for inadmissibility); 8 U.S.C. § 1227(a)(2) (same for deportation).

Nonetheless, Arizona now demands that local law enforcement officers engage in this complicated analysis of removability by folding such warrantless arrest authority into its scheme of "attrition through enforcement." But this is an analysis which Arizona's peace officers are ill prepared to make. Almost by definition, Section 6 is triggered only by non-Arizona crimes (with which Arizona police are unlikely to be familiar), and will demand an instantaneous judgment on the highly contextual and fact specific removability calculus – a matter which is the subject of intense training for federal officers and which lies squarely outside of Arizona peace officers' general expertise.[30] Adding to the complexity of this determination, various federal officers are empowered to order reprieves from the

[30] *See* Estrada Decl. ¶¶ 8-9 ("[M]y officers are not experts in immigration matters. . . . I am concerned that the state training will not equip my officers with the necessary knowledge and expertise that would allow them to reasonably suspect when someone is in the country unlawfully or has committed a public offense that makes them removable."); Declaration of Roberto Villaseñor, Chief of Police, Tucson Police Department (attached as Exhibit 9), ¶ 6 ("While my officers are comfortable establishing the existence or non-existence of reasonable suspicion as to criminal conduct, they are not at all familiar with reasonable suspicion as to immigration status, not being trained in Federal immigration law."); Harris Decl. at 7.

immigration consequences of state crimes. *See, e.g.*, 8 U.S.C. §§ 1229b(a), 1253(a)(3). For that reason alone, not every alien who has committed a "public offense" that might make removable will actually be removed from the United States. Arizona police officers will undoubtedly erroneously arrest many aliens who could not legitimately be subject to removal – whether because the Arizona police mistakenly identify an out-of-state crime as a removal predicate, the Arizona police wrongfully assess whether an out-of-state crime will result in a conviction, the Arizona police wrongly assess the removability calculus, or the particular immigration consequence of the alien's conduct has already been resolved by the federal government.[31] That outcome cannot be squared with the Supreme Court's concern for the imposition of distinct and extraordinary state burdens on aliens. *See Hines*, 312 U.S. at 65–66. The impropriety of Arizona's action is underscored by the fact that Section 6 is not "focuse[d] directly upon" a legitimate state criminal law function. *De Canas*, 424 U.S. at 357. The statute's exclusive concern for crimes that give rise to removability consequences belies a focus on the conduct of aliens, and not an effort "tailored to combat" local problems. *Id.*

2. Section 3 of S.B. 1070 – Arizona's "Complete or Carry an Alien Registration Document" Provision – Is Preempted by Federal Law

Arizona's new alien registration requirement, codified in Section 3 of S.B. 1070, is preempted because it legislates in an area fully occupied by Congress and conflicts with federal law and enforcement priorities in that field.

a. Section 3 Interferes with Comprehensive Federal Alien Registration Law

Through the federal alien registration scheme, Congress has created a comprehensive system for monitoring the entry and location of aliens within the United States. Congress has provided very specific measures ranging from which aliens must register, *see* 8 U.S.C. §§ 1201, 1301, when they must register, *see* 8 U.S.C. § 1302, the content of the registration forms and what special circumstances may require deviation, 8 U.S.C. § 1303, the

[31] The risk of harassment is not limited to aliens who have committed out-of-state crimes. Section 6 also allows for arrest for Arizona crimes.

confidential nature of registration information, 8 U.S.C. § 1304, the circumstances under which an already-registered alien must report his change of address to the government, 8 U.S.C. § 1305, and the penalties for failing to register or failing to notify the government of a change in address, 8 U.S.C. § 1306. Registered aliens are required to carry their "certificate[s] of alien registration" or "alien registration receipt card[s]," subject to punishment of up to thirty days of imprisonment and a monetary fine. 8 U.S.C. § 1304(e); 18 U.S.C. § 3571. Willful failure to apply for registration is a federal misdemeanor, punishable under the registration statute by up to six months of imprisonment and a monetary fine. 8 U.S.C. § 1306(a); 18 U.S.C. § 3571; *see also* 8 C.F.R. Part 264.

This registration system is a quintessential example of a pervasive and comprehensive scheme of federal regulation that leaves no room for state legislation. Indeed, in *Hines*, the Supreme Court recognized that federal alien registration law manifests Congress's intent to monitor aliens through a system that would be "uniform," "single," "integrated," and "all-embracing." *Id.* at 74. The Court considered the precursor to the current federal alien registration system,[32] and held that it precluded Pennsylvania from enforcing its own alien registration requirements, because:

> [T]he federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, [and] states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Hines, 312 U.S. at 66-67. Put simply, *Hines* held that Congress intended the federal government to exercise exclusive control over all issues related to alien registration.

Arizona's new alien registration provision conflicts with the federal goal, recognized in *Hines*, of uniformity and singularity in registration (a field which so closely touches on foreign relations). Section 3 removes federal control of prosecution for registration violations by creating state-specific crimes based on federal alien registration requirements.

[32] *Hines* considered the alien registration requirements imposed by the Alien Registration Act of 1940, 54 Stat. 670. Sections 1304 and 1306 were adopted in 1953 as part of the INA, which "incorporate[d] in substance the provisions of the Alien Registration Act, 1940, relating to the registration of aliens," and added additional registration requirements. H.R. Rep. 82-1365, 2d Session, 1952, 1952 U.S.C.C.A.N. 1653, 1723.

Arizona's criminal sanctions apply to aliens who violate either 8 U.S.C. § 1304(e), because they failed to carry their registration cards, or § 1306(a), because they failed to register with the federal government. S.B. 1070 § 3. But *Hines* held that states were precluded from supplementing the federal immigration scheme, even if such regulations appear to complement that scheme. *See, e.g., Hines*, 312 U.S. at 66-67; *Garamendi*, 539 U.S. at 420 n.11. Having piggybacked on the requirements of federal law, Arizona imposes its own corresponding set of state imprisonment terms and fines for federal registration violations. S.B. 1070 § 3(H). These state penalties can be imposed on an alien regardless of whether the alien has already been punished by the federal government under the federal alien registration scheme, and they therefore allow for increased and varied punishment for registration violations that happen to occur in Arizona. *Id.*[33] Arizona's creation of a state-specific criminal scheme for individuals who violate the federal alien registration laws directly contravenes the choices made by Congress in providing uniform standards under federal control. *See Hines*, 312 U.S. at 74. Arizona's auxiliary penalties for violations of the federal alien registration laws are therefore preempted.

What Arizona has done is no different from what the Supreme Court prohibited in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986), where the Supreme Court struck down a Wisconsin law that prohibited certain violators of the National Labor Relations Act ("NLRA") from doing business with the State. *Id.* at 283-84. The Court held that where states had no independent authority to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits," so, too, are states prohibited from "*providing their own regulatory or judicial remedies* for conduct prohibited or arguably prohibited by the Act." *Id.* at 286 ("The rule is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration,' . . . and this Court has recognized that '[c]onflict in technique

[33] Unlike S.B. 1070, Congress carefully calibrated and imposed *different* penalties for each specific alien registration violation. *Compare* 8 U.S.C. § 1304, *with* § 1306, *and with* S.B. 1070 § 3(H).

can be fully as disruptive to the system Congress erected as conflict in overt policy.'" (emphasis added)). Undoubtedly, under *Hines*, Arizona is barred from establishing its own registration standards. So, just as in *Gould*, Section 3 "functions unambiguously as a supplemental sanction for [federal] violations" over which the state is powerless to control. *Id.* at 288; *see also Kobar*, 378 F. Supp. 2d at 1174-75 (Bolton, J.) (finding state fraud claims preempted where proving a violation of federal law was an essential element of the claim).

Here, if Arizona's supplemental sanctions were deemed valid, aliens in Arizona and any other state that imposed similar sanctions would be penalized in a different manner than aliens who were subjected solely to the federal penal system – causing the inconsistent treatment of aliens across the United States. Such a result, *Hines* held, would violate the congressional demand for uniform treatment of alien registration. *See Hines*, 312 U.S. at 72; *see also Nelson*, 350 U.S. at 505-06. Moreover, the enforcement of obligations arising from the relationship between the federal government and persons it regulates – here, aliens required to register under the INA – is for the federal government itself, and not an area of traditional state regulation. *See Buckman*, 531 U.S. at 347; *Nelson*, 350 U.S. at 515 ("Alien registration is not directly related to control of undesirable conduct; consequently there is no imperative problem of local law enforcement.").

b. Section 3 is Preempted Because it Seeks to Criminalize Unlawful Presence and Will Result in the Harassment of Aliens

Finally, Section 3 of S.B. 1070 is preempted because it is a thinly veiled and impermissible attempt to criminalize unlawful presence. Section 3 is termed a "registration" law, but on its face seeks to criminalize only those aliens who are unlawfully present, by providing an exception for any "person who maintains authorization from the federal government to remain in the United States." S.B. 1070 § 3(F). The existence of this exception makes clear that, although Section 3 superficially tracks federal registration provisions (which is itself impermissible, as described above), its aim is to criminalize unlawful presence, thus affording a basis for stopping and inspecting aliens (Section 2) and criminally prosecuting them. The legislators who enacted S.B. 1070 have routinely

confirmed that the goal of the statute was to "mak[e] it a state crime to be in this country illegally."[34]

Whatever powers a state may have to enact laws that incidentally or indirectly touch on aliens, a state may not criminalize unlawful presence – an immigration status created by the federal scheme and of purely federal concern. *See De Canas*, 424 U.S. at 356–57. Further, this focus on criminalizing unlawful presence is at odds with the policy objectives underlying the federal scheme, in which Congress has repeatedly considered and rejected attempts to criminalize unlawful presence. *See* S. 2454, 109th Cong. §§ 206, 275 (2006); H.R. 4437, 109th Cong. § 203 (2005); *see also* Steinberg Decl. ¶ 34 ("United States immigration law – and our uniform foreign policy regarding treatment of foreign nationals – has been that the mere unlawful presence of a foreign national, without more, ordinarily will not lead to that foreign national's criminal arrest or incarceration. . . . This is a policy that is understood internationally and one which is both important to and supported by foreign governments.").

Moreover, in pursuing this improper goal, the scheme imposed by Arizona is inconsistent with federal immigration laws and would result in the harassment of aliens who are lawfully present or whose presence is known and accepted by the federal government. As noted above, in many cases, aliens who are lawfully in the United States or seeking lawful status will not be provided documentation that satisfies federal regulations governing

[34] Kirk Adams, *The Truth Behind the Arizona Law*, Wash. Post, May 28, 2010 (Bus. Sec.) (editorial from speaker of the Arizona House of Representatives). Section 3's legislative history also confirms that the statute was crafted specifically out of concern for unlawfully present aliens. The section criminalizing violations of federal registration law was originally referred to as a "Trespassing" provision. Although Arizona has since changed the title for this statutory section, the labeling was not accompanied by any change to the substance of the provision that might suggest a changed intent for the statute. In fact, the sponsors of S.B. 1070 continued to refer to Section 3 as the "trespassing" provision even after amending the section's heading. *See* Minutes of Meeting of Committee on Military Affairs and Public Safety, Consideration of S.B. 1070, March 31, 2010, at 2 (referring to the registration requirements as constituting a "trespassing" provision). And one sponsor of S.B. 1070, Arizona Senator Russell Pearce, made clear that the changed label simply represented a "change [to] the title to reflect a federal issue" and that, notwithstanding the changed label, the purpose of this section was to "say[] that if you're in Arizona . . . in violation of federal law, that you can be arrested under state law." *See* Recording of Meeting of House Committee on Military Affairs and Public Safety, March 31, 2010, 18:15–18:39, *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7286.

registration, and the federal government properly takes that fact into account in its enforcement of the registration statute. *See* Aytes Decl. ¶ ¶ 2, 5, 13, 17, 19.[35] Section 3 thus conflicts with and otherwise stands as an obstacle to the provisions of federal law and policy allowing for certain types of humanitarian relief. For these reasons, Arizona's attempt to utilize the federal registration scheme to incarcerate those who are unlawfully present will necessarily result in the broad harassment and detention of many aliens who have a legitimate immigration claim and whom the United States would not punish, *see* Aytes Decl. ¶¶ 2, 7, 12; Ragsdale Decl. ¶¶ 46, 47, 49. Section 3 is therefore independently preempted.

3. Section 4 of S.B. 1070 Amends Arizona's Alien Smuggling Statute, Which is Preempted Because it Conflicts with Federal Law

Although ostensibly crafted to resemble the federal smuggling statute, Section 4 of S.B. 1070 and the provisions of Arizona law it amends conflict with Congress's scheme concerning smuggling and regulation of the unlawful presence of aliens. Arizona's smuggling laws will also result in the harassment of lawfully present aliens.[36] They are therefore preempted.

The INA embodies Congress's considered judgment as to the appropriate punishments for the commercial facilitation of unlawful immigration. In particular, the federal alien smuggling provisions of the INA criminalize knowing attempts to bring an alien into the United States "at a place other than a designated port of entry or place other than as designated by [DHS]" and also penalizes a person who, in "*knowing or in reckless disregard* of the fact that an alien has come to, entered, or remains in the United States in violation of

[35] For example, those aliens who are lawfully visiting the United States from countries participating in the Visa Waiver Program will not have evidence of registration. Aytes Decl. ¶ 21. Similarly, aliens who are seeking humanitarian relief by submitting applications for asylum, temporary protected status, or other forms of relief based on victim status, will not have completed or received a document evidencing "registration," despite having a legitimate claim and application in process.

[36] Although several Arizona decisions have analyzed preemption challenges to the smuggling provision, none have addressed the specific issues addressed herein. *See We Are America/Somos America, Coalition of Arizona v. Maricopa County Board of Supervisors*, 594 F. Supp. 2d 1104 (D. Ariz. 2009) (appeal pending); *Arizona v. Flores*, 188 P.3d 706 (Ariz. App. Div. 1 2008); *State v. Barragan Sierra*, 196 P.3d 879 (Ariz. App. Div. 1 2008).

law," attempts to "transport or move such alien within" the United States "*in furtherance of such violation of law*." 8 U.S.C. § 1324(a) (emphasis added). Thus, in enacting this provision, Congress decided that "smuggling" occurs only when transportation *furthers* an alien's illegal entry or unlawful presence in the country. *See United States v. Rodriguez*, 587 F.3d 573, 584 (2d Cir. 2009); *United States v. Angwin*, 271 F.3d 786, 805 (9th Cir. 2001); *see also United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999). In addition, the federal smuggling scheme allows for prosecution of the transportation provider, and *not* of the unlawfully present alien. *See United States v. Hernandez-Rodriguez*, 975 F.2d 622, 626 (9th Cir. 1992).

Arizona's smuggling provision differs from and conflicts with the federal smuggling statute in several critical respects. *First*, Arizona's smuggling provision is not related to transportation that is provided "in furtherance" of unlawful immigration, as in the federal alien smuggling statute. Indeed, a state prosecution under this provision would not require that the state even prove, as an element of the crime, that the travel was "in furtherance" of an immigration violation. Instead, Arizona law criminalizes the provision of *any* commercial transportation services – including taxis and buses – to an unlawfully present alien so long as some objective basis should trigger the driver's suspicion that the passenger is unlawfully present. *See* Az. Rev. Stat. § 13-2319(A); *see Flores*, 218 Ariz. at 412. *Second*, Arizona's smuggling laws, coupled with Arizona's conspiracy statute, diverges from federal smuggling law by imposing criminal sanctions on the alien "smugglee" himself. *See Barragan Sierra*, 196 P.3d at 888. *Third*, Arizona's smuggling provision is not targeted at smuggling across the United States' international borders or at facilitation of an immigration crime, thus widening the reach of the state law smuggling crime.

In addition to significantly expanding the scope of criminality far beyond the careful balance that Congress struck in the INA, these variances from federal law operate both separately and in tandem to establish an anti-smuggling scheme that allows Arizona to punish mere unlawful presence in the country by criminalizing the use of paid transportation services. This conflicts with federal law. As evidenced by the fact that the Arizona laws

allow for the punishment of "self smuggling" and broadly target the use of commercial transportation, the real purpose and effect of Arizona law is to criminally punish unlawful presence. *See De Canas*, 424 U.S. at 356–57; *see Oxygenated Fuels Ass'n v. Davis,* 331 F.3d 665, 672 (9th Cir. 2003) ("In analyzing conflict preemption, however, we examine not only the purpose of [a state law]; we also examine its effects. Whatever the purpose . . . of the state law, preemption analysis cannot ignore the effect of the challenged state action on the pre-empted field."); *see also Anderson v. Mullaney*, 191 F.2d 123, 127 (9th Cir. 1951) (preemption concerns judged by effect of state law in addition to claimed intent of state law). But Congress, which controls the sanctions available for unlawful presence, chose *not* to subject an unlawfully present alien to incarceration for merely using commercial transportation where such use has no bearing on the alien's unlawful presence. *See De Canas*, 424 U.S. at 355-56. Arizona's criminalization of unlawful presence coupled with the natural byproducts of unlawful presence – *e.g.*, use of commercial transportation and "self-smuggling" – is directly at odds with Congress's calibrated scheme of sanctions.

The Supreme Court has repeatedly held that state action is preempted if it seeks to impose additional burdens on aliens beyond those authorized by Congress. *See, e.g.*, *Chy Lung*, 92 U.S. at 281 (statute regulating arrival of passengers from foreign port); *Henderson v. Mayor of the City of N.Y.*, 92 U.S. 259 (1875) (same); *cf. De Canas*, 424 U.S. at 357 (distinguishing state law as non-preempted where it is "focus[ed]" and "tailored" on local problem). Arizona's smuggling laws conflict with Congress's manifest intent to deter and penalize unlawful immigration through a very specific set of mechanisms. *See Crosby*, 530 U.S. at 380 (internal citations omitted); *cf. Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 966 (9th Cir. 2005) ("Where such a decision not to regulate represents . . . a considered determination that no regulation is appropriate, that choice preempts contrary state law imposing governing standards." (internal quotation marks omitted)).

If that were not enough, Arizona's smuggling statute will also result in the harassment of lawful alien residents, conflicting with the federal immigration laws' careful balance of enforcement and civil liberties articulated by the Court in *Hines*. By criminalizing the

provision of transportation services based on immigration status (as opposed to conduct), and by subjecting transportation providers to the statute's criminal penalties upon a showing of simple negligence,[37] Arizona's smuggling provisions will necessarily result in special and unique burdens on and discrimination against lawful aliens. Because, under Arizona law, a transportation provider can be charged with a felony for the merely negligent transportation of unlawfully present aliens (*i.e.*, for providing transportation to an alien who one *might* objectively believe to be unlawfully present), risk-averse transportation providers will inevitably (i) reject business from lawfully present aliens so as to protect themselves against a charge that they "should have known" that a passenger was an unlawfully present alien, or (ii) demand that lawfully present aliens provide documentation to prove their immigration status prior to using paid transportation services. The smuggling provision thus subjects lawfully present aliens to specialized burdens of the type rejected in *Hines*. 312 U.S. at 73–74.

4. Section 5 of S.B. 1070 – Arizona's New Criminal Sanction Against Unauthorized Aliens Who Solicit or Perform Work – is Preempted by the Federal Employer Sanctions Scheme

Section 5 of S.B. 1070, which establishes criminal penalties for unlawfully present aliens who solicit or perform work in Arizona, is preempted by Congress's comprehensive scheme, set forth in the Immigration Reform and Control Act of 1986 ("IRCA"), for regulating the employment of aliens.

IRCA reflects Congress's deliberate choice *not* to criminally penalize unlawfully present aliens for performing work, much less for attempting to perform it.[38] IRCA's

[37] Whereas Congress has opted to only criminalize intentional smuggling, Arizona's statute is triggered by the transportation provider's simple negligence in evaluating immigration status. *Compare* 8 U.S.C. § 1324(a)(1)(A) (federal alien smuggling statute is only implicated where transportation provider "know[s] or . . . reckless[ly] disregard[s] the fact that an alien" has unlawfully entered the United States), *with* Az. Rev. Stat. § 13-2319(E)(3) (state smuggling statute is triggered wherever a transportation provider "knows *or has reason to know*" that the persons transported have unlawfully entered or remained in the United States (emphasis added)); *see also generally United States v. Townsend*, 924 F.2d 1385, 1391 n.2 (7th Cir. 1991) ("[U]sually in the law to say that someone has 'reason to know' something means that he would be *negligent* in not knowing it." (emphasis added)).

[38] *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, (continued...)

"comprehensive scheme" places a primary emphasis on employer sanctions. *See Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002); *Lozano,* 496 F. Supp. 2d at 477, 524-25. IRCA provides robust penalties for employers of unlawfully present aliens, and no criminal penalties for unlawfully present aliens who simply perform or solicit employment. *See* 8 U.S.C. § 1324a, *et seq*. Among its many provisions targeting employers, IRCA punishes employers for knowingly hiring unauthorized workers, 8 U.S.C. § 1324a(a)(1)(A); prohibits employers from recruiting or referring for a fee such workers, *id.*; prohibits continuing employment by employers of unauthorized workers, *id.* § 1324a(a)(2); sanctions employers who use contracts or subcontracts to hire unauthorized workers, *id.* § 1324a(a)(4); and requires employers to comply with a new "employment verification system," *id.* § 1324a(b). IRCA also created a detailed compliance scheme to enforce an employer's obligations under the new law, with various monetary penalties for initial violations, larger monetary penalties for subsequent violations, as well as the prospect of injunctive sanctions. *See id.* § 1324a(e)(4); 8 C.F.R. § 274a.10. While IRCA's primary focus is on employer sanctions, Congress has demonstrated what sanctions would be appropriate for employees, by providing very targeted sanctions against certain conduct of unauthorized aliens, such as the presentation of fraudulent documents to demonstrate work eligibility. *See* 8 U.S.C. § 1324c.

But beyond these penalties linked to specific acts, IRCA does not criminalize the mere performance or solicitation of work by an unlawfully present alien. Congress's focus on employers was intentional, and reflected its belief that sanctions on employees were

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[38] (...continued)
503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn – not from federal inaction alone, but from inaction joined with action."); *Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008) ("State law may constitute an impermissible obstacle to the accomplishment of purposes of Congress by regulating conduct that federal law has chosen to leave unregulated." (internal quotation marks omitted)); *accord Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss*., 474 U.S. 409, 422 (1986) ("To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market. A federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." (internal quotation marks omitted)).

inappropriate. As the Ninth Circuit has explained, although Congress "discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals. . . . Instead, it deliberately adopted sanctions with respect to the *employer* only." *See Nat'l Ctr. for Immigrants' Rights v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990) (*rev'd on other grounds*, 502 U.S. 183 (1991)) (emphasis in original). IRCA therefore embodied a "congressional policy choice [that was] clearly elaborated" in favor of sanctions only for the employer. *Id.* at 1370. IRCA's legislative history further confirms that Congress affirmatively rejected criminal penalties for the unlawfully present employee for important policy reasons. Congress's concern about the humanitarian consequences of criminally punishing employees prompted it to exclusively enact punishments for the employer and reject such punishments for the employee.[39]

By attempting to override Congress's conscious choice not to criminally punish unlawful aliens for soliciting or performing work, Arizona has created a clear conflict with federal law. *See Crosby*, 530 U.S. at 380; *Puerto Rico Dept. of Consumer Affairs*, 485 U.S. at 503. But the Supremacy Clause does not permit Arizona to second-guess Congress's decision not to impose sanctions on employees. *See, e.g., Thunder Craft Boats, Inc.,* 489 U.S. at 152; *Felder*, 487 U.S. at 143.

5. Section 5 of S.B. 1070 – Arizona's Transporting, Harboring, or Concealing Provision – Violates Preemption and Dormant Commerce Clause Principles

The second provision of Section 5 of S.B. 1070 makes it illegal for a person, who is in violation of a criminal offense, to (1) transport an alien in Arizona in furtherance of the unlawful presence of the alien in the United States; (2) conceal, harbor, or shield an alien from detection in any place in the state; and (3) encourage or induce an alien to come to or

[39] *See* H.R. Rep. No. 99-682(I) at 46 ("Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens."); *see also Nat'l Ctr. for Immigrants' Rights*, 913 F.2d at 1366, 1369 ("The emphasis on employer sanctions in IRCA militates against reading in the authority to detain individuals to prevent them from working."); Ragsdale Decl. ¶ 21. And Congress's intent not to punish unauthorized aliens for seeking employment was further evidenced through the simultaneous passage of other sections of IRCA, which coupled new employer sanctions with the adjustment of status for certain alien workers present in the United States. *See* 8 U.S.C. §§ 1160, 1255a.

reside in this state if the person knows that such coming to, entering or residing in this state is or will be in violation of law. S.B. 1070 § 5(A) (§ 13-2929). This provision represents an invalid incursion on federal authority for two reasons.

First, to the extent that Section 5 is not a restriction of interstate movement, it is necessarily a restriction on unlawful entry into the United States. As a border state, Arizona's boundaries are in part the boundaries of the United States. Section 5 represents an attempt to regulate entry into the *nation* – a definitively federal area of concern in which state regulations are barred by the U.S. Constitution. *See De Canas*, 424 U.S. at 355 (a state may not attempt to regulate "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain"). The degree of Arizona's intrusion into the uniquely federal area of unlawful entry is further underscored by the fact that Arizona construes such prohibitions on immigration conduct to apply to the alien himself. *See, e.g.*, *Barragan-Sierra*, 196 P.3d at 888.

Second, this provision offends the Dormant Commerce Clause by restricting the interstate movement of aliens. Article I, Section 8 of the Constitution grants Congress the right to regulate commerce between the states – a positive grant of power that forbids state regulations that intentionally interfere with interstate commerce. The "Dormant Commerce Clause" forbids certain state regulations attempting to discourage or otherwise restrict the movement of people between states. *See Edwards v. California*, 314 U.S. 160, 172-73 (1941). *Edwards* involved a challenge to a depression-era California statute prohibiting "the 'bringing' or transportation of indigent persons into California." *Id.* at 173. The Supreme Court invalidated the statute under the Dormant Commerce Clause, which "prohibit[s] attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Id.*; *see also Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 584 (1997) (reaffirming that the Dormant Commerce Clause prohibits certain limitations on the interstate transportation of persons); *Anderson v. Mullaney*, 191 F.2d 123, 127 (9th Cir. 1951) (holding that Alaska violated the Dormant Commerce Clause in enacting a scheme of regulations that

discouraged the movement of out-of-state fishermen into Alaska).

Arizona's prohibition on encouraging movement into the state similarly violates the Dormant Commerce Clause. The prohibition on "encourag[ing] an alien to come to or reside in" Arizona aims to restrict the movement of unlawfully present aliens from other states into Arizona. Although the statute claims only to apply where an alien's "entering or residing in [Arizona] is or will be in violation of law," S.B. 1070 § 5(A), unlawfully present aliens who are subject to Section 3 of S.B. 1070 will usually meet this condition. Even though Arizona's statute is phrased in similar terms as the federal alien smuggling statute, the latter deals with actual immigration – the movement across an international border – whereas the former also regulates movements *within* the United States. This restriction on movement within the states is prohibited by the Dormant Commerce Clause.[40]

II. THE UNITED STATES WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

Upon demonstrating a likelihood of success on the merits, a plaintiff must also establish that, absent the preliminary injunction, there is a likelihood that the defendant's conduct will cause irreparable harm. *See Winter*, 129 S. Ct. at 375. Preliminary injunctive relief is necessary here because S.B. 1070 is causing irreparable harm to the United States, and this harm will only be magnified if the law goes into effect.[41] If not enjoined, S.B. 1070 will continue to cause irreparable harm to the United States in at least three significant ways.

First, S.B. 1070 irreparably undermines the federal government's control over the

[40] Additionally, Section 5 of S.B. 1070 directly conflicts with a section of the federal alien smuggling statute (8 U.S.C. § 1324(a)(1)(C)), which provides a distinct carve-out for certain religious organizations which would now be punishable under Arizona law. Certain religious organizations that meet the requirements of § 1324(a)(1)(C) and which conceal, harbor, or shield an alien whom they know to have illegally entered or remained in the United States, would be in violation of Section 5 of the Arizona law, despite an express command from Congress that such behavior not be subject to criminal sanctions.

[41] The Ninth Circuit has traditionally used a "sliding scale" approach to the irreparable harm standard, pursuant to which the burden for demonstrating irreparable harm decreases as the likelihood of success on the merits increases. *See Stormans*, 526 F.3d at 412. The Supreme Court has recently held that this approach may not allow preliminary relief upon a showing of only a "possibility" of irreparable harm. *Winter*, 129 S.Ct. at 375–76. However, regardless of whether a "sliding scale" is employed here, injunctive relief is appropriate because, as discussed below, the United States will suffer irreparable harm absent an injunction.

regulation of immigration and immigration policy and thereby interferes with the federal government's ability to achieve the purposes and objectives of federal law and to pursue its chosen enforcement priorities. If S.B. 1070 is permitted to become effective on July 29, 2010, the federal government's chosen policy balance with respect to immigration enforcement will be altered and, during the pendency of this action, the federal government's ability to balance the various interests that animate the federal immigration laws will be seriously damaged. Among other things, as discussed above, S.B. 1070 seeks to override, and would impair the ability of DHS to execute, the federal enforcement priority to locate, detain, prosecute and remove violent criminal aliens who pose significant risks to the safety and security of our Nation's citizens. This assault on federal priorities is not speculative; it is the avowed purpose of S.B. 1070. *See* S.B. 1070 § 1. By violating the Constitution's structural reservation of authority to the federal government to set immigration policy, S.B. 1070 effects ongoing irreparable harm to the constitutional order. Indeed, the Supreme Court has suggested that irreparable harm inherently results from the enforcement of a preempted state law. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 366-67 (1989) (suggesting that "irreparable injury may possibly be established . . . by a showing that the challenged state statute is flagrantly and patently violative . . . . of the express constitutional prescription of the Supremacy Clause").

Second, the enforcement of S.B. 1070 will inflict irreparable injury on the United States' ability to manage foreign policy. The mere existence of Arizona's "attrition through enforcement" policy – with its concomitant promise of the sweeping criminalization of immigrant populations – has already had negative effects on U.S. foreign policy interests, and these consequences will intensify if S.B. 1070 is permitted to operate. *See* Steinberg Decl. ¶ 34-44. Harm to the federal government's ability to address issues of concern to the United States and its citizens in foreign affairs – such as immigration, national security, and economic policy – cannot be undone by court order.

Foreign leaders from around the Western Hemisphere and elsewhere, including the government of Mexico, have criticized S.B. 1070, and that has undermined the United States'

ability to pursue various diplomatic objectives. *See* Steinberg Decl. ¶¶ 34-40. In one instance, because of the passage of S.B. 1070, Mexico postponed consideration of a bilateral agreement with the United States for coordinating responses to natural disasters and accidents. *See id.* ¶ 43. In another case, at least five of six Mexican governors have announced their refusal to participate in the U.S.-Mexico Border Governors' conference, wherein significant cross-border issues would have been discussed. *See id.* ¶ 42. And Mexico has further limited its participation in the Merida initiative, a partnership aimed at confronting violent transnational gangs. *See* Silver Decl. ¶ 7. Mexican President Calderón has publicly stated that he views S.B. 1070 as undermining Mexican popular goodwill toward the United States, and complicating his country's ability to remain focused on a positive bilateral agenda of critical importance to U.S. national interests. *See, e.g.*, Travel Alert, Secretaría de Relaciones Exteriores, Mexico, Apr. 27, 2010; Mexican President Calderón's Address to Joint Meeting of Congress, May 20, 2010.[42] Such reactions are the predictable result of a state immigration policy whose exclusive aim is "attrition" of foreign nationals in Arizona through a policy of maximum "enforcement" of particular criminal sanctions – a policy given teeth by a mandatory, discretion-less verification scheme that enforces a series of interlocking and virtually automatic criminal penalties. Steinberg Decl. ¶ 22 ("The exercise of immigration functions can quickly provoke a significant bilateral or multilateral problem that harms U.S. interests if handled without appropriate consideration of relevant foreign policy impacts."), ¶¶ 20, 32 ("[D]omestic processes for arrest, detention, and removal . . . are of great interest to foreign governments," and as a "matter of international law and practice, the federal government is held accountable . . . for the actions of state and local authorities regarding our treatment of foreign nationals."). These foreign policy consequences, which will only be magnified by S.B. 1070's implementation, are paradigmatic examples of irreparable harm: Once opportunities for cooperation are lost, they cannot be

[42] *See also* Brief of the United Mexican States as *amicus curiae*, *Friendly House v. Whiting*, No. 10-CV-1061 (D. Ariz.) (describing Mexico's objections to S.B. 1070 and impediments that S.B. 1070 will create to certain cooperative arrangements with the United States).

recovered by a favorable judgment at the conclusion of this case.

More generally, the State Department has advised that S.B. 1070 represents an impediment to U.S. foreign policy and diplomatic interests – both with Mexico and with other countries. *See* Steinberg Decl. ¶ 58 ("I have concluded that S.B. 1070 runs counter to American foreign policy interests, and that its enforcement would further undermine American foreign policy."). And such damage to foreign relations will have an adverse effect on federal immigration enforcement. *See* Ragsdale Decl. ¶ 54 ("Should there be any decreased cooperation from foreign governments in response to Arizona's enforcement of SB 1070, the predictable result . . . would be an adverse impact on the effectiveness and efficiency of ICE's enforcement activities"); *id.* ¶¶ 29-32 (cooperation with Mexico is critical to border security and for effectuating removal of dangerous or criminal aliens from the United States). The State Department carefully cultivates relationships with foreign governments so as to enable maximum cooperation on issues of concern to the United States and its citizens – such as immigration, national security, and economic policy. Damage that is done to these relationships is irreparable, as it cannot be undone by court order. Nor is this damage speculative; it has already manifested itself due to the passage of S.B. 1070, and it will only increase significantly if S.B. 1070 is allowed to be enforced. Indeed, with the deepest understanding of these complex foreign relationships, the State Department advises that S.B. 1070 "is likely to hinder our ability to secure the cooperation of other states in efforts to promote U.S. interests internationally across a range of trade, security, [and] tourism," is "likely to undermine the United States' ability to engage effectively with the international community to promote the advancement and protection of human rights," and "risk[s] provoking retaliatory treatment against U.S. nationals by other states." Steinberg Decl. ¶ 57. This ongoing and expected irreparable harm to weighty foreign policy interests alone warrants preliminary injunctive relief. *See Garamendi*, 539 U.S. 396 (upholding district court's injunction due to interference with foreign policy).

Similarly, for the multiple reasons discussed above, S.B. 1070 will result in the harassment of lawfully present aliens, which frustrates the United States' relationship with

immigrant communities and damages the United States' reputation as a welcoming country for lawfully admitted aliens. *See* Steinberg Decl. ¶ 20 (explaining that foreign governments take great interest in domestic processes for arrest and detention of aliens, because of "the impact these processes have on foreign nationals and their families."); *see generally Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (recognizing that injuries to reputation constitute irreparable harm); *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 526 (9th Cir. 1984) (same).

In addition, DHS, which "maintains the primary interest in the humane treatment of aliens and the fair administration of federal immigration laws," has advised that such "humanitarian interests would be undermined" if certain aliens or categories of aliens are "detained or arrested by Arizona authorities for being illegally present in the United States," Ragsdale Decl. ¶ 47, including aliens eligible for or seeking asylum, *id.* ¶ 48, aliens seeking protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *id.* ¶ 50, and aliens in various other circumstances which require individualized discretion, *id.* ¶¶ 47, 49. However, because it is impossible for the state to know when ICE would apply such discretion, and because S.B. 1070's blanket and mandatory "attrition through enforcement" policy makes any such knowledge irrelevant, it is all but guaranteed that S.B. 1070 will work a very real and irreparable interference with Congress's humanitarian objectives and enforcement priorities, which are now carried out by ICE's measured exercise of discretion. *See* Ragsdale Decl. ¶¶ 18, 24, 25 (explaining uses of discretion for humanitarian interests). A court cannot undo the interference with federal enforcement priorities, nor can it undo the effect of a victimized alien's detention or incarceration, or the message that such treatment would convey abroad.

Finally, irreparable harm will result because the enforcement of S.B. 1070 will, as discussed above, place a significant burden on DHS resources and force DHS to react to Arizona's enforcement of S.B. 1070 at the expense of its own policy priorities – namely, aliens presenting threats to national security and public safety. *See* Ragsdale Decl. ¶ 41 ("[T]he burdens placed by SB 1070 on the Federal Government will impair ICE's ability to

pursue its enforcement priorities."); Palmatier Decl. ¶ 15-17. Section 2 of S.B. 1070 will result in a dramatic increase in verification requests to DHS. Such an increase is not speculative; it is the exact point of the law. *See* Palmatier Decl. ¶ 15 ("Arizona's new law will result in an increase in the number [of queries] . . . reducing our ability to provide timely responses to law enforcement on serious criminal aliens."); Ragsdale Decl. ¶ 44 ("[T]o respond to the number of referrals likely to be generated by enforcement of SB 1070 would require ICE to divert existing resources from other duties."); *id.* ¶ 52 (noting that without diverting resources from federal priorities, ICE is not staffed to provide testimony in additional hearings against aliens in Arizona). And, as explained above, the greater share of DHS's attention that Arizona receives as a result will reduce the federal ability to pursue highly dangerous aliens. If S.B. 1070 is not enjoined, every day the federal government is forced to focus on managing the output of S.B. 1070 rather than on these dangerous aliens will constitute an irreparably lost opportunity to focus on higher priority targets. This, in turn, poses significant and irreparable risks to the safety and security of our Nation's citizens.

Enforcement of S.B. 1070's mandatory attrition provisions will similarly interfere with ICE's outreach program, which ensures the assistance of unlawfully present aliens in the prosecution of higher priority threats and will also endanger federal immigration authorities' capacity to apprehend highly dangerous targets. *See id.* ¶ 33 (S.B. 1070 "would . . . interfere with ICE's ability to pursue the prosecution or removal of aliens who pose particularly significant threats to public safety or national security."); ¶ 38 ("[V]ictims and witnesses of crime may hesitate to come forward to speak to law enforcement officials"); Palmatier Decl. ¶ 17 (predicting that, as a result of S.B. 1070, "serious violators may well escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the [unlawfully present] alien they have encountered."). Once this type of damage is done to ICE's enforcement priorities during the period in which "attrition through enforcement" supplants the federal government's balanced set of values, no final judgment can undo it.

III. A BALANCING OF EQUITIES FAVORS THE UNITED STATES AND DEMONSTRATES THAT THE PUBLIC INTEREST WOULD BE SERVED BY GRANTING INJUNCTIVE RELIEF

Finally, injunctive relief is necessary because a consideration of the public interest and the balance of hardships between the parties favors enjoining S.B. 1070. *See Stormans*, 586 F.3d at 1127. In this action, which seeks to protect the interests of the United States as a whole, the burdens that will result absent injunctive relief are directly tied to the public benefits that will be protected if this Court issues the requested injunction. *Cf. Nken v. Holder*, 129 S. Ct. 1749, 1762 (2009) (stating, in the related context of criteria governing stay of removal, that the criteria of "harm to the opposing party" and "the public interest" "merge when the Government is the opposing party" because harm to the Government is harm to the public interest). That is particularly the case given that this lawsuit seeks to vindicate the supremacy of federal law. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009) (noting, in considering the balance of equities in the context of preliminary injunction, that "the interest of preserving the Supremacy Clause is paramount" and citing Ninth Circuit precedent "considering the public interest represented by the Constitution's declaration that federal law is to be supreme" (internal quotation marks omitted)).

As discussed throughout this memorandum, a variety of national, public interests are endangered by the operation of S.B. 1070, and will be promoted by the issuance of the requested injunction. Preliminary injunctive relief will help relieve federal immigration authorities of the burdens created by S.B. 1070, thereby allowing them to focus on high priority issues of national security and public safety. The prospect of interference with federal priorities is a clear burden on the United States, just as the ability to pursue these priorities without interruption from S.B. 1070 would benefit the public interest. Additionally, absent an injunction, S.B. 1070's damage to foreign policy will continue unabated – thereby limiting the federal government's ability to productively cooperate with other countries on issues of public importance, such as national security, trade, tourism, and the environment. The operation of S.B. 1070 will also harm U.S. interests by imposing

special burdens on lawfully present aliens – thereby endangering cooperative relationships with this community while directly injuring the reputation and goodwill of the United States. Injunctive relief will serve the public interest by helping to prevent these burdens to aliens specifically and American goodwill generally.

By contrast, a preliminary injunction will not meaningfully burden Arizona. S.B. 1070 has not yet gone into effect, so an injunction in this context would have the effect of merely preserving the status quo. *See U.S. Philips Corps. v. KBC Bank*, 590 F.3d 1091, 1094 (9th Cir. 2010) ("[T]he very purpose of a preliminary injunction . . . is to preserve the status quo and the rights of the parties until a final judgment issues in the cause."). Were this Court ultimately to conclude that S.B. 1070 does not offend the Supremacy Clause, Arizona would then be able to implement and enforce S.B. 1070 without having suffered any substantial burden. What is more, given that this litigation largely concerns immigration law and policy – in which, by any plausible account, the federal interest is paramount and the state interest is (at most) minimal, *see, e.g.*, *De Canas*, 424 U.S. at 355 – the burden on Arizona from a preliminary injunction would be modest. Indeed, Arizona has no legitimate interest in the enforcement of a law that likely violates the Supremacy Clause. *See Chamber of Commerce of U.S. v. Edmonson*, 594 F.3d 742, 771 (10th Cir. 2010) ("Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm.").

CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion for a Preliminary Injunction.

DATED: July 6, 2010

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF JAMES B. STEINBERG

Pursuant to 28 U.S.C. 1746, I, James B. Steinberg, declare and state as follows:

1. I am Deputy Secretary of State. I make this declaration based on my personal knowledge and on information I have received in my official capacity.

2. I have served as Deputy Secretary of State since January 28, 2009. Immediately prior to joining the Department of State, I served as Dean of the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin. From 1993 to 1994, I served as Deputy Assistant Secretary of State for analysis in the Bureau of Intelligence and Research, and from 1994 to 1996 as Director of the Department of State's Policy Planning Staff. From December 1996 to August 2000, I served as Deputy National Security Adviser on the staff of the National Security Council. From 2001-2005, I was the President and Director of Foreign Policy Studies at the Brookings Institution in Washington, D.C.

3. In my capacity as Deputy Secretary of State, I assist the Secretary of State in

the formulation and conduct of U.S. foreign policy and in giving general supervision and direction to all elements of the Department. I have delegated authority to act on behalf of the Secretary of State, and assist the Secretary in representing the United States at international meetings and performing other representational assignments with senior foreign government officials.

4. I have read and am familiar with Arizona law S.B. 1070. I am also familiar with the reactions of foreign governments to the law.

5. As I explain further below, U.S. federal immigration law incorporates foreign relations concerns by providing a comprehensive range of tools for regulating entry and enforcement. These may be employed with sensitivity to the spectrum of foreign relations interests and priorities of the national government. By contrast, Arizona law S.B. 1070 establishes a single, inflexible, state-specific immigration policy based narrowly on criminal sanctions that is not responsive to these concerns, and will unnecessarily antagonize foreign governments. If allowed to enter into force, S.B. 1070 would result in significant and ongoing consequences for U.S. foreign relations.

6. Through the Immigration and Nationality Act ("INA") and other federal laws, the national government has developed a comprehensive regime of immigration regulation, administration, and enforcement, in which the Department of State participates. This regime is designed to accommodate complex and important U.S. foreign relations priorities that are implicated by immigration policy -- including humanitarian and refugee protection, access for diplomats and official foreign visitors, national security and counterterrorism, criminal law enforcement, and the promotion of

U.S. human rights policies abroad. To allow the national government flexibility in addressing these concerns, the INA provides the Executive Branch with a range of regulatory options governing the entry, treatment and departure of aliens. Moreover, foreign governments' reactions to immigration policies and the treatment of their nationals in the U.S. impacts not only immigration matters, but also any other issue in which we seek cooperation with foreign states, including international trade, tourism, and security cooperation. These foreign relations priorities and policy impacts are ones to which the national government is sensitive in ways that individual states are not.

7. By rigidly imposing a singular, mandatory form of criminal immigration enforcement through mandatory verification of immigration status and criminal enforcement of alien registration, S.B. 1070 deviates from the national government's policy of calibrated immigration enforcement. The Arizona law also uniquely burdens foreign nationals by criminalizing work and travel beyond the restrictions imposed by U.S. law. These multiple, interlinking procedural and criminal provisions, adopted in order to enforce an explicit state policy of "attrition through enforcement," all manifest Arizona's intention to globally influence immigration enforcement. S.B. 1070 thereby undermines the diverse immigration administration and enforcement tools made available to federal authorities, and establishes a distinct state-specific immigration policy, driven by an individual state's own policy choices, which risks significant harassment of foreign nationals, is insensitive to U.S. foreign affairs priorities, and has the potential to harm a wide range of delicate U.S. foreign relations interests.

8. Indeed, although it was only adopted in April 2010, is the law of only one

state, and has not yet gone into effect, Arizona law S.B. 1070 already has provoked significant criticism in U.S. bilateral relationships with many countries, particularly in the Western Hemisphere, as well as in a variety of regional and multilateral bodies. Foreign governments and international bodies have expressed significant concerns regarding the potential for discriminatory treatment of foreign nationals posed by S.B. 1070, among other issues.

9. By deviating from federal immigration enforcement policies as well as federal rules governing work and travel by foreign nationals, S.B. 1070 threatens at least three different serious harms to U.S. foreign relations. *First*, S.B. 1070 risks reciprocal and retaliatory treatment of U.S. citizens abroad, whom foreign governments may subject to equivalently rigid or otherwise hostile immigration regulations, with significant potential harm to the ability of U.S. citizens to travel, conduct business, and live abroad. Reciprocal treatment is a significant concern in immigration policy, and U.S. immigration laws must always be adopted and administered with sensitivity to the potential for reciprocal or retaliatory treatment of U.S. nationals by foreign governments.

10. Second, S.B. 1070 necessarily antagonizes foreign governments and their populations, both at home and in the U.S., likely making them less willing to negotiate, cooperate with, or support the United States across a broad range of important foreign policy issues. U.S. immigration policy and treatment of foreign nationals can directly affect the United States' ability to negotiate and implement favourable trade and investment agreements, to coordinate disaster response arrangements, to secure cooperation on counterterrorism or drug trafficking operations, and to obtain cooperation

in international bodies on priority U.S. goals such as nuclear non-proliferation, among other important U.S. interests. The law has already complicated our efforts to pursue broader U.S. priorities. S.B. 1070's impact is likely to be most acute, moreover, among our many important democratic allies, as those governments are most likely to be responsive to the concerns of their constituents and the treatment of their own nationals abroad.

11. Third, S.B. 1070 threatens to undermine our standing in regional and multilateral bodies that address migration and human rights matters and to hamper our ability to advocate effectively internationally for the advancement of human rights and other U.S. values. Multilateral, regional and bilateral engagement on human rights issues and the international promotion of the rule of law is a high priority for the United States, and for this Administration. Consistency in U.S. practices at home is critical for us to be able to argue for international law consistency abroad. By deviating from national policy in this area, S.B. 1070 may place the U.S. in tension with our international treaty obligations and commitments and compromise our position in bilateral, regional and multilateral conversations regarding human rights.

12. In all activities relating to U.S foreign relations, including immigration, the United States is constantly engaged in weighing multiple competing considerations and choosing among priorities in order to develop an overall foreign policy strategy that will most effectively advance U.S. interests. The United States likewise is constantly seeking the support of foreign governments through a delicately-navigated balance of interests across the entire range of U.S. national policy goals. Only the national government has

the information available to it to be able to appropriately evaluate these choices on a continuing basis in response to fluctuating events on the international stage. Because of the broad-based and often unintended ways in which U.S. immigration policies can adversely impact our foreign relations, it is critically important that national immigration policy be governed by a uniform legal regime, and that decisions regarding the development and enforcement of immigration policy be made by the national government, so that the United States can speak to the international arena with one voice in this area.

13. While isolated state enactments that incidentally touch on immigration may not implicate foreign policy concerns (or may implicate them only slightly), Arizona's law more directly and severely impacts United States foreign policy interests by establishing an alternative immigration policy of multiple, interlinking procedural and criminal provisions, all of which manifest Arizona's intention to globally influence immigration enforcement. As I understand it, Arizona's effort to set its own immigration policy is markedly different from instances in which states and localities assist and cooperate with the federal government in the enforcement of federal immigration laws. When states and localities work in concert with the federal government, the likelihood for conflicts with U.S. foreign policy interests is greatly diminished. When states and localities assist the federal government, and take measures that are in line with federal priorities, then the United States retains its ability to speak with one voice on matters of immigration policy, which in turn enables it to keep control of the message it sends to

foreign states and to calibrate responses as it deems appropriate, given the ever-changing dynamics of foreign relations.

14. By contrast, by pursuing a singular policy of criminal enforcement-at-all-costs through, among other things, imposing an extraordinary mandatory verification regime coupled with what is effectively state criminalization of unlawful presence, S.B. 1070 is likely to provoke retaliatory treatment of U.S. nationals overseas, weaken public support among key domestic constituencies abroad for cooperating with the U.S, and endanger our ability to negotiate international arrangements and to seek bilateral, regional or multilateral support across a range of economic, human rights, security, and other non-immigration concerns, and be a source of ongoing criticism in international fora. Arizona's unprecedented effort to set its own, contrary immigration policy predictably conflicts with U.S. foreign policy interests and with the United States' ability to speak with one voice.

I. U.S. Immigration Law Incorporates Foreign Relations Concerns

15. The Secretary of State is charged with the day-to-day conduct of U.S. foreign affairs, as directed by the President, and exercises authority derived from the President's powers to represent the United States under Article II of the Constitution and from statute. As part of these responsibilities, the Department of State plays a substantial role in administering U.S. immigration law and policy, as well as in managing and negotiating its foreign relations aspects and impact. Within the Department of State, the Bureau of Consular Affairs has responsibility for the adjudication and issuance of passports, visas, and related services; protection and welfare of U.S. citizens and interests

abroad; third-country representation of interests of foreign governments; and the determination of nationality of persons not in the United States. See 1 Foreign Affairs Manual 250.[1] Several other bureaus within the Department of State, including the Bureau of Population, Refugees and Migration; the Bureau of Human Rights, Democracy and Labor; the Bureau of International Organization Affairs; and all regional bureaus are routinely engaged in negotiations and multilateral diplomatic and policy work in global, regional, and bilateral forums on migration issues. Collectively, the Department of State promotes U.S. policies internationally in this area and bears the burden of managing foreign governments' objections to the treatment of their nationals in the United States.

16. U.S. law, and particularly Section 104 of the INA, as amended by the Homeland Security Act, invests the Secretary of State with specific powers and duties relating to immigration and nationality. A 2003 Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, ¶ 1(b), provided that the Secretary of Homeland Security would establish visa policy, review implementation of that policy, and provide additional direction as provided in the MOU, while respecting the prerogatives of the Secretary of State to lead and manage the consular corps and its functions, to manage the visa process, and to execute the foreign policy of the United States.

[1] The Secretary of State's authorities under the INA are found in various provisions, including §§ 104, 105, 349(a)(5), 358, and 359 (8 U.S.C. §§ 1104, 1105, 1481(a)(5), 1501, and 1502) (visa and other immigration-related laws). The Department also exercises passport-related authorities, including those found at 22 U.S.C. §§ 211a, et seq.

17. Our immigration laws, including those administered by the Department of State, are crafted to incorporate and accommodate a wide range of sensitive U.S. foreign relations concerns. Our visa regime, for example, both embodies and permits consideration of U.S. diplomatic, human rights, and other foreign relations interests. To give but a few examples, the INA authorizes the Secretary of State to help determine which diplomats are entitled to diplomatic visas to represent their countries in the United States. INA § 101(a)(15)(A). INA § 243(d) authorizes the Secretary of State to determine the scope of visa sanctions that will be imposed on countries, upon notification from DHS that such countries have denied or unreasonably delayed accepting their nationals back from the United States. The INA also authorizes the Secretary of State to deny visas to aliens whose entry or proposed activity in the United States "would have potentially serious adverse foreign policy consequences." *See* INA § 212(a)(3)(C). During the Honduran constitutional crisis in 2009, the State Department imposed visa restrictions and revoked several visas under this authority to encourage the de facto government to enter into good faith negotiations with deposed President Zelaya. Likewise, under the auspices of INA § 212(f) and Presidential Proclamation 7750, the State Department recently revoked several visas for officials who engaged in or benefited from corruption, in an effort to bring pressure to bear on other countries to investigate and eliminate corruption by their government officials.

18. Further, our law provides for the denial of U.S. visas on security and related grounds to aliens who are anticipated to violate U.S. law following entry into the United States and those with a broad range of ties to terrorism, including those with

certain ties to groups that a consular officer or the Secretary of State reasonably believes has engaged in terrorist activity, as defined in the INA, § 212(a)(3)(B). Our visa laws also deny admission and make subject to removal aliens who participated in human rights violations such as genocide or torture.[2] And even the general authority to issue visas requires Department officials to monitor the political, legal, economic, and cultural developments in foreign countries for matters directly relevant to the full range of visa ineligibilities (e.g., economic, demographic, political, ethnicity, criminal, and security issues).

19. Finally, under section 244 of the INA, 8 U.S.C. § 1254a, U.S. law also provides for temporary protected status ("TPS"), a temporary immigration status which permits eligible foreign nationals who are already present in the United States to remain in the United States and obtain employment authorization. TPS is available to eligible foreign nationals who, due to armed conflict, an environmental disaster, or extraordinary and temporary conditions in their states of nationality, may face risk to personal safety if returned to that state while such conditions persist. Recent examples include the designation this year of Haiti for TPS following the devastating earthquake in that country, and the extension of Sudan's designation as a result of ongoing armed conflict. DHS administers the program and, pursuant to the statute, routinely consults with the State Department for its views on issues relevant to determinations whether to designate or continue to designate a foreign state or part thereof for TPS, including whether the

[2] 8 U.S.C. §§ 1182(a)(2)(G), 1182(a)(3)(E), and 1182(a)(3)(G) (inadmissible); 8 U.S.C. §§ 1227(a)(4)(D)-(4)(F) (removable).

statutory criteria are satisfied in each case. TPS furthers certain U.S. foreign policy interests by facilitating provision of humanitarian protection to eligible persons who might otherwise be subject to removal to their home countries in times of armed conflict, environmental disasters, or other extenuating and temporary conditions. The impact of the program can be significant: DHS estimated that 100,000 to 200,000 individuals were eligible for TPS under the Haiti designation.

II. U.S. Immigration Practices Significantly Impact Our Foreign Relations

20. In addition to incorporating foreign relations concerns, the United States' choices with respect to immigration policies and practices also have a significant impact on our foreign relations. Again using State Department visa processes as an example, the process for visa issuance and denial is of great interest to foreign governments, owing to the direct impact the visa process has on the affairs of their own nationals. Similarly, domestic processes for arrest, detention, and removal of aliens and other aspects of their treatment in the U.S. are of great interest to foreign governments because of the impact these processes have on foreign nationals and their families. Aspects of U.S. immigration laws, such as the prohibitions on removal of an individual to a country where it is more likely than not that he would be tortured, and on removal of a refugee to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political affiliation, implement U.S. treaty obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1967 Protocol to the U.N. Convention relating to the Status of Refugees.

21. Given the diplomatic, legal, and policy sensitivities surrounding immigration issues, even small changes in U.S. immigration laws, policies, and practices can provoke a substantial international reaction -- both in the immigration context and across American diplomatic concerns. It is for this reason that, although federal law recognizes that states and localities may play beneficial roles in assisting in the enforcement of federal immigration law, *see* 8 U.S.C. § 1357(g)(10), the authority to directly regulate immigration has been assigned exclusively to the federal government.

22. Indeed, countries routinely raise concerns about such changes in bilateral, regional and multilateral arenas. The exercise of immigration functions can quickly provoke a significant bilateral or multilateral problem that harms U.S. interests if handled without appropriate consideration of relevant foreign policy impacts. The Department of State is often in the position of interacting directly with foreign governments in managing the impact of these bilateral problems. For example, decisions regarding the issuance of individual visas to controversial figures, such as leaders of foreign governments with which the United States experiences significant diplomatic tensions, prominent individuals with checkered pasts, and delegates to international bodies, require a full review of U.S. government equities, including foreign policy interests and consideration of international treaties to which the United States is a party. Requirements that a consular officer adjudicating a visa application obtain a Security Advisory Opinion ("SAO") or Advisory Opinion ("AO") can significantly delay visa processing and create tension, particularly, but not only, when the applicant is a foreign government official or other high profile individual. The broad terrorism-related provisions in the INA have also

been criticized by foreign governments and officials and raised as obstacles to bilateral cooperation.

A. *Reciprocal Harm to U.S. Citizens Abroad*

23. Specifically, U.S. immigration policies and practices can have immediate and substantial impacts on the treatment of U.S. nationals abroad. INA § 221(c), for example, requires the length of validity for visas to be reciprocal as far as practicable. Even relatively non-controversial issues such as the period of validity of a visa and the fees charged are the subject of discussion, negotiation, and agreement among countries and have a direct impact on how other governments treat U.S. citizens who wish to travel abroad. For example, in the recent past, some countries have responded to changes in U.S. visa charges by significantly raising the entry fees charged to U.S. nationals by those countries. The Enhanced Border Security and Visa Entry Reform Act of 2002, which requires the fingerprinting of foreign nationals for the visa application process and in order to enter the United States, was the subject of much criticism by other governments and caused some governments to consider taking reciprocal retaliatory action against U.S. nationals. For example, Brazil reserves the right to require a thumbprint of Americans upon entry into Brazil.

24. In the area of consular services, how we treat foreign nationals who are present in the United States likewise can impact how a foreign government treats U.S. citizens present in its country. For example, the Department of State proactively takes a number of steps to ensure U.S. compliance with our obligation under Article 36 of the Vienna Convention on Consular Relations ("VCCR"), which requires that all foreign

nationals in custody in the United States be informed of their option to request to meet with a consular official. The Department does so in important part in order to increase the likelihood that such notification and consular access are provided to U.S. citizens who are detained abroad.

25. Accordingly, the State Department not only considers carefully the foreign policy goals and consequences of its immigration-related decisions, but also the potential impact of those decisions on the reciprocal treatment of U.S. citizens by the relevant foreign government.

B. *Impact in Regional and Multilateral Fora*

26. The situation of foreign nationals within a country, particularly questions relating to the protection of the human rights of migrants, regardless of their immigration status, is a matter of international concern and is addressed by international treaties. The United Nations and regional bodies such as the Organization of American States ("OAS"), a regional intergovernmental organization comprised of all thirty-five States of the Americas, have established institutions and mechanisms for the discussion, examination, and oversight of international migration policy. As a matter of longstanding human rights and humanitarian policy, the United States government strongly supports international efforts to protect migrants, who are typically especially vulnerable to mistreatment and abuse. Accordingly, the United States as a matter of its foreign policy engages actively in regional and multilateral human rights fora, through which the United States promotes respect for human rights (including the human rights of migrants), the rule of law, and respect for other U.S. values.

27. As part of the international migration framework, the United States has ratified several global human rights treaties which impose obligations on States Parties regarding the rights of persons, including migrants, within their territories, often without regard to the legal status of a non-national within a State's territory. Such treaties include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture. The United States is party to law enforcement conventions that address multilateral cooperation on immigration issues and the rights of certain migrants, including the United Nations Convention Against Transnational Organized Crime and two of its supplementing Protocols: the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. These protocols require States Parties to protect the rights of smuggled aliens. Other relevant conventions include the 1967 Protocol relating to the Status of Refugees, the Vienna Convention on Consular Relations, and various bilateral Friendship, Commerce and Navigation treaties creating reciprocal treatment obligations toward foreign nationals.

28. Many UN human rights conventions, including those referenced above, establish expert treaty bodies which are responsible for monitoring compliance by reviewing and commenting upon reports from States Parties regarding implementation of their treaty obligations. These expert bodies routinely address immigration and migration-related issues, and criticize states, including the United States, for laws and policies which, in their view, raise questions about unfair, arbitrary, or racially

discriminatory treatment of migrants, or other human rights concerns. Such criticisms are public, are often the subject of further discussion in UN bodies, and may be raised directly with the United States in bilateral exchanges with foreign countries.

29. Additionally, the United Nations General Assembly and other UN organs routinely adopt resolutions regarding the human rights and protection of migrants. The UN has also established "special mechanisms" or "independent experts," including special rapporteurs, that investigate and issue reports and make recommendations regarding the human rights of migrants.

30. At the regional level, the OAS has several organs in which issues related to migration policy and the treatment of migrants are raised. Like the UN General Assembly, the OAS General Assembly adopts resolutions on a range of topics including the human rights of migrants. Additionally, within the OAS system, the Inter-American Commission on Human Rights ("IACHR"), which is based in Washington, D.C., promotes respect for human rights, including by issuing statements and reports and holding hearings and adopting findings in response to individual petitions regarding a breach of a Member State's human rights commitments. The IACHR often expresses concern about the treatment of migrants by OAS Member States, including the United States. For example, in addition to recent hearings related to the enforcement of U.S. immigration laws and policies, the IACHR is in the process of preparing a thematic report which we understand will address issues related to enforcement of U.S. immigration laws and policies.

31. Other intergovernmental organizations and international bodies, not

specifically focused on issues related to the human rights of migrants, also provide venues in which States address issues related to migration generally, and which often include issues related to the treatment of migrants within a State's domestic legal and policy framework. These include the International Organization for Migration, the Regional Conference on Migration (Western Hemisphere), the UN High Level Dialogue on International Migration and Development, the Global Forum on Migration and Development, the International Labor Organization, the UN Office for Drug Control and Crime Prevention, and others.

32. As both a matter of international law and practice, the federal government is held accountable internationally for the actions of state and local authorities regarding our treatment of foreign nationals. International bodies and foreign governments do not typically distinguish between the conduct of the national government and the conduct of an individual state within a federal system. This is starkly evidenced by the United States' experience in cases where state and local government authorities have failed to comply with U.S. obligations under the VCCR to provide consular notification to all foreign nationals in U.S. custody. Failure to provide such notice by state officials has led to three suits by Paraguay, Germany and Mexico against the United States in the International Court of Justice, an advisory opinion sought by Mexico in the Inter-American Court of Human Rights, a petition against the United States in the Inter-American Commission on Human Rights, and bilateral complaints by numerous foreign governments.

33. The United States takes seriously allegations that it has failed to adhere to

its international law obligations and foreign policy commitments and engages in these fora to address such claims. Although the government is fully prepared to defend U.S. practices against unjustified claims of human rights shortcomings, criticism from an international body over immigration human rights issues can directly undercut the credibility of U.S. efforts to advance human rights and can lead to significant diplomatic obstacles – both on immigration issues of bilateral concern and on other interests that might be the subject of diplomatic negotiations. As discussed below, in this context, S.B 1070's sweep into subjects left properly to federal direction and control subjects the United States to this criticism while denying the United States the tools to decide for itself whether and how to adjust such policies. The federal government should have to make its defenses or consider appropriate modifications only with regard to policies that are adopted through a considered process that reflects the interests of all the American people, not with regard to the views of one state.

III. Arizona Law S.B. 1070's Harm to U.S. Foreign Relations

34. Given the diplomatic and foreign relations sensitivities surrounding U.S. immigration policy generally, and the significant foreign relations consequences that can result from even small changes in these policies, and given that S.B. 1070 purports to impose Arizona's own immigration policy of "attrition through enforcement" through, among other provisions, mandatory verification of immigration status and state criminal enforcement of alien registration, it is not surprising that S.B. 1070 already has provoked significant international controversy. The law elevates the criminal aspect of federal immigration enforcement above all others, threatening state criminal penalties for

violations of federal immigration law. United States immigration law – and our uniform foreign policy regarding the treatment of foreign nationals – has been that the unlawful presence of a foreign national, without more, ordinarily will not lead to that foreign national's criminal arrest or incarceration, but instead to civil removal proceedings. This is a policy that is understood internationally and one which is both important to and supported by foreign governments. S.B. 1070 violates this aspect of American immigration law and foreign policy by effectively allowing for criminal sanctions based on unlawful presence alone. It deviates from federal law by imposing mandatory verification of immigration status and criminal enforcement of alien registration, and by criminalizing work and travel by foreign nationals beyond the restrictions imposed by U.S. law. In so doing, the law has already provoked significant negative reaction in U.S. bilateral relationships and in regional and multilateral fora.

35. Such criticism is not without costs. To the contrary, the criticism provoked by the Arizona law threatens at least three direct harms to U.S. foreign relations. As noted above, such a change in immigration policy invariably risks the adoption of harmful reciprocal policies toward U.S. nationals by foreign governments. It also undermines the willingness of foreign states to engage bilaterally and multilaterally with the United States to advance U.S. foreign policy goals, and it erodes the credibility of United States efforts in regional and multilateral intergovernmental bodies to advance human rights.

A. *Impact on Bilateral Relationships*

36. S.B. 1070 has unquestionably generated negative reaction that has damaged

the public image of the United States and has thereby undermined the United States' ability to pursue various diplomatic objectives. The law has provoked numerous public criticisms by governments with which the United States maintains important and sensitive diplomatic relations.

37. In Mexico, S.B. 1070 has precipitated a sharply negative public perception of the attitude toward immigrants in Arizona (and potentially by extension elsewhere in the U.S.), which in turn has negatively affected diplomatic processes with Mexican government officials. The Mexican President, Mexican Cabinet Members, the Mexican Congress, and opinion makers in Mexico all have reacted strongly in response to the law. These voices have also expressed concern about the safety of Mexicans in Arizona.

38. During his recent visit to Washington, for example, Mexico's President Calderón pointedly criticized the law, both during his joint press conference with President Obama on May 19 and in his address to the United States Congress on May 20. Speaking to the Congress, he emphasized the need for comprehensive immigration reform and focused attention specifically on the Arizona law:

> I am convinced that comprehensive immigration reform is also crucial to secure our common border. However, I strongly disagree with the recently adopted law in Arizona. It is a law that not only ignores a reality that cannot be erased by decree but also introduces a terrible idea: using racial profiling as a basis for law enforcement. And that is why I agree with President Obama, who said the new law "carries a great amount of risk when core values that we all care about are breached." I want to bridge the gap of feelings and emotions between our countries and our peoples. I believe in this. I believe in communications, I believe in cooperation, and we together must find a better way to face and fix this common problem.

39. President Calderón's criticisms reflect how negatively S.B. 1070 has

affected public attitudes in Mexico toward the United States. A recent poll in Mexico by the Pew Global Attitudes Project, for example, indicates that whereas before the adoption of the Arizona law 62 percent of those polled had a favorable attitude toward the United States and only 27 percent had an unfavorable attitude, following its adoption only 44 percent had a favorable attitude toward the U.S., while 48 had an unfavorable attitude. *See The Arizona Effect on U.S. Favorability in Mexico,* available at www.pewglobal.org. The poll demonstrates that an effort to establish a divergent immigration policy by a single state, which has not yet even gone into effect, nevertheless can significantly harm foreign attitudes toward the United States as a whole. Such effect in turn can seriously undermine support among important Mexican constituencies for Mexico's cooperation with the United States.

40. Bolivia's President Morales, Ecuador's President Correa, El Salvador's President Funes and Guatemala's President Colom have also voiced public criticism of the Arizona law. Other governments, including that of Brazil, Colombia, Honduras, and Nicaragua have issued statements criticizing the law. Additionally, the National Assemblies in Ecuador and Nicaragua, and the Central American Parliament based in Guatemala, have adopted critical resolutions or other statements. S.B. 1070 has also been raised with high level U.S. officials by various foreign states on a number of occasions in nonpublic settings.

41. Concrete steps also have been taken in response to S.B. 1070. For example, Mexico and El Salvador have issued travel warnings or alerts to their citizens traveling in the United States.

42. S.B. 1070 also already has negatively affected other American interests. As a direct result of the Arizona law, at least five of the six Mexican Governors invited to travel to Phoenix to participate in the September 8-10, 2010 U.S.-Mexico Border Governors' Conference have declined the invitation. Although not a formal binational government-to-government meeting, this annual conference is an important venue for improving binational coordination of border issues that inherently involve federal, state, and other levels of government. It is normally attended by most of the 10 U.S. and Mexican state governors, as well as some federal U.S. and Mexican government representatives who serve as technical advisors.

43. The Mexican Senate stated it would postpone review of a U.S.-Mexico agreement on emergency management cooperation to address natural disasters and accidents signed on October 23, 2008 because of the new Arizona law.

44. Negative effects such as these are only likely to intensify if S.B. 1070 goes into effect.

B. *Impact on Regional and Multilateral Relationships*

45. The Arizona legislature's adoption of S.B. 1070 also prompted harsh criticism of the law in human rights forums, demonstrating in practical terms the negative consequences that unilateral action by a single U.S. state can have on U.S. foreign policy interests. The law has diminished our credibility in advocating for human rights compliance abroad by others, and if allowed to go into effect, will continue to do so.

46. A number of U.N. and regional intergovernmental organizations and bodies,

including those whose mandates explicitly include the promotion of human rights, have criticized S.B. 1070. For example, on May 10, 2010, six UN human rights experts (the Special Rapporteur on the Human Rights of Migrants, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the Independent Expert in the Field of Cultural Rights, the Special Rapporteur on the Right to Education, and the Independent Expert on Minority Issues) issued a joint statement specifically addressing the Arizona law:

> A disturbing pattern of legislative activity hostile to ethnic minorities and immigrants has been established with the adoption of an immigration law [in Arizona] that may allow for police action targeting individuals on the basis of their perceived ethnic origin.... In Arizona, persons who appear to be of Mexican, Latin American, or indigenous origin are especially at risk of being targeted under the law.
>
> The UN independent experts stressed that "legal experts differ on the potential effects of recent amendments to the immigration law that relate to the conditions for the official detention of suspected illegal aliens," and expressed concern about the "vague standards and sweeping language of Arizona's immigration law, which raise serious doubts about the law's compatibility with relevant international human rights treaties to which the United States is a party."

47. Additionally, in June 2010, at the 14th session of the UN Human Rights Council, the membership body within the United Nations system charged with promoting human rights and addressing situations of human rights violations, many countries criticized laws that criminalize irregular migration and discriminatory practices in the enforcement of immigration laws, and several states explicitly singled out S.B. 1070 for criticism in their plenary remarks.

48. Within the Inter-American regional system, on April 28, 2010, OAS Secretary General José Miguel Insulza stated that S.B. 1070 "is an issue of concern to all citizens of the Americas" and warned against the possibility of creating an environment of discrimination in the United States, in light of its significant Hispanic population. He added that "the rich tradition we all admire, of recognizing immigrants in the United States has been harmed, undermined." He recognized the efforts of the U.S. government to legislate on the matter in a constructive way, adding,

> This has been a painful moment, difficult for everyone, and it is why we recognize and salute with energy the way in which the government of President Barack Obama has reacted faced with this fact. For our part, we are going to follow up and always act with greater unity of purpose because I believe that all of us here present share the problems this law creates.

Many permanent representatives of OAS Member States also criticized the law both at the Permanent Council in Washington and at the June 2010 OAS General assembly in Lima, Peru.

49. Separately, on April 28, 2010, the IACHR voiced its concern over the "high risk of racial discrimination in the implementation of the law" and expressed concern "with the criminalization of the presence of undocumented persons." The IACHR exhorted "U.S. authorities to find adequate measures to modify the recently approved law in the State of Arizona in order to bring it into accordance with international human rights standards for the protection of migrants."

50. Finally, on May 4, 2010, heads of government at a summit of the Union of South American Nations ("UNASUR"), which is comprised of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela,

adopted a statement condemning the law, claiming it could lead to the legitimization of racist attitudes and the latent risk of violence.

51. In short, the passage of Arizona S.B. 1070 has provoked broad-based criticism and concern among U.S. allies in the Western Hemisphere, by human rights experts, and in numerous intergovernmental fora. Nor can such criticism be readily dismissed. Such criticism, particularly when provoked by an independent immigration enforcement policy being pursued by a U.S. state, and which the national government does not control or endorse, affects the United States' standing in bilateral, regional and international relationships, and ultimately the leadership role of the United States as we seek to advance a wide range of policy goals within the international community. It risks retaliatory harms against to the legal rights of U.S. nationals abroad. And it compromises our ability to engage effectively in bilateral, regional and multilateral conversations regarding human rights.

C. *Future Ramifications*

52. If S.B. 1070 were to enter into effect, criticism will likely increase, and the risk of such harms will escalate. The Arizona law could have an increasingly caustic impact on the United States' relations with important regional allies, undermine additional diplomatic arrangements or opportunities for international cooperation, constitute an ongoing irritant in U.S. bilateral, regional and multilateral relationships, and subject the United States to ongoing criticism in international fora.

53. A few such circumstances are readily foreseeable. This fall, for example,

the United States will send a high level U.S. delegation to the UN Human Rights Council's Universal Periodic Review in Geneva, at which the United States will be questioned by other UN Member States regarding our human rights practices. This Universal Periodic Review is conducted once every four years for each UN Member State, and the United States will be presenting for the first time. It is highly likely that the Arizona law will be one of the concerns raised during the questioning by other delegations.

54. Likewise, the United States would undoubtedly be criticized for S.B. 1070 by UN human rights treaty monitoring bodies in the context of U.S. human rights treaty reporting requirements. Within the next two years alone, the United States will be expected to report to both the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination, and thereafter will be expected to appear before each body to defend the United States' record of human rights compliance. S.B. 1070, if still in effect, would very likely be the subject of criticism before both bodies.

55. If S.B. 1070, Arizona's attempt to set its own immigration policy in pursuit of "attrition through enforcement," were to go into effect, it would directly call into question the ability of the United States to speak with one voice at the international level on issues related to immigration and migration policy. Only the national government is in a position to accurately assess the impact of a policy such as S.B. 1070 on our overall foreign relations agenda and to balance the competing foreign relations considerations involved in the adoption and enforcement of such a law. When the United States incurs criticism of immigration law and policies adopted at the federal level, the United States is

normally in a position to review the criticism and determine whether to defend the practices against attack or else to take appropriate action to modify its practices. The United States is also able to develop and implement immigration policy in anticipation of these and other foreign relations concerns. In this case, however, the policy being pursued has not been developed, nor would it be implemented, with sensitivity to the full range of foreign policy information and considerations available to the national government, and the United States is unable to calibrate its immigration and foreign policies to respond effectively to these claims.

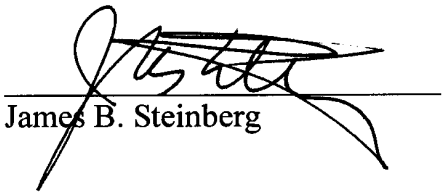
56. If the several states were each allowed to pursue independent immigration enforcement policies such as the Arizona law, these serious concerns would be multiplied significantly, as the United States could be subjected to a cacophony of competing immigration enforcement priorities and agendas, with little regard for the sensitive diplomatic and foreign relations considerations that immigration policy addresses, and with an extreme adverse impact on the United States' ability to speak with one voice.

57. S.B. 1070 – and in particular the mandatory verification regime requirement – thus poses a risk of provoking retaliatory treatment against U.S. nationals by other states, and threatens ongoing adverse consequences for important and sensitive bilateral relationships with U.S. allies such as Mexico, for our regional relations in the western hemisphere, and for our global relations in regional and multilateral institutions. It is likely to hinder our ability to secure the cooperation of other states in efforts to promote U.S. interests internationally across a range of trade, security, tourism, and other interests unrelated to immigration. Finally, it is likely to undermine the United States'

ability to engage effectively with the international community to promote the advancement and protection of human rights. Moreover, repairing such harm to international relations and U.S. stature in bilateral, regional and multilateral relationships after the fact can be extremely difficult.

58. Accordingly, after having analyzed S.B. 1070, considered how it would interact with existing federal immigration policy and practice, and assessed the international reaction to it, I have concluded that S.B. 1070 runs counter to American foreign policy interests, and that its enforcement would further undermine American foreign policy.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief. Executed the 2 day of July, 2010 in Washington, D.C.



James B. Steinberg

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF MICHAEL AYTES

Pursuant to 28 U.S.C. § 1746, I, Michael Aytes, declare and state as follows:

1. I am employed by U.S. Citizenship and Immigration Services (USCIS), an agency of the Department of Homeland Security (DHS), as Senior Advisor to the Director of USCIS. I have been employed in this position since January 2010. My duties as Senior Advisor include, among other things, directing the USCIS planning effort for comprehensive immigration reform legislation and advising the Director about the direction and progress of USCIS efforts to transform its business processes. Prior to my current position, I have held a number of executive level positions since 1989 involving immigration benefit management at USCIS and its predecessor before March 2003, the Immigration and Naturalization Service (INS), including serving as: Acting Deputy Director of USCIS between 2008 and 2010 (the highest ranking official in the agency at that time); Associate Director, USCIS Domestic Operations Directorate (2006-2008); Director, Information and Customer Service (1999-2006); and Assistant Commissioner for Service Center Operations (1989-1997). I began my federal career with the INS in 1977. I make this declaration based on personal knowledge of the subject matter

acquired by me in the course of the performance of my official duties and upon information provided to me by personnel with relevant knowledge.

2. As explained below, there are several situations in which aliens in the United States have been lawfully admitted, or are pursuing a process for obtaining a lawful status under Federal immigration law, but will not have filed an application or other form that has been designated as complying with registration requirements, and will not have been issued a document designated as evidence of registration. Nonetheless, DHS is aware of their presence through the processes provided by federal immigration law and may, in certain cases, have affirmatively decided not to pursue either removal or criminal prosecution.

3. DHS regulations at 8 C.F.R. § 264.1(a) list certain DHS applications and other forms as registration forms for the purpose of complying with the alien registration requirements in 8 U.S.C. § 1302. DHS regulations at 8 C.F.R. § 264.1(b) designate certain DHS-issued cards and other documents (also referred to in the regulations as "forms") as forms constituting evidence of registration for the purpose of complying with 8 U.S.C. § 1304(d). In this Declaration, the DHS regulations at 8 C.F.R. § 264.1(a) and (b) are referred to as the "registration regulations."

4. In many cases, aliens who are eligible to apply for a particular immigration benefit may file with USCIS a designated form that also is designated as a registration form in the registration regulations. Once the application is processed and/or approved, the alien is issued a document designated as evidence of registration in the registration regulations. An example of a designated registration form is the Form I-485, Application to Register Permanent Residence or Adjust Status (commonly known as an "adjustment application"). Approval of an adjustment application will result in issuance of a Form I-551 Permanent Resident Card

(commonly known as a "green card"). Adjustment applicants are also eligible to file a Form I-765, Application for Employment Authorization, which, if approved, results in the issuance of an Employment Authorization Document (EAD). Both the green card and the EAD are designated as evidence of registration in the registration regulations.

5. However, in a number of specific situations involving aliens within the United States who have been lawfully admitted to the United States or have a pending or approved application for a lawful immigration status, the registration regulations do not designate a DHS form currently in use as a lawful application for registration, do not specifically designate a document issued to the alien as evidence of registration, or both. These situations include, but are not limited to: Certain aliens eligible for relief under the Violence Against Women Act; aliens applying for asylum; aliens applying for "T" or "U" nonimmigrant status; aliens applying for Temporary Protected Status (TPS); and aliens applying for and granted nonimmigrant admission to the United States pursuant to the Visa Waiver Program. The registration regulations do not designate any form as a general "catch-all" that aliens present in the United States who have not otherwise submitted a form described in the regulations may submit to register with DHS. Accordingly, under these circumstances, aliens seeking the various humanitarian immigration benefits described below will not be in possession of a registration document, despite the fact that they have an application for such benefit pending with the federal government and that the federal government is aware of their presence in the United States.

6. **Violence Against Women Act.** The Violence Against Women Act (VAWA) enables certain aliens who have been subjected to battery or extreme cruelty by their U.S. citizen or lawful permanent resident spouse, parent, or child to self-petition for immigration benefits (8 U.S.C. § 1101(a)(51) (defining VAWA self-petitioner)). USCIS granted 6,258 VAWA self

petitions in fiscal year 2009. To file a VAWA self-petition, applicants submit a Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant), and written confirmation of receipt of the petition is issued by USCIS. Battered aliens who file a VAWA self-petition also receive a notice of action of a prima facie determination by USCIS, which, if positive, may be used to access certain public benefits available to victims of domestic violence. When a VAWA self-petition is approved, the battered alien receives an approval notice. Upon receipt of the approval notice, the battered alien becomes eligible, but is not required, to apply for employment authorization. When the battered alien is eligible to file for adjustment of status, which requires among other things that an immigrant visa number is immediately available, the alien may file the Form I-485 as described above; otherwise, no form or document used in the VAWA self-petition process, including USCIS confirmation of receipt of the Form I-360, is included in the registration regulations.

7. Under current DHS policy, an approved VAWA self-petitioner is placed in deferred action status by USCIS. Deferred action is a form of prosecutorial discretion by which the agency elects not to assert the full scope of its authority. Generally, a grant of deferred action stays immigration enforcement based on convenience to the government, and provides a basis for the alien to apply for employment authorization. This policy provides battered aliens some protection against immigration enforcement such as removal, and allows opportunities such as seeking protective orders against their abusers and cooperating with law enforcement in criminal cases brought against their abusers.

8. Once a battered alien receives notice of approval of the VAWA self-petition and is placed in deferred action, the battered alien may, but is not required to, file a Form I-765 (Application for Employment Authorization), which will result in issuance of an EAD. Current

processing times for VAWA self-petitions are 6 months, and current general processing times for EADs are 1.5 months. Therefore, on average, a battered alien would not receive a registration document until at least 7.5 months after the initial filing of the Form I-360. With the exception of the EAD, no form or document used in the deferred action process is included in the registration regulations.

9. Accordingly, a battered alien who is in the United States, regardless of immigration status, and who is has filed such a VAWA self petition and is awaiting an adjudication, generally will not -- by virtue of this federal immigration process -- have submitted or obtained a form satisfying the registration regulations.

10. **Asylum.** Subject to certain statutory limitations, an alien who is physically present in the United States, regardless of immigration status, may apply for asylum under section 208 of the Immigration and Nationality Act (8 U.S.C. § 1158). To apply for asylum, applicants submit a Form I-589 (Application for Asylum and Withholding of Removal). The registration regulations do not designate the Form I-589 as a form by which aliens may comply with registration requirements.

11. Under current DHS policy, arriving aliens who have established a credible fear of persecution and who are paroled from the custody of U.S. Immigration and Customs Enforcement (ICE) are provided with an approved Form I-94 (Arrival/Departure Record) reflecting parole status. Although the Form I-94 is designated as evidence of registration, not all asylum applicants are arriving aliens paroled from ICE custody.

12. For aliens affirmatively applying for asylum with USCIS, as opposed to defensively in removal proceedings before the U.S. Department of Justice's Executive Office for Immigration Review (EOIR), the applicant receives written confirmation of USCIS' receipt of

the application as well as directions for providing fingerprints. As a general matter, DHS concludes its asylum adjudication process before undertaking enforcement of immigration consequences against the alien. The applicant will then be interviewed by an asylum officer. Where a USCIS asylum officer, following an interview, determines that an alien is not eligible for asylum and the alien is not currently in a lawful immigration status, the alien is referred, typically through a Form I-862 (Notice to Appear (NTA)), for further consideration of the asylum application in removal proceedings before EOIR. If a USCIS asylum officer determines that an alien is not eligible for asylum and the alien is in a lawful immigration status, the alien is denied asylum. Any alien whose application for asylum has been pending before USCIS or EOIR at least 150 days may file a DHS Form I-765. USCIS may approve the Form I-765 as a matter of discretion if the application for asylum has been pending at least 180 days, which will result in issuance of an EAD. But before the issuance of the EAD, the alien would not necessarily possess evidence of registration. An alien whose application for asylum has been granted is issued a Form I-94, and also may file a Form I-765, which will result in issuance of an EAD. Except for the Form I-94 and EAD, which the registration regulations designate as evidence of registration, none of the forms or documents used in the USCIS asylum process are designated in those registration regulations as an application for, or evidence of, registration. USCIS granted 11,933 individuals asylum in fiscal year 2009.

13. Accordingly, an alien who is in the United States, regardless of immigration status, and who has filed a pending application for asylum with DHS, generally will not -- by virtue of this federal immigration process -- have submitted or obtained a federal form satisfying the registration regulations, except as stated above with respect to the EAD for certain applicants whose applications have been pending more than 180 days..

14. **T and U nonimmigrant status.** Federal law provides for the grant of "T" nonimmigrant status to certain victims of trafficking and their family members in the United States (8 U.S.C. § 1101(a)(15)(T)). In order to establish eligibility for T nonimmigrant status, aliens must establish, in part, that they are or have been a victim of a severe form of trafficking in persons, which means sex trafficking in which a commercial sex act was induced by force, fraud, or coercion, or the obtaining of a person for labor or services through the use of force, fraud, or coercion. Aliens seeking T nonimmigrant status must submit Form I-914 (Application for T Nonimmigrant Status), which generates written confirmation of receipt of the application. Written confirmation of receipt of the application does not, however, constitute evidence of registration under the registration regulations. The applicant must comply with fingerprinting requirements and may be interviewed, and all applications are subject to detailed review to determine eligibility and whether DHS will exercise its discretionary authority to waive applicable grounds of inadmissibility. Approval of an application for T nonimmigrant status automatically generates an EAD and a Form I-94. Except for the EAD and Form I-94, no form or document used in the T nonimmigrant application process is included in the registration regulations. The current processing time for applications for T nonimmigrant status is 6 months. USCIS granted 710 individuals T nonimmigrant status in fiscal year 2009.

15. Federal law provides for the grant of "U" nonimmigrant status to certain crime victims and their family members in the United States (8 U.S.C. § 1101(a)(15)(U)). In order to establish eligibility for U nonimmigrant status, aliens must establish, in part, that they suffered substantial physical or mental abuse as a result of being a victim of certain delineated crimes. Those crimes include rape, torture, trafficking, incest, domestic violence, sexual exploitation, and other similarly serious crimes. Applicants seeking U nonimmigrant status must submit a

Form I-918 (Petition for U Nonimmigrant Status). Submission of the application does not, however, provide an alien with evidence of registration designated under the registration regulations. Although an interview is not required, applicants are subject to fingerprinting and capture of other biometric indices, and applications are subject to detailed review to determine eligibility. Approval of an application for U nonimmigrant status automatically generates an EAD and Form I-94, which, as noted above, satisfy the proof of registration requirement. Except for the EAD and Form I-94, no form or document used in the U nonimmigrant application process is included in the registration regulations. The current average processing time for petitions for U nonimmigrant status is 6.1 months. U nonimmigrant status was granted to 8,663 individuals in fiscal year 2009.

16. DHS may grant an administrative stay of a final order of removal to aliens with pending applications or petitions for T or U nonimmigrant status who have set forth a prima facie case for approval (8 U.S.C. § 1227(d)(1)). Approval of an application for a stay of removal does not automatically generate an EAD and no form or document used in the stay of removal application process is included in the registration regulations. So an alien who received a stay of removal might still not possess evidence of registration, notwithstanding an administrative order authorizing the alien's temporary presence.

17. Accordingly, an alien who is in the United States, regardless of immigration status, and who is in the process of seeking "T" or "U" nonimmigrant status, generally will not -- by virtue of this federal immigration process -- have submitted or obtained a federal form satisfying the registration regulations.

18. **Temporary Protected Status.** Under 8 U.S.C. § 1254a, the Secretary of Homeland Security may designate foreign states whose nationals in the United States may apply

for Temporary Protected Status (TPS) in certain cases where conditions in the foreign state prevent such aliens from being returned. Eligible nationals cannot be detained and removed on the basis of immigration status during the period in which they have TPS. The eligible alien must apply using DHS Form I-821 (Application for Temporary Protected Status) and DHS Form I-765. Pursuant to the statute an alien is entitled to temporary treatment benefits, including an EAD, if the alien is prima facie eligible for TPS pending final adjudication. An alien applying for TPS can request an EAD, which may be granted based either on a prima facie determination of eligibility or upon a final adjudication granting TPS. Except for the EAD, no document used in the TPS application process is included in the registration regulations. As of June 3, 2010, USCIS has approved 23,475 applications for TPS under the designation of Haiti made by the Secretary of Homeland Security on January 15, 2010 in response to the devastating earthquake in that country three days before. The following other countries are currently within a period of designation for TPS: El Salvador; Honduras; Nicaragua; Somalia; and Sudan.

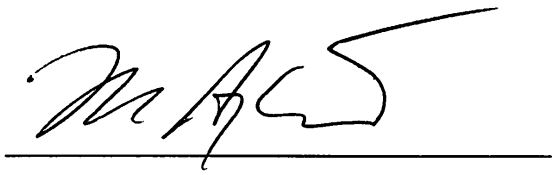
19. Accordingly, an alien who is in the United States, regardless of immigration status, and who is in the process of seeking TPS or has applied for TPS, generally will not -- by virtue of this federal immigration process -- have submitted or obtained a federal form satisfying the registration regulations.

20. **Visa Waiver Program:** The Visa Waiver Program (VWP) is administered by U.S. Customs and Border Protection (CBP), an agency of DHS. The only proof of admission currently issued to VWP travelers is the I-94W, and after implementation of the Electronic System for Travel Authorization (ESTA) is complete, the only proof of admission issued to most VWP travelers will be the entry stamp on his or her passport reflecting the date of admission. Although the registration regulations designate the Form I-94 generally as both the application

for registration and the evidence of registration for nonimmigrant aliens, the registration regulations do not refer specifically to the Form I-94W. Moreover, the ESTA process is not designated in those registration regulations as an application for, or evidence of, registration.

21. Accordingly, an alien who is admitted to the United States through the VWP and who abides by the terms of admission, will be lawfully present but will not -- by virtue of this federal immigration process -- have submitted or obtained a federal form satisfying the registration regulations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed the 22nd day of June, 2010 in Washington, D.C.



Michael Aytes

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF DAVID C. PALMATIER

Pursuant to 28 U.S.C. § 1746, I, David C. Palmatier, declare and state as follows:

1. I am the Unit Chief for the Law Enforcement Support Center (LESC) within U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS). I have served in this position since March 16, 2008. Prior to my current position, I served as the Assistant Special Agent in Charge in Boston, Massachusetts, from December 2005 to March 2008. Prior to that, I served as the Director of the Office of Investigations Training Division from November 2000 to December 2005. I make this declaration based on personal knowledge of the subject matter acquired by me in the course of the performance of my official duties. I am aware that the State of Arizona has enacted new immigration legislation, known as Senate Bill 1070 (SB 1070), and I have read and reviewed SB 1070 as amended.

2. The purpose of my declaration is to describe the adverse effects of Arizona SB 1070 on the LESC's ability to respond, supervise, and monitor requests from law enforcement

partners in an effort to provide accurate and timely alien status determinations for subjects arrested or under investigation.

3. As the LESC Unit Chief, I have direct managerial and supervisory authority over all sections that comprise the LESC, including three Operations Sections, the National Crime Information Center (NCIC) Section, the Communications Center Section, the Tip-line Section, the Training Section, and the Administration Section. The Operations Sections respond to requests for alien status determinations sent to the LESC via computer. The NCIC Section enters and validates all ICE lookout records in the NCIC computer system for immigration absconders (those who have been ordered removed but have absconded), previously deported aggravated felons, and fugitives sought for criminal violations of customs and immigration laws investigated by ICE. The Communications Center Section responds to phone requests for information and assistance by our state, local, and federal law enforcement partners. The Tip-line Section handles phone tips from the public relating to the full range of crimes enforced by DHS. The Training Section provides basic and advanced training to LESC employees. The Administration Section provides personnel, budget, and logistical support for the LESC.

4. The LESC also responds to FBI requests for alien status determinations on non-U.S. citizens seeking to purchase firearms; responds to U.S. Secret Service alien status determinations for aliens seeking access to a protected area (*e.g.*, the White House Complex); and responds to alien status determinations related to employment issues at national security related locations that could be vulnerable to sabotage, attack, or exploitation.

5. Congress established the LESC to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis. The enabling legislation is codified in 8 U.S.C. §§ 1226(d)(1)(A) & 1252 Note.

6. The core mission of the LESC is to receive and respond to Immigration Alien Queries (IAQ) from law enforcement partners in an effort to provide accurate and timely alien status determinations for subjects arrested or under investigation. Biographic queries are routed to the LESC via the International Justice and Public Safety Information Sharing Network (NLETS). Biometric queries are routed to the LESC via state information bureaus and the FBI Criminal Justice Information Services (CJIS). Both biographic and biometric queries are sent and received via computer systems. Queries contain basic information such as name, date of birth, place of birth, sex, and other identifying information. LESC Law Enforcement Specialists query as many as ten DHS, FBI, and Interpol databases in order to produce a written alien status determination for the requesting agency.

7. Like other components within DHS, the LESC prioritizes its efforts in order to focus on criminal aliens and those most likely to pose a potential threat to their communities. For example, criminal violations of the Immigration and Nationality Act (INA) are given priority over administrative violations. The goal is to invest our finite resources on the criminals who pose the largest threat to public safety or national security risks. In addition, LESC supervisors monitor incoming requests for information and prioritize those that are time sensitive, such as roadside traffic stops and subjects that are about to be released from police custody. The LESC also conducts "enhanced responses" for IAQs that are associated with crimes such as murder, sexual assault, terrorism, gang-related crimes, and other serious crimes. As a general practice, IAQs are processed in the order they are received at the LESC. Older queries are generally completed before work is completed on new queries. However, there are exceptions made in an effort to respond to time-sensitive queries and those queries that involve serious offenders; one example, listed above, would be traffic stops, where a highway patrolman has a limited amount

of time to detain a suspected illegal alien. Likewise, illegal aliens arrested for serious crimes such as homicide are made a priority in the queue if the subject will be released on bail or bond. This prioritization ensures that aliens arrested for particularly serious or violent crimes are not released into the general public if LESC's verification allows for the further detention of the alien. But the two priorities (responding on illegal aliens arrested for particularly serious crimes and responding to time sensitive inquiries, such as traffic stops) compete with each other, meaning that a surge in time-sensitive inquiries from the enforcement of the Arizona law will adversely affect responses regarding aliens arrested for particularly serious crimes. Additionally, the LESC has several queues that allow for the prioritization of queries based upon originating agency. Examples of unique queues include interoperability queries based upon fingerprints, biographical queries sent via NLETS, and Brady Act queries for firearms purchasers. The LESC does not currently have the ability to separate queries from Arizona as they arrive. Furthermore, creating an Arizona queue would not prioritize queries based upon the risk posed by the violator or the seriousness of the charge. Separating data in that manner is not currently possible using the data fields provided in the current IAQ formatted messages

8. Currently, the average query waits for approximately 70 minutes before a Law Enforcement Specialist is available to work on the request. On average, it takes an additional 11 minutes per query to research DHS data systems and to provide the written alien status determination.

9. Over the years, the LESC has experienced continuous and dramatic increases in alien status determination queries. IAQs from fiscal year (FY) 2007 to date were:

FY 2007	727,903
FY 2008	807,106
FY 2009	1,064,261
FY 2010	726,275 (through May 31, 2010)

10. From FY 08 to FY 09, the LESC had a 20% increase in the number of IAQs. Although FY 10 is not over yet, LESC personnel project there will be at least a 10% increase in IAQs from FY 09 to FY 10.

11. The internal LESC computer system (ACRIMe) is dynamically updated as records are added or deleted. ACRIMe alien status determination records are retained for 75 years. Law Enforcement Specialists also access approximately six to ten other federal databases, depending on the circumstances regarding the subject, in order to determine alien status. The ACRIMe computer system randomly selects approximately 5% of all alien status determination responses for quality assurance. Quality assurance reviews determine if the search protocols were followed and if the correct status determination was made. LESC employees do not typically review alien files in order to provide alien status determinations. If an alien file review is required, that review will have to be completed by the ICE field office, and depending on the physical location of the alien file, the review may take two days or more.

12. Many U.S. citizens, if queried through the LESC, result in a "no match" response to the requesting agency, meaning that the Law Enforcement Specialist was unable to locate any records or prior encounters in the DHS databases queried. However, to arrive at the no match response for U.S. citizens requires the same level of investment in staffing resources to determine the subject is a no match. And, notably, a "no match" response would not guarantee that the subject of the search was an American citizen—it would simply reflect an absence of records in the LESC system.

13. The LESC has 153 Law Enforcement Specialists (LES) assigned to respond to IAQs from all partner agencies. If queries come to the LESC in a consistent and steady manner,

a fully trained and experienced LES can process approximately 10,000 IAQs per year. Based on current LES staffing, the LESC theoretically has the capacity to handle approximately 1.5 million IAQs per year. However, the number of queries that come to the LESC at any given time is not consistent. This makes it difficult to predict and staff in a manner that accounts for temporary spikes in activity. On a weekly basis, the LESC experiences activity spikes that require the use of overtime in order to handle the incoming IAQs from LESC partners. In addition, personnel from other LESC sections are routinely diverted from other critical missions to deal with IAQ activity spikes.

14. The LESC also performs a significant role in supporting the ICE Secure Communities Program by producing alien status determinations based on biometric (fingerprint) booking information. Secure Communities was created to improve, modernize, and prioritize ICE's efforts to identify and remove criminal aliens from the United States. Secure Communities arranges for willing jurisdictions to access biometric technology so they can simultaneously check a person's criminal and immigration history when the person is charged criminally. Once illegal aliens are identified, ICE must then determine how to proceed and whether to lodge a detainer or otherwise pursue the alien's detention and removal from the United States upon the alien's release from criminal custody. ICE first deployed the technology in October of 2008, and as of June 8, 2010, has deployed it to 281 jurisdictions. ICE plans to deploy the technology nationwide to more than 3,000 jurisdictions by the end of FY 2013. The LESC has already experienced an increase in processing times since the establishment of the Secure Communities Program due to the receipt of extensive criminal records and previous DHS encounters with more serious criminal aliens. As our support for Secure Communities continues to grow, we anticipate an increased workload due to the need for more complex queries that will

further increase LESC response times. Thus, the expansion of the Secure Communities Program alone will likely utilize much of the capacity of the LESC.

15. In my professional judgment, Arizona SB 1070 will inevitably result in a significant increase in the number of IAQs. The LESC processed just over 1,000,000 IAQs in FY 09. According to the FBI Criminal Justice Information Services (CJIS), in FY 09 criminal justice agencies in Arizona submitted 563,474 arrest records to CJIS, but just over 80,000 IAQs originated from all agencies within the state of Arizona in FY 09. Thus, Arizona SB 1070's requirement that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released" could, by itself, dramatically increase the LESC's workload. Moreover, because Arizona's law calls for status verifications for lawful stops—whether or not such stops result in an arrest—the number of IAQ's will increase dramatically. If even a small percentage of these stops, detentions, and arrests lead to new IAQs, the LESC will be forced to process thousands of additional IAQs annually. Moreover, Arizona's new law will result in an increase in the number of U.S. citizens and lawful permanent residents being queried through the LESC, reducing our ability to provide timely responses to law enforcement on serious criminal aliens.

16. This increase in queries from Arizona will delay response times for all IAQs and risks exceeding the capacity of the LESC to respond to higher priority requests for criminal alien status determinations from law enforcement partners nationwide. Furthermore, the potential increase in queries by Arizona along with the possibility of other states adopting similar legislation could overwhelm the system.

17. If the LESC's capacity to respond to requests for assistance is exceeded, the initial impact would be delays in responding to time-sensitive inquiries from state, local, and federal

law enforcement, meaning that very serious violators may well escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the illegal alien they have encountered. If delays continue to increase at the LESC, ICE might have to divert personnel from other critical missions to serve the needs of our law enforcement partners. The LESC directly supports both the public safety and national security missions of DHS. These are critical missions which cannot be allowed to fail.

18. I expect no increase in LESC resources in terms of personnel. As such, I anticipate an increase in inquiries will slow response times for inquiries without respect to the priority level of the subject in question. Based on my professional experience, slower response times result in an increased likelihood that the subject of an inquiry, including subjects who are high-priority, will be released, potentially resulting in the commission of additional violent crimes, greater difficulty in locating the alien to initiate removal proceedings, and further impediments to ICE's ability to efficiently obtain removal orders and remove criminal aliens from the United States.

19. It is important to note that LESC's responses to IAQs do not always provide a definitive answer as to an alien's immigration status. Indeed, almost 10,000 of the 80,000 IAQs the LESC processed from Arizona in FY 2009 resulted in an indeterminate answer (for comparison, just over 15,000 of the IAQs from Arizona in FY 2009 resulted in a response of lawful presence). Moreover, a U.S. citizen, when queried through the LESC, would likely be returned with a "no match" response. Many—if not most—U.S. citizens have no records contained in the databases available to the LESC. Experience has demonstrated that some police officers are confused in these types of situations and sometimes want to detain the suspected

illegal alien (actually a U.S. citizen) until they can call the LESC or their local ICE field office to confirm the subject's immigration status.

20. This declaration has focused on the impact of SB 1070 on the LESC system. If other populous states adopted similar laws, the LESC would be unable to respond to inquiries in a time frame which would be useful to law enforcement needs.

21. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed the 28th day of June, 2010 in Williston, Vermont.

David C. Palmatier

David C. Palmatier
Unit Chief
Law Enforcement Support Center

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF DANIEL H. RAGSDALE

Pursuant to 28 U.S.C. § 1746, I, Daniel H. Ragsdale, declare and state as follows:

1. I am the Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security (DHS). I have served in this position since January 2010. Before that, I served as a Senior Counselor to ICE's Assistant Secretary from November 2008 until October 2009, and, prior to that, as the Chief of the ICE Enforcement Law Division from October 2006 until November 2008. From September 1999 until September 2006, I served in several positions in ICE's Office of Chief Counsel in Phoenix, Arizona. I also was designated as a Special Assistant U.S. Attorney (SAUSA), which allowed me to prosecute immigration crimes.

2. Under the supervision of ICE's Assistant Secretary, I have direct managerial and supervisory authority over the management and administration of ICE. I am closely involved in the management of ICE's human and financial resources, matters of significance to the agency, and the day-to-day operations of the agency. I make this declaration based on personal

knowledge of the subject matter acquired by me in the course of the performance of my official duties.

Overview of ICE Programs

3. ICE consists of two core operational programs, Enforcement and Removal Operations (ERO), which handles civil immigration enforcement, and Homeland Security Investigations (HSI), which handles criminal investigations. I am generally aware of the operational activities of all offices at ICE, and I am specifically aware of their activities as they affect and interface with the programs I directly supervise.

4. HSI houses the special agents who investigate criminal violations of the federal customs and immigration laws. HSI also primarily handles responses to calls from local and state law enforcement officers requesting assistance, including calls requesting that ICE transfer aliens into detention. However, because of the policy focus on devoting investigative resources towards the apprehension of criminal aliens, the responsibility of responding to state and local law enforcement is shared with, and is increasingly transitioning to, ERO to allow HSI special agents to focus more heavily on criminal investigations. On an average day in FY 2009, HSI special agents nationwide arrested 62 people for administrative immigration violations, 22 people for criminal immigration offenses, and 42 people for criminal customs offenses.

5. ERO is responsible for detaining and removing aliens who lack lawful authority to remain in the United States. On an average day, ERO officers nationwide arrest approximately 816 aliens for administrative immigration violations and remove approximately 912 aliens, including 456 criminal aliens, from the United States to countries around the globe. As of June 2, 2010, ICE had approximately 32,313 aliens in custody pending their removal proceedings or removal from the United States.

6. In addition to HSI and ERO, ICE has the Office of State and Local Coordination (OSLC) which focuses on outreach to state, local, and tribal law enforcement agencies to build positive relationships with ICE. In addition, OSLC administers the 287(g) Program, through which ICE enters into agreements with state, local, and tribal law enforcement agencies for those agencies to perform certain federal immigration enforcement functions under the supervision of federal officials. Each agreement is formalized through a Memorandum of Agreement (MOA) and authorized pursuant to Section 287(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g).

7. Consistent with its policy of focusing enforcement efforts on criminal aliens, ICE created the Secure Communities program to improve, modernize, and prioritize ICE's efforts to identify and remove criminal aliens from the United States. Through the program, ICE has leveraged biometric information-sharing to ensure accurate and timely identification of criminal aliens in law enforcement custody. The program office arranges for willing jurisdictions to access the biometric technology so they can simultaneously check a person's criminal and immigration history when the person is booked on criminal charges. When an individual in custody is identified as being an alien, ICE must then determine how to proceed with respect to that alien, including whether to lodge a detainer or otherwise pursue the alien's detention and removal from the United States upon the alien's release from criminal custody. ICE does not lodge detainers or otherwise pursue removal for every alien in custody, and has the discretion to decide whether lodging a detainer and / or pursuing removal reflects ICE's policy priorities.

ICE Initiatives and Activities in Arizona and at the Southwest Border

8. ICE has devoted substantial resources to increasing border security and combating smuggling of contraband and people. Indeed, 25 percent of all ICE special agents are stationed in the five Southwest border offices. Of those, 353 special agents are stationed in Arizona to investigate crimes, primarily cross-border crimes. ERO currently has 361 law enforcement officers in Arizona. Further, the ICE Office of the Principal Legal Advisor (OPLA) has 147 attorneys stationed in the areas of responsibility on the Southwest border, including 37 attorneys in Arizona alone to prosecute removal cases and advise ICE officers and special agents, as well as one attorney detailed to the U.S. Attorney's Office for the District of Arizona to support the prosecution of criminals identified and investigated by ICE agents. Two additional attorneys have been allocated and are expected to enter on duty as SAUSAs in the very near future.

9. ICE's attention to the Southwest Border has included the March 2009 launch of the Southwest Border Initiative to disrupt and dismantle drug trafficking organizations operating along the Southwest border. This initiative was designed to support three goals: guard against the spillover of violent crime into the United States; support Mexico's campaign to crack down on drug cartels in Mexico; and reduce movement of contraband across the border. This initiative called for additional personnel, increased intelligence capability, and better coordination with state, local, tribal, and Mexican law enforcement authorities. This plan also bolstered the law enforcement resources and information-sharing capabilities between and among DHS and the Departments of Justice and Defense. ICE's efforts on the Southwest border between March 2009 and March 2010 have resulted in increased seizures of weapons, money, and narcotics along the Southwest border as compared to the same time period between 2008 and 2009. ICE also

increased administrative arrests of criminal aliens for immigration violations by 11 percent along the Southwest border during this period.

10. ICE has focused even more closely on border security in Arizona. ICE is participating in a multi-agency operation known as the Alliance to Combat Transnational Threats (ACTT) (formerly the Arizona Operational Plan). Other federal agencies, including the Department of Defense, as well as state and local law enforcement agencies also support the ACTT. To a much smaller degree, ACTT receives support from the Government of Mexico through the Merida initiative, a United States funded program designed to support and assist Mexico in its efforts to disrupt and dismantle transnational criminal organizations, build capacity, strengthen its judicial and law enforcement institutions, and build strong and resilient communities.

11. The ACTT began in September 2009 to address concerns about crime along the border between the United States and Mexico in Arizona. The primary focus of ACTT is conducting intelligence-driven border enforcement operations to disrupt and dismantle violent cross-border criminal organizations that have a negative impact on the lives of the people on both sides of the border. The ACTT in particular seeks to reduce serious felonies that negatively affect public safety in Arizona. These include the smuggling of aliens, bulk cash, and drugs; document fraud; the exportation of weapons; street violence; homicide; hostage-taking; money laundering; and human trafficking and prostitution.

12. In addition to the ACTT, the Federal Government is making other significant efforts to secure the border. On May 25, 2010, the President announced that he will be requesting $500 million in supplemental funds for enhanced border protection and law enforcement activities, and that he would be ordering a strategic and requirements-based

deployment of 1,200 National Guard troops to the border. This influx of resources will be utilized to enhance technology at the border; share information and support with state, local, and tribal law enforcement; provide intelligence and intelligence analysis, surveillance, and reconnaissance support; and additional training capacity.

13. ICE also is paying increasing attention to alien smuggling, along with other contraband smuggling, with the goal of dismantling large organizations. Smuggling organizations are an enforcement priority because they tend to create a high risk of danger for the persons being smuggled, and tend to be affiliated with the movement of drugs and weapons. ICE has had success of late in large operations to prosecute and deter alien smugglers and those who transport smuggled aliens. During recent operations in Arizona and Texas, ICE agents made a combined total of 85 arrests, searched 18 companies, and seized more than 100 vehicles and more than 30 firearms.

14. This summer, ICE launched a surge in its efforts near the Mexican border. This surge was a component of a strategy to identify, disrupt, and dismantle cartel operations. The focus on cartel operations is a policy priority because such cartels are responsible for high degrees of violence in Mexico and the United States—the cartels destabilize Mexico and threaten regional security. For 120 days, ICE will add 186 agents and officers to its five Southwest border offices to attack cartel capabilities to conduct operations; disrupt and dismantle drug trafficking organizations; diminish the illicit flow of money, weapons, narcotics, and people into and out of the U.S.; and enhance border security. The initiative, known as Operation Southern Resolve, is closely coordinated with the Government of Mexico, as well as Mexican and U.S. federal, state and local law enforcement to ensure maximum impact. The initiative also includes

targeting transnational gang activity, targeting electronic and traditional methods of moving illicit proceeds, and identifying, arresting, and removing criminal aliens present in the region.

15. Although ICE continues to devote significant resources to immigration enforcement in Arizona and elsewhere along the Southwest border, ICE recognizes that a full solution to the immigration problem will only be achieved through comprehensive immigration reform (CIR). Thus, ICE, in coordination with DHS and the Department's other operating components, has committed personnel and energy to advancing CIR. For example, ICE's Assistant Secretary and other senior leaders have advocated for comprehensive immigration reform during meetings with, and in written letters and statements to, advocacy groups, non-governmental organizations, members of the media, and members of Congress. Other ICE personnel have participated in working groups to develop immigration reform proposals to include in CIR and to prepare budget assessments and projections in support of those proposals.

ICE Enforcement Priorities

16. DHS is the federal department with primary responsibility for the enforcement of federal immigration law. Within DHS, ICE plays a key role in this enforcement by, among other functions, serving as the agency responsible for the investigation of immigration-related crimes, the apprehension and removal of individuals from the interior United States, and the representation of the United States in removal proceedings before the Executive Office for Immigration Review within the Department of Justice. As the department charged with enforcement of federal immigration laws, DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities. This discretion also allows ICE to forego criminal prosecutions or removal proceedings in individual cases, where such forbearance will further federal immigration priorities.

17. ICE's priorities at a national level have been refined to reflect Secretary Napolitano's commitment to the "smart and tough enforcement of immigration laws." Currently, ICE's highest enforcement priorities—meaning, the most important targets for apprehension and removal efforts—are aliens who pose a danger to national security or a risk to public safety, including: aliens engaged in or suspected of terrorism or espionage; aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; certain gang members; and aliens subject to outstanding criminal warrants.

18. Other high priorities include aliens who are recent illegal entrants and "fugitive aliens" (*i.e.*, aliens who have failed to comply with final orders of removal). The attention to fugitive aliens, especially those with criminal records, recognizes that the government expends significant resources providing procedural due process in immigration proceedings, and that the efficacy of removal proceedings is undermined if final orders of removal are not enforced. Finally, the attention to aliens who are recent illegal entrants is intended to help maintain control at the border. Aliens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority. And aliens who meet certain humanitarian criteria may not be an "enforcement" priority at all—in such humanitarian cases, federal immigration priorities may recommend forbearance in pursuing removal.

19. ICE bases its current priorities on a number of different factors. One factor is the differential between the number of people present in the United States illegally—approximately 10.8 million aliens, including 460,000 in Arizona—and the number of people ICE is resourced to remove each year—approximately 400,000. This differential necessitates prioritization to ensure that ICE expends resources most efficiently to advance the goals of protecting national security,

protecting public safety, and securing the border. Another factor is ICE's consideration of humanitarian interests in enforcing federal immigration laws, and its desire to ensure aliens in the system are treated fairly and with appropriate respect given their individual circumstances. Humanitarian interests may, in appropriate cases, support a conclusion that an alien should not be removed or detained at all. And yet another factor is ICE's recognition that immigration detainees are held for a civil purpose—namely, removal—and not for punishment. Put another way, although entering the United States illegally or failing to cooperate with ICE during the removal process is a crime, being in the United States without authorization is not itself a crime. ICE prioritizes enforcement to distinguish between aliens who commit civil immigration violations from those commit or who have been convicted of a crime.

20. Consequently, ICE is revising policies and practices regarding civil immigration enforcement and the immigration detention system to ensure the use of its enforcement personnel, detention space, and removal resources are focused on advancing these priorities. For example, ICE has two programs within ERO designed to arrest convicted criminal aliens and alien fugitives. These are the Criminal Alien Program (CAP) and the National Fugitive Operations Program (fugitive operations). ICE officers assigned to CAP identify criminal aliens who are incarcerated within federal, state, and local prisons and jails, as well as aliens who have been charged or arrested and remain in the custody of the law enforcement agency. ICE officers assigned to fugitive operations seek to locate and arrest aliens with final orders of removal. These officers also seek to locate, arrest, and remove convicted criminal aliens living at large in communities and aliens who previously have been deported but have returned unlawfully to the United States. They also present illegal reentry cases for prosecution in federal courts to deter such recidivist conduct.

21. Likewise, in keeping with the Secretary's policy determination that immigration enforcement should be "smart and tough" by focusing on specific priorities, ICE issued a new strategy regarding worksite enforcement. This strategy shift prioritized the criminal investigation and prosecution of employers and de-emphasized the apprehension and removal of illegal aliens working in the United States without authorization. Although Federal law does not make it a distinct civil or criminal offense for unauthorized aliens merely to seek employment in the U.S., such aliens may be removed for being in the U.S. illegally. ICE's new strategy acknowledges that many enter the United States illegally because of the opportunity to work. Thus, the strategy seeks to address the root causes of illegal immigration and to do the following: (i) penalize employers who knowingly hire illegal workers; (ii) deter employers who are tempted to hire illegal workers; and (iii) encourage all employers to take advantage of well-crafted compliance tools. At the same time, the policy recognizes that humanitarian concerns counsel against focusing enforcement efforts on unauthorized workers. The strategy permits agents to exercise discretion and work with the prosecuting attorney to assess how to best proceed with respect to illegal alien witnesses. One of the problems with Arizona Senate Bill 1070 (SB 1070) is that it will divert focus from this "smart and tough" focus on employers to responses to requests from local law enforcement to apprehend aliens not within ICE's priorities.

22. In addition to refocusing ICE's civil enforcement priorities, ICE has also refocused the 287(g) program so that state and local jurisdictions with which ICE has entered into agreements to exercise federal immigration authority do so in a manner consistent with ICE's priorities. The mechanism for this refocusing has been a new MOA with revised terms and conditions. Jurisdictions that already had agreements were required to enter into this revised MOA in October of 2009. Also, ICE opted not to renew 287(g) agreements with task force

officers with the Maricopa County Sheriff's Office and officers stationed within the Los Angeles County Sheriff's Office's jail. These decisions were based on inconsistency between the expectations of the local jurisdiction and the priorities of ICE.

23. ICE communicates its enforcement priorities to state and local law enforcement officials in a number of ways. With respect to the 287(g) program, the standard MOA describes the focus on criminals, with the highest priority on the most serious offenders. In addition, when deploying interoperability technology through the Secure Communities program, local jurisdictions are advised of ICE's priorities in the MOA and in outreach materials.

24. In addition to the dissemination of national civil enforcement priorities to the field, the refocusing of existing ICE programs, and other efforts to prioritize immigration enforcement to most efficiently protect the border and public safety, the Assistant Secretary and his senior staff routinely inform field locations that they have the authority and should exercise discretion in individual cases. This includes when deciding whether to issue charging documents, institute removal proceedings, release or detain aliens, place aliens on alternatives to detention (*e.g.,* electronic monitoring), concede an alien's eligibility for relief from removal, move to terminate cases where the alien may have some other avenue for relief, stay deportations, or defer an alien's departure.

25. The Assistant Secretary has communicated to ICE personnel that discretion is particularly important when dealing with long-time lawful permanent residents, juveniles, the immediate family members of U.S. citizens, veterans, members of the armed forces and their families, and others with illnesses or special circumstances.

26. ICE exercises prosecutorial discretion throughout all the stages of the removal process—investigations, initiating and pursuing proceedings, which charges to lodge, seeking

termination of proceedings, administrative closure of cases, release from detention, not taking an appeal, and declining to execute a removal order. The decision on whether and how to exercise prosecutorial discretion in a given case is largely informed by ICE's enforcement priorities. During my tenure at ICE as an attorney litigating administrative immigration cases, as well as my role as a SAUSA prosecuting criminal offenses and in my legal and management roles at ICE headquarters, I am aware of many cases where ICE has exercised prosecutorial discretion to benefit an alien who was not within the stated priorities of the agency or because of humanitarian factors. For example, ICE has released an individual with medical issues from detention, terminated removal proceedings to allow an alien to regularize her immigration status, declined to assert the one year filing deadline in order to allow an individual to apply for asylum before the immigration judge, and terminated proceedings for a long-term legal permanent resident who served in the military, among numerous other examples.

27. ICE's exercise of discretion in enforcement decisions has been the subject of several internal agency communications. For example, Attachment A is a true and accurate copy of a November 7, 2007 memorandum from ICE Assistant Secretary Julie Myers to ICE Field Office Directors and ICE Special Agents in Charge. Pursuant to this memorandum, ICE agents and officers should exercise prosecutorial discretion when making administrative arrests and custody determinations for aliens who are nursing mothers absent any statutory detention requirement or concerns such as national security or threats to public safety. Attachment B is a true and accurate copy, omitting attachments thereto, of an October 24, 2005 memorandum from ICE Principal Legal Advisor William J. Howard to OPLA Chief Counsel as to the manner in which prosecutorial discretion is exercised in removal proceedings. Attachment C is a true and accurate copy of a November 17, 2000 memorandum from Immigration and Naturalization

Service (INS) Commissioner Doris Meissner to various INS personnel concerning the exercise of prosecutorial discretion. The Assistant Secretary also outlined in a recent memorandum to all ICE employees the agency's civil immigration enforcement priorities relating to the apprehension, detention, and removal of aliens (available at http://www.ice.gov/doclib/civil_enforcement_priorities.pdf).

28. In sum, ICE does not seek to arrest, detain, remove, or refer for prosecution, all aliens who may be present in the United States illegally. ICE focuses its enforcement efforts in a manner that is intended to most effectively further national security, public safety, and security of the border, and has affirmative reasons not to seek removal or prosecution of certain aliens.

International Cooperation with ICE Enforcement

29. ICE cooperates with foreign governments to advance our criminal investigations of transnational criminal organizations (such as drug cartels, major gangs, and organized alien smugglers) and to repatriate their citizens and nationals who are facing deportation. With respect to our criminal investigations, ICE's Office of International Affairs has 63 offices in 44 countries staffed with special agents who, among other things, investigate crime. In Mexico alone, ICE has five offices consisting of a total of 38 personnel. Investigators in ICE attaché offices investigate cross-border crime, including crime that affects Arizona and the rest of the Southwest. In addition, they work with foreign governments to secure travel documents and clearance for ICE to remove aliens from the United States. ICE negotiates with foreign governments to expedite the removal process, including negotiating electronic travel document arrangements. International cooperation for ICE is critical.

30. International cooperation advances ICE's goal of making the borders more secure. To address cross-border crime at the Southwest border, ICE is cooperating very closely with the

Government of Mexico in particular. Two prime examples of ICE and Mexican cooperation include Operation Armas Cruzadas, designed to improve information sharing and to identify, disrupt, and dismantle criminal networks engaged in weapons smuggling, and Operation Firewall, as part of which Mexican customs and ICE-trained Mexican Money Laundering-Vetted Units target the illicit flow of money out of Mexico on commercial flights and in container shipments.

31. Also to improve border security and combat cross-border crime, ICE is engaged in other initiatives with the Government of Mexico. For instance, ICE is training Mexican customs investigators. ICE also provides Mexican law enforcement officers and prosecutors training in human trafficking, child sexual exploitation, gang investigations, specialized investigative techniques, and financial crimes. ICE has recruited Mexican federal police officers to participate in five of the ICE-led Border Enforcement Security Task Forces (BESTs). The BEST platform brings together multiple law enforcement agencies at every level to combat cross-border crime, including crime touching Arizona. Sharing information and agents is promoting more efficient and effective investigations. ICE has benefited from the Government of Mexico's increased cooperation, including in recent alien smuggling investigations that resulted in arrests in Mexico and Arizona.

32. In addition to the importance of cooperation from foreign governments in criminal investigations, ICE also benefits from good relationships with foreign governments in effecting removals of foreign nationals. Negotiating removals, including country clearance, to approvals and securing travel documents, is a federal matter and often one that requires the cooperation of the country that is accepting the removed alien. ICE removes more nationals of Mexico than of any other country. In FY 2009, ICE removed or returned approximately 275,000

Mexican nationals, which constitutes more than 70 percent of all removals and returns. Not all countries are equally willing to repatriate their nationals. Delays in repatriating nationals of foreign countries causes ICE financial and operational challenges, particularly when the aliens are detained pending removal. Federal law limits how long ICE can detain an alien once the alien is subject to a final order of removal. Therefore, difficulties in persuading a foreign country to accept a removed alien runs the risk of extending the length of time that a potentially dangerous or criminal alien remains in the United States. Thus, the efficient operation of the immigration system relies on cooperation from foreign governments.

Reliance on Illegal Aliens in Enforcement and Prosecution

33. ICE agents routinely rely on foreign nationals, including aliens unlawfully in the United States, to build criminal cases, including cases against other aliens in the United States illegally. Aliens who are unlawfully in the United States, like any other persons, may have important information about criminals they encounter—from narcotics smugglers to alien smugglers and beyond—and routinely support ICE's enforcement activities by serving as confidential informants or witnesses. When ICE's witnesses or informants are illegal aliens who are subject to removal, ICE can exercise discretion and ensure the alien is able to remain in the country to assist in an investigation, prosecution, or both. The blanket removal or incarceration of all aliens unlawfully present in Arizona or in certain other individual states would interfere with ICE's ability to pursue the prosecution or removal of aliens who pose particularly significant threats to public safety or national security. Likewise, ICE can provide temporary and long-term benefits to ensure victims of illegal activity are able to remain in the United States.

34. Tools relied upon by ICE to ensure the cooperation of informants and witnesses include deferred action, stays of removal, U visas for crime victims, T visas for victims of human

trafficking, and S visas for significant cooperators against other criminals and to support investigations. These tools allow aliens who otherwise would face removal to remain in the United States either temporarily or permanently, and to work in the United States in order to support themselves while here. Many of these tools are employed in situations where federal immigration policy suggests an affirmative benefit that can only be obtained by not pursuing an alien's removal or prosecution. Notably, utilization of these tools is a dynamic process between ICE and the alien, which may play out over time. An alien who ultimately may receive a particular benefit—for example, an S visa—may not immediately receive that visa upon initially coming forward to ICE or other authorities, and thus at a given time may not have documentation or evidence of the fact that ICE is permitting that alien to remain in the United States.

35. Although ICE may rely on an illegal alien as an informant in any type of immigration or custom violation it investigates, this is particularly likely in alien smuggling and illegal employment cases. Aliens who lack lawful status in the United States are routinely witnesses in criminal cases against alien smugglers. For example, in an alien smuggling case, the smuggled aliens are in a position to provide important information about their journey to the United States, including how they entered, who provided them assistance, and who they may have paid. If these aliens were not available to ICE, special agents would not be positioned to build criminal cases against the smuggler. ICE may use a case against the smuggler to then build a larger case against others in the smuggling organization that assisted the aliens across the border.

36. ICE also relies heavily on alien informants and witnesses in illegal employment cases. In worksite cases, the unauthorized alien workers likewise have important insight and

information about the persons involved in the hiring and employment process, including who may be amenable to a criminal charge.

37. ICE also relies heavily on alien informants and cooperators in investigations of transnational gangs, including violent street gangs with membership and leadership in the United States and abroad. Informants and cooperating witnesses help ICE identify gang members in the United States and provide information to support investigations into crimes the gang may be committing. In some cases, this includes violent crime in aid of racketeering, narcotics trafficking, or other crimes.

38. During my years at ICE, I have heard many state and local law enforcement and immigration advocacy groups suggest that victims and witnesses of crime may hesitate to come forward to speak to law enforcement officials if they lack lawful status. The concern cited is that, rather than finding redress for crime, victims and witnesses will face detention and removal from the United States. To ensure that illegal aliens who are the victims of crimes or have witnessed crimes come forward to law enforcement, ICE has a robust outreach program, particularly in the context of human trafficking, to assure victims and witnesses that they can safely come forward against traffickers without fearing immediate immigration custody, extended detention, or removal. If this concern manifested itself—and if crime victims became reluctant to come forward—ICE would have a more difficult time apprehending, prosecuting, and removing particularly dangerous aliens.

Potential Adverse Impact of SB 1070 on ICE's Priorities and Enforcement Activities

39. I am aware that the State of Arizona has enacted new immigration legislation, known as SB 1070. I have read SB 1070, and I am generally familiar with the purpose and

provisions of that legislation. SB 1070 will adversely impact ICE's operational activities with respect to federal immigration enforcement.

40. I understand that section two of SB 1070 generally requires Arizona law enforcement personnel to inquire as to the immigration status of any individual encountered during "any lawful stop, detention or arrest" where there is a reasonable suspicion to believe that the individual is unlawfully present in the United States. I also understand that section two contemplates referral to DHS of those aliens confirmed to be in the United States illegally.

41. As a federal agency with national responsibilities, the burdens placed by SB 1070 on the Federal Government will impair ICE's ability to pursue its enforcement priorities. For example, referrals by Arizona under this section likely would be handled by either the Special Agent in Charge (SAC) Phoenix (the local HSI office), or the Field Office Director (FOD) Phoenix (the local ERO office). Both offices currently have broad portfolios of responsibility. Notably, SAC Phoenix is responsible for investigating crimes at eight ports of entry and two international airports. FOD Phoenix is responsible for two significant detention centers located in Florence and Eloy, Arizona, and a large number of immigration detainees housed at a local county jail in Pinal County, Arizona. FOD Phoenix also has a fugitive operations team, a robust criminal alien program, and it manages the 287(g) programs in the counties of Maricopa, Yavapai, and Pinal, as well as at the Arizona Department of Corrections.

42. Neither the SAC nor the FOD offices in Phoenix are staffed to assume additional duties. Inquiries from state and local law enforcement officers about a subject's immigration status could be routed to the Law Enforcement Support Center in Vermont or to agents and officers stationed at SAC or FOD Phoenix. ICE resources are currently engaged in investigating criminal violations and managing the enforcement priorities and existing enforcement efforts,

and neither the SAC nor FOD Phoenix are scheduled for a significant increase in resources to accommodate additional calls from state and local law enforcement. Similarly, the FOD and SAC offices in Arizona are not equipped to respond to any appreciable increase in requests from Arizona to take custody of aliens apprehended by the state.

43. Moreover, ICE's detention capacity is limited. In FY 2009, FOD Phoenix was provided with funds to detain no more than approximately 2,900 detention beds on an average day. FOD Phoenix uses that detention budget and available bed space not only for aliens arrested in Arizona, but also aliens transferred from Los Angeles, San Francisco, and San Diego. Notably, the President's budget for FY 2011 does not request an increase in money to purchase detention space. And with increasing proportions of criminal aliens in ICE custody and static bed space, the detention resources will be directed to those aliens who present a danger to the community and the greatest risk of flight.

44. Thus, to respond to the number of referrals likely to be generated by enforcement of SB 1070 would require ICE to divert existing resources from other duties, resulting in fewer resources being available to dedicate to cases and aliens within ICE's priorities. This outcome is especially problematic because ICE's current priorities are focused on national security, public safety, and security of the border. Diverting resources to cover the influx of referrals from Arizona (and other states, to the extent similar laws are adopted) could, therefore, mean decreasing ICE's ability to focus on priorities such as protecting national security or public safety in order to pursue aliens who are in the United States illegally but pose no immediate or known danger or threat to the safety and security of the public.

45. An alternative to responding to the referrals from Arizona, and thus diverting resources, is to largely disregard referrals from Arizona. But this too would have adverse

consequences in that it could jeopardize ICE's relationships with state and local law enforcement agencies (LEAs). For example, LEAs often request ICE assistance when individuals are encountered who are believed to be in the United States illegally. Since ICE is not always available to immediately respond to LEA calls, potentially removable aliens are often released back into the community. Historically, this caused some LEAs to complain that ICE was unresponsive. In September 2006, to address this enforcement gap, the FOD office in Phoenix created the Law Enforcement Agency Response (LEAR) Unit, a unit of officers specifically dedicated to provide 24-hour response, 365 days per year. ICE's efforts with this project to ensure better response to LEAs would be undermined if ICE is forced to largely disregard referrals from Arizona, and consequently may result in LEAs being less willing to cooperate with ICE on various enforcement matters, including those high-priority targets on which ICE enforcement is currently focused.

46. In addition to section two of SB 1070, I understand that the stated purpose of the act is to "make attrition through enforcement the public policy of all state and local government agencies in Arizona," and that the "provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." To this end, I understand that section three of SB 1070 authorizes Arizona to impose criminal penalties for failing to carry a registration document, that sections four and five, along with existing provisions of Arizona law, prohibit certain alien smuggling activity, as well as the transporting, concealing, and harboring of illegal aliens, and that section six authorizes the warrantless arrest of certain aliens believed to be removable from the United States.

47. The Arizona statute does not appear to make any distinctions based on the circumstances of the individual aliens or to take account of the Executive Branch's determination with respect to individual aliens, such as to not pursue removal proceedings or grant some form of relief from removal. Thus, an alien for whom ICE deliberately decided for humanitarian reasons not to pursue removal proceedings or not to refer for criminal prosecution, despite the fact that the alien may be in the United States illegally, may still be prosecuted under the provisions of the Arizona law. DHS maintains the primary interest in the humane treatment of aliens and the fair administration of federal immigration laws. The absence of a federal prosecution does not necessarily indicate a lack of federal resources; rather, the Federal Government often has affirmative reasons for not prosecuting an alien. For example, ICE may exercise its discretionary authority to grant deferred action to an alien in order to care for a sick child. ICE's humanitarian interests would be undermined if that alien was then detained or arrested by Arizona authorities for being illegally present in the United States.

48. Similarly, certain aliens who meet statutory requirements may seek to apply for asylum in the United States, pursuant to 8 U.S.C. § 1158, based on their having been persecuted in the past or because of a threat of future persecution. The asylum statute recognizes a policy in favor of hospitality to persecuted aliens. In many cases, these aliens are not detained while they pursue protection, and they do not have the requisite immigration documents that would provide them lawful status within the United States during that period. Under SB 1070, these aliens could be subjected to detention or arrest based on the state's priorities, despite the fact that affirmative federal policy supports not detaining or prosecuting the alien.

49. Additionally, some aliens who do not qualify for asylum may qualify instead for withholding of removal under 8 U.S.C. § 1231(b)(3). Similar to asylum, withholding of removal

provides protection in the United States for aliens who seek to escape persecution. Arizona's detention or arrest of these aliens would not be consistent with the Government's desire to ensure their humanitarian treatment.

50. Further, there are many aliens in the United States who seek protection from removal under the federal regulatory provisions at 8 C.F.R. § 208.18 implementing the Government's non-*refoulement* obligations under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In many cases, these aliens are not detained while they pursue CAT protection. Under SB 1070, these aliens could be subjected to detention or arrest based on the state's priorities. The detention or arrest of such aliens would be inconsistent with the Government's interest in ensuring their humane treatment, especially where such aliens may have been subject to torture before they came to the U.S.

51. Application of SB 1070 also could undermine ICE's efforts to secure the cooperation of confidential informants, witnesses, and victims who are present in the United States without legal status. The stated purpose of SB 1070, coupled with the extensive publicity surrounding this law, may lead illegal aliens to believe, rightly or wrongly, that they will be subject to immigration detention and removal if they cooperate with authorities, not to mention the possibility that they may expose themselves to sanctions under Arizona law if they choose to cooperate with authorities. Consequently, SB 1070 very likely will chill the willingness of certain aliens to cooperate with ICE. Although ICE has tools to address those concerns, SB 1070 would undercut those efforts, and thus risks ICE's investigation and prosecution of criminal activity, such as that related to illegal employment, the smuggling of contraband or people, or human trafficking.

52. Moreover, just as the ICE offices in Arizona are not staffed to respond to additional inquiries about the immigration status of individuals encountered by Arizona, or to and arrest or detain appreciably more aliens not within ICE's current priorities, the offices are not staffed to provide personnel to testify in Arizona state criminal proceedings related to a defendant's immigration status, such as a "Simpson Hearing" where there is indication that a person may be in the United States illegally and the prosecutor invokes Arizona Revised Statute § 13-3961(A)(a)(ii) (relating to determination of immigration status for purposes of bail). In some federal criminal immigration cases, Assistant United States Attorneys call ICE special agents to testify to provide such information as a person's immigration history or status. If ICE agents are asked to testify in a significant number of state criminal proceedings, as contemplated under SB 1070, they will be forced either to divert resources from federal priorities, or to refuse to testify in those proceedings, thus damaging their relationships with the state and local officials whose cooperation is often of critical importance in carrying out federal enforcement priorities.

53. Enforcement of SB 1070 also threatens ICE's cooperation from foreign governments. For example, the Government of Mexico, a partner to ICE in many law enforcement efforts and in repatriation of Mexican nationals, has expressed strong concern about Arizona's law. On May 19, 2010, President Barack Obama and Mexican President Felipe Calderón held a joint news conference, during which President Calderón criticized the Arizona immigration law, saying it criminalized immigrants. President Calderón reiterated these concerns to a joint session of the United States Congress on May 20, 2010. Any decrease in participation and support from the Government of Mexico will hinder ICE efforts to prioritize and combat cross-border crime.

54. The Government of Mexico is not the only foreign nation that has expressed concern about SB 1070. Should there be any decreased cooperation from foreign governments in response to Arizona's enforcement of SB 1070, the predictable result of such decreased cooperation would be an adverse impact on the effectiveness and efficiency of ICE's enforcement activities, which I have detailed above.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed the 1st day of July 2010 in Washington, D.C.

Daniel H. Ragsdale
Executive Associate Director
Management and Administration
U.S. Immigration and Customs Enforcement

ATTACHMENT A

Office of the Assistant Secretary

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

U.S. Immigration and Customs Enforcement

NOV - 7 2007

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

FROM: Julie L. Myers
Assistant Secretary

SUBJECT: Prosecutorial and Custody Discretion

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

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

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

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

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

Attachment

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 7 2000

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

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

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

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

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

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

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[1] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

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

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

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

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

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

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

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

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

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

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

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

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

ATTACHMENT B

Office of the Principal Legal Advisor

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

U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

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

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

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

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

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

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

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

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

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

* * * * * * * * * *

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

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

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

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

Examples:

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

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

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

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

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

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

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

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

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

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

Example:

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

3) Prosecutorial Discretion after NTA Issuance and Filing:

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

Examples:

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

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

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

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

4) **Post-Hearing Actions**:

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

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

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

Examples:

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

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

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

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

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

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

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

Examples:

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

* * * * * * * * * *

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

Official Use Disclaimer:

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

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

ATTACHMENT C

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

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

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

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

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

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

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

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

Legal and Policy Background

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

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

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

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

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

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

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

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

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

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

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

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

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

Investigations

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

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

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

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

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

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

Initiating and Pursuing Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Process for Decisions

Identification of Suitable Cases

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

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

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

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

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

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

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

Documenting Decisions

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

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

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

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

Future Impact

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

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

Legal Liability and Enforceability

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

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

Training and Implementation

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

EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF DAVID V. AGUILAR

Pursuant to 28 U.S.C. § 1746, I, David V. Aguilar, declare and state as follows:

1. I am employed by U.S. Customs and Border Protection (CBP), within the U.S. Department of Homeland Security, in the position of Deputy Commissioner. I have held this position since April 11, 2010. Prior to holding the position of Deputy Commissioner, I served as Acting Deputy Commissioner beginning on January 2, 2010, previously as the Chief of the Border Patrol for just short of six years and, prior to that, as the Chief Patrol Agent of the Tucson Sector. I began my service with the U.S. Border Patrol in 1978. I make this declaration based on personal knowledge of the subject matter acquired by me in the course of the performance of my official duties. I am aware that the State of Arizona has enacted new immigration legislation, known as Senate Bill 1070 (SB 1070).

2. In deploying resources between the ports of entry, CBP seeks to incorporate the appropriate mix of personnel, infrastructure, and technology that will allow us to best advance our objectives: specifically, preventing the commission of crimes, apprehending those who have endangered or will endanger public safety, and securing the border. As explained below, our assets at

and between the ports of entry in Arizona are deployed to establish and maintain operational control of the border in the state of Arizona.

3. CBP currently maintains six land ports of entry within the State of Arizona, found in the following locations: Douglas, Lukeville, Naco, Nogales, San Luis, and Sasabe. These ports of entry accommodate private and commercial vehicles, as well as pedestrians seeking entry or admission into the United States. The Nogales Port of Entry also accommodates rail traffic. CBP's port operations include seven air ports of entry in Douglas, Nogales, Phoenix, Scottsdale Air Force Base, Williams Gateway Air Force Base (Mesa), San Luis, and Tucson. CBP's Office of Field Operations (OFO) currently has 780 CBP Officers stationed in Arizona, both at these ports of entry and in the Arizona operational offices, as well as ninety-four agriculture specialists and fourteen import specialists.

4. As of June 2, 2010, CBP has processed over 4,562,900 pedestrians, 3,918,000 personal vehicles, 246,600 commercial vehicles (for purposes of this declaration this number does not include rail), 10,745 private aircraft passengers and crew, and 456,459 commercial aircraft passengers and crew in Arizona this fiscal year alone.[1] This traffic is processed through seventy-five lanes of traffic as well as those entering at the airports — thirty-one for personal vehicles inbound into the United States, ten for personal vehicles outbound from the United States, seventeen for pedestrians inbound to the United States, thirteen for commercial vehicles inbound to the United States, and four for commercial vehicles outbound from the United States. The volume for fiscal year 2010 is in keeping with the high volume that CBP has consistently processed in Arizona since 2005:

[1] These numbers and those in the subsequent bullets represent the number of crossings and may not be unique persons or vehicles, as individuals or vehicles may make repeated crossings.

a. In fiscal year 2009, CBP processed over 8,288,000 pedestrians, 7,416,700 personal vehicles, 341,100 commercial vehicles, 17,474 private aircraft passengers and crew, and 670,821 commercial aircraft passengers and crew.

b. In fiscal year 2008, CBP processed over 11,393,800 pedestrians, 7,938,000 personal vehicles, 381,100 commercial vehicles, 22,662 private aircraft passengers and crew, and 711,553 commercial aircraft passengers and crew.

c. In fiscal year 2007, CBP processed over 11,856,100 pedestrians, 8,282,500 personal vehicles, 368,100 commercial vehicles, 23,091 private aircraft passengers and crew, and 672,593 commercial aircraft passengers and crew.

d. In fiscal year 2006, CBP processed over 10,890,500 pedestrians, 9,117,300 personal vehicles, 367,300 commercial vehicles, 21,711 private aircraft passengers and crew, and 685,043 commercial aircraft passengers and crew.

e. In fiscal year 2005, CBP processed over 9,867,800 pedestrians, 10,025,600 personal vehicles, 341,300 commercial vehicles, 20,722 private aircraft passengers and crew, and 698,277 commercial aircraft passengers and crew.

5. CBP processed 357 trains in Arizona in fiscal year 2009. Moreover, at the rail port in Nogales, CBP implemented 100 percent screening of all outbound rail traffic as of March 16, 2009.

6. As of May 31, 2010, during CBP's processing of individuals at the ports of entry in Arizona, 5,975 were determined to be inadmissible into the United States under the Immigration and Nationality Act during fiscal year 2010, with another 5,358 withdrawing their applications for admission. Since the beginning of fiscal year 2005, 48,549 individuals have been found inadmissible at the Arizona Ports of Entry, with another 42,069 withdrawing their

applications for admission. In addition, from the beginning of fiscal year 2005 through the present the Office of Field Operations has arrested 9,428 individuals in Arizona and referred them for criminal prosecution for a variety of criminal violations.

7. In 2009 CBP deployed additional canine teams to the Southwest Border to augment teams previously in place. Of these, forty-nine teams are permanently assigned to ports of entry within Arizona.

8. In 2009, CBP deployed additional Z-Backscatter Van Units to the Southwest border to augment those previously in place, which help CBP identify anomalies in passenger vehicles—that is, a deviation from the normal reading which may be indicative of the presence of unlawful or undeclared merchandise, as well as potentially smuggled individuals. CBP deployed eight units at ports of entry within Arizona.

9. CBP has also implemented the Western Hemisphere Travel Initiative (WHTI) for land and sea travel to the United States, including upgrades to the physical and technical capabilities at the ports of entry. Under WHTI, radio frequency identification (RFID) technology and next generation license plate readers were deployed, along with coordinate hardware and software updates. The new license plate readers (which provide CBP officers with pre-positioned traveler information) are ten percent more accurate than those they replaced, now reading at or above ninety percent accuracy, saving officers from manually correcting almost 10 million erroneous license plate queries per year. As a result, CBP is able to process travelers more efficiently. The technology deployed as part of WHTI allows law enforcement queries to proceed at a pace 60 percent faster than manual queries. These upgrades were completed at the Arizona land ports of entry, ending with Naco in February 2010 (though due to its size Sasabe has a hybrid solution in place with many, though not all, of these technical capabilities).

10. CBP's Office of Border Patrol (Border Patrol) maintains a presence between the ports of entry in Arizona as well. For operational purposes, the Border Patrol divides the United States into geographical areas known as "sectors." Two of these Border Patrol sectors are located in Arizona. The Tucson sector is located wholly within the State of Arizona. The sector known as the Yuma sector largely covers area found within the State of Arizona, but also includes an unpopulated area of the southeastern portion of California along the border. CBP's activities in the Yuma sector are based on a variety of factors and are not driven by the state—*i.e.*, Arizona versus California—where the activities take place.

11. The Border Patrol nationwide is better staffed today than at any time in its eighty-five year history, having nearly doubled the number of agents from approximately 10,000 in 2004 to more than 20,000 in 2009. As of May 22, 2010, there are over 4,000 agents stationed in Arizona alone. This is an increase from the approximately 3,500 agents stationed during fiscal year 2007 in Arizona and the approximately 2,800 agents stationed in Arizona in fiscal year 2005.

12. The Border Patrol utilizes various technologies to assist in locating, identifying, and apprehending those attempting to cross the border illegally. Nearly every piece of technology utilized between the ports of entry is found in northern, southern, and coastal border operations. Technology deployments are based on operational need and the technology's ability to fit within that area's operating environment. The following technologies, among others, are being used between ports of entry: night vision and thermal imaging equipment; magnetometers; infrared and seismic sensors; mobile x-ray, gamma ray and backscatter nonintrusive inspection systems; and additional remote video and sensing equipment.

13. The Border Patrol participates in a program known as Immigration Quick Court. This is a program in which an Immigration Judge holds hearings at the Border Patrol Tucson Sector Processing Center. The Quick Court is an initiative that works to ease the dockets of the traditional immigration courts. The process expedites the formal removal proceedings of illegal aliens arrested within the Tucson Sector. As of April 2010, the Court has presided over 3,153 cases for fiscal year 2010.

14. The Border Patrol operates check-points at twenty-five locations in Arizona, though given the nature of checkpoints these are not all operational at any one given time.

15. The United States has also erected approximately 305.7 miles of border fence in Arizona. Of that, 123.2 miles is pedestrian fence and 182.5 miles consist of vehicle fence.

16. The work performed by CBP's Office of Air and Marine augments these operations. In addition to the technology described above, the Office of Air and Marine conducts continuous operations along our borders nationally with more than 290 aircraft, including Unmanned Aircraft Systems (UAS), and 253 vessels. As of this date, eight fixed winged aircraft, thirty rotary wing aircraft, three unmanned aerial systems, as well as 125 Air Interdiction Agents are based in Arizona. The Office of Air and Marine is an integral part of the overall efforts of CBP and in fiscal year 2009 participated in over 34,800 apprehensions nationally and flew over 45,679 sorties for a total of 100,639 flight hours.

17. Another CBP effort is the Operation Against Smugglers Initiative on Safety and Security (OASISS), a bi-national initiative designed to increase the ability of the U.S. and Mexican governments to prosecute alien smugglers and human traffickers on both sides of the border. The OASISS program was established because, among other reasons, the prosecution of smugglers and human traffickers is a high immigration priority and because DHS has recognized

the need for international cooperation in pursuit of this goal. Conducted in cooperation with Mexico's Attorney General's Office, under OASISS select alien smuggling cases that are declined by United States Attorney's Offices are subsequently turned over to the Government of Mexico for prosecution under Mexico's judicial system. Since its inception on August 17, 2005, the OASISS program has generated 2,031 cases and led to the prosecution of 2,290 principal defendants in Mexico. During fiscal year 2009, 261 alien smuggling cases originating in Arizona were referred to Mexico.

18. CBP also conducts a program known as Operation Streamline, which is a geographically focused prosecution initiative that targets aliens who illegally enter the U.S. through a designated focus area. Currently, approximately seventy (70) illegal aliens are criminally prosecuted each court day. The illegal aliens are prosecuted for violation of 8 U.S.C. § 1325, 8 U.S.C § 1326, or both. Currently, CBP has two attorneys who are full time Special Assistant United States Attorneys for the District of Arizona dedicated to Operation Streamline prosecutions.

19. As of May 28, 2010, approximately 10,700 prosecutions have been brought under Operation Streamline in the Tucson Sector for fiscal year 2010. In fiscal year 2009 over 15,500 prosecutions were brought, which was an increase from the approximately 9,600 prosecutions which were brought in fiscal year 2008.

20. Consistent with DHS's prioritization of enforcement efforts that focus on the promotion of public safety, CBP initiated the Operation Alliance to Combat Transnational Threats (ACTT) in September 2009. ACTT is a multi-agency operation in the Sonora-Arizona Corridor involving over fifty (50) Federal, tribal, state, and local law enforcement and public safety organizations. The ACTT works collaboratively to deny, degrade, disrupt, and ultimately

dismantle criminal organizations and their ability to operate; engage communities to reduce their tolerance of illegal activity; and establish a secure and safe border environment, which will ultimately improve the quality of life of affected communities. Examples of the coordinated operations taken to date to target aliens affiliated with drug trafficking and prevent the expansion of these criminal organizations include the enhanced targeting associates of drug trafficking organizations and, in conjunction with Immigration and Customs Enforcement, the strategic removal of aliens to locations in the interior of Mexico to minimize the recruitment of inadmissible aliens by criminal organizations operating in the border environment.

21. CBP also participates in Operation Stonegarden. The intent of the operation is to provide funding to designated localities to enhance cooperation and coordination between federal, state, local, and tribal law enforcement agencies to secure the United States Southwest Border. In 2009, DHS provided $90 million in funding for Operation Stonegarden to border law enforcement agencies, a record amount. Eighty-five percent of this funding went to the Southwest border—up from fifty-nine percent in fiscal year 2008. The fiscal year 2011 budget request focuses Stonegarden funding solely on the Southwest border.

22. At times, certain state and local law enforcement entities may contact CBP, either through the Office of Field Operations or the Office of Border Patrol, to verify or ascertain the citizenship or immigration status of an individual within the jurisdiction of that agency. Responding to these inquiries takes the time of officers and agents at our ports of entry, offices, and stations.

23. CBP has seen the overall apprehensions of illegal aliens by Border Patrol decrease from our highest point of over one million apprehensions in FY 2000. These numbers

demonstrate the effectiveness of our layered approach to security, comprised of a balance of tactical infrastructure, technology, and personnel at our borders.

a. Specifically, in the Yuma sector the Border Patrol apprehended 138,419 individuals in fiscal year 2005. In fiscal year 2009, Border Patrol apprehended 6,949 individuals, down ninety-four percent from 2005.

b. In the Tucson Sector 439,005 individuals were arrested in fiscal year 2005. In fiscal year 2009, Border Patrol apprehended 241,558 individuals, down forty-five percent from 2005.

24. As part of CBP's processing of individuals for admissibility, it administers the inspection and admissions process for aliens seeking admission to the United States under the Visa Waiver Program (VWP). The VWP enables eligible nationals from thirty-six (36) designated countries to travel to the United States temporarily for business or pleasure for up to ninety (90) days without obtaining a visa. In fiscal year 2009, more than 14 million aliens were admitted to the United States under the VWP. Historically, upon arrival in the United States and during the inspection and admission process, VWP travelers signed and submitted Form I-94W (Nonimmigrant Visa Waiver Arrival/Departure Form), which was stamped by a CBP Officer to reflect the date of admission and authorized period of stay as a nonimmigrant visitor (as described in 8 U.S.C. § 1101(a)(15)(B)). The lower portion of the Form I-94W was retained by the alien.

25. As of January 12, 2009, VWP travelers must complete an Electronic System for Travel Authorization (ESTA) application prior to initiating travel by air or sea carrier to the United States when they intend to apply for admission under the VWP. The ESTA application contains the questions that appeared on the Form I-94W. Approval of the ESTA application

represents a determination by CBP that an alien may travel (absent a subsequent revocation by CBP) to the United States under the VWP for the duration of the validity of the authorization, which generally is two years. CBP, however, retains authority to make the determination as to the alien's admissibility upon the alien's arrival and inspection at a port of entry, as well as the period of each VWP admission, not to exceed 90 days.

26. On May 25, 2010, the Secretary of Homeland Security began the process of eliminating the paper Form I-94W requirement for VWP travelers whose ESTA applications are approved prior to boarding a carrier to travel by air or sea to the United States. The transition to paperless processing of ESTA-compliant travelers is expected to be completed by the end of June 2010. As a result, the only proof of admission issued to most VWP travelers will be the entry stamp on his or her passport reflecting the date of admission.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief. Executed the 24th day of June, 2010 in Washington, D.C.

David V. Aguilar

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF MARIKO SILVER

Pursuant to 28 U.S.C. § 1746, I, Mariko Silver, declare and state as follows:

1. I am the Deputy Assistant Secretary for International Policy and the current Acting Assistant Secretary for International Affairs at the United States Department of Homeland Security (DHS or the Department). I make this declaration based on my personal knowledge and from information provided to me by personnel with relevant knowledge.

2. I have served as the Deputy Assistant Secretary for International Policy for 16 months (February 2009 – June 2010). Prior to joining DHS, I served as Policy Advisor for innovation, higher education, and economic development in the office of Arizona Governor Janet Napolitano. I have also held positions at Arizona State University and Columbia University. In my capacity as the Acting Assistant Secretary for International Affairs I manage a department-wide approach to DHS's international engagement, advising the Office of the Secretary and senior leadership of the department on international policy and programs.

3. I am aware that the State of Arizona has enacted new immigration legislation, known as Senate Bill 1070 (Arizona SB 1070).

4. The Office of International Affairs in the Department of Homeland Security, Office of Policy, plays a central role in developing the Department's strategy for the Homeland Security mission overseas and actively engages foreign counterparts to improve international cooperation on homeland security issues. The very existence of the Office of International Affairs affirms that immigration policy and enforcement demand, in many instances, cooperation with foreign governments and that American immigration policy is a topic of interest in American diplomatic relationships. The Office of International Affairs provides the Secretary and the Department with policy analysis and management of the international affairs and foreign policies that impact the Department. Among other things, the Office of International Affairs builds support among nations and international organizations for actions against global terrorism; manages international activities within the Department in coordination with other federal officials with responsibility for counter-terrorism matters; assists in the promotion of information and education exchange with nations friendly to the United States in order to promote sharing of best practices and technologies relating to homeland security; builds upon and creates new partnerships to enhance DHS's ability through enforcement of the immigration and customs laws, to investigate and interdict transnational criminals and others who threaten public safety and the security of the United States; and coordinates Department international affairs including reviewing departmental positions on international matters, negotiating agreements, developing policy and programs, and interacting with foreign officials.

5. Arizona's new immigration law, Arizona SB 1070, is affecting DHS's ongoing efforts to secure international cooperation in carrying out its mission to safeguard America's people, borders, and infrastructure. DHS depends upon building international partnerships in order to be able to identify vulnerabilities and to understand, investigate, and interdict threats or

hazards at the earliest possible point, ideally before they manifest, reach our shores, or disrupt the critical networks on which the United States depends. Some of these potential threats involve people looking to enter the United States. These international relationships provide critical assistance towards enforcing the immigration laws to help prevent the arrival of individuals who pose national security or public safety concerns.

6. In the weeks following the passage of Arizona law SB 1070, DHS has seen negative effects on our outreach programs and on DHS's interactions with foreign governments. One specific instance where the bill has had a negative impact is on the implementation of provisions of the Rice-Espinosa agreement, which was designed to increase cooperation with Mexico on emergency management issues. On October 23, 2008, the United States and Mexico signed the Agreement between the Government of the United States and the Government of the United Mexican States on Emergency Management Cooperation in Cases of Natural Disasters and Accidents, which provided for increased cooperation in the event of natural disasters and accidents. DHS is of the view that revisions to this dated agreement with Mexico are necessary to reflect the current and emerging emergency management environment. To date, the Mexican Senate has yet to ratify the agreement. The Mexican Senate was scheduled to consider this revised agreement on April 27, 2010. The agreement was removed from the agenda, however, before it could be considered by the Mexican Senate. Mexican senators cited their anger over the passage of SB 1070 as the reason for postponing consideration of the agreement. *See* Ricardo Gomez Y Elena Michel, Senado congeal acuerdo con EU por Ley Arizona, El Universal (Mexico City), April 27, 2010, *available at* http://www.eluniversal.com.mx/notas/676153.html. It is likely that the Senate will not take up consideration of the agreement again until its next

session in September, 2010. Of course, if a natural disaster occurs in the interim, the response will not benefit from the agreement's framework for enhanced cooperation.

7. Fallout related to the passage of the Arizona bill has also impacted DHS's progress with the Merida initiative. When it was launched in 2007, the Merida Initiative, led by the United States Department of State, was a partnership among the governments of the United States, Mexico, and the countries of Central America to confront the violent transnational gangs and organized crime syndicates that plague the entire region. Based in part on this initiative, the United States has forged strong partnerships to enhance citizen safety in affected areas to fight drug trafficking, organized crime, corruption, illicit arms trafficking, money-laundering, and demand for drugs on both sides of the border. DHS is one of the key agencies involved in executing this initiative. Since the Arizona Bill was enacted, DHS representatives in Mexico working on the Merida initiative have reported complications in their efforts in the area of public diplomacy. DHS representatives in Mexico have had to field a barrage of questions relating to the Arizona bill which has delayed discussions regarding DHS cooperation and progress on this initiative.

8. DHS is also concerned about reports from border state officials that as a direct result of the passage of Arizona SB 1070, 5 of 6 Mexican governors will not participate in the Border Governors Conference, scheduled for September 8th through the 10th, if it is held in Arizona as planned. This year's conference is to be chaired by Arizona Governor Brewer. The conference agenda includes worktables on issues such as border security, science and technology, public health, tourism, emergency and civil protection and logistics and international crossings. The conference is normally attended by most of the ten U.S. and Mexican border state governors. DHS and other federal agencies are invited to the conference to provide technical

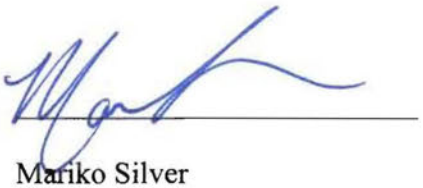
advice and ensure close state-federal cooperation. A boycott by Mexican officials in protest to Arizona law SB 1070 could hinder progress on issues that are critical to the DHS mission such as cross-border emergency management, trade facilitation, security cooperation, public health, and border crossing infrastructure.

9. DHS is similarly concerned about the damage this bill has caused in the general public perception abroad. Arizona SB 1070 is damaging the public trust that both the United States and Mexico have sought to build for our collaborative work in the fight against drug trafficking organizations. Much of the rhetoric in the Mexican media surrounding the bill demonstrates that the Mexican public views the bill as confirmation of the U.S. public's negative view of immigrants. This rhetoric also places DHS in a negative light. Such damage to the Department's international image is difficult to repair and could potentially have long term effects on future cooperation.

10. The Regional Conference on Migration (RCM), a migration forum with participants from all the Central and North American Countries, met most recently on May 20th and 21st of this year. Many delegations and multiple NGOs, rather than addressing broader migration issues, used their speaking time to criticize Arizona SB 1070 and express their concern about its potential impact on their citizens. Some Central American delegations even sought to include a condemnation of the Arizona law in the final RCM Declaration. Although the US delegation was able to block the inclusion of this specific reference, the Arizona bill was a constant and regular part of the RCM dialogue. The discussions regarding Arizona SB 1070 took time away from other, more critical, migration issues that could have furthered the Department's objectives, such as building partnerships and information sharing agreements which would enhance our ability to make informed decisions regarding applicants for admission

and to facilitate legitimate immigration and the protection of refugees, trafficking victims, and other vulnerable individuals as well as building partnerships which would further the Department's objective of deterring and interdicting illegal migration efforts and ensuring the safe and timely repatriation of illegal migrants.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 24th day of June, 2010, in Washington, D.C.



Mariko Silver

EXHIBIT 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	Civil Action No.

DECLARATION OF DOMINICK GENTILE

Pursuant to 28 U.S.C. § 1746, I, Dominick Gentile, declare and state as follows:

1. I am employed by U.S. Citizenship and Immigration Services (USCIS) as Chief, Records Division. I have been employed in this position since October 2000. As Chief, Records Division, I am responsible for USCIS' records policy and systems, which include, but are not limited to, Alien Files (A-File) and USCIS' Central Index System (CIS). I make this declaration based on personal knowledge of the subject matter acquired by me in the course of the performance of my official duties. The purpose of my declaration is to describe the burden that would be placed upon USCIS if the State of Arizona were to request records for criminal prosecutions under Arizona Statute SB1070-HB2162.

2. The A-File is primarily a paper based system that contains records of an individual's transactions as he or she passes through the U.S. immigration and inspection process. CIS is an electronic database that contains personal identification data such as A-File number, date and place of birth, date and port of entry, as well as the location of

each official hard copy paper A-File. There are also other database systems controlled by USCIS that may reflect an individual's transactions with USCIS, such as naturalization applications, asylum applications, fingerprints and photographs, eligibility for work authorization, and other various types of benefit applications for which an individual may apply.

3. The Department of Homeland Security's (DHS) System of Records Notice for the A-File and the Central Index System provide that USCIS is the custodian of the A-File within the Department of Homeland Security. See 72 Fed. Reg. 1755 (January 16, 2007). The A-File is jointly owned by USCIS, U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). Physical custody of the files is also shared between USCIS, CBP, and ICE. USCIS supports other components within DHS and other government agencies responding to lawful requests for information relating to A-Files. Both CBP and ICE maintain their own systems of records. Depending upon the type of encounter between an individual who comes into contact with CBP or ICE officers, the data evidencing that encounter may or may not be transferred to a USCIS systems of records by CBP or ICE.

4. USCIS typically does not receive direct requests from state or local law enforcement agencies for records. Instead, these requests usually are routed through ICE or CBP. If a request for a record is made through ICE or CBP by a law enforcement organization, including a state or local law enforcement agency, USCIS does not require the requesting organization to submit a Freedom of Information Act request. Instead, USCIS typically treats such request as falling under DHS' *Touhy* regulations. DHS' *Touhy* regulations are set forth at 6 C.F.R. §§ 5.41–.49, and provide DHS and its

components with a process for disclosing information that is the subject of a subpoena or other demand or request for information. USCIS' practice is to provide immediate assistance to any request for information submitted by a law enforcement organization. USCIS normally provides information back to the state or local enforcement organization via ICE, CBP or USCIS counsel.

5. Upon receiving a request for information from a law enforcement organization via ICE or CBP, USCIS will first determine if any A-File exists. An A-File may be stored at any USCIS, CBP or ICE facility. If an A-File is stored at a CBP or ICE facility, those components typically will transfer the file to the closest USCIS facility. In addition, depending upon the age of the A-File, it may be retired. USCIS stores the retired files at the Federal Records Center (FRC), National Archives and Records Administration (NARA). If the A-File is located at the FRC, USCIS must pay a fee to NARA to locate the file and send it to USCIS.

6. Once the A-File is located, a USCIS employee will review it to determine whether it relates to the subject of the request. If USCIS determines that it has located the correct A-File, a USCIS employee will conduct an initial review of the A-File to determine whether any information is not releasable, for example, because it belongs to an agency outside of DHS or it is privileged. Currently, the typical request requires only an oral response from USCIS. USCIS can provide this oral response within two to seven workdays once the file is located and received.

7. If a law enforcement organization requests copies of documents from an A-File, then USCIS is required to perform additional work. It must remove and annotate any information provided by agencies outside of USCIS. The A-File will then be

transferred to a USCIS attorney who will review the file to determine if any of the material is privileged or otherwise is protected from disclosure and therefore should not be disclosed. In either case, USCIS must then decide the appropriate response to the request, and whether the information should be redacted or withheld in the case of non-releasable information. Depending on the size of the file and number of pending requests, USCIS requires an additional time frame of between two to fourteen work days to process the file for redactions and copying.

8. If the law enforcement agency requires a certified copy then USCIS is required to certify the existence of these records. *See* 8 C.F.R. § 103.7(d)(1). Depending upon the amount of documents contained within the A-File, the USCIS employee may be required to manually certify hundreds of pages of material. The process of certifying records may add an additional two to seven work days to the process, depending upon the size of the file.

9. If there is no responsive information, USCIS has the authority within DHS to provide a certificate of non-existence. 8 C.F.R. § 103.7(d)(4). Currently, the only requests that USCIS receives for the issuance of certificates of non-existence is with regard to cases in which there is a prosecution for illegal re-entry after deportation. Based upon location of the file, number of requests and check of electronic systems such as CIS, Claims, Enforce Alien Removal Module, among others, the timeframe for issuing a certificate of non-existence may be between one and ten days once USCIS obtains the file.

10. In my capacity as Chief, Records Division, I am aware of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). In that case, the Supreme Court decided that a

criminal defendant has the constitutional right to confront an affiant whose affidavit reported the results of a drug test. As a result of this decision, USCIS has been producing witnesses and incurring travel expenses in cases in which it would previously have produced affidavits to authenticate records or certificates of the non-existence of records. Since the A-File may be located at any USCIS facility, witnesses have been called from offices throughout the United States in order to testify at criminal proceedings. This typically requires a witness to be away from the office for at least one day, given travel and the logistics of testifying.

11. Other than amounts appropriated for activities not relevant here, USCIS does not receive appropriated funds from Congress for the work it performs. Instead, it relies upon the fees submitted by applicants who are applying for various immigration benefits. *See* 8 U.S.C. § 1356(m). Therefore, if the recently enacted Arizona immigration act requires USCIS to expend time and money processing requests for records and presenting witnesses to verify such records for purposes of prosecution under the Arizona statute, the costs would ultimately be born by applicants.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed the 11 day of June, 2010 in Washington, D.C.

Dominick Gentile

EXHIBIT 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	)	Civil Action No.

DECLARATION OF TONY ESTRADA

Pursuant to 28 U.S.C. 1746, I, Tony Estrada, declare and state as follows:

1. I have been the Sheriff of Santa Cruz County, Arizona for seventeen years, since 1993. I was previously Captain for the City of Nogales, Arizona Police Department. I have more than forty years of law enforcement experience in Santa Cruz County, which is a border county.

2. As the County Sheriff, I am responsible for protecting and ensuring the public safety of all people living and traveling in my jurisdiction, regardless of their immigration status. Santa Cruz County has a population of approximately 50,000 people but more than 40,000 people legally come across its 53-mile border with Mexico every day to shop or visit family or for other activities.

3. As the County Sheriff, I am also responsible for establishing policies and enforcement priorities for the department and my officers. The department has forty officers who engage in a broad range of law enforcement activities and actions, including but not limited to investigating and solving serious and violent crimes, responding to domestic violence calls, taking and responding to complaints from the public, and working with the community to encourage

reporting of crime and cooperation with police. I am bound, however, in many instances to follow the dictates of the state government.

4. Arizona S.B. 1070, which was signed into law on April 23, 2010 and becomes effective July 29, 2010, mandates that my officers determine the immigration status of any person they lawfully stop, detain or arrest in every case in which there is reasonable suspicion that the person is in the country unlawfully, regardless of the severity of the suspected or actual offense at issue. In such cases, my officers will be required to detain the target of the stop pending confirmation of the individual's immigration status. SB 1070 requires us to detain the individual for however long it takes to verify immigration status. If my department does not enforce the State's immigration laws without exception, we risk being sued by private parties under this new law. The threat and real possibility of litigation requires that my officers determine the immigration status of every person they stop, detain or arrest if they have any reason to suspect that the person is in the country unlawfully.

5. S.B 1070 undermines my ability to set law enforcement priorities for my agency. As the Sheriff, I am responsible for setting my agency's law enforcement priorities. My top priority is investigating, preventing and deterring the most violent and serious crimes. This new law requires me to expend substantial and already scarce resources on immigration matters at the expense of combating serious crime. Currently, my department reports to U.S. Customs and Border Protection (CBP) the aliens whom we arrest for non-immigration crimes. The new law will require that we not only verify the immigration status of those whom we stop or arrest, if we have reason to suspect they are in the country unlawfully, but also investigate and arrest those who cannot prove their lawful status and, as a result, whom we will now have reason to suspect, or have probable cause to believe, are in violation of other S.B. 1070 misdemeanor provisions.

6. CBP is an important partner in our law enforcement efforts. I frequently reach out to CBP for information and assistance. Under this new law, my department will be making unlimited number of additional inquiries to CBP every year. If CBP cannot respond to this increased volume with an immediate verification of the immigration status of every person my officers stop, detain or arrest and who they suspect is in the country unlawfully, this law will require my officers to either hold people for prolonged periods of time to verify their status (and face potential liability for unlawful detention) or release people and face liability for not enforcing S.B. 1070 strictly enough.

7. Because of this law, my officers will be required in many cases to determine the immigration status of U.S. citizens and other people who are in the country lawfully but cannot easily produce documentation that proves their status. For example, my officers frequently come into contact with U.S. citizens and non-citizens lawfully living in or visiting Arizona who do not have the type of identification that would prevent my officers from having to validate immigration status under S.B. 1070. Along the border, we also encounter U.S. citizens and non-citizens with lawful status who do not speak English and regularly travel to and from Mexico to visit family or friends in Mexico – factors that we might consider in a "reasonable suspicion" determination with respect to immigration status. Obviously, these same factors are likely to apply to both lawfully present aliens and unlawfully present aliens. We also frequently come into contact with minors who usually do not have any sort of government-issued identification. Under this new law, the lack of such documentation would raise suspicion as to their lawful status and therefore require my officers to conduct immigration-status checks even if the person encountered is in the country lawfully and was stopped for a minor offense. If these minors are not cataloged in the federal immigration authorities' database, there is no limit to how long S.B. 1070 requires my officers to detain these American citizens and lawful aliens.

8. Immigration law and immigration status are complex, and my officers are not experts in immigration matters. There is a real risk that determining a person's immigration status will result in that person's prolonged and unlawful detention, violating that person's constitutional and civil rights and further subjecting the department to liability.

9. No amount of training prescribed by Arizona Governor Brewer will sufficiently prepare my officers to become experts on immigration law and immigration enforcement. The immigration laws are complex, and I am concerned that the state training will not equip my officers with the necessary knowledge and expertise that would allow them to reasonably suspect when someone is in the country unlawfully or has committed a public offense that makes them removable.

10. To enforce all of S.B. 1070's provisions, my department will be forced to divert significant resources and incur additional costs. At a minimum, we will be forced to pay $63 per day for every person we book in the county jail for violating one of S.B. 1070's criminal provisions. If the person we arrest is injured or needs medical treatment—which is common along the border where we encounter migrants who are usually dehydrated or have injuries resulting from having walked through the desert—we cannot book them until we take them to the hospital for medical treatment. The time and resources spent on taking the person to the hospital and paying their hospital costs will not be insignificant. The additional cost of holding them in our jail is particularly significant given my department's already scarce resources and limited bed space. Our county jail is designed to hold only fifty-two inmates. We are averaging seventy-six inmates daily and do not have a classification system designed to deal with inmates we arrest under this new law.

11. S.B. 1070 will also undermine the necessary trust between my department and community members whom we have a duty to protect and serve. Being labeled an "immigration

officer" will have serious consequences for community policing. It will deter immigrants, including those who are here legally, and other individuals, particularly those in the Latino community, from coming forward and interacting with the police, because they will fear being questioned about their status and possibly arrested for violating one of Arizona's new state immigration crimes. This will undoubtedly damage my department's ability to investigate and solve serious and violent crimes.

12. I am concerned that S.B. 1070's new immigration crimes will also lead private citizens to report people they suspect are in the country unlawfully in the same way they might report other crimes. This will drive immigrants in my community further underground.

13. Many families in my community live in "mixed status" households, meaning that some members of the household are either U.S. citizens or otherwise have legal immigration status, while others do not have legal status. This law will make it more difficult to secure cooperation in the investigation of violent crimes from U.S. citizens, because I believe that many of them will not come forward out of concern that police will question and arrest their family members who lack legal status.

14. Immigrant victims and witnesses of crime are made more vulnerable by S.B. 1070. It is standard police practice to identify victims and witnesses of crimes. Many victims or witnesses do not have a valid Arizona driver's license, non-operating identification license, tribal identification, or any other state, federal or local identification that is only issued upon proof of legal presence in the United States. Under this new law, the lack of such identification will raise suspicion that such victims or witnesses are in the country unlawfully and thus possibly in violation of the state alien-registration requirement or another new state immigration crime. My officers will be placed in the precarious position of deciding whether to treat the person as a crime

victim/witness or as a possible immigration violator, effectively undermining our law enforcement priorities and ability to protect people from serious crime.

15. My officers investigate domestic violence cases, in which many victims are undocumented and their assailants take advantage of this fact. Based on my years of law enforcement experience, I know that victims of domestic violence are less likely to come forward and report crimes if they fear that police are there not to protect them but instead to report them to immigration officials. This new law will serve to push these victims further underground and make our job to identify and arrest the perpetrators of such crimes that much more difficult.

16. The combined effect of the provisions of S.B. 1070 will force my officers to devote a substantial amount of their time to arresting aliens based on unlawful status. Section 3 of SB 1070 requires my officers to arrest aliens for registration violations – a new state crime that will allow for the arrest and prosecution of almost every unlawful alien. And Sections 4 and 5 create other state crimes that largely turn on an alien's unlawful presence. In light of S.B. 1070's command that my officers enforce state law to the maximum extent allowed by federal law, these various provisions require my officers to round up for criminal prosecution aliens who my officers believe to be unlawfully present.

17. My officers investigate human trafficking cases, in which most of the victims and witnesses are undocumented and their assailants take advantage of this fact. Based on my years of law enforcement experience, I know that victims and witnesses of human trafficking are less likely to come forward and report crimes if they fear that the police is there not to protect them but instead to report them to immigration officials. This new law will serve to push these victims and witnesses further underground and make our job to identify and arrest the perpetrators of such crimes that much more difficult.

18. My officers investigate alien smuggling cases, in which those being smuggled are undocumented. Under this new law, my officers will be required to determine the immigration status of those persons being smuggled and will be forced to arrest them for failing to carry alien registration documents or violating other state immigration crimes. Without the victims' cooperation, my officers will have difficulty identifying and arresting the smugglers themselves.

19. I am very concerned that S.B. 1070 will also impact my county's relationship with our Mexican neighbors and Mexican law enforcement. Nogales, Arizona, which is in Santa Cruz County, and Nogales, Sonora, Mexico share not only a common name but also a long and intertwined history. Members of the same families have always lived on both sides of the border. Anywhere between 40,000 and 50,000 people travel between the two Nogales ports of entry every day. Mexican nationals with border-crossing cards enter the U.S. daily to shop and visit family. I have been informed by residents and Mexican officials that Mexican nationals are scared to enter Nogales for fear that they will be stopped and arrested, even if they have a valid border-crossing card to enter the United States.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

TONY ESTRADA

Sheriff of Santa Cruz County, Arizona

Executed the 28th day of June, 2010 in Nogales, Arizona.

EXHIBIT 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	)	Civil Action No.

DECLARATION OF ROBERTO VILLASEÑOR

Pursuant to 28 U.S.C. 1746, I, ROBERTO VILLASEÑOR declare and state as follows:

1. I have been employed by the Tucson Police Department for almost 30 years and have been the Chief of Police for about 1 year and one month. The operations budget for the Tucson Police Department in fiscal year 2009/2010 was approximately $159 million.

2. As Chief of Police, I am responsible for protecting and ensuring the public safety of all people living and traveling in my jurisdiction, regardless of their immigration status. Tucson is the 2nd largest city in the state of Arizona and the 32nd largest city in the United States with a 2008 Census Bureau estimate population of 541,811. Hispanic or Latino population was estimated by the American Community Survey in 2005-7 3 Year Estimates to comprise approximately 39.5% of Tucson' population. Tucson is located some 60 miles from the US-Mexico Border. The surrounding metropolitan population exceeds 1 million persons.

3. As Chief of Police, I am also responsible for establishing policies and priorities for the department and my officers. The department is budgeted for 1113 sworn officers who engage in a broad range of law enforcement activities and actions, including but not limited to investigating and solving serious and violent crimes, responding to domestic violence calls, taking and responding to complaints from the public, and working with the community to encourage reporting of crime and cooperation with police. Deterring, investigating and solving serious and violent crimes are the department's top priorities, and it is absolutely essential to the success of our mission that we have the cooperation and support of all members of our community, whether they are here lawfully or not.

4. Arizona S.B. 1070 as amended by H.B. 2162 ("SB 1070"), which becomes law July 29, 2010, mandates that my officers determine the immigration status of any person they lawfully stop, detain or arrest in every case in which there is reasonable suspicion that the person is in the country unlawfully, regardless of the severity of the suspected or actual offense. The new law remove my ability to provide guidance and direction to officers as to what is practicable during the course of prioritizing investigations involving an immigration component. While I understand the impetus for legislation addressing illegal immigration issues, with Arizona bearing the brunt of the negative impact of illegal immigration that passes into our nation through this state, my concern is that these laws amount to an unfunded mandate that impose a Federal responsibility on local law enforcement. In an era of shrinking governmental budgets, local police authorities will be forced to assume a role not unlike that of at least two major Federal enforcement agencies, and with not an additional cent from the state to do so. The Tucson Police Department already cooperates with Federal immigration authorities when it can, and has actively worked with the Immigration and Customs Enforcement and Customs and

Border Protection when suspects are arrested and booked into jail in order that their immigration status can be verified. The impact of illegal immigration on Arizona's well-being cannot be denied. But to require local police to act as immigration agents when a lack of local resources already makes enforcing criminal laws and ordinances a challenging proposition, is not realistic. Our community will suffer as a result, with a decrease in quality of life, and an increase in local mistrust of police.

5. The new law takes away my discretion as the Chief of Police to administer police resources as I see fit for the protection and betterment of the community, which is my foremost duty. SB 1070 reprioritizes the regulation of immigration above almost every other enforcement effort that my department pursues. Tucson is currently plagued with home invasions, armed robberies, and violent gang activity, and is also subjected to some of the highest burglary and larceny rates in the country. Of the 4 states bordering Mexico, law enforcement agents and officers in Arizona seized almost 44% of all illicit drugs brought over the border from Mexico in 2009. All of these local crimes now get second priority to the state's mandated enforcement of immigration laws. This new law will take many officers from their patrol and enforcement duties while they process and/or transport what will amount to thousands of individuals, at a time when due to budgetary constraints my department is losing both resources and officer positions that I cannot fill.

6. In addition, SB 1070 implements a vague standard from which my officers are expected to enforce this immigration law. While my officers are comfortable establishing the existence or non-existence of reasonable suspicion as to criminal conduct, they are not at all familiar with reasonable suspicion as to immigration status, not being trained in Federal immigration law. Despite the executive order of Arizona Governor Jan Brewer to the contrary, Arizona Peace

Officer Standards and Training board has not been able to clearly define for Arizona's law enforcement officers what is reasonable suspicion regarding immigration status. Each police agency in this state will therefore develop its own definition, no doubt resulting in a patchwork of policies and procedures, with obvious danger to both law enforcement agencies and their communities. The relationship between law enforcement agencies and their communities will be seriously strained. Many community leaders now believe that their constituents will be unfairly targeted in the eyes of law enforcement. The concern is not over persons illegally present, but rather with legal citizens of the United States, who may, they believe, experience unnecessary and prolonged police contact based on their appearance of national origin or ethnicity. They fear the legislation codifies racial profiling, despite its wording, and such fear could destroy the good relationships that currently exist between police and local communities that have taken years to build through our efforts in community policing.

7. The financial cost to our community will also be high when SB 1070 becomes law July 29, 2010. The law mandates that police officers shall verify the immigration status of all arrestees prior to their release. The result will be the detention and incarceration of vast numbers of arrestees that up until now have been simply cited and released for various offenses. In fiscal year 2009/2010, the Tucson Police Department cited and released 36,821 arrestees, which is more than 100 persons a day. If each arrest were followed by only approximately 1 hour of mandated verification of immigration status, that amounts to over 36,000 hours of staff time, the equivalent of approximately 18 full-time officer's yearly work schedules! This mandate will be especially taxing at a time when my department is currently down 119 officer positions from authorized strength (that cannot be filled due to the budget), and is expected to get close to 200 officer positions down by the end of the year. Most taxing, however, is if there are no Customs

and Border Protection agents or Immigration and Customs Enforcement employees available to establish immigration status, these offenders who might otherwise have been cited and released, must be booked in the Pima County Jail. The Sheriff of Pima County charges the City $200.38 for the first day and $82.03 for any subsequent day of jail for misdemeanor and petty offenses. The City of Tucson's budget is already set for next year, and additional monies for these costs simply do not exist. On an individual level, should a lawful resident of Arizona be cited for a misdemeanor criminal offense, they might be incarcerated for who-knows how long in jail until Federal authorities can verify their immigration status. I have a realistic expectation that Customs and Border Protection agents or Immigration and Customs Enforcement employees will not be able to respond in a timely manner, if at all, to the thousands of calls they will be receiving statewide from Arizona's law enforcement agencies after these laws go into effect July 29, 2010. This law is a very expensive law not only in terms of financial costs, but also in human costs.

8. Another extremely expensive and negative result of SB 1070 may be the potential costs due to lawsuits that can arise from another provision of the legislation. The law permits a legal resident of Arizona to sue my department if they feel that I have implemented a policy that limits or restricts the enforcement of Federal immigration law to the less than the full extent permitted by Federal law. These suits may arise even if my policy is to investigate homicides, acts of terrorism, home invasions, armed robberies, sexual assaults and other violent offenses before my officers investigate suspected violations of Federal immigration law! As part of this absurdity, the law provides for court costs and attorneys fees on top of a fine of up to $5,000 per day from the *filing* of the lawsuit. Arizona service of process rules allow a litigant to serve a lawsuit up to 120 days after the filing of the suit. Therefore, a city could tally up $600,000 in fines from the

day of filing if not served until the 120 day period has run, and not even know about it. I hardly need point out that a city racked by such lawsuits could easily be rendered bankrupt.

9. The Constitution of the United States is the supreme law of the land, and as a law enforcement officer and as Tucson's Chief of Police I have sworn to uphold that law. Immigration law is an exclusively Federal jurisdiction and is inherently intertwined with Federal foreign policy concerns. Since SB 1070 states that it is intended to regulate immigration, it is therefore contrary to the United States Constitution. Additionally, there is already a process for federal immigration agencies to contract with local law enforcement to carry out immigration enforcement. This arrangement is a voluntary and cooperative one. The procedure, known as "287(g) agreements," includes extensive training of local officers by federal agencies and continued supervision of immigration enforcement by the Federal government. While S.B. 1070 recognizes the 287(g) program, this law will in fact make local police act as Federal immigration enforcement officers without the extensive training provided to 287(g) officers. The training is an important prerequisite of the 287(g) program that ensures local law enforcement have sufficient knowledge and experience in the complex area of Federal immigration law. The Arizona legislature has placed Arizona law enforcement officers in the awkward position of mandating that they enforce immigration laws that are the sole province of the Federal government without the necessary 287(g) training. This is not consistent with Federal efforts to properly counter illegal immigration. This cannot be.

10. While I agree that something must absolutely be done to tackle the problems associated with illegal immigration into this country, the means of shifting the burden of immigration enforcement and responsibility from Federal to local authorities cannot be justified nor sustained. We cannot bear the burden of the Federal government's financial and legal responsibilities. We

cannot bear the destruction of our relationships with our local community that we so vitally need in order to be successful in our mission to protect the public and make our City a better place to live with an excellent quality of life.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

ROBERTO VILLASEÑOR

Executed the 25th day of June, 2010 in Tucson, Arizona.

EXHIBIT 10

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ARIZONA, et al., Defendants.	)	Civil Action No.

DECLARATION OF PHOENIX POLICE CHIEF JACK HARRIS

Pursuant to 28 U.S.C. 1746, I, Jack Harris, declare and state as follows:

I have been employed with the Phoenix Police Department for 38 years and I have served as the Chief since 2004. As the Chief, I am responsible for protecting and ensuring the public safety of all people living and traveling in my jurisdiction. Currently, the City of Phoenix is the 5th largest City in the United States. Phoenix is the largest City in the State of Arizona and the state is located on the US-Mexican border. Phoenix has a population of approximately 1.6 million people and covers 519 square miles. It is estimated that nearly 500,000 immigrants live in the state of Arizona and nearly 150,000 to 250,000 live in Phoenix alone. The surrounding valley population is close to three million people.

Community Policing Ethic

I believe SB1070 will have a negative effect on our community policing efforts. I am very concerned that victims and witnesses will be afraid to call police for fear of deportation. A woman who is unlawfully present in the United States and a victim of domestic violence may very well suffer injury rather than take a chance on deportation. Recently, we had a witness physically detain a suspected child molester until officers arrived to apprehend the suspect. The witness was an undocumented member of

our community. Had this new law been in effect, the witness may have been reluctant to take action and call the police.

Deterring, investigating and solving serious and violent crimes are the department's top priorities, and it would be impossible for us to do our job without the collaboration and support of community members, including those who may be in the country unlawfully.

On many occasions, Home Invasion Kidnapping Enforcement (H.I.K.E) Squad investigators, and other investigative bureaus rely heavily on information received from victims and witnesses who are unlawfully present but otherwise compliant with the laws of this state. In fact, the Phoenix Police Department's Drug Enforcement Bureau, consisting of undercover narcotics and conspiracy detectives, receives valuable information from persons who may be unlawfully present but who provide a wealth of information concerning major players in the illegal drug trade. It takes cooperation and collaboration from all persons living in Arizona and elsewhere to defeat large illegal drug operations. Most investigations involving illegal drug trafficking are very large and complicated investigations.

The new SB1070 may also adversely impact the department's ability to fulfill its investigative priorities because its implementation will require the department to reassign officers from critical areas. If many of our current officers decide to engage in routine civil immigration enforcement, which clearly we cannot limit or restrict by policy, it will severely impact our primary mission which is answering calls for service. Unfortunately, I cannot hire more officers to assist with this problem due to budget constraints. Thus, we will have to move officers from other details in an attempt to accommodate the calls for service. Those details may include motorcycle officers, detectives assigned to work violent crimes, property crimes and home invasion/kidnapping enforcement squads to name a few.

Cooperation with those who are unlawfully present and a victim/witness of a crime, allow us to apprehend suspects who would not otherwise have been caught had it not been for the information received that lead us to the ultimate goal; to solve violent crimes, combat the drug activity, and protect the safety of all persons in our community.

School resource officers are Phoenix Police officers assigned to local schools. If a school resource officer is investigating a student for allegations of criminal activity at school (i.e. assaulting another student, theft), and the officer develops reasonable suspicion the student is an unlawful alien, pursuant to SB1070 the officer must make a "reasonable attempt" to contact ICE and verify the student's immigration status, unless the officer applies one of the limited discretionary exceptions. More troubling is when a student is the victim of a violent crime and is scared to come forward for fear the officer will take immigration enforcement action or inquire further about the student's family's immigration status. Once again, my officers are placed in a losing situation.

Financial Costs

SB1070 mandates that each time an officer makes an arrest of any person, regardless of whether there is reasonable suspicion to believe the person is an unlawfully present alien; the officer MUST verify a person's immigration status with the Federal government. Presumptive identification does not alleviate this requirement in arrest situations. Persons committing criminal misdemeanor offenses, to include criminal traffic offenses, who would normally receive a criminal citation, will likely be booked. If a police officer is unable to contact the Federal government to verify the arrested person's immigration status, that person must be booked. A criminal citation is a quick process and allows the officer to quickly return to patrolling the city and answers call for service. The booking process at the jail can take one hour to three hours. This mandate applies to juveniles and adults.

Under these circumstances, this immigration law will impact the department's operations and budget in a number of significant ways. There is a strong possibility that we will see a significant increase in prisoner bookings and operating costs to house prisoners. In 2009 we had nearly 51,479 criminal citations in lieu of detentions. This number includes 37,731 criminal traffic citations, and 13,748 non traffic citations (i.e. shopliftings, theft, and other misdemeanors). The initial cost to book a person into jail, excluding felonies, is $192.26. After the initial booking, the fee is $71.66 for each night the person stays in jail. Had the police officers booked all those persons into jail who received a criminal

citation in lieu of detention, the cities lowest estimated expense for these booking would be approximately ten million dollars. This is solely for the initial booking and does not include any additional nights in jail.

The potential for police officers to be out of service for extended periods of time during a work shift for civil immigration violations and nothing more, forces local police to be civil federal immigration enforcement agents. In 2009, our officers answered over 660,000 dispatched calls for service. With this new law, calls for service will be affected if officers divert their attention to civil immigration violations rather than answering calls for service such as domestic violence, burglaries, robberies, criminal immigration enforcement, and other officers' back-ups and will also reduce proactive patrolling in neighborhoods.

The new law subverts the authority of management to direct its sworn resources where it deems appropriate because the law allows police officers complete discretion to enforce civil immigration violations. An officer could spend the entire shift enforcing civil federal violations of immigration

This problem is aggravated by the fact the Phoenix Police Department is carrying nearly 400 vacant sworn positions. The operations budget for the department is over $500 million dollars each year. Ninety-two percent of our current operating budget is for personnel.

Lawsuits

If I exercise the authority of my position to direct the resources of the department to areas I believe are a greater priority than immigration enforcement, we risk the possibility of a lawsuit by private parties. SB1070 provides that any Arizona citizen may bring suit against the city if I exercise my authority or they feel I am limiting or restricting the enforcement of federal immigration law. Further, the City can be ordered to pay the court costs and attorney fees for the police officer or citizen suing the City for failing to enforce civil immigration violations instead of perhaps taking a homicide or armed robbery radio call for service.

In Arizona, service of process must be done within 120 days of filing the lawsuit. Under SB1070, fines may be placed against an agency upon the filing of a lawsuit, not when the agency is served with a

lawsuit. This allows the court to award damages when the city does not know a lawsuit has even been filed. SB1070 provides that the agency may be fined for up to $5000.00 each day that the suspect policy (i.e. insubordination) remains in affect.

Management of Resources/Policies

As the Chief, I am responsible for establishing policies, procedures, and priorities for the department and my officers. I am responsible as the Chief for setting my agency's law enforcement priorities. One such priority is investigating, preventing and deterring violent crimes. This law undermines my ability to set law enforcement priorities for my agency, because I cannot prohibit the use of already scarce resources towards civil immigration enforcement instead of violent crimes and criminal immigration enforcement.

SB1070 provides that "… no official or agency of this state or county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by law. Further, the law provides that "… no official or agency of this state or county, city, town or other political subdivision of this state may have a policy that limits or restricts…" The law does not limit violations solely to immigration policies, but rather the law provides that ANY policy that limits or restricts immigration enforcement is prohibited. This subjects the department to civil lawsuits by anyone who perceives a limitation or restriction.

Here, management loses control of managing resources when an officer or many officers choose to only enforce civil immigration violations during the course of a work shift. For example, if an officer is on a valid traffic stop and asks the driver if they are an unlawful alien and the person admits to this, or the officer develops reasonable suspicion to believe the person stopped or detained is an unlawful alien, the officer must make a reasonable attempt to contact ICE. Even if the officer has no other criminal charges, once reasonable suspicion is developed to believe the person is an unlawful alien, the officer shall make a "reasonable attempt" to contact ICE. If a police supervisor gives an order to a police officer to leave his/her traffic stop and answer calls for service, the officer may refuse and continue with the

possible federal immigration violations. Currently, the Phoenix Police Department has a "policy" on insubordination. This policy may violate SB1070 because the insubordination policy interfered with the officer's ability to enforce federal immigration law.

Serious Crimes

SB1070 does nothing to support law enforcement's efforts to combat serious violent crimes associated with federal criminal immigration violations. This law's failure to distinguish between civil and criminal violations, and prohibition on management's ability to do so, allows officers to focus their enforcement efforts on civil immigration laws rather than criminal violations, such as kidnappings, human smuggling, extortions, and drop houses where people are holding others for ransom. The Phoenix Police Department has a H.I.K.E squad that was designed exclusively for the purpose of investigating, enforcing and supporting patrol with these types of crimes. The state of Arizona already has statutes to address these types of crimes. Unfortunately, this law authorizes officers to divert from focusing on these crimes and instead focus on federal civil violations, such as unlawful aliens who may have expired student or work Visa's or those who present no danger to the public.

Relationship with ICE

SB1070 will cause an overwhelming amount of calls to ICE. I believe this will severely limit our ability to continue getting the valuable service we receive from ICE on our criminal investigations and federal criminal immigration violations.

In Phoenix, we experience approximately 300 kidnapping crimes per year. Many of the victims are unlawfully present and are tortured while family members are told by telephone to bring money to those holding them. Family members currently call police and we have saved many victims from further torture and even murder because the family called police. That may change dramatically if the family loses confidence in the police. My department currently works closely with agents from ICE for enforcement of human smuggling and other related crimes.

Immigration law and immigration status is a very complex area, and local law enforcement cannot possibly be experts in all the different ways a person can be lawfully or unlawfully present. Thus, officers will heavily rely on ICE to provide guidance to verify a person's status. ICE cannot handle the amount of calls it currently receives from local law enforcement. With this new law it will be even more difficult to have ICE assist in investigations. The time we have to prepare for such a complicated law is very difficult. There is already confusion in this country about how the law works and the complexities of this law in its application with federal civil immigration laws. It is my fear that the state training will not equip my officers with the necessary knowledge and expertise that would allow them to reasonably understand how to enforce the new statutes added and referred to in SB1070. Further, once an officer develops reasonable suspicion that a person is here as an unlawful alien without using race, color, or national origin, they will need documentation and clear guidance to carefully walk the line between violating a persons civil rights, subjecting the officer to 18 USC § 1983 actions, and articulating factors supported by case law for reasonable suspicion that a person is unlawfully present.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Chief Jack Harris

Executed the 25th day of June, 2010 in Phoenix, Arizona.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The United States of America, Plaintiff, v. The State of Arizona; and Janice K Brewer, Governor of the State of Arizona, in her Official Capacity, Defendants.	No. 02:10-cv-1413-NVW **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the Court on Plaintiff's Motion for a Preliminary Injunction. Having considered the motion, including Plaintiff's Memorandum of Law and Defendants' opposition thereto, and having further considered: (1) the likelihood that the United States will succeed on the merits of its claims; (2) the likelihood that the United States will suffer irreparable injury absent an injunction; (3) whether injunctive relief would substantially harm Defendants; and (4) whether the public interest would be furthered by an injunction, this Court concludes that Plaintiff is entitled to preliminary injunctive relief.

THEREFORE, pursuant to Federal Rule of Civil Procedure 65, Plaintiff's Motion is GRANTED. Defendants are hereby enjoined from enforcing Sections 1-6 of Arizona's S.B. 1070 (as amended by H.B. 2162), until such time as the Court enters judgment on the United States' claims for relief.

.....

(Original Signature of Member)

115TH CONGRESS
1ST SESSION

H. R. _____

To amend the immigration laws and the homeland security laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. GOODLATTE (for himself, Mr. MCCAUL, Mr. LABRADOR, Ms. MCSALLY, Mr. SENSENBRENNER, and Mr. CARTER of Texas) introduced the following bill; which was referred to the Committee on

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A BILL

To amend the immigration laws and the homeland security laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Securing America's Future Act of 2018''.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

DIVISION A—LEGAL IMMIGRATION REFORM

TITLE I—IMMIGRANT VISA ALLOCATIONS AND PRIORITIES

TITLE II—AGRICULTURAL WORKER REFORM

TITLE III—VISA SECURITY

DIVISION B—INTERIOR IMMIGRATION ENFORCEMENT

TITLE I—LEGAL WORKFORCE ACT

DIVISION A—LEGAL IMMIGRATION REFORM

TITLE I—IMMIGRANT VISA ALLOCATIONS AND PRIORITIES

SEC. 1101. FAMILY-SPONSORED IMMIGRATION PRIORITIES.

(a) IMMEDIATE RELATIVE REDEFINED.—Section 201 of the Immigration and Nationality Act (8 U.S.C. 1151) is amended—

(1) in subsection (b)(2)(A)—

(A) in clause (i), by striking ''children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.'' and

inserting ''children and spouse of a citizen of the United States.''; and

(B) in clause (ii), by striking ''such an immediate relative'' and inserting ''the immediate relative spouse of a United States citizen'';

(2) by striking subsection (c) and inserting the following:

''(c) WORLDWIDE LEVEL OF FAMILY-SPONSORED IMMIGRANTS.—(1) The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is equal to 87,934 minus the number computed under paragraph (2).

''(2) The number computed under this paragraph for a fiscal year is the number of aliens who were paroled into the United States under section 212(d)(5) in the second preceding fiscal year who—

''(A) did not depart from the United States (without advance parole) within 365 days; and

''(B)(i) did not acquire the status of an alien lawfully admitted to the United States for permanent residence during the two preceding fiscal years; or

''(ii) acquired such status during such period under a provision of law (other than subsection (b)) that exempts adjustment to such status from the nu-

merical limitation on the worldwide level of immigration under this section.''; and

(3) in subsection (f)—

(A) in paragraph (2), by striking ''section 203(a)(2)(A)'' and inserting ''section 203(a)'';

(B) by striking paragraph (3);

(C) by redesignating paragraph (4) as paragraph (3); and

(D) in paragraph (3), as redesignated, by striking ''(1) through (3)'' and inserting ''(1) and (2)''.

(b) FAMILY-BASED VISA PREFERENCES.—Section 203(a) of the Immigration and Nationality Act (8 U.S.C. 1153(a)) is amended to read as follows:

''(a) SPOUSES AND MINOR CHILDREN OF PERMANENT RESIDENT ALIENS.—Family-sponsored immigrants described in this subsection are qualified immigrants who are the spouse or a child of an alien lawfully admitted for permanent residence. Such immigrants shall be allocated visas in accordance with the number computed under section 201(c).''.

(c) AGING OUT.—Section 203(h) of the Immigration and Nationality Act (8 U.S.C. 1153(h)) is amended—

(1) by striking ''(a)(2)(A)'' each place such term appears and inserting ''(a)(2)'';

(2) by amending paragraph (1) to read as follows:

''(1) IN GENERAL.—Subject to paragraph (2), for purposes of subsections (a)(2) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using the age of the alien on the date on which a petition is filed with the Secretary of Homeland Security.''.

(3) by redesignating paragraphs (2) through (4) as paragraphs (3) through (5), respectively;

(4) by inserting after paragraph (1) the following:

''(2) LIMITATION.—Notwithstanding the age of an alien on the date on which a petition is filed, an alien who marries or turns 25 years of age prior to being issued a visa pursuant to subsection (a)(2) or (d), no longer satisfies the age requirement described in paragraph (1).''; and

(5) in paragraph (5), as so redesignated, by striking ''(3)'' and inserting ''(4)''.

(d) CONFORMING AMENDMENTS.—

(1) DEFINITION OF V NONIMMIGRANT.—Section 101(a)(15)(V) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(V)) is amended by strik-

ing ''section 203(a)(2)(A)'' each place such term appears and inserting ''section 203(a)''.

(2) NUMERICAL LIMITATION TO ANY SINGLE FOREIGN STATE.—Section 202 of such Act (8 U.S.C. 1152) is amended—

(A) in subsection (a)(4)—

(i) by striking subparagraphs (A) and (B) and inserting the following:

''(A) 75 PERCENT OF FAMILY-SPONSORED IMMIGRANTS NOT SUBJECT TO PER COUNTRY LIMITATION.—Of the visa numbers made available under section 203(a) in any fiscal year, 75 percent shall be issued without regard to the numerical limitation under paragraph (2).

''(B) TREATMENT OF REMAINING 25 PERCENT FOR COUNTRIES SUBJECT TO SUBSECTION (e).—

''(i) IN GENERAL.—Of the visa numbers made available under section 203(a) in any fiscal year, 25 percent shall be available, in the case of a foreign state or dependent area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign

state or dependent area is less than the subsection (e) ceiling.

''(ii) SUBSECTION (e) CEILING DEFINED.—In clause (i), the term 'subsection (e) ceiling' means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 203(a) to immigrants who are natives of the state or area, consistent with subsection (e).''; and

(ii) by striking subparagraphs (C) and (D); and

(B) in subsection (e)—

(i) in paragraph (1), by adding ''and'' at the end;

(ii) by striking paragraph (2);

(iii) by redesignating paragraph (3) as paragraph (2); and

(iv) in the undesignated matter after paragraph (2), as redesignated, by striking '', respectively,'' and all that follows and inserting a period.

(3) PROCEDURE FOR GRANTING IMMIGRANT STATUS.—Section 204 of such Act (8 U.S.C. 1154) is amended—

(A) in subsection (a)(1)—

(i) in subparagraph (A)(i), by striking ''to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) or'';

(ii) in subparagraph (B)—

(I) in clause (i), by redesignating the second subclause (I) as subclause (II); and

(II) by striking ''203(a)(2)(A)'' each place such terms appear and inserting ''203(a)''; and

(iii) in subparagraph (D)(i)(I), by striking ''a petitioner'' and all that follows through ''section 204(a)(1)(B)(iii).'' and inserting ''an individual younger than 21 years of age for purposes of adjudicating such petition and for purposes of admission as an immediate relative under section 201(b)(2)(A)(i) or a family-sponsored immigrant under section 203(a), as appropriate, notwithstanding the actual age of the individual.'';

(B) in subsection (f)(1), by striking '', 203(a)(1), or 203(a)(3), as appropriate''; and

(C) by striking subsection (k).

(4) WAIVERS OF INADMISSIBILITY.—Section 212 of such Act (8 U.S.C. 1182) is amended—

(A) in subsection (a)(6)(E)(ii), by striking ''section 203(a)(2)'' and inserting ''section 203(a)''; and

(B) in subsection (d)(11), by striking ''(other than paragraph (4) thereof)''.

(5) EMPLOYMENT OF V NONIMMIGRANTS.—Section 214(q)(1)(B)(i) of such Act (8 U.S.C. 1184(q)(1)(B)(i)) is amended by striking ''section 203(a)(2)(A)'' each place such term appears and inserting ''section 203(a)''.

(6) DEFINITION OF ALIEN SPOUSE.—Section 216(h)(1)(C) of such Act (8 U.S.C. 1186a(h)(1)(C)) is amended by striking ''section 203(a)(2)'' and inserting ''section 203(a)''.

(7) CLASSES OF DEPORTABLE ALIENS.—Section 237(a)(1)(E)(ii) of such Act (8 U.S.C. 1227(a)(1)(E)(ii)) is amended by striking ''section 203(a)(2)'' and inserting ''section 203(a)''.

(e) CREATION OF NONIMMIGRANT CLASSIFICATION FOR ALIEN PARENTS OF ADULT UNITED STATES CITIZENS.—

(1) IN GENERAL.—Section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) is amended—

(A) in subparagraph (T)(ii)(III), by striking the period at the end and inserting a semicolon;

(B) in subparagraph (U)(iii), by striking ''or'' at the end;

(C) in subparagraph (V)(ii)(II), by striking the period at the end and inserting ''; or''; and

(D) by adding at the end the following:

''(W) Subject to section 214(s), an alien who is a parent of a citizen of the United States, if the citizen—

''(i) is at least 21 years of age; and

''(ii) has never received contingent nonimmigrant status under division D of the Securing America's Future Act.''.

(2) CONDITIONS ON ADMISSION.—Section 214 of such Act (8 U.S.C. 1184) is amended by adding at the end the following:

''(s)(1) The initial period of authorized admission for a nonimmigrant described in section 101(a)(15)(W) shall be 5 years, but may be extended by the Secretary of Homeland Security for additional 5-year periods if the

United States citizen son or daughter of the nonimmigrant is still residing in the United States.

''(2) A nonimmigrant described in section 101(a)(15)(W)—

''(A) is not authorized to be employed in the United States; and

''(B) is not eligible for any Federal, State, or local public benefit.

''(3) Regardless of the resources of a nonimmigrant described in section 101(a)(15)(W), the United States citizen son or daughter who sponsored the nonimmigrant parent shall be responsible for the nonimmigrant's support while the nonimmigrant resides in the United States.

''(4) An alien is ineligible to receive a visa or to be admitted into the United States as a nonimmigrant described in section 101(a)(15)(W) unless the alien provides satisfactory proof that the United States citizen son or daughter has arranged for health insurance coverage for the alien, at no cost to the alien, during the anticipated period of the alien's residence in the United States.''.

(f) EFFECTIVE DATE; APPLICABILITY.—

(1) EFFECTIVE DATE.—The amendments made by this section shall take effect on October 1, 2018.

(2) INVALIDITY OF CERTAIN PETITIONS AND APPLICATIONS.—

(A) IN GENERAL.—No person may file, and the Secretary of Homeland Security and the Secretary of State may not accept, adjudicate, or approve any petition under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) filed on or after the date of enactment of this Act seeking classification of an alien under section 201(b)(2)(A)(i) with respect to a parent of a United States citizen, or under section 203(a)(1), (2)(B), (3) or (4) of such Act (8 U.S.C. 1151(b)(2)(A)(i), 1153(a)(1), (2)(B), (3), or (4)). Any application for adjustment of status or an immigrant visa based on such a petition shall be invalid.

(B) PENDING PETITIONS.—Neither the Secretary of Homeland Security nor the Secretary of State may adjudicate or approve any petition under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) pending as of the date of enactment of this Act seeking classification of an alien under section 201(b)(2)(A)(i) with respect to a parent of a United States citizen, or under section

203(a)(1), (2)(B), (3) or (4) of such Act (8 U.S.C. 1151(b)(2)(A)(i), 1153(a)(1), (2)(B), (3), or (4)). Any application for adjustment of status or an immigrant visa based on such a petition shall be invalid.

(3) APPLICABILITY TO WAITLISTED APPLICANTS.—

(A) IN GENERAL.—Notwithstanding the amendments made by this section, an alien with regard to whom a petition or application for status under paragraph (1), (2)(B), (3) or (4) of section 203(a) of the Immigration and Nationality Act (8 U.S.C. 1153(a)), as in effect on September 30, 2018, was approved prior to the date of the enactment of this Act, may be issued a visa pursuant to that paragraph in accordance with the availability of visas under subparagraph (B).

(B) AVAILABILITY OF VISAS.—Visas may be issued to beneficiaries of approved petitions under each category described in subparagraph (A), but only until such time as the number of visas that would have been allocated to that category in fiscal year 2019, notwithstanding the amendments made by this section, have

been issued. When the number of visas described in the previous sentence have been issued for each category described in subparagraph (A), no additional visas may be issued for that category.

SEC. 1102. ELIMINATION OF DIVERSITY VISA PROGRAM.

(a) IN GENERAL.—Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended by striking subsection (c).

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IMMIGRATION AND NATIONALITY ACT.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended—

(A) in section 101(a)(15)(V), by striking ''section 203(d)'' and inserting ''section 203(c)'';

(B) in section 201—

(i) in subsection (a)—

(I) in paragraph (1), by adding ''and'' at the end; and

(II) by striking paragraph (3); and

(ii) by striking subsection (e);

(C) in section 203—

(i) in subsection (b)(2)(B)(ii)(IV), by striking ''section 203(b)(2)(B)'' each place such term appears and inserting ''clause (i)'';

(ii) by redesignating subsections (d), (e), (f), (g), and (h) as subsections (c), (d), (e), (f), and (g), respectively;

(iii) in subsection (c), as redesignated, by striking ''subsection (a), (b), or (c)'' and inserting ''subsection (a) or (b)'';

(iv) in subsection (d), as redesignated—

(I) by striking paragraph (2); and

(II) by redesignating paragraph (3) as paragraph (2);

(v) in subsection (e), as redesignated, by striking ''subsection (a), (b), or (c) of this section'' and inserting ''subsection (a) or (b)'';

(vi) in subsection (f), as redesignated, by striking ''subsections (a), (b), and (c)'' and inserting ''subsections (a) and (b)''; and

(vii) in subsection (g), as redesignated—

(I) by striking ''(d)'' each place such term appears and inserting ''(c)''; and

(II) in paragraph (2)(B), by striking ''subsection (a), (b), or (c)'' and inserting ''subsection (a) or (b)'';

(D) in section 204—

(i) in subsection (a)(1), by striking subparagraph (I);

(ii) in subsection (e), by striking ''subsection (a), (b), or (c) of section 203'' and inserting ''subsection (a) or (b) of section 203''; and

(iii) in subsection (l)(2)—

(I) in subparagraph (B), by striking ''section 203 (a) or (d)'' and inserting ''subsection (a) or (c) of section 203''; and

(II) in subparagraph (C), by striking ''section 203(d)'' and inserting ''section 203(c)'';

(E) in section 214(q)(1)(B)(i), by striking ''section 203(d)'' and inserting ''section 203(c)'';

(F) in section 216(h)(1), in the undesignated matter following subparagraph (C), by striking ''section 203(d)'' and inserting ''section 203(c)''; and

(G) in section 245(i)(1)(B), by striking ''section 203(d)'' and inserting ''section 203(c)''.

(2) IMMIGRANT INVESTOR PILOT PROGRAM.—Section 610(d) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Public Law 102–395) is amended by striking ''section 203(e) of such Act (8 U.S.C. 1153(e))'' and inserting ''section 203(d) of such Act (8 U.S.C. 1153(d))''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the first day of the first fiscal year beginning on or after the date of the enactment of this Act.

SEC. 1103. EMPLOYMENT-BASED IMMIGRATION PRIORITIES.

(a) INCREASE IN VISAS FOR SKILLED WORKERS.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended—

(1) in section 201(d)(1)(A), by striking ''140,000'' and inserting ''195,000''; and

(2) in section 203(b)—

(A) in paragraph (1), by striking ''28.6 percent of such worldwide level'' and inserting ''58,374'';

(B) in paragraphs (2) and (3), by striking ''28.6 percent of such worldwide level'' each place it appears and inserting ''58,373''; and

(C) by striking ''7.1 percent of such worldwide level'' each place it appears and inserting ''9,940''.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the first day of fiscal year 2019 and shall apply to the visas made available in that and subsequent fiscal years.

SEC. 1104. WAIVER OF RIGHTS BY B VISA NONIMMIGRANTS.

Section 101(a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B) is amended by adding before the semicolon at the end the following: '', and who has waived any right to review or appeal of an

immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or to contest, other than on the basis of an application for asylum, any action for removal of the alien''.

TITLE II—AGRICULTURAL WORKER REFORM

SEC. 2101. SHORT TITLE.

This title may be cited as—

(1) the ''Agricultural Guestworker Act''; or

(2) the ''AG Act''.

SEC. 2102. H–2C TEMPORARY AGRICULTURAL WORK VISA PROGRAM.

(a) IN GENERAL.—Section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) is amended by striking ''; or (iii)'' and inserting '', or (c) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services; or (iii)''.

(b) DEFINITION.—Section 101(a) of such Act (8 U.S.C. 1101(a)) is amended by adding at the end the following:

''(53) The term 'agricultural labor or services' has the meaning given such term by the Secretary of Agriculture in regulations and includes—

''(A) agricultural labor as defined in section 3121(g) of the Internal Revenue Code of 1986;

''(B) agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

''(C) the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state;

''(D) all activities required for the preparation, processing or manufacturing of a product of agriculture (as such term is defined in such section 3(f)) for further distribution;

''(E) forestry-related activities;

''(F) aquaculture activities; and

''(G) the primary processing of fish or shellfish, except that in regard to labor or services consisting of meat or poultry processing, the term 'agricultural labor or services' only includes the killing of animals and the breakdown of their carcasses.''.

SEC. 2103. ADMISSION OF TEMPORARY H–2C WORKERS.

(a) PROCEDURE FOR ADMISSION.—Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1181 et seq.) is amended by inserting after section 218 the following:

"SEC. 218A. ADMISSION OF TEMPORARY H–2C WORKERS.

''(a) DEFINITIONS.—In this section and section 218B:

''(1) DISPLACE.—The term 'displace' means to lay off a United States worker from the job for which H–2C workers are sought.

''(2) JOB.—The term 'job' refers to all positions with an employer that—

''(A) involve essentially the same responsibilities;

''(B) are held by workers with substantially equivalent qualifications and experience; and

''(C) are located in the same place or places of employment.

''(3) EMPLOYER.—The term 'employer' includes a single or joint employer, including an association acting as a joint employer with its members, who hires workers to perform agricultural labor or services.

''(4) FORESTRY-RELATED ACTIVITIES.—The term 'forestry-related activities' includes tree planting, timber harvesting, logging operations, brush clearing, vegetation management, herbicide application, the maintenance of rights-of-way (including for roads, trails, and utilities), regardless of whether

such right-of-way is on forest land, and the harvesting of pine straw.

''(5) H–2C WORKER.—The term 'H–2C worker' means a nonimmigrant described in section 101(a)(15)(H)(ii)(c).

''(6) LAY OFF.—

''(A) IN GENERAL.—The term 'lay off'—

''(i) means to cause a worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in paragraph (4) of subsection (b)); and

''(ii) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar position with the same employer at equivalent or higher wages and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

''(B) CONSTRUCTION.—Nothing in this paragraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

''(7) UNITED STATES WORKER.—The term 'United States worker' means any worker who is—

''(A) a citizen or national of the United States; or

''(B) an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207, or is granted asylum under section 208.

''(8) SPECIAL PROCEDURES INDUSTRY.—The term 'special procedures industry' includes sheepherding, goat herding, and the range production of livestock, itinerant commercial beekeeping and pollination, itinerant animal shearing, and custom combining and harvesting.

''(b) PETITION.—An employer that seeks to employ aliens as H–2C workers under this section shall file with the Secretary of Homeland Security a petition attesting to the following:

''(1) OFFER OF EMPLOYMENT.—The employer will offer employment to the aliens on a contractual basis as H–2C workers under this section for a spe-

cific period of time during which the aliens may not work on an at-will basis (as provided for in section 218B), and such contract shall only be required to include a description of each place of employment, period of employment, wages and other benefits to be provided, and the duties of the positions.

''(2) TEMPORARY LABOR OR SERVICES.—

''(A) IN GENERAL.—The employer is seeking to employ a specific number of H–2C workers on a temporary basis and will provide compensation to such workers at a wage rate no less than that set forth in subsection (k)(2).

''(B) DEFINITION.—For purposes of this paragraph, a worker is employed on a temporary basis if the employer intends to employ the worker for no longer than the time period set forth in subsection (n)(1) (subject to the exceptions in subsection (n)(3)).

''(3) BENEFITS, WAGES, AND WORKING CONDITIONS.—The employer will provide, at a minimum, the benefits, wages, and working conditions required by subsection (k) to all workers employed in the job for which the H–2C workers are sought.

''(4) NONDISPLACEMENT OF UNITED STATES WORKERS.—The employer did not displace and will

not displace United States workers employed by the employer during the period of employment of the H–2C workers and during the 30-day period immediately preceding such period of employment in the job for which the employer seeks approval to employ H–2C workers.

''(5) RECRUITMENT.—

''(A) IN GENERAL.—The employer—

''(i) conducted adequate recruitment before filing the petition; and

''(ii) was unsuccessful in locating sufficient numbers of willing and qualified United States workers for the job for which the H–2C workers are sought.

''(B) OTHER REQUIREMENTS.—The recruitment requirement under subparagraph (A) is satisfied if the employer places a local job order with the State workforce agency serving each place of employment, except that nothing in this subparagraph shall require the employer to file an interstate job order under section 653 of title 20, Code of Federal Regulations. The State workforce agency shall post the job order on its official agency website for a minimum of 30 days and not later than 3 days after receipt

using the employment statistics system authorized under section 15 of the Wagner-Peyser Act (29 U.S.C. 49l–2). The Secretary of Labor shall include links to the official Web sites of all State workforce agencies on a single webpage of the official Web site of the Department of Labor.

''(C) END OF RECRUITMENT REQUIREMENT.—The requirement to recruit United States workers for a job shall terminate on the first day that work begins for the H–2C workers.

''(6) OFFERS TO UNITED STATES WORKERS.—The employer has offered or will offer the job for which the H–2C workers are sought to any eligible United States workers who—

''(A) apply;

''(B) are qualified for the job; and

''(C) will be available at the time, at each place, and for the duration, of need.

This requirement shall not apply to United States workers who apply for the job on or after the first day that work begins for the H–2C workers.

''(7) PROVISION OF INSURANCE.—If the job for which the H–2C workers are sought is not covered

by State workers' compensation law, the employer will provide, at no cost to the workers unless State law provides otherwise, insurance covering injury and disease arising out of, and in the course of, the workers' employment, which will provide benefits at least equal to those provided under the State workers compensation law for comparable employment.

''(8) STRIKE OR LOCKOUT.—The job that is the subject of the petition is not vacant because the former workers in that job are on strike or locked out in the course of a labor dispute.

''(c) PUBLIC EXAMINATION.—Not later than 1 working day after the date on which a petition under this section is filed, the employer shall make the petition available for public examination, at the employer's principal place of employment.

''(d) LIST.—

''(1) IN GENERAL.—The Secretary of Homeland Security shall maintain a list of the petitions filed under this subsection, which shall—

''(A) be sorted by employer; and

''(B) include the number of H–2C workers sought, the wage rate, the period of employment, each place of employment, and the date of need for each alien.

''(2) AVAILABILITY.—The Secretary of Homeland Security shall make the list available for public examination.

''(e) PETITIONING FOR ADMISSION.—

''(1) CONSIDERATION OF PETITIONS.—For petitions filed and considered under this subsection—

''(A) the Secretary of Homeland Security may not require such petition to be filed more than 28 days before the first date the employer requires the labor or services of H–2C workers;

''(B) within the appropriate time period under subparagraph (C) or (D), the Secretary of Homeland Security shall—

''(i) approve the petition;

''(ii) reject the petition; or

''(iii) determine that the petition is incomplete or obviously inaccurate or that the employer has not complied with the requirements of subsection (b)(5)(A)(i) (which the Secretary can ascertain by verifying whether the employer has placed a local job order as provider for in subsection (b)(5)(B));

''(C) if the Secretary determines that the petition is incomplete or obviously inaccurate,

or that the employer has not complied with the requirements of subsection (b)(5)(A)(i) (which the Secretary can ascertain by verifying whether the employer has placed a local job order as provider for in subsection (b)(5)(B)), the Secretary shall—

"(i) within 5 business days of receipt of the petition, notify the petitioner of the deficiencies to be corrected by means ensuring same or next day delivery; and

"(ii) within 5 business days of receipt of the corrected petition, approve or reject the petition and provide the petitioner with notice of such action by means ensuring same or next day delivery; and

"(D) if the Secretary does not determine that the petition is incomplete or obviously inaccurate, the Secretary shall not later than 10 business days after the date on which such petition was filed, either approve or reject the petition and provide the petitioner with notice of such action by means ensuring same or next day delivery.

"(2) ACCESS.—By filing an H–2C petition, the petitioner and each employer (if the petitioner is an

association that is a joint employer of workers who perform agricultural labor or services) consent to allow access to each place of employment to the Department of Agriculture and the Department of Homeland Security for the purpose of investigations and audits to determine compliance with the immigration laws (as defined in section 101(a)(17)).

''(f) ROLES OF AGRICULTURAL ASSOCIATIONS.—

''(1) TREATMENT OF ASSOCIATIONS ACTING AS EMPLOYERS.—If an association is a joint employer of workers who perform agricultural labor or services, H–2C workers may be transferred among its members to perform the agricultural labor or services on a temporary basis for which the petition was approved.

''(2) TREATMENT OF VIOLATIONS.—

''(A) INDIVIDUAL MEMBER.—If an individual member of an association that is a joint employer commits a violation described in paragraph (2) or (3) of subsection (i) or subsection (j)(1), the Secretary of Agriculture shall invoke penalties pursuant to subsections (i) and (j) against only that member of the association unless the Secretary of Agriculture determines

that the association participated in, had knowledge of, or had reason to know of the violation.

''(B) ASSOCIATION OF AGRICULTURAL EMPLOYERS.—If an association that is a joint employer commits a violation described in subsections (i)(2) and (3) or (j)(1), the Secretary of Agriculture shall invoke penalties pursuant to subsections (i) and (j) against only the association and not any individual members of the association, unless the Secretary determines that the member participated in the violation.

''(g) EXPEDITED ADMINISTRATIVE APPEALS.—The Secretary of Homeland Security shall promulgate regulations to provide for an expedited procedure for the review of a denial of a petition under this section by the Secretary. At the petitioner's request, the review shall include a de novo administrative hearing at which new evidence may be introduced.

''(h) FEES.—The Secretary of Homeland Security shall require, as a condition of approving the petition, the payment of a fee to recover the reasonable cost of processing the petition.

''(i) ENFORCEMENT.—

''(1) INVESTIGATIONS AND AUDITS.—The Secretary of Agriculture shall be responsible for con-

ducting investigations and audits, including random audits, of employers to ensure compliance with the requirements of the H–2C program. All monetary fines levied against employers shall be paid to the Department of Agriculture and used to enhance the Department of Agriculture's investigative and auditing abilities to ensure compliance by employers with their obligations under this section.

''(2) VIOLATIONS.—If the Secretary of Agriculture finds, after notice and opportunity for a hearing, a failure to fulfill an attestation required by this subsection, or a material misrepresentation of a material fact in a petition under this subsection, the Secretary—

''(A) may impose such administrative remedies (including civil money penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate; and

''(B) may disqualify the employer from the employment of H–2C workers for a period of 1 year.

''(3) WILLFUL VIOLATIONS.—If the Secretary of Agriculture finds, after notice and opportunity for a hearing, a willful failure to fulfill an attestation required by this subsection, or a willful misrepresenta-

tion of a material fact in a petition under this subsection, the Secretary—

''(A) may impose such administrative remedies (including civil money penalties in an amount not to exceed $5,000 per violation, or not to exceed $15,000 per violation if in the course of such failure or misrepresentation the employer displaced one or more United States workers employed by the employer during the period of employment of H–2C workers or during the 30-day period immediately preceding such period of employment) in the job the H–2C workers are performing as the Secretary determines to be appropriate;

''(B) may disqualify the employer from the employment of H–2C workers for a period of 2 years;

''(C) may, for a subsequent failure to fulfill an attestation required by this subsection, or a misrepresentation of a material fact in a petition under this subsection, disqualify the employer from the employment of H–2C workers for a period of 5 years; and

''(D) may, for a subsequent willful failure to fulfill an attestation required by this sub-

section, or a willful misrepresentation of a material fact in a petition under this subsection, permanently disqualify the employer from the employment of H–2C workers.

''(j) FAILURE TO PAY WAGES OR REQUIRED BENEFITS.—

''(1) IN GENERAL.—If the Secretary of Agriculture finds, after notice and opportunity for a hearing, that the employer has failed to provide the benefits, wages, and working conditions that the employer has attested that it would provide under this subsection, the Secretary shall require payment of back wages, or such other required benefits, due any United States workers or H–2C workers employed by the employer.

''(2) AMOUNT.—The back wages or other required benefits described in paragraph (1)—

''(A) shall be equal to the difference between the amount that should have been paid and the amount that was paid to such workers; and

''(B) shall be distributed to the workers to whom such wages or benefits are due.

''(k) MINIMUM WAGES, BENEFITS, AND WORKING CONDITIONS.—

''(1) PREFERENTIAL TREATMENT OF H–2C WORKERS PROHIBITED.—

''(A) IN GENERAL.—Each employer seeking to hire United States workers for the job the H–2C workers will perform shall offer such United States workers not less than the same benefits, wages, and working conditions that the employer will provide to the H–2C workers. No job offer may impose on United States workers any restrictions or obligations which will not be imposed on H–2C workers.

''(B) INTERPRETATION.—Every interpretation and determination made under this section or under any other law, regulation, or interpretative provision regarding the nature, scope, and timing of the provision of these and any other benefits, wages, and other terms and conditions of employment shall be made so that—

''(i) the services of workers to their employers and the employment opportunities afforded to workers by the employers, including those employment opportunities that require United States workers or H–2C workers to travel or relocate in order to accept or perform employment—

''(I) mutually benefit such workers, as well as their families, and employers; and

''(II) principally benefit neither employer nor employee; and

''(ii) employment opportunities within the United States benefit the United States economy.

''(2) REQUIRED WAGES.—

''(A) IN GENERAL.—Each employer petitioning for H–2C workers under this subsection (other than in the case of workers who will perform agricultural labor or services consisting of meat or poultry processing) will offer the H–2C workers, during the period of authorized employment as H–2C workers, wages that are at least the greatest of—

''(i) the applicable State or local minimum wage;

''(ii) 115 percent of the Federal minimum wage, or 150 percent of the Federal minimum wage; or

''(iii) the actual wage level paid by the employer to all other individuals in the job.

''(B) SPECIAL RULES.—

''(i) ALTERNATE WAGE PAYMENT SYSTEMS.—An employer can utilize a piece rate or other alternative wage payment system so long as the employer guarantees each worker a wage rate that equals or exceeds the amount required under subparagraph (A) for the total hours worked in each pay period. Compensation from a piece rate or other alternative wage payment system shall include time spent during rest breaks, moving from job to job, clean up, or any other nonproductive time, provided that such time does not exceed 20 percent of the total hours in the work day.

''(ii) MEAT OR POULTRY PROCESSING.—Each employer petitioning for H–2C workers under this subsection who will perform agricultural labor or services consisting of meat or poultry processing will offer the H–2C workers, during the period of authorized employment as H–2C workers, wages that are at least the greatest of—

''(I) the applicable State or local minimum wage;

''(II) 115 percent of the Federal minimum wage;

''(III) the prevailing wage level for the occupational classification in the area of employment; or

''(IV) the actual wage level paid by the employer to all other individuals in the job.

''(3) EMPLOYMENT GUARANTEE.—

''(A) IN GENERAL.—

''(i) REQUIREMENT.—Each employer petitioning for workers under this subsection shall guarantee to offer the H–2C workers and United States workers performing the same job employment for the hourly equivalent of not less than 50 percent of the work hours set forth in the work contract.

''(ii) FAILURE TO MEET GUARANTEE.—If an employer affords the United States workers or the H–2C workers less employment than that required under this subparagraph, the employer shall pay such workers the amount which the workers would have earned if the work-

ers had worked for the guaranteed number of hours.

''(B) CALCULATION OF HOURS.—Any hours which workers fail to work, up to a maximum of the number of hours specified in the work contract for a work day, when the workers have been offered an opportunity to do so, and all hours of work actually performed (including voluntary work in excess of the number of hours specified in the work contract in a work day) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

''(C) LIMITATION.—If the workers abandon employment before the end of the work contract period, or are terminated for cause, the workers are not entitled to the 50 percent guarantee described in subparagraph (A).

''(D) TERMINATION OF EMPLOYMENT.—

''(i) IN GENERAL.—If, before the expiration of the period of employment specified in the work contract, the services of the workers are no longer required due to any form of natural disaster, including flood, hurricane, freeze, earthquake, fire,

drought, plant or animal disease, pest infestation, regulatory action, or any other reason beyond the control of the employer before the employment guarantee in subparagraph (A) is fulfilled, the employer may terminate the workers' employment.

''(ii) REQUIREMENTS.—If a worker's employment is terminated under clause (i), the employer shall—

''(I) fulfill the employment guarantee in subparagraph (A) for the work days that have elapsed during the period beginning on the first work day and ending on the date on which such employment is terminated;

''(II) make efforts to transfer the worker to other comparable employment acceptable to the worker; and

''(III) not later than 72 hours after termination, notify the Secretary of Agriculture of such termination and stating the nature of the contract impossibility.

''(l) NONDELEGATION.—The Department of Agriculture and the Department of Homeland Security shall

not delegate their investigatory, enforcement, or administrative functions relating to this section or section 218B to other agencies or departments of the Federal government.

''(m) COMPLIANCE WITH BIO-SECURITY PROTOCOLS.—Except in the case of an imminent threat to health or safety, any personnel from a Federal agency or Federal grantee seeking to determine the compliance of an employer with the requirements of this section or section 218B shall, when visiting such employer's place of employment, make their presence known to the employer and sign-in in accordance with reasonable bio-security protocols before proceeding to any other area of the place of employment.

''(n) LIMITATION ON H–2C WORKERS' STAY IN STATUS.—

''(1) MAXIMUM PERIOD.—The maximum continuous period of authorized status as an H–2C worker (including any extensions) is 18 months for workers employed in a job that is of a temporary or seasonal nature. For H–2C workers employed in a job that is not of a temporary or seasonal nature, the initial maximum continuous period of authorized status is 36 months and subsequent maximum continuous periods of authorized status are 18 months.

"(2) REQUIREMENT TO REMAIN OUTSIDE THE UNITED STATES.—In the case of H–2C workers who were employed in a job of a temporary or seasonal nature whose maximum continuous period of authorized status as H–2C workers (including any extensions) have expired, the aliens may not again be eligible to be H–2C workers until they remain outside the United States for a continuous period equal to at least 1/12th of the duration of their previous period of authorized status an H–2C workers. For H–2C workers who were employed in a job not of a temporary or seasonal nature whose maximum continuous period of authorized status as H–2C workers (including any extensions) have expired, the aliens may not again be eligible to be H–2C workers until they remain outside the United States for a continuous period equal to at least the lesser of 1/12th of the duration of their previous period of authorized status as H–2C workers or 45 days.

"(3) EXCEPTIONS.—

"(A) The Secretary of Homeland Security shall deduct absences from the United States that take place during an H–2C worker's period of authorized status from the period that the alien is required to remain outside the United

States under paragraph (2), if the alien or the alien's employer requests such a deduction, and provides clear and convincing proof that the alien qualifies for such a deduction. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

''(B) There is no maximum continuous period of authorized status as set forth in paragraph (1) or a requirement to remain outside the United States as set forth in paragraph (2) for H–2C workers employed as a sheepherder, goatherder, in the range production of livestock, or who return to the workers' permanent residence outside the United States each day.

''(o) PERIOD OF ADMISSION.—

''(1) IN GENERAL.—In addition to the maximum continuous period of authorized status, workers' authorized period of admission shall include—

''(A) a period of not more than 7 days prior to the beginning of authorized employment as H–2C workers for the purpose of travel to the place of employment; and

''(B) a period of not more than 14 days after the conclusion of their authorized employ-

ment for the purpose of departure from the United States or a period of not more than 30 days following the employment for the purpose of seeking a subsequent offer of employment by an employer pursuant to a petition under this section (or pursuant to at-will employment under section 218B during such times as that section is in effect) if they have not reached their maximum continuous period of authorized employment under subsection (n) (subject to the exceptions in subsection (n)(3)) unless they accept subsequent offers of employment as H–2C workers or are otherwise lawfully present.

''(2) FAILURE TO DEPART.—H–2C workers who do not depart the United States within the periods referred to in paragraph (1) will be considered to have failed to maintain nonimmigrant status as H–2C workers and shall be subject to removal under section 237(a)(1)(C)(i). Such aliens shall be considered to be inadmissible pursuant to section 212(a)(9)(B)(i) for having been unlawfully present, with the aliens considered to have been unlawfully present for 181 days as of the 15th day following their period of employment for the purpose of departure or as of the 31st day following their period of

employment for the purpose of seeking subsequent offers of employment.

''(p) ABANDONMENT OF EMPLOYMENT.—

''(1) REPORT BY EMPLOYER.—Not later than 72 hours after an employer learns of the abandonment of employment by H–2C workers before the conclusion of their work contracts, the employer shall notify the Secretary of Agriculture and the Secretary of Homeland Security of such abandonment.

''(2) REPLACEMENT OF ALIENS.—An employer may designate eligible aliens to replace H–2C workers who abandon employment notwithstanding the numerical limitation found in section 214(g)(1)(C).

''(q) CHANGE TO H–2C STATUS.—

''(1) WAIVER.—In the case of an alien described in paragraph (4), the Secretary of Homeland Security shall waive the ground of inadmissibility under paragraphs (6)(C) and (9)(B) of section 212(a) with respect to conduct that occurred prior to the alien first receiving status as an H–2C worker, solely in order to provide the alien with such status.

''(2) ALIEN DESCRIBED.—An alien described in this paragraph is an alien who—

''(A) was unlawfully present in the United States on October 23, 2017;

''(B) performed agricultural labor or services in the United States for at least 5.75 hours during each of at least 180 days during the 2-year period ending on October 23, 2017; and

''(C) has departed the United States within 180 days of the issuance of final rules carrying out the Ag Act, and remains outside the United States.

''(r) TRUST FUND TO ASSURE WORKER RETURN.—

''(1) ESTABLISHMENT.—There is established in the Treasury of the United States a trust fund (in this section referred to as the 'Trust Fund') for the purpose of providing a monetary incentive for H–2C workers to return to their country of origin upon expiration of their visas.

''(2) WITHHOLDING OF WAGES; PAYMENT INTO THE TRUST FUND.—

''(A) IN GENERAL.—Notwithstanding the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) and State and local wage laws, all employers of H–2C workers shall withhold from the wages of all H–2C workers other than those employed as sheepherders, goatherders, in the

range production of livestock, or who return to the their permanent residence outside the United States each day, an amount equivalent to 10 percent of the gross wages of each worker in each pay period and, on behalf of each worker, transfer such withheld amount to the Trust Fund.

''(B) JOBS THAT ARE NOT OF A TEMPORARY OR SEASONAL NATURE.—Employers of H–2C workers employed in jobs that are not of a temporary or seasonal nature, other than those employed as a sheepherder, goatherder, or in the range production of livestock, shall also pay into the Trust Fund an amount equivalent to the Federal tax on the wages paid to H–2C workers that the employer would be obligated to pay under chapters 21 and 23 of the Internal Revenue Code of 1986 had the H–2C workers been subject to such chapters.

''(3) DISTRIBUTION OF FUNDS.—Amounts paid into the Trust Fund on behalf of an H–2C worker, and held pursuant to paragraph (2)(A) and interest earned thereon, shall be transferred from the Trust Fund to the Secretary of Homeland Security, who shall distribute them to the worker if the worker—

''(A) applies to the Secretary of Homeland Security (or the designee of the Secretary) for payment within 120 days of the expiration of the alien's last authorized stay in the United States as an H–2C worker, for which they seek amounts from the Trust Fund;

''(B) establishes to the satisfaction of the Secretary of Homeland Security that they have complied with the terms and conditions of the H–2C program;

''(C) once approved by the Secretary of Homeland Security for payment, physically appears at a United States embassy or consulate in the worker's home country; and

''(D) establishes their identity to the satisfaction of the Secretary of Homeland Security.

''(4) ADMINISTRATIVE EXPENSES.—The amounts paid into the Trust Fund and held pursuant to paragraph (2)(B), and interest earned thereon, shall be distributed annually to the Secretary of Agriculture and the Secretary of Homeland Security in amounts proportionate to the expenses incurred by such officials in the administration and enforcement of the terms of the H–2C program.

''(5) LAW ENFORCEMENT.—Notwithstanding any other provision of law, amounts paid into the Trust Fund under paragraph (2), and interest earned thereon, that are not needed to carry out paragraphs (3) and (4) shall, to the extent provided in advance in appropriations Acts, be made available until expended without fiscal year limitation to the Secretary of Homeland Security to apprehend, detain, and remove aliens inadmissible to or deportable from the United States.

''(6) INVESTMENT OF TRUST FUND.—

''(A) IN GENERAL.—It shall be the duty of the Secretary of the Treasury to invest such portion of the Trust Fund as is not, in the Secretary's judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States.

''(B) CREDITS TO TRUST FUND.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Trust Fund shall be credited to and form a part of the Trust Fund.

''(C) REPORT TO CONGRESS.—It shall be the duty of the Secretary of the Treasury to hold the Trust Fund, and (after consultation with the Secretary of Homeland Security) to report to the Congress each year on the financial condition and the results of the operations of the Trust Fund during the preceding fiscal year and on its expected condition and operations during the next fiscal year. Such report shall be printed as both a House and a Senate document of the session of the Congress in which the report is made.

''(s) PROCEDURES FOR SPECIAL PROCEDURES INDUSTRIES.—

''(1) WORK LOCATIONS.—The Secretary of Homeland Security shall permit an employer in a Special Procedures Industry that does not operate at a single fixed place of employment to provide, as part of its petition, a list of places of employment, which—

''(A) may include an itinerary; and

''(B) may be subsequently amended at any time by the employer, after notice to the Secretary.

''(2) WAGES.—Notwithstanding subsection (k)(2), the Secretary of Agriculture may establish monthly, weekly, or biweekly wage rates for occupations in a Special Procedures Industry for a State or other geographic area. For an employer in a Special Procedures Industry that typically pays a monthly wage, the Secretary shall require that H–2C workers be paid not less frequently than monthly and at a rate no less than the legally required monthly cash wage in an amount as re-determined annually by the Secretary.

''(3) ALLERGY LIMITATION.—An employer engaged in the commercial beekeeping or pollination services industry may require that job applicants be free from bee-related allergies, including allergies to pollen and bee venom.''.

(b) AT-WILL EMPLOYMENT.—Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1181 et seq.) is amended by inserting after section 218A (as inserted by subsection (a) of this section) the following:

''SEC. 218B. AT-WILL EMPLOYMENT OF TEMPORARY H–2C WORKERS.

''(a) IN GENERAL.—An employer that is designated as a 'registered agricultural employer' pursuant to subsection (c) may employ aliens as H–2C workers. However,

an H–2C worker may only perform labor or services pursuant to this section if the worker is already lawfully present in the United States as an H–2C worker, having been admitted or otherwise provided nonimmigrant status pursuant to section 218A, and has completed the period of employment specified in the job offer the worker accepted pursuant to section 218A or the employer has terminated the worker's employment pursuant to section 218A(k)(3)(D)(i). An H–2C worker who abandons the employment which was the basis for admission or status pursuant to section 218A may not perform labor or services pursuant to this section until the worker has returned to their home country, been readmitted as an H–2C worker pursuant to section 218A and has completed the period of employment specified in the job offer the worker accepted pursuant to section 218A or the employer has terminated the worker's employment pursuant to section 218A(k)(3)(D)(i).

''(b) PERIOD OF STAY.—H–2C workers performing at-will labor or services for a registered agricultural employer are subject to the period of admission, limitation of stay in status, and requirement to remain outside the United States contained in subsections (o) and (n) of section 218A, except that subsection (n)(3)(A) does not apply.

''(c) REGISTERED AGRICULTURAL EMPLOYERS.—The Secretary of Agriculture shall establish a process to accept and adjudicate applications by employers to be designated as registered agricultural employers. The Secretary shall require, as a condition of approving the application, the payment of a fee to recover the reasonable cost of processing the application. The Secretary shall designate an employer as a registered agricultural employer if the Secretary determines that the employer—

''(1) employs (or plans to employ) individuals who perform agricultural labor or services;

''(2) has not been subject to debarment from receiving temporary agricultural labor certifications pursuant to section 101(a)(15)(H)(ii)(a) within the last three years;

''(3) has not been subject to disqualification from the employment of H–2C workers within the last five years;

''(4) agrees to, if employing H–2C workers pursuant to this section, fulfill the attestations contained in section 218A(b) as if it had submitted a petition making those attestations (excluding subsection (k)(3) of such section) and not to employ H–2C workers who have reached their maximum continuous period of authorized status under section

218A(n) (subject to the exceptions contained in section 218A(n)(3)) or if the workers have complied with the terms of section 218A(n)(2); and

''(5) agrees to notify the Secretary of Agriculture and the Secretary of Homeland Security each time it employs H–2C workers pursuant to this section within 72 hours of the commencement of employment and within 72 hours of the cessation of employment.

''(d) LENGTH OF DESIGNATION.—An employer's designation as a registered agricultural employer shall be valid for 3 years, and the Secretary may extend such designation for additional 3-year terms upon the reapplication of the employer. The Secretary shall revoke a designation before the expiration of its 3-year term if the employer is subject to disqualification from the employment of H–2C workers subsequent to being designated as a registered agricultural employer.

''(e) ENFORCEMENT.—The Secretary of Agriculture shall be responsible for conducting investigations and audits, including random audits, of employers to ensure compliance with the requirements of this section. All monetary fines levied against employers shall be paid to the Department of Agriculture and used to enhance the Department of Agriculture's investigatory and audit abilities to ensure

compliance by employers with their obligations under this section and section 218A. The Secretary of Agriculture's enforcement powers and an employer's liability described in subsections (i) through (j) of section 218A are applicable to employers employing H–2C workers pursuant to this section.''.

(c) PROHIBITION ON FAMILY MEMBERS.—Section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) is amended by striking ''him;'' at the end and inserting ''him, except that no spouse or child may be admitted under clause (ii)(c);''.

(d) NUMERICAL CAP.—Section 214(g)(1) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)) is amended—

(1) in subparagraph (A), by striking ''or'' at the end;

(2) in subparagraph (B), by striking the period at the end and inserting ''; or''; and

(3) by adding at the end the following:

''(C) under section 101(a)(15)(H)(ii)(c)—

''(i) except as otherwise provided under this subparagraph, may not exceed 40,000 for aliens issued visas or otherwise provided nonimmigrant status under such section for the purpose of performing agricultural labor or

services consisting or meat or poultry processing;

''(ii) except as otherwise provided under this subparagraph, may not exceed 410,000 for aliens issued visas or otherwise provided nonimmigrant status under such section for the purpose of performing agricultural labor or services other than agricultural labor or services consisting of meat or poultry processing;

''(iii) if the base allocation under clause (i) or (ii) is exhausted during any fiscal year, the base allocation under such clause for that and subsequent fiscal years shall be increased by the lesser of 10 percent or a percentage representing the number of petitioned-for aliens (as a percentage of the base allocation) who would be eligible to be issued visas or otherwise provided nonimmigrant status described in that clause during that fiscal year but for the base allocation being exhausted, and if the increased base allocation is itself exhausted during a subsequent fiscal year, the base allocation for that and subsequent fiscal years shall be further increased by the lesser of 10 percent or a percentage representing the number of petitioned-for

aliens (as a percentage of the increased base allocation) who would be eligible to be issued visas or otherwise provided nonimmigrant status described in that clause during that fiscal year but for the increased base allocation being exhausted (subject to clause (iv));

''(iv) if the base allocation under clause (i) or (ii) is not exhausted during any fiscal year, the base allocation under such clause for subsequent fiscal years shall be decreased by the greater of 5 percent or a percentage representing the unutilized portion of the base allocation (as a percentage of the base allocation) during that fiscal year, and if in a subsequent fiscal year the decreased base allocation is itself not exhausted, the base allocation for fiscal years subsequent to that fiscal year shall be further decreased by the greater of 5 percent or a percentage representing the unutilized portion of the decreased base allocation (as a percentage of the decreased base allocation) during that fiscal year (subject to clause (iii) and except that the base allocations under clauses (ii) shall not fall below 410,000);

''(v) the numerical limitations under this subparagraph shall not apply to any alien—

''(I) who—

''(aa) was physically present in the United States on October 23, 2017; and

''(bb) performed agricultural labor or services in the United States for at least 5.75 hours during each of at least 180 days during the 2-year period ending on October 23, 2017; or

''(II) who has previously been issued a visa or otherwise provided nonimmigrant status pursuant to subclause (a) or (b) of section 101(a)(15)(H)(ii), but only to the extent that the alien is being petitioned for by an employer pursuant to section 218A(b) who previously employed the alien pursuant to subclause (a) or (b) of section 101(a)(15)(H)(ii) beginning no later than October 23, 2017.''.

(e) INTENT.—Section 214(b) of the Immigration and Nationality Act (8 U.S.C. 1184(b)) is amended by striking ''section 101(a)(15)(H)(i) except subclause (b1) of such

section'' and inserting ''clause (i), except subclause (b1), or (ii)(c) of section 101(a)(15)(H)''.

(f) CLERICAL AMENDMENT.—The table of contents for the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after the item relating to section 218 the following:

''Sec. 218B. At-will employment of temporary H–2C workers.''.

SEC. 2104. MEDIATION.

Nonimmigrants having status under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(c)) may not bring civil actions for damages against their employers, nor may any other attorneys or individuals bring civil actions for damages on behalf of such nonimmigrants against the nonimmigrants' employers, unless at least 90 days prior to bringing an action a request has been made to the Federal Mediation and Conciliation Service to assist the parties in reaching a satisfactory resolution of all issues involving all parties to the dispute and mediation has been attempted.

SEC. 2105. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION.

Section 3(8)(B)(ii) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1802(8)(B)(ii)) is amended by striking ''under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and

Nationality Act.'' and inserting ''under subclauses (a) and (c) of section 101(a)(15)(H)(ii), and section 214(c), of the Immigration and Nationality Act.''.

SEC. 2106. BINDING ARBITRATION.

(a) APPLICABILITY.—H–2C workers may, as a condition of employment with an employer, be subject to mandatory binding arbitration and mediation of any grievance relating to the employment relationship. An employer shall provide any such workers with notice of such condition of employment at the time it makes job offers.

(b) ALLOCATION OF COSTS.—Any cost associated with such arbitration and mediation process shall be equally divided between the employer and the H–2C workers, except that each party shall be responsible for the cost of its own counsel, if any.

(c) DEFINITIONS.—As used in this section:

(1) The term ''condition of employment'' means a term, condition, obligation, or requirement that is part of the job offer, such as the term of employment, job responsibilities, employee conduct standards, and the grievance resolution process, and to which applicants or prospective H–2C workers must consent or accept in order to be hired for the position.

(2) The term ''H–2C worker'' means a nonimmigrant described in section 218A(a)(5) of the Immigration and Nationality Act, as added by this title.

SEC. 2107. ELIGIBILITY FOR HEALTH CARE SUBSIDIES AND REFUNDABLE TAX CREDITS; REQUIRED HEALTH INSURANCE COVERAGE.

(a) HEALTH CARE SUBSIDIES.—H–2C workers (as defined in section 218A(a)(5) of the Immigration and Nationality Act, as added by this title)—

(1) are not entitled to the premium assistance tax credit authorized under section 36B of the Internal Revenue Code of 1986 and shall be subject to the rules applicable to individuals who are not lawfully present set forth in subsection (e) of such section; and

(2) shall be subject to the rules applicable to individuals who are not lawfully present set forth in section 1402(e) of the Patient Protection and Affordable Care Act (42 U.S.C. 18071(e)).

(b) REFUNDABLE TAX CREDITS.—H–2C workers (as defined in section 218A(a)(5) of the Immigration and Nationality Act, as added by this title), shall not be allowed any credit under sections 24 and 32 of the Internal Revenue Code of 1986. In the case of a joint return, no credit

shall be allowed under either such section if both spouses are such workers or aliens.

(c) REQUIREMENT REGARDING HEALTH INSURANCE COVERAGE.—Notwithstanding the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) and State and local wage laws, not later than 21 days after being issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(c)), an alien must obtain health insurance coverage accepted in their State or States of employment and residence for the period of employment specified in section 218A(b)(1) of the Immigration and Nationality Act. H–2C workers under sections 218A or 218B of the Immigration and Nationality Act who do not obtain and maintain the required insurance coverage will be considered to have failed to maintain nonimmigrant status under section 101(a)(15)(H)(ii)(c) of the Immigration and Nationality Act and shall be subject to removal under section 237(a)(1)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(1)(C)(i)).

SEC. 2108. STUDY OF ESTABLISHMENT OF AN AGRICULTURAL WORKER EMPLOYMENT POOL.

(a) STUDY.—The Secretary of Agriculture shall conduct a study on the feasibility of establishing an agricultural worker employment pool and an electronic Internet-

based portal to assist H–2C workers (as such term is defined in section 218A of the Immigration and Nationality Act), prospective H–2C workers, and employers to identify job opportunities in the H–2C program and willing, able and available workers for the program, respectively.

(b) CONTENTS.—The study required under subsection (a) shall include an analysis of—

(1) the cost of creating such a pool and portal;

(2) potential funding sources or mechanisms to support the creation and maintenance of the pool and portal;

(3) with respect to H–2C workers and prospective H–2C workers in the pool, the data that would be relevant for employers;

(4) the merits of assisting H–2C workers and employers in identifying job opportunities and willing, able, and available workers, respectively; and

(5) other beneficial uses for such a pool and portal.

(c) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary of Agriculture shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report containing the results of the study required under subsection (a).

SEC. 2109. PREVAILING WAGE.

Section 212(p) of the Immigration and Nationality Act (8 U.S.C. 1182(p)) is amended—

(1) in paragraph (1), by inserting after ''subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II)'' the following: ''of this section and section 218A(k)(2)(B)(ii)''; and

(2) in paragraph (3), by inserting after ''subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II)'' the following: ''of this section and section 218A(k)(2)(B)(ii)''.

SEC. 2110. EFFECTIVE DATES; SUNSET; REGULATIONS.

(a) EFFECTIVE DATES; REGULATIONS.—

(1) IN GENERAL.—Sections 2102 and 2104 through 2106 of this title, subsections (a) and (c) through (f) of section 2103 of this title, and the amendments made by the sections, shall take effect on the date on which the Secretary issues the rules under paragraph (3), and the Secretary of Homeland Security shall accept petitions pursuant to section 218A of the Immigration and Nationality Act, as inserted by this Act, beginning no later than that date. Sections 2107 and 2109 of this title shall take effect on the date of the enactment of this Act.

(2) AT-WILL EMPLOYMENT.—Section 2103(b) of this title and the amendments made by that subsection shall take effect when—

(A) it becomes unlawful for all persons or other entities to hire, or to recruit or refer for a fee, for employment in the United States an individual (as provided in section 274A(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)) without participating in the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) or an employment eligibility verification system patterned on such program's verification system; and

(B) the E–Verify Program responds to inquiries made by such persons or entities described in subparagraph (A) by providing confirmation, tentative nonconfirmation, and final nonconfirmation of an individual's identity and employment eligibility in such a way that indicates whether the individual is eligible to be employed in all occupations or only to perform agricultural labor or services under sections 218A and 219B of the Immigration and Nationality

Act, as added by section 2103 of this title, and if the latter, whether the nonimmigrant would be in compliance with their maximum continuous period of authorized status and requirement to remain outside the United States under section 218A(n) of such Act, as added by section 2103(a) of this title, and on what date the alien would cease to be in compliance with their maximum continuous period of authorized status.

(3) REGULATIONS.—Notwithstanding any other provision of law, not later than the first day of the seventh month that begins after the date of the enactment of this Act, the Secretary of Homeland Security shall issue final rules, on an interim or other basis, to carry out this title.

(b) OPERATION AND SUNSET OF THE H–2A PROGRAM.—

(1) APPLICATION OF EXISTING REGULATIONS.—The Department of Labor H–2A program regulations published at 73 Federal Register 77110 et seq. (2008) shall be in force for all petitions approved under sections 101(a)(15)(H)(ii)(a) and 218 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(h)(ii)(a); 8 U.S.C. 1188) beginning on

the date of the enactment of this Act, except that the following, as in effect on such date, shall remain in effect, and, to the extent that any rule published at 73 Federal Register 77110 et seq. is in conflict, such rule shall have no force and effect:

(A) Paragraph (a) and subparagraphs (1) and (3) of paragraph (b) of section 655.200 of title 20, Code of Federal Regulations.

(B) Section 655.201 of title 20, Code of Federal Regulations, except the paragraphs entitled ''Production of Livestock'' and ''Range''.

(C) Paragraphs (c), (d) and (e) of section 655.210 of title 20, Code of Federal Regulations.

(D) Section 655.230 of title 20, Code of Federal Regulations.

(E) Section 655.235 of title 20, Code of Federal Regulations.

(F) The Special Procedures Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program in effect under the Training and Employment Guidance Letter No. 17–06, Change 1, Attachment B, Section II, with an effective date of October 1, 2011.

(2) SUNSET.—Beginning on the date on which employers can file petitions pursuant to section 218A of the Immigration and Nationality Act, as added by section 2103(a) of this title, no new petitions under sections 101(a)(15)(H)(ii)(a) and 218 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a); 8 U.S.C. 1188) shall be accepted.

SEC. 2111. REPORT ON COMPLIANCE AND VIOLATIONS.

(a) IN GENERAL.—Not later than 1 year after the first day on which employers can file petitions pursuant to section 218A of the Immigration and Nationality Act, as added by section 2103(a) of this title, the Secretary of Homeland Security, in consultation with the Secretary of Agriculture, shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report on compliance by H–2C workers with the requirements of this title and the Immigration and Nationality Act, as amended by this title. In the case of a violation of a term or condition of the temporary agricultural work visa program established by this title, the report shall identify the provision or provisions of law violated.

(b) DEFINITION.—As used in this section, the term ''H–2C worker'' means a nonimmigrant described in sec-

tion 218A(a)(4) of the Immigration and Nationality Act, as added by section 2103(a) of this title.

TITLE III—VISA SECURITY

SEC. 3101. CANCELLATION OF ADDITIONAL VISAS.

(a) IN GENERAL.—Section 222(g) of the Immigration and Nationality Act (8 U.S.C. 1202(g)) is amended—

(1) in paragraph (1)—

(A) by striking ''Attorney General'' and inserting ''Secretary''; and

(B) by inserting ''and any other nonimmigrant visa issued by the United States that is in the possession of the alien'' after ''such visa''; and

(2) in paragraph (2)(A), by striking ''(other than the visa described in paragraph (1)) issued in a consular office located in the country of the alien's nationality'' and inserting ''(other than a visa described in paragraph (1)) issued in a consular office located in the country of the alien's nationality or foreign residence''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to a visa issued before, on, or after such date.

SEC. 3102. VISA INFORMATION SHARING.

(a) IN GENERAL.—Section 222(f) of the Immigration and Nationality Act (8 U.S.C. 1202(f)(2)) is amended—

(1) by striking ''issuance or refusal'' and inserting ''issuance, refusal, or revocation'';

(2) in paragraph (2), in the matter preceding subparagraph (A), by striking ''and on the basis of reciprocity'' and all that follows and inserting the following ''may provide to a foreign government information in a Department of State computerized visa database and, when necessary and appropriate, other records covered by this section related to information in such database—'';

(3) in paragraph (2)(A)—

(A) by inserting at the beginning ''on the basis of reciprocity,'';

(B) by inserting ''(i)'' after ''for the purpose of''; and

(C) by striking ''illicit weapons; or'' and inserting ''illicit weapons, or (ii) determining a person's deportability or eligibility for a visa, admission, or other immigration benefit;'';

(4) in paragraph (2)(B)—

(A) by inserting at the beginning ''on the basis of reciprocity,'';

(B) by striking ''in the database'' and inserting ''such database'';

(C) by striking ''for the purposes'' and inserting ''for one of the purposes''; and

(D) by striking ''or to deny visas to persons who would be inadmissible to the United States.'' and inserting ''; or''; and

(5) in paragraph (2), by adding at the end the following:

''(C) with regard to any or all aliens in the database specified data elements from each record, if the Secretary of State determines that it is in the national interest to provide such information to a foreign government.''.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect 60 days after the date of the enactment of this Act.

SEC. 3103. RESTRICTING WAIVER OF VISA INTERVIEWS.

Section 222(h) of the Immigration and Nationality Act (8 U.S.C. 1202(h)(1)(B)) is amended—

(1) in paragraph (1)(C), by inserting '', in consultation with the Secretary of Homeland Security,'' after ''if the Secretary'';

(2) in paragraph (1)(C)(i), by inserting '', where such national interest shall not include facili-

tation of travel of foreign nationals to the United States, reduction of visa application processing times, or the allocation of consular resources'' before the semicolon at the end; and

(3) in paragraph (2)—

(A) by striking ''or'' at the end of subparagraph (E);

(B) by striking the period at the end of subparagraph (F) and inserting ''; or''; and

(C) by adding at the end the following:

''(G) is an individual—

''(i) determined to be in a class of aliens determined by the Secretary of Homeland Security to be threats to national security;

''(ii) identified by the Secretary of Homeland Security as a person of concern; or

''(iii) applying for a visa in a visa category with respect to which the Secretary of Homeland Security has determined that a waiver of the visa interview would create a high risk of degradation of visa program integrity.''.

SEC. 3104. AUTHORIZING THE DEPARTMENT OF STATE TO NOT INTERVIEW CERTAIN INELIGIBLE VISA APPLICANTS.

(a) IN GENERAL.—Section 222(h)(1) of the Immigration and Nationality Act (8 U.S.C. 1202(h)(1)) is amended by inserting ''the alien is determined by the Secretary of State to be ineligible for a visa based upon review of the application or'' after ''unless''.

(b) GUIDANCE.—Not later than 90 days after the date of the enactment of this Act, the Secretary of State shall issue guidance to consular officers on the standards and processes for implementing the authority to deny visa applications without interview in cases where the alien is determined by the Secretary of State to be ineligible for a visa based upon review of the application.

(c) REPORTS.—Not less frequently than once each quarter, the Secretary of State shall submit to the Congress a report on the denial of visa applications without interview, including—

(1) the number of such denials; and

(2) a post-by-post breakdown of such denials.

SEC. 3105. VISA REFUSAL AND REVOCATION.

(a) AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY AND THE SECRETARY OF STATE.—

(1) IN GENERAL.—Section 428 of the Homeland Security Act of 2002 (6 U.S.C. 236) is amend-

ed by striking subsections (b) and (c) and inserting the following:

''(b) AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY.—

''(1) IN GENERAL.—Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except as provided in subsection (c) and except for the authority of the Secretary of State under subparagraphs (A) and (G) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), the Secretary—

''(A) shall have exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa; and

''(B) may refuse or revoke any visa to any alien or class of aliens if the Secretary, or designee, determines that such refusal or revocation is necessary or advisable in the security or foreign policy interests of the United States.

''(2) EFFECT OF REVOCATION.—The revocation of any visa under paragraph (1)(B)—

''(A) shall take effect immediately; and

''(B) shall automatically cancel any other valid visa that is in the alien's possession.

''(3) JUDICIAL REVIEW.—Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review a decision by the Secretary of Homeland Security to refuse or revoke a visa, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a refusal or revocation.

''(c) AUTHORITY OF THE SECRETARY OF STATE.—

''(1) IN GENERAL.—The Secretary of State may direct a consular officer to refuse a visa requested by an alien if the Secretary of State determines such refusal to be necessary or advisable in the security or foreign policy interests of the United States.

''(2) LIMITATION.—No decision by the Secretary of State to approve a visa may override a decision by the Secretary of Homeland Security under subsection (b).''.

(2) AUTHORITY OF THE SECRETARY OF STATE.—Section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i)) is amended by striking ''subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B).'' and inserting ''subsection.''.

(3) CONFORMING AMENDMENT.—Section 237(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(1)(B)) is amended by striking ''under section 221(i)''.

(4) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act and shall apply to visa refusals and revocations occurring before, on, or after such date.

(b) TECHNICAL CORRECTIONS TO THE HOMELAND SECURITY ACT.—Section 428(a) of the Homeland Security Act of 2002 (6 U.S.C. 236(a)) is amended—

(1) by striking ''subsection'' and inserting ''section''; and

(2) by striking ''consular office'' and inserting ''consular officer''.

SEC. 3106. PETITION AND APPLICATION PROCESSING FOR VISAS AND IMMIGRATION BENEFITS.

(a) IN GENERAL.—Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1181 et seq.) is amended by inserting after section 211 the following:

"SEC. 211A. PETITION AND APPLICATION PROCESSING.

"(a) SIGNATURE REQUIREMENT.—

"(1) IN GENERAL.—No petition or application filed with the Secretary of Homeland Security or with a consular officer relating to the issuance of a visa or to the admission of an alien to the United States as an immigrant or as a nonimmigrant may be approved unless the petition or application is signed by each party required to sign such petition or application.

"(2) APPLICATIONS FOR IMMIGRANT VISAS.—Except as may be otherwise prescribed by regulations, each application for an immigrant visa shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer.

"(b) COMPLETION REQUIREMENT.—No petition or application filed with the Secretary of Homeland Security or with a consular officer relating to the issuance of a visa or to the admission of an alien to the United States as an immigrant or as a nonimmigrant may be approved un-

less each applicable portion of the petition or application has been completed.

''(c) TRANSLATION REQUIREMENT.—No document submitted in support of a petition or application for a nonimmigrant or immigrant visa may be accepted by a consular officer if such document contains information in a foreign language, unless such document is accompanied by a full English translation, which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

''(d) REQUESTS FOR ADDITIONAL INFORMATION.—In the case that the Secretary of Homeland Security or a consular officer requests any additional information relating to a petition or application filed with the Secretary or consular officer relating to the issuance of a visa or to the admission of an alien to the United States as an immigrant or as a nonimmigrant, such petition or application may not be approved unless all of the additional information requested is provided, or is shown to have been previously provided, in complete form and is provided on or before any reasonably established deadline included in the request.''.

(b) CLERICAL AMENDMENT.—The table of contents for the Immigration and Nationality Act (8 U.S.C. 1101

et seq.) is amended by inserting after the item relating to section 211 the following:

''Sec. 211A. Petition and application processing.''.

(c) APPLICATION.—The amendments made by this section shall apply with respect to applications and petitions filed after the date of the enactment of this Act.

SEC. 3107. FRAUD PREVENTION.

(a) PROSPECTIVE ANALYTICS TECHNOLOGY.—

(1) PLAN FOR IMPLEMENTATION.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Homeland Security shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a plan for the use of advanced analytics software to ensure the proactive detection of fraud in immigration benefits applications and petitions and to ensure that any such applicant or petitioner does not pose a threat to national security.

(2) IMPLEMENTATION OF PLAN.—Not later than 1 year after the date of the submission of the plan under paragraph (1), the Secretary of Homeland Security shall begin implementation of the plan.

(b) BENEFITS FRAUD ASSESSMENT.—

(1) IN GENERAL.—The Secretary of Homeland Security, acting through the Fraud Detection and

Nationality Security Directorate, shall complete a benefit fraud assessment by fiscal year 2021 on each of the following:

(A) Petitions by VAWA self-petitioners (as such term is defined in section 101(a)(51) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(51)).

(B) Applications or petitions for visas or status under section 101(a)(15)(K) of such Act or under section 201(b)(2) of such Act, in the case of spouses (8 U.S.C. 1101(a)(15)(K)).

(C) Applications for visas or status under section 101(a)(27)(J) of such Act (8 U.S.C. 1101(a)(27)(J)).

(D) Applications for visas or status under section 101(a)(15)(U) of such Act (8 U.S.C. 1101(a)(15)(U)).

(E) Petitions for visas or status under section 101(a)(27)(C) of such Act (8 U.S.C. 1101(a)(27)(C)).

(F) Applications for asylum under section 208 of such Act (8 U.S.C. 1158).

(G) Applications for adjustment of status under section 209 of such Act (8 U.S.C. 1159).

(H) Petitions for visas or status under section 201(b) of such Act (8 U.S.C. 1151(b)).

(2) REPORTING ON FINDINGS.—Not later than 30 days after the completion of each benefit fraud assessment under paragraph (1), the Secretary shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate such assessment and recommendations on how to reduce the occurrence of instances of fraud identified by the assessment.

SEC. 3108. VISA INELIGIBILITY FOR SPOUSES AND CHILDREN OF DRUG TRAFFICKERS.

Section 202(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)) is amended—

(1) in subparagraph (C)(ii), by striking ''is the spouse, son, or daughter'' and inserting ''is or has been the spouse, son, or daughter''; and

(2) in subparagraph (H)(ii), by striking ''is the spouse, son, or daughter'' and inserting ''is or has been the spouse, son, or daughter''.

SEC. 3109. DNA TESTING.

Section 222(b) of the Immigration and Nationality Act (8 U.S.C. 1202(b)) is amended by inserting ''Where considered necessary, by the consular officer or immigration official, to establish family relationships, the immi-

grant shall provide DNA evidence of such a relationship in accordance with procedures established for submitting such evidence. The Secretary and the Secretary of State may, in consultation, issue regulations to require DNA evidence to establish family relationship, from applicants for certain visa classifications.'' after ''and a certified copy of all other records or documents concerning him or his case which may be required by the consular officer.''.

SEC. 3110. ACCESS TO NCIC CRIMINAL HISTORY DATABASE FOR DIPLOMATIC VISAS.

Subsection (a) of article V of section 217 of the National Crime Prevention and Privacy Compact Act of 1998 (34 U.S.C. 40316(V)(a)) is amended by inserting '', except for diplomatic visa applications for which only full biographical information is required'' before the period at the end.

SEC. 3111. ELIMINATION OF SIGNED PHOTOGRAPH REQUIREMENT FOR VISA APPLICATIONS.

Section 221(b) of the Immigration and Nationality Act (8 U.S.C. 1201(b)) is amended by striking the first sentence and insert the following: ''Each alien who applies for a visa shall be registered in connection with his or her application and shall furnish copies of his or her photograph for such use as may be required by regulation.''.

SEC. 3112. ADDITIONAL FRAUD DETECTION AND PREVENTION.

Section 286(v)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1356(v)(2)(A)) is amended—

(1) in the matter preceding clause (i), by striking ''at United States embassies and consulates abroad'';

(2) by amending clause (i) to read as follows:

''(i) to increase the number of diplomatic security personnel assigned exclusively or primarily to the function of preventing and detecting visa fraud;''; and

(3) in clause (ii), by striking '', including primarily fraud by applicants for visas described in subparagraph (H)(i), (H)(ii), or (L) of section 101(a)(15)''.

DIVISION B—INTERIOR IMMIGRATION ENFORCEMENT

TITLE I—LEGAL WORKFORCE ACT

SEC. 1101. SHORT TITLE.

This title may be cited as the ''Legal Workforce Act''.

SEC. 1102. EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS.

(a) IN GENERAL.—Section 274A(b) of the Immigration and Nationality Act (8 U.S.C. 1324a(b)) is amended to read as follows:

''(b) EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS.—

''(1) NEW HIRES, RECRUITMENT, AND REFERRAL.—The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the following:

''(A) ATTESTATION AFTER EXAMINATION OF DOCUMENTATION.—

''(i) ATTESTATION.—During the verification period (as defined in subparagraph (E)), the person or entity shall attest, under penalty of perjury and on a form, including electronic and telephonic formats, designated or established by the Secretary by regulation not later than 6 months after the date of the enactment of the Legal Workforce Act, that it has verified that the individual is not an unauthorized alien by—

''(I) obtaining from the individual the individual's social security account number or United States passport number and recording the number on the form (if the individual claims to have been issued such a number), and, if the individual does not attest to United States nationality under subparagraph (B), obtaining such identification or authorization number established by the Department of Homeland Security for the alien as the Secretary of Homeland Security may specify, and recording such number on the form; and

''(II) examining—

''(aa) a document relating to the individual presenting it described in clause (ii); or

''(bb) a document relating to the individual presenting it described in clause (iii) and a document relating to the individual presenting it described in clause (iv).

"(ii) DOCUMENTS EVIDENCING EMPLOYMENT AUTHORIZATION AND ESTABLISHING IDENTITY.—A document described in this subparagraph is an individual's—

"(I) unexpired United States passport or passport card;

"(II) unexpired permanent resident card that contains a photograph;

"(III) unexpired employment authorization card that contains a photograph;

"(IV) in the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I–94 or Form I–94A, or other documentation as designated by the Secretary specifying the alien's nonimmigrant status as long as the period of status has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified in the documentation;

''(V) passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I–94 or Form I–94A, or other documentation as designated by the Secretary, indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI; or

''(VI) other document designated by the Secretary of Homeland Security, if the document—

''(aa) contains a photograph of the individual and biometric identification data from the individual and such other personal identifying information relating to the individual as the Secretary of Homeland Security finds, by regulation, sufficient for purposes of this clause;

''(bb) is evidence of authorization of employment in the United States; and

"(cc) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

"(iii) DOCUMENTS EVIDENCING EMPLOYMENT AUTHORIZATION.—A document described in this subparagraph is an individual's social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States).

"(iv) DOCUMENTS ESTABLISHING IDENTITY OF INDIVIDUAL.—A document described in this subparagraph is—

"(I) an individual's unexpired driver's license or identification card if it was issued by a State or American Samoa and contains a photograph and information such as name, date of birth, gender, height, eye color, and address;

"(II) an individual's unexpired U.S. military identification card;

''(III) an individual's unexpired Native American tribal identification document issued by a tribal entity recognized by the Bureau of Indian Affairs; or

''(IV) in the case of an individual under 18 years of age, a parent or legal guardian's attestation under penalty of law as to the identity and age of the individual.

''(v) AUTHORITY TO PROHIBIT USE OF CERTAIN DOCUMENTS.—If the Secretary of Homeland Security finds, by regulation, that any document described in clause (i), (ii), or (iii) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Secretary may prohibit or place conditions on its use for purposes of this paragraph.

''(vi) SIGNATURE.—Such attestation may be manifested by either a handwritten or electronic signature.

"(B) INDIVIDUAL ATTESTATION OF EMPLOYMENT AUTHORIZATION.—During the verification period (as defined in subparagraph (E)), the individual shall attest, under penalty of perjury on the form designated or established for purposes of subparagraph (A), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this Act or by the Secretary of Homeland Security to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a handwritten or electronic signature. The individual shall also provide that individual's social security account number or United States passport number (if the individual claims to have been issued such a number), and, if the individual does not attest to United States nationality under this subparagraph, such identification or authorization number established by the Department of Homeland Security for the alien as the Secretary may specify.

"(C) RETENTION OF VERIFICATION FORM AND VERIFICATION.—

''(i) IN GENERAL.—After completion of such form in accordance with subparagraphs (A) and (B), the person or entity shall—

''(I) retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Department of Homeland Security, the Department of Justice, or the Department of Labor during a period beginning on the date of the recruiting or referral of the individual, or, in the case of the hiring of an individual, the date on which the verification is completed, and ending—

''(aa) in the case of the recruiting or referral of an individual, 3 years after the date of the recruiting or referral; and

''(bb) in the case of the hiring of an individual, the later of 3 years after the date the verification is completed or one year after the date the individ-

ual's employment is terminated; and

"(II) during the verification period (as defined in subparagraph (E)), make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of an individual.

"(ii) CONFIRMATION.—

"(I) CONFIRMATION RECEIVED.—If the person or other entity receives an appropriate confirmation of an individual's identity and work eligibility under the verification system within the time period specified, the person or entity shall record on the form an appropriate code that is provided under the system and that indicates a final confirmation of such identity and work eligibility of the individual.

"(II) TENTATIVE NONCONFIRMATION RECEIVED.—If the person or other entity receives a tentative non-

confirmation of an individual's identity or work eligibility under the verification system within the time period specified, the person or entity shall so inform the individual for whom the verification is sought. If the individual does not contest the nonconfirmation within the time period specified, the nonconfirmation shall be considered final. The person or entity shall then record on the form an appropriate code which has been provided under the system to indicate a final nonconfirmation. If the individual does contest the nonconfirmation, the individual shall utilize the process for secondary verification provided under subsection (d). The nonconfirmation will remain tentative until a final confirmation or nonconfirmation is provided by the verification system within the time period specified. In no case shall an employer terminate employment of an individual because of a failure of the in-

dividual to have identity and work eligibility confirmed under this section until a nonconfirmation becomes final. Nothing in this clause shall apply to a termination of employment for any reason other than because of such a failure. In no case shall an employer rescind the offer of employment to an individual because of a failure of the individual to have identity and work eligibility confirmed under this subsection until a nonconfirmation becomes final. Nothing in this subclause shall apply to a recission of the offer of employment for any reason other than because of such a failure.

''(III) FINAL CONFIRMATION OR NONCONFIRMATION RECEIVED.—If a final confirmation or nonconfirmation is provided by the verification system regarding an individual, the person or entity shall record on the form an appropriate code that is provided under the system and that indicates a confirmation or nonconfirmation of iden-

tity and work eligibility of the individual.

"(IV) EXTENSION OF TIME.—If the person or other entity in good faith attempts to make an inquiry during the time period specified and the verification system has registered that not all inquiries were received during such time, the person or entity may make an inquiry in the first subsequent working day in which the verification system registers that it has received all inquiries. If the verification system cannot receive inquiries at all times during a day, the person or entity merely has to assert that the entity attempted to make the inquiry on that day for the previous sentence to apply to such an inquiry, and does not have to provide any additional proof concerning such inquiry.

"(V) CONSEQUENCES OF NONCONFIRMATION.—

"(aa) TERMINATION OR NOTIFICATION OF CONTINUED EM-

PLOYMENT.—If the person or other entity has received a final nonconfirmation regarding an individual, the person or entity may terminate employment of the individual (or decline to recruit or refer the individual). If the person or entity does not terminate employment of the individual or proceeds to recruit or refer the individual, the person or entity shall notify the Secretary of Homeland Security of such fact through the verification system or in such other manner as the Secretary may specify.

''(bb) FAILURE TO NOTIFY.—If the person or entity fails to provide notice with respect to an individual as required under item (aa), the failure is deemed to constitute a violation of subsection (a)(1)(A) with respect to that individual.

''(VI) CONTINUED EMPLOYMENT AFTER FINAL NONCONFIRMATION.—If the person or other entity continues to employ (or to recruit or refer) an individual after receiving final nonconfirmation, a rebuttable presumption is created that the person or entity has violated subsection (a)(1)(A).

''(D) EFFECTIVE DATES OF NEW PROCEDURES.—

''(i) HIRING.—Except as provided in clause (iii), the provisions of this paragraph shall apply to a person or other entity hiring an individual for employment in the United States as follows:

''(I) With respect to employers having 10,000 or more employees in the United States on the date of the enactment of the Legal Workforce Act, on the date that is 6 months after the date of the enactment of such Act.

''(II) With respect to employers having 500 or more employees in the United States, but less than 10,000

employees in the United States, on the date of the enactment of the Legal Workforce Act, on the date that is 12 months after the date of the enactment of such Act.

''(III) With respect to employers having 20 or more employees in the United States, but less than 500 employees in the United States, on the date of the enactment of the Legal Workforce Act, on the date that is 18 months after the date of the enactment of such Act.

''(IV) With respect to employers having 1 or more employees in the United States, but less than 20 employees in the United States, on the date of the enactment of the Legal Workforce Act, on the date that is 24 months after the date of the enactment of such Act.

''(ii) RECRUITING AND REFERRING.—Except as provided in clause (iii), the provisions of this paragraph shall apply to a person or other entity recruiting or refer-

ring an individual for employment in the United States on the date that is 12 months after the date of the enactment of the Legal Workforce Act.

''(iii) AGRICULTURAL LABOR OR SERVICES.—With respect to an employee performing agricultural labor or services, this paragraph shall not apply with respect to the verification of the employee until the date that is 18 months after the date of the enactment of the Legal Workforce Act. For purposes of the preceding sentence, the term 'agricultural labor or services' has the meaning given such term by the Secretary of Agriculture in regulations and includes agricultural labor as defined in section 3121(g) of the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state, all activities required for the prepa-

ration, processing or manufacturing of a product of agriculture (as such term is defined in such section 3(f)) for further distribution, and activities similar to all the foregoing as they relate to fish or shellfish facilities. An employee described in this clause shall not be counted for purposes of clause (i).

''(iv) EXTENSIONS.—Upon request by an employer having 50 or fewer employees, the Secretary shall allow a one-time 6-month extension of the effective date set out in this subparagraph applicable to such employer. Such request shall be made to the Secretary and shall be made prior to such effective date.

''(v) TRANSITION RULE.—Subject to paragraph (4), the following shall apply to a person or other entity hiring, recruiting, or referring an individual for employment in the United States until the effective date or dates applicable under clauses (i) through (iii):

''(I) This subsection, as in effect before the enactment of the Legal Workforce Act.

''(II) Subtitle A of title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), as in effect before the effective date in section 7(c) of the Legal Workforce Act.

''(III) Any other provision of Federal law requiring the person or entity to participate in the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), as in effect before the effective date in section 7(c) of the Legal Workforce Act, including Executive Order 13465 (8 U.S.C. 1324a note; relating to Government procurement).

''(E) VERIFICATION PERIOD DEFINED.—

''(i) IN GENERAL.—For purposes of this paragraph:

''(I) In the case of recruitment or referral, the term 'verification period' means the period ending on the date recruiting or referring commences.

''(II) In the case of hiring, the term 'verification period' means the period beginning on the date on which an offer of employment is extended and ending on the date that is three business days after the date of hire, except as provided in clause (iii). The offer of employment may be conditioned in accordance with clause (ii).

''(ii) JOB OFFER MAY BE CONDITIONAL.—A person or other entity may offer a prospective employee an employment position that is conditioned on final verification of the identity and employment eligibility of the employee using the procedures established under this paragraph.

''(iii) SPECIAL RULE.—Notwithstanding clause (i)(II), in the case of an alien who is authorized for employment and who provides evidence from the Social Security Administration that the alien has

applied for a social security account number, the verification period ends three business days after the alien receives the social security account number.

''(2) REVERIFICATION FOR INDIVIDUALS WITH LIMITED WORK AUTHORIZATION.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), a person or entity shall make an inquiry, as provided in subsection (d), using the verification system to seek reverification of the identity and employment eligibility of all individuals with a limited period of work authorization employed by the person or entity during the three business days after the date on which the employee's work authorization expires as follows:

''(i) With respect to employers having 10,000 or more employees in the United States on the date of the enactment of the Legal Workforce Act, beginning on the date that is 6 months after the date of the enactment of such Act.

''(ii) With respect to employers having 500 or more employees in the United States, but less than 10,000 employees in

the United States, on the date of the enactment of the Legal Workforce Act, beginning on the date that is 12 months after the date of the enactment of such Act.

''(iii) With respect to employers having 20 or more employees in the United States, but less than 500 employees in the United States, on the date of the enactment of the Legal Workforce Act, beginning on the date that is 18 months after the date of the enactment of such Act.

''(iv) With respect to employers having 1 or more employees in the United States, but less than 20 employees in the United States, on the date of the enactment of the Legal Workforce Act, beginning on the date that is 24 months after the date of the enactment of such Act.

''(B) AGRICULTURAL LABOR OR SERVICES.—With respect to an employee performing agricultural labor or services, or an employee recruited or referred by a farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act (29

U.S.C. 1801)), subparagraph (A) shall not apply with respect to the reverification of the employee until the date that is 18 months after the date of the enactment of the Legal Workforce Act. For purposes of the preceding sentence, the term 'agricultural labor or services' has the meaning given such term by the Secretary of Agriculture in regulations and includes agricultural labor as defined in section 3121(g) of the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state, all activities required for the preparation, processing, or manufacturing of a product of agriculture (as such term is defined in such section 3(f)) for further distribution, and activities similar to all the foregoing as they relate to fish or shellfish facilities. An employee described in this subparagraph shall not be counted for purposes of subparagraph (A).

"(C) REVERIFICATION.—Paragraph (1)(C)(ii) shall apply to reverifications pursuant to this paragraph on the same basis as it applies to verifications pursuant to paragraph (1), except that employers shall—

"(i) use a form designated or established by the Secretary by regulation for purposes of this paragraph; and

"(ii) retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Department of Homeland Security, the Department of Justice, or the Department of Labor during the period beginning on the date the reverification commences and ending on the date that is the later of 3 years after the date of such reverification or 1 year after the date the individual's employment is terminated.

"(3) PREVIOUSLY HIRED INDIVIDUALS.—

"(A) ON A MANDATORY BASIS FOR CERTAIN EMPLOYEES.—

"(i) IN GENERAL.—Not later than the date that is 6 months after the date of the enactment of the Legal Workforce Act, an

employer shall make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of any individual described in clause (ii) employed by the employer whose employment eligibility has not been verified under the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note).

''(ii) INDIVIDUALS DESCRIBED.—An individual described in this clause is any of the following:

''(I) An employee of any unit of a Federal, State, or local government.

''(II) An employee who requires a Federal security clearance working in a Federal, State or local government building, a military base, a nuclear energy site, a weapons site, or an airport or other facility that requires workers to carry a Transportation Worker Identification Credential (TWIC).

''(III) An employee assigned to perform work in the United States under a Federal contract, except that this subclause—

''(aa) is not applicable to individuals who have a clearance under Homeland Security Presidential Directive 12 (HSPD 12 clearance), are administrative or overhead personnel, or are working solely on contracts that provide Commercial Off The Shelf goods or services as set forth by the Federal Acquisition Regulatory Council, unless they are subject to verification under subclause (II); and

''(bb) only applies to contracts over the simple acquisition threshold as defined in section 2.101 of title 48, Code of Federal Regulations.

''(B) ON A MANDATORY BASIS FOR MULTIPLE USERS OF SAME SOCIAL SECURITY ACCOUNT NUMBER.—In the case of an employer

who is required by this subsection to use the verification system described in subsection (d), or has elected voluntarily to use such system, the employer shall make inquiries to the system in accordance with the following:

''(i) The Commissioner of Social Security shall notify annually employees (at the employee address listed on the Wage and Tax Statement) who submit a social security account number to which more than one employer reports income and for which there is a pattern of unusual multiple use. The notification letter shall identify the number of employers to which income is being reported as well as sufficient information notifying the employee of the process to contact the Social Security Administration Fraud Hotline if the employee believes the employee's identity may have been stolen. The notice shall not share information protected as private, in order to avoid any recipient of the notice from being in the position to further commit or begin committing identity theft.

''(ii) If the person to whom the social security account number was issued by the Social Security Administration has been identified and confirmed by the Commissioner, and indicates that the social security account number was used without their knowledge, the Secretary and the Commissioner shall lock the social security account number for employment eligibility verification purposes and shall notify the employers of the individuals who wrongfully submitted the social security account number that the employee may not be work eligible.

''(iii) Each employer receiving such notification of an incorrect social security account number under clause (ii) shall use the verification system described in subsection (d) to check the work eligibility status of the applicable employee within 10 business days of receipt of the notification.

''(C) ON A VOLUNTARY BASIS.—Subject to paragraph (2), and subparagraphs (A) through (C) of this paragraph, beginning on the date that is 30 days after the date of the enactment

of the Legal Workforce Act, an employer may make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of any individual employed by the employer. If an employer chooses voluntarily to seek verification of any individual employed by the employer, the employer shall seek verification of all individuals employed at the same geographic location or, at the option of the employer, all individuals employed within the same job category, as the employee with respect to whom the employer seeks voluntarily to use the verification system. An employer's decision about whether or not voluntarily to seek verification of its current workforce under this subparagraph may not be considered by any government agency in any proceeding, investigation, or review provided for in this Act.

''(D) VERIFICATION.—Paragraph (1)(C)(ii) shall apply to verifications pursuant to this paragraph on the same basis as it applies to verifications pursuant to paragraph (1), except that employers shall—

''(i) use a form designated or established by the Secretary by regulation for purposes of this paragraph; and

''(ii) retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Department of Homeland Security, the Department of Justice, or the Department of Labor during the period beginning on the date the verification commences and ending on the date that is the later of 3 years after the date of such verification or 1 year after the date the individual's employment is terminated.

''(4) EARLY COMPLIANCE.—

''(A) FORMER E–VERIFY REQUIRED USERS, INCLUDING FEDERAL CONTRACTORS.—Notwithstanding the deadlines in paragraphs (1) and (2), beginning on the date of the enactment of the Legal Workforce Act, the Secretary is authorized to commence requiring employers required to participate in the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), including

employers required to participate in such program by reason of Federal acquisition laws (and regulations promulgated under those laws, including the Federal Acquisition Regulation), to commence compliance with the requirements of this subsection (and any additional requirements of such Federal acquisition laws and regulation) in lieu of any requirement to participate in the E–Verify Program.

''(B) FORMER E–VERIFY VOLUNTARY USERS AND OTHERS DESIRING EARLY COMPLIANCE.—Notwithstanding the deadlines in paragraphs (1) and (2), beginning on the date of the enactment of the Legal Workforce Act, the Secretary shall provide for the voluntary compliance with the requirements of this subsection by employers voluntarily electing to participate in the E–Verify Program described in section 403(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) before such date, as well as by other employers seeking voluntary early compliance.

''(5) COPYING OF DOCUMENTATION PERMITTED.—Notwithstanding any other provision of

law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

''(6) LIMITATION ON USE OF FORMS.—A form designated or established by the Secretary of Homeland Security under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this Act and any other provision of Federal criminal law.

''(7) GOOD FAITH COMPLIANCE.—

''(A) IN GENERAL.—Except as otherwise provided in this subsection, a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

''(B) EXCEPTION IF FAILURE TO CORRECT AFTER NOTICE.—Subparagraph (A) shall not apply if—

''(i) the failure is not de minimus;

''(ii) the Secretary of Homeland Security has explained to the person or entity the basis for the failure and why it is not de minimus;

''(iii) the person or entity has been provided a period of not less than 30 calendar days (beginning after the date of the explanation) within which to correct the failure; and

''(iv) the person or entity has not corrected the failure voluntarily within such period.

''(C) EXCEPTION FOR PATTERN OR PRACTICE VIOLATORS.—Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2).

''(8) SINGLE EXTENSION OF DEADLINES UPON CERTIFICATION.—In a case in which the Secretary of Homeland Security has certified to the Congress that the employment eligibility verification system required under subsection (d) will not be fully operational by the date that is 6 months after the date of the enactment of the Legal Workforce Act, each deadline established under this section for an em-

ployer to make an inquiry using such system shall be extended by 6 months. No other extension of such a deadline shall be made except as authorized under paragraph (1)(D)(iv).''.

(b) DATE OF HIRE.—Section 274A(h) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)) is amended by adding at the end the following:

''(4) DEFINITION OF DATE OF HIRE.—As used in this section, the term 'date of hire' means the date of actual commencement of employment for wages or other remuneration, unless otherwise specified.''.

SEC. 1103. EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM.

Section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)) is amended to read as follows:

''(d) EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM.—

''(1) IN GENERAL.—Patterned on the employment eligibility confirmation system established under section 404 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note), the Secretary of Homeland Security shall establish and administer a verification system through which the Secretary (or a designee of the

Secretary, which may be a nongovernmental entity)—

"(A) responds to inquiries made by persons at any time through a toll-free telephone line and other toll-free electronic media concerning an individual's identity and whether the individual is authorized to be employed; and

"(B) maintains records of the inquiries that were made, of verifications provided (or not provided), and of the codes provided to inquirers as evidence of their compliance with their obligations under this section.

"(2) INITIAL RESPONSE.—The verification system shall provide confirmation or a tentative nonconfirmation of an individual's identity and employment eligibility within 3 working days of the initial inquiry. If providing confirmation or tentative nonconfirmation, the verification system shall provide an appropriate code indicating such confirmation or such nonconfirmation.

"(3) SECONDARY CONFIRMATION PROCESS IN CASE OF TENTATIVE NONCONFIRMATION.—In cases of tentative nonconfirmation, the Secretary shall specify, in consultation with the Commissioner of Social Security, an available secondary verification

process to confirm the validity of information provided and to provide a final confirmation or nonconfirmation not later than 10 working days after the date on which the notice of the tentative nonconfirmation is received by the employee. The Secretary, in consultation with the Commissioner, may extend this deadline once on a case-by-case basis for a period of 10 working days, and if the time is extended, shall document such extension within the verification system. The Secretary, in consultation with the Commissioner, shall notify the employee and employer of such extension. The Secretary, in consultation with the Commissioner, shall create a standard process of such extension and notification and shall make a description of such process available to the public. When final confirmation or nonconfirmation is provided, the verification system shall provide an appropriate code indicating such confirmation or nonconfirmation.

''(4) DESIGN AND OPERATION OF SYSTEM.—The verification system shall be designed and operated—

''(A) to maximize its reliability and ease of use by persons and other entities consistent

with insulating and protecting the privacy and security of the underlying information;

''(B) to respond to all inquiries made by such persons and entities on whether individuals are authorized to be employed and to register all times when such inquiries are not received;

''(C) with appropriate administrative, technical, and physical safeguards to prevent unauthorized disclosure of personal information;

''(D) to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including—

''(i) the selective or unauthorized use of the system to verify eligibility; or

''(ii) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants;

''(E) to maximize the prevention of identity theft use in the system; and

''(F) to limit the subjects of verification to the following individuals:

''(i) Individuals hired, referred, or recruited, in accordance with paragraph (1) or (4) of subsection (b).

''(ii) Employees and prospective employees, in accordance with paragraph (1), (2), (3), or (4) of subsection (b).

''(iii) Individuals seeking to confirm their own employment eligibility on a voluntary basis.

''(5) RESPONSIBILITIES OF COMMISSIONER OF SOCIAL SECURITY.—As part of the verification system, the Commissioner of Social Security, in consultation with the Secretary of Homeland Security (and any designee of the Secretary selected to establish and administer the verification system), shall establish a reliable, secure method, which, within the time periods specified under paragraphs (2) and (3), compares the name and social security account number provided in an inquiry against such information maintained by the Commissioner in order to validate (or not validate) the information provided regarding an individual whose identity and employment eligibility must be confirmed, the correspondence of the name and number, and whether the individual has presented a social security account number that is

not valid for employment. The Commissioner shall not disclose or release social security information (other than such confirmation or nonconfirmation) under the verification system except as provided for in this section or section 205(c)(2)(I) of the Social Security Act.

''(6) RESPONSIBILITIES OF SECRETARY OF HOMELAND SECURITY.—As part of the verification system, the Secretary of Homeland Security (in consultation with any designee of the Secretary selected to establish and administer the verification system), shall establish a reliable, secure method, which, within the time periods specified under paragraphs (2) and (3), compares the name and alien identification or authorization number (or any other information as determined relevant by the Secretary) which are provided in an inquiry against such information maintained or accessed by the Secretary in order to validate (or not validate) the information provided, the correspondence of the name and number, whether the alien is authorized to be employed in the United States, or to the extent that the Secretary determines to be feasible and appropriate, whether the records available to the Secretary verify the identity or status of a national of the United States.

''(7) UPDATING INFORMATION.—The Commissioner of Social Security and the Secretary of Homeland Security shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process described in paragraph (3).

''(8) LIMITATION ON USE OF THE VERIFICATION SYSTEM AND ANY RELATED SYSTEMS.—

''(A) NO NATIONAL IDENTIFICATION CARD.—Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

''(B) CRITICAL INFRASTRUCTURE.—The Secretary may authorize or direct any person or entity responsible for granting access to, protecting, securing, operating, administering, or regulating part of the critical infrastructure (as defined in section 1016(e) of the Critical Infrastructure Protection Act of 2001 (42 U.S.C. 5195c(e))) to use the verification system to the

extent the Secretary determines that such use will assist in the protection of the critical infrastructure.

''(9) REMEDIES.—If an individual alleges that the individual would not have been dismissed from a job but for an error of the verification mechanism, the individual may seek compensation only through the mechanism of the Federal Tort Claims Act, and injunctive relief to correct such error. No class action may be brought under this paragraph.''.

SEC. 1104. RECRUITMENT, REFERRAL, AND CONTINUATION OF EMPLOYMENT.

(a) ADDITIONAL CHANGES TO RULES FOR RECRUITMENT, REFERRAL, AND CONTINUATION OF EMPLOYMENT.—Section 274A(a) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)) is amended—

(1) in paragraph (1)(A), by striking ''for a fee'';

(2) in paragraph (1), by amending subparagraph (B) to read as follows:

''(B) to hire, continue to employ, or to recruit or refer for employment in the United States an individual without complying with the requirements of subsection (b).''; and

(3) in paragraph (2), by striking ''after hiring an alien for employment in accordance with para-

graph (1),'' and inserting ''after complying with paragraph (1),''.

(b) DEFINITION.—Section 274A(h) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)), as amended by this title, is further amended by adding at the end the following:

''(5) DEFINITION OF RECRUIT OR REFER.—As used in this section, the term 'refer' means the act of sending or directing a person who is in the United States or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person. Only persons or entities referring for remuneration (whether on a retainer or contingency basis) are included in the definition, except that union hiring halls that refer union members or nonunion individuals who pay union membership dues are included in the definition whether or not they receive remuneration, as are labor service entities or labor service agencies, whether public, private, forprofit, or nonprofit, that refer, dispatch, or otherwise facilitate the hiring of laborers for any period of time by a third party. As used in this section, the term 'recruit' means the act of soliciting a person who is in the United States, directly or indirectly,

and referring the person to another with the intent of obtaining employment for that person. Only persons or entities referring for remuneration (whether on a retainer or contingency basis) are included in the definition, except that union hiring halls that refer union members or nonunion individuals who pay union membership dues are included in this definition whether or not they receive remuneration, as are labor service entities or labor service agencies, whether public, private, for-profit, or nonprofit that recruit, dispatch, or otherwise facilitate the hiring of laborers for any period of time by a third party.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date that is 1 year after the date of the enactment of this Act, except that the amendments made by subsection (a) shall take effect 6 months after the date of the enactment of this Act insofar as such amendments relate to continuation of employment.

SEC. 1105. GOOD FAITH DEFENSE.

Section 274A(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(3)) is amended to read as follows:

''(3) GOOD FAITH DEFENSE.—

''(A) DEFENSE.—An employer (or person or entity that hires, employs, recruits, or refers (as defined in subsection (h)(5)), or is otherwise obligated to comply with this section) who establishes that it has complied in good faith with the requirements of subsection (b)—

''(i) shall not be liable to a job applicant, an employee, the Federal Government, or a State or local government, under Federal, State, or local criminal or civil law for any employment-related action taken with respect to a job applicant or employee in good-faith reliance on information provided through the system established under subsection (d); and

''(ii) has established compliance with its obligations under subparagraphs (A) and (B) of paragraph (1) and subsection (b) absent a showing by the Secretary of Homeland Security, by clear and convincing evidence, that the employer had knowledge that an employee is an unauthorized alien.

''(B) MITIGATION ELEMENT.—For purposes of subparagraph (A)(i), if an employer

proves by a preponderance of the evidence that the employer uses a reasonable, secure, and established technology to authenticate the identity of the new employee, that fact shall be taken into account for purposes of determining good faith use of the system established under subsection (d).

''(C) FAILURE TO SEEK AND OBTAIN VERIFICATION.—Subject to the effective dates and other deadlines applicable under subsection (b), in the case of a person or entity in the United States that hires, or continues to employ, an individual, or recruits or refers an individual for employment, the following requirements apply:

''(i) FAILURE TO SEEK VERIFICATION.—

''(I) IN GENERAL.—If the person or entity has not made an inquiry, under the mechanism established under subsection (d) and in accordance with the timeframes established under subsection (b), seeking verification of the identity and work eligibility of the individual, the de-

fense under subparagraph (A) shall not be considered to apply with respect to any employment, except as provided in subclause (II).

''(II) SPECIAL RULE FOR FAILURE OF VERIFICATION MECHANISM.—If such a person or entity in good faith attempts to make an inquiry in order to qualify for the defense under subparagraph (A) and the verification mechanism has registered that not all inquiries were responded to during the relevant time, the person or entity can make an inquiry until the end of the first subsequent working day in which the verification mechanism registers no nonresponses and qualify for such defense.

''(ii) FAILURE TO OBTAIN VERIFICATION.—If the person or entity has made the inquiry described in clause (i)(I) but has not received an appropriate verification of such identity and work eligibility under such mechanism within the time period specified under subsection

(d)(2) after the time the verification inquiry was received, the defense under subparagraph (A) shall not be considered to apply with respect to any employment after the end of such time period.''.

SEC. 1106. PREEMPTION AND STATES' RIGHTS.

Section 274A(h)(2) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(2)) is amended to read as follows:

''(2) PREEMPTION.—

''(A) SINGLE, NATIONAL POLICY.—The provisions of this section preempt any State or local law, ordinance, policy, or rule, including any criminal or civil fine or penalty structure, insofar as they may now or hereafter relate to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens.

''(B) STATE ENFORCEMENT OF FEDERAL LAW.—

''(i) BUSINESS LICENSING.—A State, locality, municipality, or political subdivision may exercise its authority over business licensing and similar laws as a penalty for failure to use the verification sys-

tem described in subsection (d) to verify employment eligibility when and as required under subsection (b).

''(ii) GENERAL RULES.—A State, at its own cost, may enforce the provisions of this section, but only insofar as such State follows the Federal regulations implementing this section, applies the Federal penalty structure set out in this section, and complies with all Federal rules and guidance concerning implementation of this section. Such State may collect any fines assessed under this section. An employer may not be subject to enforcement, including audit and investigation, by both a Federal agency and a State for the same violation under this section. Whichever entity, the Federal agency or the State, is first to initiate the enforcement action, has the right of first refusal to proceed with the enforcement action. The Secretary must provide copies of all guidance, training, and field instructions provided to Federal officials implementing the provisions of this section to each State.''.

SEC. 1107. REPEAL.

(a) IN GENERAL.—Subtitle A of title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) is repealed.

(b) REFERENCES.—Any reference in any Federal law, Executive order, rule, regulation, or delegation of authority, or any document of, or pertaining to, the Department of Homeland Security, Department of Justice, or the Social Security Administration, to the employment eligibility confirmation system established under section 404 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) is deemed to refer to the employment eligibility confirmation system established under section 274A(d) of the Immigration and Nationality Act, as amended by this title.

(c) EFFECTIVE DATE.—This section shall take effect on the date that is 24 months after the date of the enactment of this Act.

(d) CLERICAL AMENDMENT.—The table of sections, in section 1(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is amended by striking the items relating to subtitle A of title IV.

SEC. 1108. PENALTIES.

Section 274A of the Immigration and Nationality Act (8 U.S.C. 1324a) is amended—

(1) in subsection (e)(1)—

(A) by striking ''Attorney General'' each place such term appears and inserting ''Secretary of Homeland Security''; and

(B) in subparagraph (D), by striking ''Service'' and inserting ''Department of Homeland Security'';

(2) in subsection (e)(4)—

(A) in subparagraph (A), in the matter before clause (i), by inserting '', subject to paragraph (10),'' after ''in an amount'';

(B) in subparagraph (A)(i), by striking ''not less than $250 and not more than $2,000'' and inserting ''not less than $2,500 and not more than $5,000'';

(C) in subparagraph (A)(ii), by striking ''not less than $2,000 and not more than $5,000'' and inserting ''not less than $5,000 and not more than $10,000'';

(D) in subparagraph (A)(iii), by striking ''not less than $3,000 and not more than $10,000'' and inserting ''not less than $10,000 and not more than $25,000''; and

(E) by moving the margin of the continuation text following subparagraph (B) two ems

to the left and by amending subparagraph (B) to read as follows:

''(B) may require the person or entity to take such other remedial action as is appropriate.'';

(3) in subsection (e)(5)—

(A) in the paragraph heading, strike ''PAPERWORK'';

(B) by inserting '', subject to paragraphs (10) through (12),'' after ''in an amount'';

(C) by striking ''$100'' and inserting ''$1,000'';

(D) by striking ''$1,000'' and inserting ''$25,000''; and

(E) by adding at the end the following: ''Failure by a person or entity to utilize the employment eligibility verification system as required by law, or providing information to the system that the person or entity knows or reasonably believes to be false, shall be treated as a violation of subsection (a)(1)(A).'';

(4) by adding at the end of subsection (e) the following:

''(10) EXEMPTION FROM PENALTY FOR GOOD FAITH VIOLATION.—In the case of imposition of a

civil penalty under paragraph (4)(A) with respect to a violation of subsection (a)(1)(A) or (a)(2) for hiring or continuation of employment or recruitment or referral by person or entity and in the case of imposition of a civil penalty under paragraph (5) for a violation of subsection (a)(1)(B) for hiring or recruitment or referral by a person or entity, the penalty otherwise imposed may be waived or reduced if the violator establishes that the violator acted in good faith.

''(11) MITIGATION ELEMENT.—For purposes of paragraph (4), the size of the business shall be taken into account when assessing the level of civil money penalty.

''(12) AUTHORITY TO DEBAR EMPLOYERS FOR CERTAIN VIOLATIONS.—

''(A) IN GENERAL.—If a person or entity is determined by the Secretary of Homeland Security to be a repeat violator of paragraph (1)(A) or (2) of subsection (a), or is convicted of a crime under this section, such person or entity may be considered for debarment from the receipt of Federal contracts, grants, or cooperative agreements in accordance with the debarment standards and pursuant to the debar-

ment procedures set forth in the Federal Acquisition Regulation.

"(B) DOES NOT HAVE CONTRACT, GRANT, AGREEMENT.—If the Secretary of Homeland Security or the Attorney General wishes to have a person or entity considered for debarment in accordance with this paragraph, and such an person or entity does not hold a Federal contract, grant or cooperative agreement, the Secretary or Attorney General shall refer the matter to the Administrator of General Services to determine whether to list the person or entity on the List of Parties Excluded from Federal Procurement, and if so, for what duration and under what scope.

"(C) HAS CONTRACT, GRANT, AGREEMENT.—If the Secretary of Homeland Security or the Attorney General wishes to have a person or entity considered for debarment in accordance with this paragraph, and such person or entity holds a Federal contract, grant or cooperative agreement, the Secretary or Attorney General shall advise all agencies or departments holding a contract, grant, or cooperative agreement with the person or entity of the Govern-

ment's interest in having the person or entity considered for debarment, and after soliciting and considering the views of all such agencies and departments, the Secretary or Attorney General may refer the matter to any appropriate lead agency to determine whether to list the person or entity on the List of Parties Excluded from Federal Procurement, and if so, for what duration and under what scope.

''(D) REVIEW.—Any decision to debar a person or entity in accordance with this paragraph shall be reviewable pursuant to part 9.4 of the Federal Acquisition Regulation.

''(13) OFFICE FOR STATE AND LOCAL GOVERNMENT COMPLAINTS.—The Secretary of Homeland Security shall establish an office—

''(A) to which State and local government agencies may submit information indicating potential violations of subsection (a), (b), or (g)(1) that were generated in the normal course of law enforcement or the normal course of other official activities in the State or locality;

''(B) that is required to indicate to the complaining State or local agency within five business days of the filing of such a complaint

by identifying whether the Secretary will further investigate the information provided;

''(C) that is required to investigate those complaints filed by State or local government agencies that, on their face, have a substantial probability of validity;

''(D) that is required to notify the complaining State or local agency of the results of any such investigation conducted; and

''(E) that is required to report to the Congress annually the number of complaints received under this paragraph, the States and localities that filed such complaints, and the resolution of the complaints investigated by the Secretary.''; and

(5) by amending paragraph (1) of subsection (f) to read as follows:

''(1) CRIMINAL PENALTY.—Any person or entity which engages in a pattern or practice of violations of subsection (a)(1) or (2) shall be fined not more than $5,000 for each unauthorized alien with respect to which such a violation occurs, imprisoned for not more than 18 months, or both, notwithstanding the provisions of any other Federal law relating to fine levels.''.

SEC. 1109. FRAUD AND MISUSE OF DOCUMENTS.

Section 1546(b) of title 18, United States Code, is amended—

(1) in paragraph (1), by striking ''identification document,'' and inserting ''identification document or document meant to establish work authorization (including the documents described in section 274A(b) of the Immigration and Nationality Act),''; and

(2) in paragraph (2), by striking ''identification document'' and inserting ''identification document or document meant to establish work authorization (including the documents described in section 274A(b) of the Immigration and Nationality Act),''.

SEC. 1110. PROTECTION OF SOCIAL SECURITY ADMINISTRATION PROGRAMS.

(a) FUNDING UNDER AGREEMENT.—Effective for fiscal years beginning on or after October 1, 2019, the Commissioner of Social Security and the Secretary of Homeland Security shall enter into and maintain an agreement which shall—

(1) provide funds to the Commissioner for the full costs of the responsibilities of the Commissioner under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by this title, including (but not limited to)—

(A) acquiring, installing, and maintaining technological equipment and systems necessary for the fulfillment of the responsibilities of the Commissioner under such section 274A(d), but only that portion of such costs that are attributable exclusively to such responsibilities; and

(B) responding to individuals who contest a tentative nonconfirmation provided by the employment eligibility verification system established under such section;

(2) provide such funds annually in advance of the applicable quarter based on estimating methodology agreed to by the Commissioner and the Secretary (except in such instances where the delayed enactment of an annual appropriation may preclude such quarterly payments); and

(3) require an annual accounting and reconciliation of the actual costs incurred and the funds provided under the agreement, which shall be reviewed by the Inspectors General of the Social Security Administration and the Department of Homeland Security.

(b) CONTINUATION OF EMPLOYMENT VERIFICATION IN ABSENCE OF TIMELY AGREEMENT.—In any case in which the agreement required under subsection (a) for any

fiscal year beginning on or after October 1, 2019, has not been reached as of October 1 of such fiscal year, the latest agreement between the Commissioner and the Secretary of Homeland Security providing for funding to cover the costs of the responsibilities of the Commissioner under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)) shall be deemed in effect on an interim basis for such fiscal year until such time as an agreement required under subsection (a) is subsequently reached, except that the terms of such interim agreement shall be modified by the Director of the Office of Management and Budget to adjust for inflation and any increase or decrease in the volume of requests under the employment eligibility verification system. In any case in which an interim agreement applies for any fiscal year under this subsection, the Commissioner and the Secretary shall, not later than October 1 of such fiscal year, notify the Committee on Ways and Means, the Committee on the Judiciary, and the Committee on Appropriations of the House of Representatives and the Committee on Finance, the Committee on the Judiciary, and the Committee on Appropriations of the Senate of the failure to reach the agreement required under subsection (a) for such fiscal year. Until such time as the agreement required under subsection (a) has been reached for such fiscal year, the

Commissioner and the Secretary shall, not later than the end of each 90-day period after October 1 of such fiscal year, notify such Committees of the status of negotiations between the Commissioner and the Secretary in order to reach such an agreement.

SEC. 1111. FRAUD PREVENTION.

(a) BLOCKING MISUSED SOCIAL SECURITY ACCOUNT NUMBERS.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program in which social security account numbers that have been identified to be subject to unusual multiple use in the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by this title, or that are otherwise suspected or determined to have been compromised by identity fraud or other misuse, shall be blocked from use for such system purposes unless the individual using such number is able to establish, through secure and fair additional security procedures, that the individual is the legitimate holder of the number.

(b) ALLOWING SUSPENSION OF USE OF CERTAIN SOCIAL SECURITY ACCOUNT NUMBERS.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program which

shall provide a reliable, secure method by which victims of identity fraud and other individuals may suspend or limit the use of their social security account number or other identifying information for purposes of the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by this title. The Secretary may implement the program on a limited pilot program basis before making it fully available to all individuals.

(c) ALLOWING PARENTS TO PREVENT THEFT OF THEIR CHILD'S IDENTITY.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program which shall provide a reliable, secure method by which parents or legal guardians may suspend or limit the use of the social security account number or other identifying information of a minor under their care for the purposes of the employment eligibility verification system established under 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), as amended by this title. The Secretary may implement the program on a limited pilot program basis before making it fully available to all individuals.

SEC. 1112. USE OF EMPLOYMENT ELIGIBILITY VERIFICATION PHOTO TOOL.

An employer or entity who uses the photo matching tool, if required by the Secretary as part of the verification system, shall match, either visually, or using facial recognition or other verification technology approved or required by the Secretary, the photo matching tool photograph to the photograph on the identity or employment eligibility document provided by the individual or to the face of the employee submitting the document for employment verification purposes, or both, as determined by the Secretary.

SEC. 1113. IDENTITY AUTHENTICATION EMPLOYMENT ELIGIBILITY VERIFICATION PILOT PROGRAMS.

Not later than 24 months after the date of the enactment of this Act, the Secretary of Homeland Security, after consultation with the Commissioner of Social Security and the Director of the National Institute of Standards and Technology, shall establish by regulation not less than 2 Identity Authentication Employment Eligibility Verification pilot programs, each using a separate and distinct technology (the ''Authentication Pilots''). The purpose of the Authentication Pilots shall be to provide for identity authentication and employment eligibility verification with respect to enrolled new employees which shall be available to any employer that elects to participate

in either of the Authentication Pilots. Any participating employer may cancel the employer's participation in the Authentication Pilot after one year after electing to participate without prejudice to future participation. The Secretary shall report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate the Secretary's findings on the Authentication Pilots, including the authentication technologies chosen, not later than 12 months after commencement of the Authentication Pilots.

SEC. 1114. INSPECTOR GENERAL AUDITS.

(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the Inspector General of the Social Security Administration shall complete audits of the following categories in order to uncover evidence of individuals who are not authorized to work in the United States:

(1) Workers who dispute wages reported on their social security account number when they believe someone else has used such number and name to report wages.

(2) Children's social security account numbers used for work purposes.

(3) Employers whose workers present significant numbers of mismatched social security account numbers or names for wage reporting.

(b) SUBMISSION.—The Inspector General of the Social Security Administration shall submit the audits completed under subsection (a) to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate for review of the evidence of individuals who are not authorized to work in the United States. The Chairmen of those Committees shall then determine information to be shared with the Secretary of Homeland Security so that such Secretary can investigate the unauthorized employment demonstrated by such evidence.

TITLE II—SANCTUARY CITIES AND STATE AND LOCAL LAW ENFORCEMENT COOPERATION

SEC. 2201. SHORT TITLE.

This title may be cited as the ''No Sanctuary for Criminals Act''.

SEC. 2202. STATE NONCOMPLIANCE WITH ENFORCEMENT OF IMMIGRATION LAW.

(a) IN GENERAL.—Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373) is amended—

(1) by striking subsection (a) and inserting the following:

''(a) IN GENERAL.—Notwithstanding any other provision of Federal, State, or local law, no Federal, State, or local government entity, and no individual, may prohibit or in any way restrict, a Federal, State, or local government entity, official, or other personnel from complying with the immigration laws (as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17))), or from assisting or cooperating with Federal law enforcement entities, officials, or other personnel regarding the enforcement of these laws.'';

(2) by striking subsection (b) and inserting the following:

''(b) LAW ENFORCEMENT ACTIVITIES.—Notwithstanding any other provision of Federal, State, or local law, no Federal, State, or local government entity, and no individual, may prohibit, or in any way restrict, a Federal, State, or local government entity, official, or other personnel from undertaking any of the following law enforcement activities as they relate to information regarding the

citizenship or immigration status, lawful or unlawful, the inadmissibility or deportability, or the custody status, of any individual:

''(1) Making inquiries to any individual in order to obtain such information regarding such individual or any other individuals.

''(2) Notifying the Federal Government regarding the presence of individuals who are encountered by law enforcement officials or other personnel of a State or political subdivision of a State.

''(3) Complying with requests for such information from Federal law enforcement entities, officials, or other personnel.'';

(3) in subsection (c), by striking ''Immigration and Naturalization Service'' and inserting ''Department of Homeland Security''; and

(4) by adding at the end the following:

''(d) COMPLIANCE.—

''(1) ELIGIBILITY FOR CERTAIN GRANT PROGRAMS.—A State, or a political subdivision of a State, that is found not to be in compliance with subsection (a) or (b) shall not be eligible to receive—

''(A) any of the funds that would otherwise be allocated to the State or political subdivision under section 241(i) of the Immigration and

Nationality Act (8 U.S.C. 1231(i)), the 'Cops on the Beat' program under part Q of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10381 et seq.), or the Edward Byrne Memorial Justice Assistance Grant Program under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10151 et seq.); or

''(B) any other grant administered by the Department of Justice that is substantially related to law enforcement (including enforcement of the immigration laws), immigration, enforcement of the immigration laws, or naturalization or administered by the Department of Homeland Security that is substantially related to immigration, the enforcement of the immigration laws, or naturalization.

''(2) TRANSFER OF CUSTODY OF ALIENS PENDING REMOVAL PROCEEDINGS.—The Secretary, at the Secretary's discretion, may decline to transfer an alien in the custody of the Department of Homeland Security to a State or political subdivision of a State found not to be in compliance with subsection (a) or

(b), regardless of whether the State or political subdivision of the State has issued a writ or warrant.

''(3) TRANSFER OF CUSTODY OF CERTAIN ALIENS PROHIBITED.—The Secretary shall not transfer an alien with a final order of removal pursuant to paragraph (1)(A) or (5) of section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1231(a)) to a State or a political subdivision of a State that is found not to be in compliance with subsection (a) or (b).

''(4) ANNUAL DETERMINATION.—The Secretary shall determine for each calendar year which States or political subdivision of States are not in compliance with subsection (a) or (b) and shall report such determinations to Congress by March 1 of each succeeding calendar year.

''(5) REPORTS.—The Secretary of Homeland Security shall issue a report concerning the compliance with subsections (a) and (b) of any particular State or political subdivision of a State at the request of the House or the Senate Judiciary Committee. Any jurisdiction that is found not to be in compliance shall be ineligible to receive Federal financial assistance as provided in paragraph (1) for a minimum period of 1 year, and shall only become

eligible again after the Secretary of Homeland Security certifies that the jurisdiction has come into compliance.

''(6) REALLOCATION.—Any funds that are not allocated to a State or to a political subdivision of a State due to the failure of the State or of the political subdivision of the State to comply with subsection (a) or (b) shall be reallocated to States or to political subdivisions of States that comply with both such subsections.

''(e) CONSTRUCTION.—Nothing in this section shall require law enforcement officials from States, or from political subdivisions of States, to report or arrest victims or witnesses of a criminal offense.''.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, except that subsection (d) of section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373), as added by this section, shall apply only to prohibited acts committed on or after the date of the enactment of this Act.

SEC. 2203. CLARIFYING THE AUTHORITY OF ICE DETAINERS.

(a) IN GENERAL.—Section 287(d) of the Immigration and Nationality Act (8 U.S.C. 1357(d)) is amended to read as follows:

''(d) DETAINER OF INADMISSIBLE OR DEPORTABLE ALIENS.—

''(1) IN GENERAL.—In the case of an individual who is arrested by any Federal, State, or local law enforcement official or other personnel for the alleged violation of any criminal or motor vehicle law, the Secretary may issue a detainer regarding the individual to any Federal, State, or local law enforcement entity, official, or other personnel if the Secretary has probable cause to believe that the individual is an inadmissible or deportable alien.

''(2) PROBABLE CAUSE.—Probable cause is deemed to be established if—

''(A) the individual who is the subject of the detainer matches, pursuant to biometric confirmation or other Federal database records, the identity of an alien who the Secretary has reasonable grounds to believe to be inadmissible or deportable;

''(B) the individual who is the subject of the detainer is the subject of ongoing removal

proceedings, including matters where a charging document has already been served;

"(C) the individual who is the subject of the detainer has previously been ordered removed from the United States and such an order is administratively final;

"(D) the individual who is the subject of the detainer has made voluntary statements or provided reliable evidence that indicate that they are an inadmissible or deportable alien; or

"(E) the Secretary otherwise has reasonable grounds to believe that the individual who is the subject of the detainer is an inadmissible or deportable alien.

"(3) TRANSFER OF CUSTODY.—If the Federal, State, or local law enforcement entity, official, or other personnel to whom a detainer is issued complies with the detainer and detains for purposes of transfer of custody to the Department of Homeland Security the individual who is the subject of the detainer, the Department may take custody of the individual within 48 hours (excluding weekends and holidays), but in no instance more than 96 hours, following the date that the individual is otherwise to

be released from the custody of the relevant Federal, State, or local law enforcement entity.''.

(b) IMMUNITY.—

(1) IN GENERAL.—A State or a political subdivision of a State (and the officials and personnel of the State or subdivision acting in their official capacities), and a nongovernmental entity (and its personnel) contracted by the State or political subdivision for the purpose of providing detention, acting in compliance with a Department of Homeland Security detainer issued pursuant to this section who temporarily holds an alien in its custody pursuant to the terms of a detainer so that the alien may be taken into the custody of the Department of Homeland Security, shall be considered to be acting under color of Federal authority for purposes of determining their liability and shall be held harmless for their compliance with the detainer in any suit seeking any punitive, compensatory, or other monetary damages.

(2) FEDERAL GOVERNMENT AS DEFENDANT.—In any civil action arising out of the compliance with a Department of Homeland Security detainer by a State or a political subdivision of a State (and the officials and personnel of the State or subdivision

acting in their official capacities), or a nongovernmental entity (and its personnel) contracted by the State or political subdivision for the purpose of providing detention, the United States Government shall be the proper party named as the defendant in the suit in regard to the detention resulting from compliance with the detainer.

(3) BAD FAITH EXCEPTION.—Paragraphs (1) and (2) shall not apply to any mistreatment of an individual by a State or a political subdivision of a State (and the officials and personnel of the State or subdivision acting in their official capacities), or a nongovernmental entity (and its personnel) contracted by the State or political subdivision for the purpose of providing detention.

(c) PRIVATE RIGHT OF ACTION.—

(1) CAUSE OF ACTION.—Any individual, or a spouse, parent, or child of that individual (if the individual is deceased), who is the victim of a murder, rape, or any felony, as defined by the State, for which an alien (as defined in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3))) has been convicted and sentenced to a term of imprisonment of at least 1 year, may bring an action against a State or political subdivision of

a State or public official acting in an official capacity in the appropriate Federal court if the State or political subdivision, except as provided in paragraph (3)—

(A) released the alien from custody prior to the commission of such crime as a consequence of the State or political subdivision's declining to honor a detainer issued pursuant to section 287(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1357(d)(1));

(B) has in effect a statute, policy, or practice not in compliance with section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373) as amended, and as a consequence of its statute, policy, or practice, released the alien from custody prior to the commission of such crime; or

(C) has in effect a statute, policy, or practice requiring a subordinate political subdivision to decline to honor any or all detainers issued pursuant to section 287(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1357(d)(1)), and, as a consequence of its statute, policy or practice, the subordinate political subdivision declined to honor a detainer issued pursuant to

such section, and as a consequence released the alien from custody prior to the commission of such crime.

(2) LIMITATIONS ON BRINGING ACTION.—An action may not be brought under this subsection later than 10 years following the occurrence of the crime, or death of a person as a result of such crime, whichever occurs later.

(3) PROPER DEFENDANT.—If a political subdivision of a State declines to honor a detainer issued pursuant to section 287(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1357(d)) as a consequence of the State or another political subdivision with jurisdiction over the subdivision prohibiting the subdivision through a statute or other legal requirement of the State or other political subdivision—

(A) from honoring the detainer; or

(B) fully complying with section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373),

and, as a consequence of the statute or other legal requirement of the State or other political subdivision, the subdivision released the alien referred to in paragraph (1) from custody prior to the commission

of the crime referred to in that paragraph, the State or other political subdivision that enacted the statute or other legal requirement, shall be deemed to be the proper defendant in a cause of action under this subsection, and no such cause of action may be maintained against the political subdivision which declined to honor the detainer.

(4) ATTORNEY'S FEE AND OTHER COSTS.—In any action or proceeding under this subsection the court shall allow a prevailing plaintiff a reasonable attorneys'' fee as part of the costs, and include expert fees as part of the attorneys'' fee.

(d) ELIGIBILITY FOR CERTAIN GRANT PROGRAMS.—

(1) IN GENERAL.—Except as provided in paragraph (2), a State or political subdivision of a State that has in effect a statute, policy or practice providing that it not comply with any or all Department of Homeland Security detainers issued pursuant to section 287(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1357(d)) shall not be eligible to receive—

(A) any of the funds that would otherwise be allocated to the State or political subdivision under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i)), the ''Cops

on the Beat'' program under part Q of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10301 et seq.), or the Edward Byrne Memorial Justice Assistance Grant Program under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10151 et seq.); or

(B) any other grant administered by the Department of Justice that is substantially related to law enforcement (including enforcement of the immigration laws), immigration, or naturalization or grant administered by the Department of Homeland Security that is substantially related to immigration, enforcement of the immigration laws, or naturalization.

(2) EXCEPTION.—A political subdivision described in subsection (c)(3) that declines to honor a detainer issued pursuant to section 287(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1357(d)(1)) as a consequence of being required to comply with a statute or other legal requirement of a State or another political subdivision with jurisdiction over that political subdivision, shall remain eligible to receive grant funds described in paragraph

(1). In the case described in the previous sentence, the State or political subdivision that enacted the statute or other legal requirement shall not be eligible to receive such funds.

SEC. 2204. SARAH AND GRANT'S LAW.

(a) DETENTION OF ALIENS DURING REMOVAL PROCEEDINGS.—

(1) CLERICAL AMENDMENTS.—(A) Section 236 of the Immigration and Nationality Act (8 U.S.C. 1226) is amended by striking ''Attorney General'' each place it appears (except in the second place that term appears in section 236(a)) and inserting ''Secretary of Homeland Security''.

(B) Section 236(a) of such Act (8 U.S.C. 1226(a)) is amended by inserting ''the Secretary of Homeland Security or'' before ''the Attorney General—''.

(C) Section 236(e) of such Act (8 U.S.C. 1226(e)) is amended by striking ''Attorney General's'' and inserting ''Secretary of Homeland Security's''.

(2) LENGTH OF DETENTION.—Section 236 of such Act (8 U.S.C. 1226) is amended by adding at the end the following:

''(f) LENGTH OF DETENTION.—

''(1) IN GENERAL.—Notwithstanding any other provision of this section, an alien may be detained, and for an alien described in subsection (c) shall be detained, under this section without time limitation, except as provided in subsection (h), during the pendency of removal proceedings.

''(2) CONSTRUCTION.—The length of detention under this section shall not affect detention under section 241.''.

(3) DETENTION OF CRIMINAL ALIENS.—Section 236(c)(1) of such Act (8 U.S.C. 1226(c)(1)) is amended—

(A) in subparagraph (C), by striking ''or'' at the end;

(B) by inserting after subparagraph (D) the following:

''(E) is unlawfully present in the United States and has been convicted for driving while intoxicated (including a conviction for driving while under the influence or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under State law, or

''(F)(i)(I) is inadmissible under section 212(a)(6)(i),

''(II) is deportable by reason of a visa revocation under section 221(i), or

''(III) is deportable under section 237(a)(1)(C)(i), and

''(ii) has been arrested or charged with a particularly serious crime or a crime resulting in the death or serious bodily injury (as defined in section 1365(h)(3) of title 18, United States Code) of another person;''; and

(C) by amending the matter following subparagraph (F) (as added by subparagraph (B) of this paragraph) to read as follows:

''any time after the alien is released, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense. If the activity described in this paragraph does not result in the alien being taken into custody by any person other than the Secretary, then when the alien is brought to the attention of the Secretary or when the Secretary determines it is practical to take such alien into custody, the Secretary shall take such alien into custody.''.

(4) ADMINISTRATIVE REVIEW.—Section 236 of the Immigration and Nationality Act (8 U.S.C. 1226), as amended by paragraph (2), is further amended by adding at the end the following:

''(g) ADMINISTRATIVE REVIEW.—The Attorney General's review of the Secretary's custody determinations under subsection (a) for the following classes of aliens shall be limited to whether the alien may be detained, released on bond (of at least $1,500 with security approved by the Secretary), or released with no bond:

''(1) Aliens in exclusion proceedings.

''(2) Aliens described in section 212(a)(3) or 237(a)(4).

''(3) Aliens described in subsection (c).

''(h) RELEASE ON BOND.—

''(1) IN GENERAL.—An alien detained under subsection (a) may seek release on bond. No bond may be granted except to an alien who establishes by clear and convincing evidence that the alien is not a flight risk or a danger to another person or the community.

''(2) CERTAIN ALIENS INELIGIBLE.—No alien detained under subsection (c) may seek release on bond.''.

(5) CLERICAL AMENDMENTS.—(A) Section 236(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1226(a)(2)(B)) is amended by striking ''conditional parole'' and inserting ''recognizance''.

(B) Section 236(b) of such Act (8 U.S.C. 1226(b)) is amended by striking ''parole'' and inserting ''recognizance''.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to any alien in detention under the provisions of section 236 of the Immigration and Nationality Act (8 U.S.C. 1226), as so amended, or otherwise subject to the provisions of such section, on or after such date.

SEC. 2205. CLARIFICATION OF CONGRESSIONAL INTENT.

Section 287(g) of the Immigration and Nationality Act (8 U.S.C. 1357(g)) is amended—

(1) in paragraph (1) by striking ''may enter'' and all that follows through the period at the end and inserting the following: ''shall enter into a written agreement with a State, or any political subdivision of a State, upon request of the State or political subdivision, pursuant to which officers or employees of the State or subdivision, who are determined by

the Secretary to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law. No request from a bona fide State or political subdivision or bona fide law enforcement agency shall be denied absent a compelling reason. No limit on the number of agreements under this subsection may be imposed. The Secretary shall process requests for such agreements with all due haste, and in no case shall take not more than 90 days from the date the request is made until the agreement is consummated.'';

(2) by redesignating paragraph (2) as paragraph (5) and paragraphs (3) through (10) as paragraphs (7) through (14), respectively;

(3) by inserting after paragraph (1) the following:

''(2) An agreement under this subsection shall accommodate a requesting State or political subdivision with respect to the enforcement model or combination of models, and shall accommodate a patrol model, task force model,

jail model, any combination thereof, or any other reasonable model the State or political subdivision believes is best suited to the immigration enforcement needs of its jurisdiction.

''(3) No Federal program or technology directed broadly at identifying inadmissible or deportable aliens shall substitute for such agreements, including those establishing a jail model, and shall operate in addition to any agreement under this subsection.

''(4)(A) No agreement under this subsection shall be terminated absent a compelling reason.

''(B)(i) The Secretary shall provide a State or political subdivision written notice of intent to terminate at least 180 days prior to date of intended termination, and the notice shall fully explain the grounds for termination, along with providing evidence substantiating the Secretary's allegations.

''(ii) The State or political subdivision shall have the right to a hearing before an administrative law judge and, if the ruling is against the State or political subdivision, to appeal the ruling to the Federal Circuit Court of Appeals and, if the ruling is against the State or political subdivision, to petition the Supreme Court for certeriori.

''(C) The agreement shall remain in full effect during the course of any and all legal proceedings.''; and

(4) by inserting after paragraph (5) (as redesignated) the following:

''(6) The Secretary of Homeland Security shall make training of State and local law enforcement officers available through as many means as possible, including through residential training at the Center for Domestic Preparedness and the Federal Law Enforcement Training Center, onsite training held at State or local police agencies or facilities, online training courses by computer, teleconferencing, and videotape, or the digital video display (DVD) of a training course or courses. Distance learning through a secure, encrypted, distributed learning system that has all its servers based in the United States, is scalable, survivable, and can have a portal in place not later than 30 days after the date of the enactment of the Securing America's Future Act of 2018, shall be made available by the COPS Office of the Department of Justice and the Federal Law Enforcement Training Center Distributed Learning Program for State and local law enforcement personnel. Preference shall be given to private sector-based, web-based immigration enforcement training programs for which the Federal Government has already provided support to develop.''.

SEC. 2206. PENALTIES FOR ILLEGAL ENTRY OR PRESENCE.

(a) IN GENERAL.—Section 275 of the Immigration and Nationality Act (8 U.S.C. 1325) is amended to read as follows:

''ILLEGAL ENTRY OR PRESENCE

''SEC. 275. (a) IN GENERAL.—

''(1) ILLEGAL ENTRY OR PRESENCE.—An alien shall be subject to the penalties set forth in paragraph (2) if the alien—

''(A) knowingly enters or crosses the border into the United States at any time or place other than as designated by the Secretary of Homeland Security;

''(B) knowingly eludes, at any time or place, examination or inspection by an authorized immigration, customs, or agriculture officer (including by failing to stop at the command of such officer);

''(C) knowingly enters or crosses the border to the United States and, upon examination or inspection, knowingly makes a false or misleading representation or the knowing concealment of a material fact (including such representation or concealment in the context of arrival, reporting, entry, or clearance require-

ments of the customs laws, immigration laws, agriculture laws, or shipping laws);

''(D) knowingly violates the terms or conditions of the alien's admission or parole into the United States and has remained in violation for an aggregate period of 90 days or more; or

''(E) knowingly is unlawfully present in the United States (as defined in section 212(a)(9)(B)(ii) subject to the exceptions set forth in section 212(a)(9)(B)(iii)) and has remained in violation for an aggregate period of 90 days or more.

''(2) CRIMINAL PENALTIES.—Any alien who violates any provision under paragraph (1)—

''(A) shall, for the first violation, be fined under title 18, United States Code, imprisoned not more than 6 months, or both;

''(B) shall, for a second or subsequent violation, or following an order of voluntary departure, be fined under such title, imprisoned not more than 2 years (or not more than 6 months in the case of a second or subsequent violation of paragraph (1)(E)), or both;

''(C) if the violation occurred after the alien had been convicted of 3 or more mis-

demeanors or for a felony, shall be fined under such title, imprisoned not more than 10 years, or both;

''(D) if the violation occurred after the alien had been convicted of a felony for which the alien received a term of imprisonment of not less than 30 months, shall be fined under such title, imprisoned not more than 15 years, or both; and

''(E) if the violation occurred after the alien had been convicted of a felony for which the alien received a term of imprisonment of not less than 60 months, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

''(3) PRIOR CONVICTIONS.—The prior convictions described in subparagraphs (C) through (E) of paragraph (2) are elements of the offenses described and the penalties in such subparagraphs shall apply only in cases in which the conviction or convictions that form the basis for the additional penalty are—

''(A) alleged in the indictment or information; and

''(B) proven beyond a reasonable doubt at trial or admitted by the defendant.

''(4) DURATION OF OFFENSE.—An offense under this subsection continues until the alien is discovered within the United States by an immigration, customs, or agriculture officer, or until the alien is granted a valid visa or relief from removal.

''(5) ATTEMPT.—Whoever attempts to commit any offense under this section shall be punished in the same manner as for a completion of such offense.

''(b) IMPROPER TIME OR PLACE; CIVIL PENALTIES.—Any alien who is apprehended while entering, attempting to enter, or knowingly crossing or attempting to cross the border to the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty, in addition to any criminal or other civil penalties that may be imposed under any other provision of law, in an amount equal to—

''(1) not less than $50 or more than $250 for each such entry, crossing, attempted entry, or attempted crossing; or

''(2) twice the amount specified in paragraph (1) if the alien had previously been subject to a civil penalty under this subsection.''.

(b) CLERICAL AMENDMENT.—The table of contents for the Immigration and Nationality Act is amended by

striking the item relating to section 275 and inserting the following:

''Sec. 275. Illegal entry or presence.''.

(c) EFFECTIVE DATES AND APPLICABILITY.—

(1) CRIMINAL PENALTIES.—Section 275(a) of the Immigration and Nationality Act (8 U.S.C. 1325(a)), as amended by subsection (a), shall take effect 90 days after the date of the enactment of this Act, and shall apply to acts, conditions, or violations described in such section 275(a) that occur or exist on or after such effective date.

(2) CIVIL PENALTIES.—Section 275(b) of the Immigration and Nationality Act (8 U.S.C. 1325(b)), as amended by subsection (a), shall take effect on the date of the enactment of this Act and shall apply to acts described in such section 275(b) that occur before, on, or after such date.

TITLE III—CRIMINAL ALIENS

SEC. 3301. PRECLUDING ADMISSIBILITY OF ALIENS CONVICTED OF AGGRAVATED FELONIES OR OTHER SERIOUS OFFENSES.

(a) INADMISSIBILITY ON CRIMINAL AND RELATED GROUNDS; WAIVERS.—Section 212 of the Immigration and Nationality Act (8 U.S.C. 1182) is amended—

(1) in subsection (a)(2)(A)(i)—

(A) in subclause (I), by striking ''or'' at the end;

(B) in subclause (II), by adding ''or'' at the end; and

(C) by inserting after subclause (II) the following:

''(III) a violation of (or a conspiracy or attempt to violate) an offense described in section 208 of the Social Security Act (42 U.S.C. 408) (relating to social security account numbers or social security cards) or section 1028 of title 18, United States Code (relating to fraud and related activity in connection with identification documents, authentication features, and information),'';

(2) by adding at the end of subsection (a)(2) the following:

''(J) PROCUREMENT OF CITIZENSHIP OR NATURALIZATION UNLAWFULLY.—Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of, a violation of, or an attempt or a conspiracy to violate, subsection

(a) or (b) of section 1425 of title 18, United States Code (relating to the procurement of citizenship or naturalization unlawfully) is inadmissible.

''(K) CERTAIN FIREARM OFFENSES.—Any alien who at any time has been convicted under any law of, or who admits having committed or admits committing acts which constitute the essential elements of, purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is inadmissible.

''(L) AGGRAVATED FELONS.—Any alien who has been convicted of an aggravated felony at any time is inadmissible.

''(M) CRIMES OF DOMESTIC VIOLENCE, STALKING, OR VIOLATION OF PROTECTION ORDERS, CRIMES AGAINST CHILDREN.—

''(i) DOMESTIC VIOLENCE, STALKING, AND CHILD ABUSE.—Any alien who at any

time is convicted of, or who admits having committed or admits committing acts which constitute the essential elements of, a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is inadmissible. For purposes of this clause, the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local or foreign government.

''(ii) VIOLATORS OF PROTECTION ORDERS.—Any alien who at any time is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is inadmissible. For purposes of this clause, the term 'protection order' means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a independent order in another proceeding.

''(iii) WAIVER AUTHORIZED.—The waiver authority available under section 237(a)(7) with respect to section 237(a)(2)(E)(i) shall be available on a

comparable basis with respect to this subparagraph.

''(iv) CLARIFICATION.—If the conviction records do not conclusively establish whether a crime of domestic violence constitutes a crime of violence (as defined in section 16 of title 18, United States Code), the Attorney General may consider other evidence related to the conviction that establishes that the conduct for which the alien was engaged constitutes a crime of violence.''; and

(3) in subsection (h)—

(A) by striking ''The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2)'' and inserting ''The Attorney General or the Secretary of Homeland Security may, in the discretion of the Attorney General or the Secretary, waive the application of subparagraphs (A)(i)(I), (III), (B), (D), (E), (K), and (M) of subsection (a)(2)'';

(B) by striking ''a criminal act involving torture.'' and inserting ''a criminal act involving

torture, or has been convicted of an aggravated felony.'';

(C) by striking ''if either since the date of such admission the alien has been convicted of an aggravated felony or the alien'' and inserting ''if since the date of such admission the alien''; and

(D) by inserting ''or Secretary of Homeland Security'' after ''the Attorney General'' each place it appears.

(b) DEPORTABILITY; CRIMINAL OFFENSES.—Section 237(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(3)(B)) is amended—

(1) in clause (ii), by striking ''or'' at the end;

(2) in clause (iii), by inserting ''or'' at the end; and

(3) by inserting after clause (iii) the following:

''(iv) of a violation of, or an attempt or a conspiracy to violate, section 1425(a) or (b) of title 18 (relating to the procurement of citizenship or naturalization unlawfully),''.

(c) DEPORTABILITY; OTHER CRIMINAL OFFENSES.—Section 237(a)(2) of the Immigration and Nationality Act

(8 U.S.C. 1227(a)(2)) is amended by adding at the end the following:

"(G) FRAUD AND RELATED ACTIVITY ASSOCIATED WITH SOCIAL SECURITY ACT BENEFITS AND IDENTIFICATION DOCUMENTS.—Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) section 208 of the Social Security Act (42 U.S.C. 408) (relating to social security account numbers or social security cards) or section 1028 of title 18, United States Code (relating to fraud and related activity in connection with identification) is deportable.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply—

(1) to any act that occurred before, on, or after the date of the enactment of this Act; and

(2) to all aliens who are required to establish admissibility on or after such date, and in all removal, deportation, or exclusion proceedings that are filed, pending, or reopened, on or after such date.

(e) CONSTRUCTION.—The amendments made by subsection (a) shall not be construed to create eligibility for relief from removal under former section 212(c) of the Im-

migration and Nationality Act where such eligibility did not exist before these amendments became effective.

SEC. 3302. INCREASED PENALTIES BARRING THE ADMISSION OF CONVICTED SEX OFFENDERS FAILING TO REGISTER AND REQUIRING DEPORTATION OF SEX OFFENDERS FAILING TO REGISTER.

(a) INADMISSIBILITY.—Section 212(a)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)(A)(i)), as amended by this title, is further amended—

(1) in subclause (II), by striking ''or'' at the end;

(2) in subclause (III), by adding ''or'' at the end; and

(3) by inserting after subclause (III) the following:

''(IV) a violation of section 2250 of title 18, United States Code (relating to failure to register as a sex offender),''.

(b) DEPORTABILITY.—Section 237(a)(2) of such Act (8 U.S.C. 1227(a)(2)), as amended by this title, is further amended—

(1) in subparagraph (A), by striking clause (v); and

(2) by adding at the end the following:

''(I) FAILURE TO REGISTER AS A SEX OFFENDER.—Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of section 2250 of title 18, United States Code (relating to failure to register as a sex offender) is deportable.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to acts that occur before, on, or after the date of the enactment of this Act.

SEC. 3303. GROUNDS OF INADMISSIBILITY AND DEPORTABILITY FOR ALIEN GANG MEMBERS.

(a) DEFINITION OF GANG MEMBER.—Section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)) is amended by adding at the end the following:

''(53) The term 'criminal gang' means an ongoing group, club, organization, or association of 5 or more persons that has as one of its primary purposes the commission of 1 or more of the following criminal offenses and the members of which engage, or have engaged within the past 5 years, in a continuing series of such offenses, or

that has been designated as a criminal gang by the Secretary of Homeland Security, in consultation with the Attorney General, as meeting these criteria. The offenses described, whether in violation of Federal or State law or foreign law and regardless of whether the offenses occurred before, on, or after the date of the enactment of this paragraph, are the following:

''(A) A 'felony drug offense' (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

''(B) A felony offense involving firearms or explosives or in violation of section 931 of title 18, United States Code (relating to purchase, ownership, or possession of body armor by violent felons).

''(C) An offense under section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose).

''(D) A crime of violence (as defined in section 16 of title 18, United States Code).

''(E) A crime involving obstruction of justice, tampering with or retaliating against a witness, victim, or informant.

''(F) Any conduct punishable under sections 1028A and 1029 of title 18, United States Code (relating to aggravated identity theft or fraud and related activity in connection with identification documents or access devices), sections 1581 through 1594 of such title (relating to peonage, slavery, and trafficking in persons), section 1951 of such title (relating to interference with commerce by threats or violence), section 1952 of such title (relating to interstate and foreign travel or transportation in aid of racketeering enterprises), section 1956 of such title (relating to the laundering of monetary instruments), section 1957 of such title (relating to engaging in monetary transactions in property derived from specified unlawful activity), or sections 2312 through 2315 of such title (relating to interstate transportation of stolen motor vehicles or stolen property).

''(G) A conspiracy to commit an offense described in subparagraphs (A) through (F).''.

(b) INADMISSIBILITY.—Section 212(a)(2) of such Act (8 U.S.C. 1182(a)(2)) is amended by adding at the end the following:

''(J) ALIENS ASSOCIATED WITH CRIMINAL GANGS.—(i) Any alien is inadmissible who a

consular officer, an immigration officer, the Secretary of Homeland Security, or the Attorney General knows or has reason to believe—

"(I) to be or to have been a member of a criminal gang (as defined in section 101(a)(53)); or

"(II) to have participated in the activities of a criminal gang (as defined in section 101(a)(53)), knowing or having reason to know that such activities will promote, further, aid, or support the illegal activity of the criminal gang.

"(ii) Any alien for whom a consular officer, an immigration officer, the Secretary of Homeland Security, or the Attorney General has reasonable grounds to believe has participated in, been a member of, promoted, or conspired with a criminal gang, either inside or outside of the United States, is inadmissible.

"(iii) Any alien for whom a consular officer, an immigration officer, the Secretary of Homeland Security, or the Attorney General has reasonable grounds to believe seeks to enter the United States or has entered the United States in furtherance of the activities of a

criminal gang, either inside or outside of the United States, is inadmissible.''.

(c) DEPORTABILITY.—Section 237(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(2)) is amended by adding at the end the following:

''(G) ALIENS ASSOCIATED WITH CRIMINAL GANGS.—Any alien is deportable who—

''(i) is or has been a member of a criminal gang (as defined in section 101(a)(53)); or

''(ii) has participated in the activities of a criminal gang (as so defined), knowing or having reason to know that such activities will promote, further, aid, or support the illegal activity of the criminal gang.''.

(d) DESIGNATION.—

(1) IN GENERAL.—Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1182) is amended by inserting after section 219 the following:

''DESIGNATION OF CRIMINAL GANG

''SEC. 220.

''(a) DESIGNATION.—

''(1) IN GENERAL.—The Secretary of Homeland Security, in consultation with the Attorney General, may designate a group, club, organization, or association of 5

or more persons as a criminal gang if the Secretary finds that their conduct is described in section 101(a)(53).

''(2) PROCEDURE.—

''(A) NOTIFICATION.—Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate a group, club, organization, or association of 5 or more persons under this subsection and the factual basis therefor.

''(B) PUBLICATION IN THE FEDERAL REGISTER.—The Secretary shall publish the designation in the Federal Register seven days after providing the notification under subparagraph (A).

''(3) RECORD.—

''(A) IN GENERAL.—In making a designation under this subsection, the Secretary shall create an administrative record.

''(B) CLASSIFIED INFORMATION.—The Secretary may consider classified information in making a designation under this subsection. Classified infor-

mation shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c).

''(4) PERIOD OF DESIGNATION.—

''(A) IN GENERAL.—A designation under this subsection shall be effective for all purposes until revoked under paragraph (5) or (6) or set aside pursuant to subsection (c).

''(B) REVIEW OF DESIGNATION UPON PETITION.—

''(i) IN GENERAL.—The Secretary shall review the designation of a criminal gang under the procedures set forth in clauses (iii) and (iv) if the designated group, club, organization, or association of 5 or more persons files a petition for revocation within the petition period described in clause (ii).

''(ii) PETITION PERIOD.—For purposes of clause (i)—

''(I) if the designated group, club, organization, or association of 5 or more persons has not previously filed a petition for revocation under this subparagraph, the

petition period begins 2 years after the date on which the designation was made; or

''(II) if the designated group, club, organization, or association of 5 or more persons has previously filed a petition for revocation under this subparagraph, the petition period begins 2 years after the date of the determination made under clause (iv) on that petition.

''(iii) PROCEDURES.—Any group, club, organization, or association of 5 or more persons that submits a petition for revocation under this subparagraph of its designation as a criminal gang must provide evidence in that petition that it is not described in section 101(a)(53).

''(iv) DETERMINATION.—

''(I) IN GENERAL.—Not later than 180 days after receiving a petition for revocation submitted under this subparagraph, the Secretary shall make a determination as to such revocation.

''(II) CLASSIFIED INFORMATION.—The Secretary may consider classified information in making a determination in re-

sponse to a petition for revocation. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c).

''(III) PUBLICATION OF DETERMINATION.—A determination made by the Secretary under this clause shall be published in the Federal Register.

''(IV) PROCEDURES.—Any revocation by the Secretary shall be made in accordance with paragraph (6).

''(C) OTHER REVIEW OF DESIGNATION.—

''(i) IN GENERAL.—If in a 5-year period no review has taken place under subparagraph (B), the Secretary shall review the designation of the criminal gang in order to determine whether such designation should be revoked pursuant to paragraph (6).

''(ii) PROCEDURES.—If a review does not take place pursuant to subparagraph (B) in response to a petition for revocation that is filed in accordance with that subparagraph, then the

review shall be conducted pursuant to procedures established by the Secretary. The results of such review and the applicable procedures shall not be reviewable in any court.

''(iii) PUBLICATION OF RESULTS OF REVIEW.—The Secretary shall publish any determination made pursuant to this subparagraph in the Federal Register.

''(5) REVOCATION BY ACT OF CONGRESS.—The Congress, by an Act of Congress, may block or revoke a designation made under paragraph (1).

''(6) REVOCATION BASED ON CHANGE IN CIRCUMSTANCES.—

''(A) IN GENERAL.—The Secretary may revoke a designation made under paragraph (1) at any time, and shall revoke a designation upon completion of a review conducted pursuant to subparagraphs (B) and (C) of paragraph (4) if the Secretary finds that—

''(i) the group, club, organization, or association of 5 or more persons that has been designated as a criminal gang is no longer described in section 101(a)(53); or

''(ii) the national security or the law enforcement interests of the United States warrants a revocation.

''(B) PROCEDURE.—The procedural requirements of paragraphs (2) and (3) shall apply to a revocation under this paragraph. Any revocation shall take effect on the date specified in the revocation or upon publication in the Federal Register if no effective date is specified.

''(7) EFFECT OF REVOCATION.—The revocation of a designation under paragraph (5) or (6) shall not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

''(8) USE OF DESIGNATION IN TRIAL OR HEARING.—If a designation under this subsection has become effective under paragraph (2) an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection.

''(b) AMENDMENTS TO A DESIGNATION.—

''(1) IN GENERAL.—The Secretary may amend a designation under this subsection if the Secretary finds that the group, club, organization, or association of 5 or more persons has changed its name, adopted a new alias, dissolved and then reconsti-

tuted itself under a different name or names, or merged with another group, club, organization, or association of 5 or more persons.

''(2) PROCEDURE.—Amendments made to a designation in accordance with paragraph (1) shall be effective upon publication in the Federal Register. Paragraphs (2), (4), (5), (6), (7), and (8) of subsection (a) shall also apply to an amended designation.

''(3) ADMINISTRATIVE RECORD.—The administrative record shall be corrected to include the amendments as well as any additional relevant information that supports those amendments.

''(4) CLASSIFIED INFORMATION.—The Secretary may consider classified information in amending a designation in accordance with this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

''(c) JUDICIAL REVIEW OF DESIGNATION.—

''(1) IN GENERAL.—Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determina-

tion in response to a petition for revocation, the designated group, club, organization, or association of 5 or more persons may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.

''(2) BASIS OF REVIEW.—Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation, amended designation, or determination in response to a petition for revocation.

''(3) SCOPE OF REVIEW.—The Court shall hold unlawful and set aside a designation, amended designation, or determination in response to a petition for revocation the court finds to be—

''(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

''(B) contrary to constitutional right, power, privilege, or immunity;

''(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

''(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2); or

''(E) not in accord with the procedures required by law.

''(4) JUDICIAL REVIEW INVOKED.—The pendency of an action for judicial review of a designation, amended designation, or determination in response to a petition for revocation shall not affect the application of this section, unless the court issues a final order setting aside the designation, amended designation, or determination in response to a petition for revocation.

''(d) DEFINITIONS.—As used in this section—

''(1) the term 'classified information' has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

''(2) the term 'national security' means the national defense, foreign relations, or economic interests of the United States;

''(3) the term 'relevant committees' means the Committees on the Judiciary of the Senate and of the House of Representatives; and

''(4) the term 'Secretary' means the Secretary of Homeland Security, in consultation with the Attorney General.''.

(2) CLERICAL AMENDMENT.—The table of contents for such Act is amended by inserting after the item relating to section 219 the following:

''Sec. 220. Designation.''.

(e) MANDATORY DETENTION OF CRIMINAL GANG MEMBERS.—

(1) IN GENERAL.—Section 236(c)(1) of the Immigration and Nationality Act (8 U.S.C. 1226(c)(1)), as amended by this title, is further amended—

(A) in subparagraph (D), by striking ''or'' at the end;

(B) in subparagraph (E), by inserting ''or'' at the end; and

(C) by inserting after subparagraph (E) the following:

''(F) is inadmissible under section 212(a)(2)(J) or deportable under section 217(a)(2)(G),''.

(2) ANNUAL REPORT.—Not later than March 1 of each year (beginning 1 year after the date of the enactment of this Act), the Secretary of Homeland Security, after consultation with the appropriate

Federal agencies, shall submit a report to the Committees on the Judiciary of the House of Representatives and of the Senate on the number of aliens detained under the amendments made by paragraph (1).

(f) ASYLUM CLAIMS BASED ON GANG AFFILIATION.—

(1) INAPPLICABILITY OF RESTRICTION ON REMOVAL TO CERTAIN COUNTRIES.—Section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1251(b)(3)(B)) is amended, in the matter preceding clause (i), by inserting ''who is described in section 212(a)(2)(J)(i) or section 237(a)(2)(G)(i) or who is'' after ''to an alien''.

(2) INELIGIBILITY FOR ASYLUM.—Section 208(b)(2)(A) of such Act (8 U.S.C. 1158(b)(2)(A)) is amended—

(A) in clause (v), by striking ''or'' at the end;

(B) by redesignating clause (vi) as clause (vii); and

(C) by inserting after clause (v) the following:

''(vi) the alien is described in section 212(a)(2)(J)(i) or section 237(a)(2)(G)(i); or''.

(g) TEMPORARY PROTECTED STATUS.—Section 244 of such Act (8 U.S.C. 1254a) is amended—

(1) by striking ''Attorney General'' each place it appears and inserting ''Secretary of Homeland Security'';

(2) in subparagraph (c)(2)(B)—

(A) in clause (i), by striking ''or'' at the end;

(B) in clause (ii), by striking the period and inserting ''; or''; and

(C) by adding at the end the following:

''(iii) the alien is, or at any time has been, described in section 212(a)(2)(J) or section 237(a)(2)(G).''; and

(3) in subsection (d)—

(A) by striking paragraph (3); and

(B) in paragraph (4), by adding at the end the following: ''The Secretary of Homeland Security may detain an alien provided temporary protected status under this section whenever appropriate under any other provision of law.''.

(h) SPECIAL IMMIGRANT JUVENILE VISAS.—Section 101(a)(27)(J)(iii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)(iii)) is amended—

(1) in subclause (I), by striking ''and'';

(2) in subclause (II), by adding ''and'' at the end; and

(3) by adding at the end the following:

''(III) no alien who is, or at any time has been, described in section 212(a)(2)(J) or section 237(a)(2)(G) shall be eligible for any immigration benefit under this subparagraph;''.

(i) PAROLE.—An alien described in section 212(a)(2)(J) of the Immigration and Nationality Act, as added by subsection (b), shall not be eligible for parole under section 212(d)(5)(A) of such Act unless—

(1) the alien is assisting or has assisted the United States Government in a law enforcement matter, including a criminal investigation; and

(2) the alien's presence in the United States is required by the Government with respect to such assistance.

(j) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment

of this Act and shall apply to acts that occur before, on, or after the date of the enactment of this Act.

SEC. 3304. INADMISSIBILITY AND DEPORTABILITY OF DRUNK DRIVERS.

(a) IN GENERAL.—Section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)), is amended—

(1) in subparagraph (T), by striking ''and'';

(2) in subparagraph (U), by striking the period at the end and inserting ''; and''; and

(3) by inserting after subparagraph (U) the following:

''(V)(i) a single conviction for driving while intoxicated (including a conviction for driving while under the influence of or impairment by alcohol or drugs), when such impaired driving was a cause of the serious bodily injury or death of another person; or

''(ii) a second or subsequent conviction for driving while intoxicated (including a conviction for driving under the influence of or impaired by alcohol or drugs).''.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date of the enact-

ment of this Act and apply to convictions entered on or after such date.

SEC. 3305. DEFINITION OF AGGRAVATED FELONY.

(a) DEFINITION OF AGGRAVATED FELONY.—Section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)), as amended by this title, is further amended—

(1) by striking ''The term 'aggravated felony' means—'' and inserting ''Notwithstanding any other provision of law, the term 'aggravated felony' applies to an offense described in this paragraph, whether in violation of Federal or State law, or in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years, even if the length of the term of imprisonment for the offense is based on recidivist or other enhancements and regardless of whether the conviction was entered before, on, or after September 30, 1996, and means—'';

(2) in subparagraph (A), by striking ''murder, rape, or sexual abuse of a minor;'' and inserting ''an offense relating to murder, manslaughter, homicide, rape (whether the victim was conscious or unconscious), statutory rape, or any offense of a sexual

nature involving a victim under the age of 18 years;'';

(3) in subparagraph (B)—

(A) by inserting ''an offense relating to'' before ''illicit trafficking''; and

(B) by inserting before the semicolon at the end the following: ''and any offense under State law relating to a controlled substance (as so classified under State law) which is classified as a felony in that State, regardless of whether the substance is classified as a controlled substance under section 102 of the Controlled Substances Act (8 U.S.C. 802)'';

(4) in subparagraph (C), by inserting ''an offense relating to'' before ''illicit trafficking in firearms'';

(5) in subparagraph (I), by striking ''or 2252'' and inserting ''2252, or 2252A'';

(6) in subparagraph (F), by striking ''for which the term of imprisonment is at least one year;'' and inserting '', including offenses of assault and battery under State or Federal law, for which the term of imprisonment is at least one year, except that if the conviction records do not conclusively establish whether a crime constitutes a crime of violence, the

Attorney General or the Secretary of Homeland Security, as appropriate, may consider other evidence related to the conviction that establishes that the conduct for which the alien was engaged constitutes a crime of violence;'';

(7) by striking subparagraph (G) and inserting the following:

''(G) an offense relating to a theft under State or Federal law (including theft by deceit, theft by fraud, and receipt of stolen property) regardless of whether any taking was temporary or permanent, or burglary offense under State or Federal law for which the term of imprisonment is at least one year, except that if the conviction records do not conclusively establish whether a crime constitutes a theft or burglary offense, the Attorney General or Secretary of Homeland Security, as appropriate, may consider other evidence related to the conviction that establishes that the conduct for which the alien was engaged constitutes a theft or burglary offense;'';

(8) in subparagraph (N)—

(A) by striking ''paragraph (1)(A) or (2) of''; and

(B) by inserting a semicolon at the end;

(9) in subparagraph (O), by striking ''section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph'' and inserting ''section 275 or 276 for which the term of imprisonment is at least 1 year'';

(10) in subparagraph (P)—

(A) by striking ''(i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii)'' and inserting ''which is described in any section of chapter 75 of title 18, United States Code, and''; and

(B) by striking '', except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act'';

(11) in subparagraph (U), by striking ''an attempt or conspiracy to commit an offense described

in this paragraph'' and inserting ''attempting or conspiring to commit an offense described in this paragraph, or aiding, abetting, counseling, procuring, commanding, inducing, or soliciting the commission of such an offense''; and

(12) by striking the undesignated matter following subparagraph (U).

(b) EFFECTIVE DATE; APPLICATION OF AMENDMENTS.—

(1) IN GENERAL.—The amendments made by subsection (a)—

(A) shall take effect on the date of the enactment of this Act; and

(B) shall apply to any act or conviction that occurred before, on, or after such date.

(2) APPLICATION OF IIRIRA AMENDMENTS.—The amendments to section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)) made by section 321 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104–208; 110 Stat. 3009–627) shall continue to apply, whether the conviction was entered before, on, or after September 30, 1996.

SEC. 3306. PRECLUDING WITHHOLDING OF REMOVAL FOR AGGRAVATED FELONS.

(a) IN GENERAL.—Section 241(b)(3)(B) (8 U.S.C. 1231(b)(3)(B)), is amended by inserting after clause (v) the following:

''(vi) the alien is convicted of an aggravated felony.''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply—

(1) to any act that occurred before, on, or after the date of the enactment of this Act; and

(2) to all aliens who are required to establish admissibility on or after such date, and in all removal, deportation, or exclusion proceedings that are filed, pending, or reopened on or after such date.

SEC. 3307. PROTECTING IMMIGRANTS FROM CONVICTED SEX OFFENDERS.

(a) IMMIGRANTS.—Section 204(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)), is amended—

(1) in subparagraph (A), by amending clause (viii) to read as follows:

''(viii) Clause (i) shall not apply to a citizen of the United States who has been convicted of an offense described in subparagraph (A), (I), or (K) of section 101(a)(43), unless the Secretary of Homeland Security,

in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.''; and

(2) in subparagraph (B)(i)—

(A) by redesignating the second subclause (I) as subclause (II); and

(B) by amending such subclause (II) to read as follows:

''(II) Subclause (I) shall not apply in the case of an alien admitted for permanent residence who has been convicted of an offense described in subparagraph (A), (I), or (K) of section 101(a)(43), unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the alien lawfully admitted for permanent residence poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.''.

(b) NONIMMIGRANTS.—Section 101(a)(15)(K) of such Act (8 U.S.C. 1101(a)(15)(K)), is amended by striking ''204(a)(1)(A)(viii)(I))'' each place such term appears and inserting ''204(a)(1)(A)(viii))''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment

of this Act and shall apply to petitions filed on or after such date.

SEC. 3308. CLARIFICATION TO CRIMES OF VIOLENCE AND CRIMES INVOLVING MORAL TURPITUDE.

(a) INADMISSIBLE ALIENS.—Section 212(a)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)(A)) is amended by adding at the end the following:

> ''(iii) CLARIFICATION.—If the conviction records do not conclusively establish whether a crime constitutes a crime involving moral turpitude, the Attorney General or the Secretary of Homeland Security, as appropriate, may consider other evidence related to the conviction that establishes that the conduct for which the alien was engaged constitutes a crime involving moral turpitude.''.

(b) DEPORTABLE ALIENS.—

(1) GENERAL CRIMES.—Section 237(a)(2)(A) of such Act (8 U.S.C. 1227(a)(2)(A)), as amended by this title, is further amended by inserting after clause (iv) the following:

> ''(v) CRIMES INVOLVING MORAL TURPITUDE.—If the conviction records do not

conclusively establish whether a crime constitutes a crime involving moral turpitude, the Attorney General or the Secretary of Homeland Security, as appropriate, may consider other evidence related to the conviction that establishes that the conduct for which the alien was engaged constitutes a crime involving moral turpitude.''.

(2) DOMESTIC VIOLENCE.—Section 237(a)(2)(E) of such Act (8 U.S.C. 1227(a)(2)(E)) is amended by adding at the end the following:

''(iii) CRIMES OF VIOLENCE.—If the conviction records do not conclusively establish whether a crime of domestic violence constitutes a crime of violence (as defined in section 16 of title 18, United States Code), the Attorney General or the Secretary of Homeland Security, as appropriate, may consider other evidence related to the conviction that establishes that the conduct for which the alien was engaged constitutes a crime of violence.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment

of this Act and shall apply to acts that occur before, on, or after the date of the enactment of this Act.

SEC. 3309. DETENTION OF DANGEROUS ALIENS.

Section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1231(a)) is amended—

(1) by striking ''Attorney General'' each place it appears, except for the first reference in paragraph (4)(B)(i), and inserting ''Secretary of Homeland Security'';

(2) in paragraph (1), by amending subparagraph (B) to read as follows:

''(B) BEGINNING OF PERIOD.—The removal period begins on the latest of the following:

''(i) The date the order of removal becomes administratively final.

''(ii) If the alien is not in the custody of the Secretary on the date the order of removal becomes administratively final, the date the alien is taken into such custody.

''(iii) If the alien is detained or confined (except under an immigration process) on the date the order of removal becomes administratively final, the date the alien is taken into the custody of the Sec-

retary, after the alien is released from such detention or confinement.'';

(3) in paragraph (1), by amending subparagraph (C) to read as follows:

''(C) SUSPENSION OF PERIOD.—

''(i) EXTENSION.—The removal period shall be extended beyond a period of 90 days and the Secretary may, in the Secretary's sole discretion, keep the alien in detention during such extended period if—

''(I) the alien fails or refuses to make all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal that is subject to an order of removal;

''(II) a court, the Board of Immigration Appeals, or an immigration judge orders a stay of removal of an

alien who is subject to an administratively final order of removal;

"(III) the Secretary transfers custody of the alien pursuant to law to another Federal agency or a State or local government agency in connection with the official duties of such agency; or

"(IV) a court or the Board of Immigration Appeals orders a remand to an immigration judge or the Board of Immigration Appeals, during the time period when the case is pending a decision on remand (with the removal period beginning anew on the date that the alien is ordered removed on remand).

"(ii) RENEWAL.—If the removal period has been extended under subparagraph (C)(i), a new removal period shall be deemed to have begun on the date—

"(I) the alien makes all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the

alien's identity and carry out the removal order;

"(II) the stay of removal is no longer in effect; or

"(III) the alien is returned to the custody of the Secretary.

"(iii) MANDATORY DETENTION FOR CERTAIN ALIENS.—In the case of an alien described in subparagraphs (A) through (D) of section 236(c)(1), the Secretary shall keep that alien in detention during the extended period described in clause (i).

"(iv) SOLE FORM OF RELIEF.—An alien may seek relief from detention under this subparagraph only by filing an application for a writ of habeas corpus in accordance with chapter 153 of title 28, United States Code. No alien whose period of detention is extended under this subparagraph shall have the right to seek release on bond.";

(4) in paragraph (3)—

(A) by adding after "If the alien does not leave or is not removed within the removal pe-

riod'' the following: ''or is not detained pursuant to paragraph (6) of this subsection''; and

(B) by striking subparagraph (D) and inserting the following:

''(D) to obey reasonable restrictions on the alien's conduct or activities that the Secretary prescribes for the alien, in order to prevent the alien from absconding, for the protection of the community, or for other purposes related to the enforcement of the immigration laws.'';

(5) in paragraph (4)(A), by striking ''paragraph (2)'' and inserting ''subparagraph (B)''; and

(6) by striking paragraph (6) and inserting the following:

''(6) ADDITIONAL RULES FOR DETENTION OR RELEASE OF CERTAIN ALIENS.—

''(A) DETENTION REVIEW PROCESS FOR COOPERATIVE ALIENS ESTABLISHED.—For an alien who is not otherwise subject to mandatory detention, who has made all reasonable efforts to comply with a removal order and to cooperate fully with the Secretary of Homeland Security's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or

other documents necessary to the alien's departure, and who has not conspired or acted to prevent removal, the Secretary shall establish an administrative review process to determine whether the alien should be detained or released on conditions. The Secretary shall make a determination whether to release an alien after the removal period in accordance with subparagraph (B). The determination shall include consideration of any evidence submitted by the alien, and may include consideration of any other evidence, including any information or assistance provided by the Secretary of State or other Federal official and any other information available to the Secretary of Homeland Security pertaining to the ability to remove the alien.

''(B) AUTHORITY TO DETAIN BEYOND REMOVAL PERIOD.—

''(i) IN GENERAL.—The Secretary of Homeland Security, in the exercise of the Secretary's sole discretion, may continue to detain an alien for 90 days beyond the removal period (including any extension of the removal period as provided in paragraph (1)(C)). An alien whose detention is

extended under this subparagraph shall have no right to seek release on bond.

''(ii) SPECIFIC CIRCUMSTANCES.—The Secretary of Homeland Security, in the exercise of the Secretary's sole discretion, may continue to detain an alien beyond the 90 days authorized in clause (i)—

''(I) until the alien is removed, if the Secretary, in the Secretary's sole discretion, determines that there is a significant likelihood that the alien—

''(aa) will be removed in the reasonably foreseeable future; or

''(bb) would be removed in the reasonably foreseeable future, or would have been removed, but for the alien's failure or refusal to make all reasonable efforts to comply with the removal order, or to cooperate fully with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other doc-

uments necessary to the alien's departure, or conspires or acts to prevent removal;

"(II) until the alien is removed, if the Secretary of Homeland Security certifies in writing—

"(aa) in consultation with the Secretary of Health and Human Services, that the alien has a highly contagious disease that poses a threat to public safety;

"(bb) after receipt of a written recommendation from the Secretary of State, that release of the alien is likely to have serious adverse foreign policy consequences for the United States;

"(cc) based on information available to the Secretary of Homeland Security (including classified, sensitive, or national security information, and without regard to the grounds upon which the alien was ordered re-

moved), that there is reason to believe that the release of the alien would threaten the national security of the United States; or

''(dd) that the release of the alien will threaten the safety of the community or any person, conditions of release cannot reasonably be expected to ensure the safety of the community or any person, and either (AA) the alien has been convicted of one or more aggravated felonies (as defined in section 101(a)(43)(A)) or of one or more crimes identified by the Secretary of Homeland Security by regulation, or of one or more attempts or conspiracies to commit any such aggravated felonies or such identified crimes, if the aggregate term of imprisonment for such attempts or conspiracies is at least 5 years; or (BB) the alien has committed one or more crimes of vio-

lence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) and, because of a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; or

''(III) pending a certification under subclause (II), so long as the Secretary of Homeland Security has initiated the administrative review process not later than 30 days after the expiration of the removal period (including any extension of the removal period, as provided in paragraph (1)(C)).

''(iii) NO RIGHT TO BOND HEARING.—An alien whose detention is extended under this subparagraph shall have no right to seek release on bond, including by reason of a certification under clause (ii)(II).

''(C) RENEWAL AND DELEGATION OF CERTIFICATION.—

"(i) RENEWAL.—The Secretary of Homeland Security may renew a certification under subparagraph (B)(ii)(II) every 6 months, after providing an opportunity for the alien to request reconsideration of the certification and to submit documents or other evidence in support of that request. If the Secretary does not renew a certification, the Secretary may not continue to detain the alien under subparagraph (B)(ii)(II).

"(ii) DELEGATION.—Notwithstanding section 103, the Secretary of Homeland Security may not delegate the authority to make or renew a certification described in item (bb), (cc), or (dd) of subparagraph (B)(ii)(II) below the level of the Director of Immigration and Customs Enforcement.

"(iii) HEARING.—The Secretary of Homeland Security may request that the Attorney General or the Attorney General's designee provide for a hearing to make the determination described in item (dd)(BB) of subparagraph (B)(ii)(II).

''(D) RELEASE ON CONDITIONS.—If it is determined that an alien should be released from detention by a Federal court, the Board of Immigration Appeals, or if an immigration judge orders a stay of removal, the Secretary of Homeland Security, in the exercise of the Secretary's discretion, may impose conditions on release as provided in paragraph (3).

''(E) REDETENTION.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, without any limitations other than those specified in this section, may again detain any alien subject to a final removal order who is released from custody, if removal becomes likely in the reasonably foreseeable future, the alien fails to comply with the conditions of release, or to continue to satisfy the conditions described in subparagraph (A), or if, upon reconsideration, the Secretary, in the Secretary's sole discretion, determines that the alien can be detained under subparagraph (B). This section shall apply to any alien returned to custody pursuant to this subparagraph, as if the removal period terminated on the day of the redetention.

''(F) REVIEW OF DETERMINATIONS BY SECRETARY.—A determination by the Secretary under this paragraph shall not be subject to review by any other agency.''.

SEC. 3310. TIMELY REPATRIATION.

(a) LISTING OF COUNTRIES.—Beginning on the date that is 6 months after the date of the enactment of this Act, and every 6 months thereafter, the Secretary of Homeland Security shall publish a report including the following:

(1) A list of the following:

(A) Countries that have refused or unreasonably delayed repatriation of an alien who is a national of that country since the date of the enactment of this Act and the total number of such aliens, disaggregated by nationality.

(B) Countries that have an excessive repatriation failure rate.

(2) A list of each country that was included under subparagraph (B) or (C) of paragraph (1) in both the report preceding the current report and the current report.

(b) SANCTIONS.—Beginning on the date on which a country is included in a list under subsection (a)(2) and

ending on the date on which that country is not included in such list, that country shall be subject to the following:

(1) The Secretary of State may not issue visas under section 101(a)(15)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(A)(iii)) to attendants, servants, personal employees, and members of their immediate families, of the officials and employees of that country who receive nonimmigrant status under clause (i) or (ii) of section 101(a)(15)(A) of such Act.

(2) Each 6 months thereafter that the country is included in that list, the Secretary of State shall reduce the number of visas available under clause (i) or (ii) of section 101(a)(15)(A) of the Immigration and Nationality Act in a fiscal year to nationals of that country by an amount equal to 10 percent of the baseline visa number for that country. Except as provided under section 243(d) of the Immigration and Nationality Act (8 U.S.C. 1253), the Secretary may not reduce the number to a level below 20 percent of the baseline visa number.

(c) WAIVERS.—

(1) NATIONAL SECURITY WAIVER.—If the Secretary of State submits to Congress a written determination that significant national security interests

of the United States require a waiver of the sanctions under subsection (b), the Secretary may waive any reduction below 80 percent of the baseline visa number. The Secretary of Homeland Security may not delegate the authority under this subsection.

(2) TEMPORARY EXIGENT CIRCUMSTANCES.—If the Secretary of State submits to Congress a written determination that temporary exigent circumstances require a waiver of the sanctions under subsection (b), the Secretary may waive any reduction below 80 percent of the baseline visa number during 6-month renewable periods. The Secretary of Homeland Security may not delegate the authority under this subsection.

(d) EXEMPTION.—The Secretary of Homeland Security, in consultation with the Secretary of State, may exempt a country from inclusion in a list under subsection (a)(2) if the total number of nonrepatriations outstanding is less than 10 for the preceding 3-year period.

(e) UNAUTHORIZED VISA ISSUANCE.—Any visa issued in violation of this section shall be void.

(f) NOTICE.—If an alien who has been convicted of a criminal offense before a Federal or State court whose repatriation was refused or unreasonably delayed is to be released from detention by the Secretary of Homeland Se-

curity, the Secretary shall provide notice to the State and local law enforcement agency for the jurisdictions in which the alien is required to report or is to be released. When possible, and particularly in the case of violent crime, the Secretary shall make a reasonable effort to provide notice of such release to any crime victims and their immediate family members.

(g) DEFINITIONS.—For purposes of this section:

(1) REFUSED OR UNREASONABLY DELAYED.—A country is deemed to have refused or unreasonably delayed the acceptance of an alien who is a citizen, subject, national, or resident of that country if, not later than 90 days after receiving a request to repatriate such alien from an official of the United States who is authorized to make such a request, the country does not accept the alien or issue valid travel documents.

(2) FAILURE RATE.—The term ''failure rate'' for a period means the percentage determined by dividing the total number of repatriation requests for aliens who are citizens, subjects, nationals, or residents of a country that that country refused or unreasonably delayed during that period by the total number of such requests during that period.

(3) EXCESSIVE REPATRIATION FAILURE RATE.—The term ''excessive repatriation failure rate'' means, with respect to a report under subsection (a), a failure rate greater than 10 percent for any of the following:

(A) The period of the 3 full fiscal years preceding the date of publication of the report.

(B) The period of 1 year preceding the date of publication of the report.

(4) NUMBER OF NONREPATRIATIONS OUTSTANDING.—The term ''number of nonrepatriations outstanding'' means, for a period, the number of unique aliens whose repatriation a country has refused or unreasonably delayed and whose repatriation has not occurred during that period.

(5) BASELINE VISA NUMBER.—The term ''baseline visa number'' means, with respect to a country, the average number of visas issued each fiscal year to nationals of that country under clauses (i) and (ii) of section 101(a)(15)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(A)) for the 3 full fiscal years immediately preceding the first report under subsection (a) in which that country is included in the list under subsection (a)(2).

(h) GAO REPORT.—On the date that is 1 day after the date that the President submits a budget under section 1105(a) of title 31, United States Code, for fiscal year 2016, the Comptroller General of the United States shall submit a report to Congress regarding the progress of the Secretary of Homeland Security and the Secretary of State in implementation of this section and in making requests to repatriate aliens as appropriate.

SEC. 3311. ILLEGAL REENTRY.

Section 276 of the Immigration and Nationality Act (8 U.S.C. 1326) is amended to read as follows:

"SEC. 276. REENTRY OF REMOVED ALIEN.

''(a) REENTRY AFTER REMOVAL.—

''(1) IN GENERAL.—Any alien who has been denied admission, excluded, deported, or removed, or who has departed the United States while an order of exclusion, deportation, or removal is outstanding, and subsequently enters, attempts to enter, crosses the border to, attempts to cross the border to, or is at any time found in the United States, shall be fined under title 18, United States Code, imprisoned not more than 2 years, or both.

''(2) EXCEPTION.—If an alien sought and received the express consent of the Secretary to reapply for admission into the United States, or, with

respect to an alien previously denied admission and removed, the alien was not required to obtain such advance consent under the Immigration and Nationality Act or any prior Act, the alien shall not be subject to the fine and imprisonment provided for in paragraph (1).

''(b) REENTRY OF CRIMINAL OFFENDERS.—Notwithstanding the penalty provided in subsection (a), if an alien described in that subsection was convicted before such removal or departure—

''(1) for 3 or more misdemeanors or for a felony, the alien shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both;

''(2) for a felony for which the alien was sentenced to a term of imprisonment of not less than 30 months, the alien shall be fined under such title, imprisoned not more than 15 years, or both;

''(3) for a felony for which the alien was sentenced to a term of imprisonment of not less than 60 months, the alien shall be fined under such title, imprisoned not more than 20 years, or both; or

''(4) for murder, rape, kidnapping, or a felony offense described in chapter 77 (relating to peonage and slavery) or 113B (relating to terrorism) of such

title, or for 3 or more felonies of any kind, the alien shall be fined under such title, imprisoned not more than 25 years, or both.

''(c) REENTRY AFTER REPEATED REMOVAL.—Any alien who has been denied admission, excluded, deported, or removed 3 or more times and thereafter enters, attempts to enter, crosses the border to, attempts to cross the border to, or is at any time found in the United States, shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both.

''(d) PROOF OF PRIOR CONVICTIONS.—The prior convictions described in subsection (b) are elements of the crimes described, and the penalties in that subsection shall apply only in cases in which the conviction or convictions that form the basis for the additional penalty are—

''(1) alleged in the indictment or information; and

''(2) proven beyond a reasonable doubt at trial or admitted by the defendant.

''(e) REENTRY OF ALIEN REMOVED PRIOR TO COMPLETION OF TERM OF IMPRISONMENT.—Any alien removed pursuant to section 241(a)(4) who enters, attempts to enter, crosses the border to, attempts to cross the border to, or is at any time found in, the United States shall be incarcerated for the remainder of the sentence of im-

prisonment which was pending at the time of deportation without any reduction for parole or supervised release unless the alien affirmatively demonstrates that the Secretary of Homeland Security has expressly consented to the alien's reentry. Such alien shall be subject to such other penalties relating to the reentry of removed aliens as may be available under this section or any other provision of law.

''(f) DEFINITIONS.—For purposes of this section and section 275, the following definitions shall apply:

''(1) CROSSES THE BORDER TO THE UNITED STATES.—The term 'crosses the border' refers to the physical act of crossing the border free from official restraint.

''(2) OFFICIAL RESTRAINT.—The term 'official restraint' means any restraint known to the alien that serves to deprive the alien of liberty and prevents the alien from going at large into the United States. Surveillance unbeknownst to the alien shall not constitute official restraint.

''(3) FELONY.—The term 'felony' means any criminal offense punishable by a term of imprisonment of more than 1 year under the laws of the United States, any State, or a foreign government.

''(4) MISDEMEANOR.—The term 'misdemeanor' means any criminal offense punishable by a term of imprisonment of not more than 1 year under the applicable laws of the United States, any State, or a foreign government.

''(5) REMOVAL.—The term 'removal' includes any denial of admission, exclusion, deportation, or removal, or any agreement by which an alien stipulates or agrees to exclusion, deportation, or removal.

''(6) STATE.—The term 'State' means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.''.

TITLE IV—ASYLUM REFORM

SEC. 4401. CLARIFICATION OF INTENT REGARDING TAXPAYER-PROVIDED COUNSEL.

Section 292 of the Immigration and Nationality Act (8 U.S.C. 1362) is amended—

(1) by striking ''In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings'' and inserting ''In any removal proceedings before an immigration judge, or any other immigration proceedings before the Attorney

General, the Secretary of Homeland Security, or any appeal of such a proceeding''.

(2) by striking ''(at no expense to the Government)''; and

(3) by adding at the end the following ''Notwithstanding any other provision of law, in no instance shall the Government bear any expense for counsel for any person in proceedings described in this section.''.

SEC. 4402. CREDIBLE FEAR INTERVIEWS.

Section 235(b)(1)(B)(v) of the Immigration and Nationality Act (8 U.S.C. 1225(b)(1)(B)(v)) is amended by striking ''claim'' and all that follows, and inserting ''claim, as determined pursuant to section 208(b)(1)(B)(iii), and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title, and it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien's claim are true.''.

SEC. 4403. RECORDING EXPEDITED REMOVAL AND CREDIBLE FEAR INTERVIEWS.

(a) IN GENERAL.—The Secretary of Homeland Security shall establish quality assurance procedures and take steps to effectively ensure that questions by employees of the Department of Homeland Security exercising expe-

dited removal authority under section 235(b) of the Immigration and Nationality Act (8 U.S.C. 1225(b)) are asked in a uniform manner, to the extent possible, and that both these questions and the answers provided in response to them are recorded in a uniform fashion.

(b) FACTORS RELATING TO SWORN STATEMENTS.—Where practicable, any sworn or signed written statement taken of an alien as part of the record of a proceeding under section 235(b)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1225(b)(1)(A)) shall be accompanied by a recording of the interview which served as the basis for that sworn statement.

(c) INTERPRETERS.—The Secretary shall ensure that a competent interpreter, not affiliated with the government of the country from which the alien may claim asylum, is used when the interviewing officer does not speak a language understood by the alien.

(d) RECORDINGS IN IMMIGRATION PROCEEDINGS.—There shall be an audio or audio visual recording of interviews of aliens subject to expedited removal. The recording shall be included in the record of proceeding and shall be considered as evidence in any further proceedings involving the alien.

(e) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be construed to create any right, benefit,

trust, or responsibility, whether substantive or procedural, enforceable in law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person, nor does this section create any right of review in any administrative, judicial, or other proceeding.

SEC. 4404. SAFE THIRD COUNTRY.

Section 208(a)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1158(a)(2)(A)) is amended—

(1) by striking ''Attorney General'' each place it appears and inserting ''Secretary of Homeland Security''; and

(2) by striking ''removed, pursuant to a bilateral or multilateral agreement, to'' and inserting ''removed to''.

SEC. 4405. RENUNCIATION OF ASYLUM STATUS PURSUANT TO RETURN TO HOME COUNTRY.

(a) IN GENERAL.—Section 208(c) of the Immigration and Nationality Act (8 U.S.C. 1158(c)) is amended by adding at the end the following new paragraph:

''(4) RENUNCIATION OF STATUS PURSUANT TO RETURN TO HOME COUNTRY.—

''(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), any alien who is granted asylum status under this Act, who, ab-

sent changed country conditions, subsequently returns to the country of such alien's nationality or, in the case of an alien having no nationality, returns to any country in which such alien last habitually resided, and who applied for such status because of persecution or a well-founded fear of persecution in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, shall have his or her status terminated.

''(B) WAIVER.—The Secretary has discretion to waive subparagraph (A) if it is established to the satisfaction of the Secretary that the alien had a compelling reason for the return. The waiver may be sought prior to departure from the United States or upon return.

''(C) EXCEPTION FOR CERTAIN ALIENS FROM CUBA.—Subparagraph (A) shall not apply to an alien who is eligible for adjustment to that of an alien lawfully admitted for permanent residence pursuant to the Cuban Adjustment Act of 1966 (Public Law 89–732).''.

(b) CONFORMING AMENDMENT.—Section 208(c)(3) of the Immigration and Nationality Act (8 U.S.C.

1158(c)(3)) is amended by inserting after ''paragraph (2)'' the following: ''or (4)''.

SEC. 4406. NOTICE CONCERNING FRIVOLOUS ASYLUM APPLICATIONS.

(a) IN GENERAL.—Section 208(d)(4) of the Immigration and Nationality Act (8 U.S.C. 1158(d)(4)) is amended—

(1) in the matter preceding subparagraph (A), by inserting ''the Secretary of Homeland Security or'' before ''the Attorney General'';

(2) in subparagraph (A), by striking ''and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and'' and inserting a semicolon;

(3) in subparagraph (B), by striking the period and inserting ''; and''; and

(4) by adding at the end the following:

''(C) ensure that a written warning appears on the asylum application advising the alien of the consequences of filing a frivolous application and serving as notice to the alien of the consequence of filing a frivolous application.''.

(b) CONFORMING AMENDMENT.—Section 208(d)(6) of the Immigration and Nationality Act (8 U.S.C.

1158(d)(6)) is amended by striking ''If the'' and all that follows and inserting:

''(A) If the Secretary of Homeland Security or the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(C), the alien shall be permanently ineligible for any benefits under this chapter, effective as the date of the final determination of such an application;

''(B) An application is frivolous if the Secretary of Homeland Security or the Attorney General determines, consistent with subparagraph (C), that—

''(i) it is so insufficient in substance that it is clear that the applicant knowingly filed the application solely or in part to delay removal from the United States, to seek employment authorization as an applicant for asylum pursuant to regulations issued pursuant to paragraph (2), or to seek issuance of a Notice to Appeal in order to pursue Cancellation of Removal under section 240A(b); or

''(ii) any of its material elements are deliberately fabricated.

''(C) In determining that an application is frivolous, the Secretary or the Attorney General, must be satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to clarify any discrepancies or implausible aspects of the claim.

''(D) For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3).) or protection pursuant to the Convention Against Torture.''.

SEC. 4407. ANTI-FRAUD INVESTIGATIVE WORK PRODUCT.

(a) ASYLUM CREDIBILITY DETERMINATIONS.—Section 208(b)(1)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(1)(B)(iii)) is amended by inserting after ''all relevant factors'' the following: '', including statements made to, and investigative reports prepared by, immigration authorities and other government officials''.

(b) RELIEF FOR REMOVAL CREDIBILITY DETERMINATIONS.—Section 240(c)(4)(C) of the Immigration and Nationality Act (8 U.S.C. 1229a(c)(4)(C)) is amended by inserting after ''all relevant factors'' the following: '',

including statements made to, and investigative reports prepared by, immigration authorities and other government officials''.

SEC. 4408. PENALTIES FOR ASYLUM FRAUD.

Section 1001 of title 18 is amended by inserting at the end of the paragraph—

''(d) Whoever, in any matter before the Secretary of Homeland Security or the Attorney General pertaining to asylum under section 208 of the Immigration and Nationality Act or withholding of removal under section 241(b)(3) of such Act, knowingly and willfully—

''(1) makes any materially false, fictitious, or fraudulent statement or representation; or

''(2) makes or uses any false writings or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 10 years, or both.''.

SEC. 4409. STATUTE OF LIMITATIONS FOR ASYLUM FRAUD.

Section 3291 of title 18 is amended—

(1) by striking ''1544,'' and inserting ''1544 and 1546,'';

(2) by striking ''offense.'' and inserting ''offense or within 10 years after the fraud is discovered.''.

SEC. 4410. TECHNICAL AMENDMENTS.

Section 208 of the Immigration and Nationality Act (8 U.S.C. 1158) is amended—

(1) in subsection (a)—

(A) in paragraph (2)(D), by inserting ''Secretary of Homeland Security or the'' before ''Attorney General''; and

(B) in paragraph (3), by inserting ''Secretary of Homeland Security or the'' before ''Attorney General'';

(2) in subsection (b)(2), by inserting ''Secretary of Homeland Security or the'' before ''Attorney General'' each place such term appears;

(3) in subsection (c)—

(A) in paragraph (1), by striking ''Attorney General'' each place such term appears and inserting ''Secretary of Homeland Security''; and

(B) in paragraph (3), by inserting ''Secretary of Homeland Security or the'' before ''Attorney General''; and

(4) in subsection (d)—

(A) in paragraph (1), by inserting ''Secretary of Homeland Security or the'' before ''Attorney General'' each place such term appears;

(B) in paragraph (2), by striking ''Attorney General'' and inserting ''Secretary of Homeland Security''; and

(C) in paragraph (5)—

(i) in subparagraph (A), by striking ''Attorney General'' and inserting ''Secretary of Homeland Security''; and

(ii) in subparagraph (B), by inserting ''Secretary of Homeland Security or the'' before ''Attorney General''.

TITLE V—UNACCOMPANIED AND ACCOMPANIED ALIEN MINORS APPREHENDED ALONG THE BORDER

SEC. 5501. REPATRIATION OF UNACCOMPANIED ALIEN CHILDREN.

(a) IN GENERAL.—Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) is amended—

(1) in subsection (a)—

(A) in paragraph (2)—

(i) by amending the heading to read as follows: ''RULES FOR UNACCOMPANIED ALIEN CHILDREN.—'';

(ii) in subparagraph (A)—

(I) in the matter preceding clause (i), by striking ''who is a national or habitual resident of a country that is contiguous with the United States'';

(II) in clause (i), by inserting ''and'' at the end;

(III) in clause (ii), by striking ''; and'' and inserting a period; and

(IV) by striking clause (iii);

(iii) in subparagraph (B)—

(I) in the matter preceding clause (i), by striking ''(8 U.S.C. 1101 et seq.) may—'' and inserting ''(8 U.S.C. 1101 et seq.)—'';

(II) in clause (i), by inserting before ''permit such child to withdraw'' the following: ''may''; and

(III) in clause (ii), by inserting before ''return such child'' the following: ''shall''; and

(iv) in subparagraph (C)—

(I) by amending the heading to read as follows: ''AGREEMENTS WITH FOREIGN COUNTRIES.—''; and

(II) in the matter preceding clause (i), by striking ''The Secretary of State shall negotiate agreements between the United States and countries contiguous to the United States'' and inserting ''The Secretary of State may negotiate agreements between the United States and any foreign country that the Secretary determines appropriate'';

(B) by redesignating paragraphs (3) through (5) as paragraphs (4) through (6), respectively, and inserting after paragraph (2) the following:

''(3) SPECIAL RULES FOR INTERVIEWING UNACCOMPANIED ALIEN CHILDREN.—An unaccompanied alien child shall be interviewed by a dedicated U.S. Citizenship and Immigration Services immigration officer with specialized training in interviewing child trafficking victims. Such officer shall be in plain clothes and shall not carry a weapon. The interview shall occur in a private room.''; and

(C) in paragraph (6)(D) (as so redesignated)—

(i) in the matter preceding clause (i), by striking ", except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2)," and inserting "who does not meet the criteria listed in paragraph (2)(A)"; and

(ii) in clause (i), by inserting before the semicolon at the end the following: ", which shall include a hearing before an immigration judge not later than 14 days after being screened under paragraph (4)";

(2) in subsection (b)—

(A) in paragraph (2)—

(i) in subparagraph (A), by inserting before the semicolon the following: "believed not to meet the criteria listed in subsection (a)(2)(A)"; and

(ii) in subparagraph (B), by inserting before the period the following: "and does not meet the criteria listed in subsection (a)(2)(A)"; and

(B) in paragraph (3), by striking "an unaccompanied alien child in custody shall" and all that follows, and inserting the following: "an unaccompanied alien child in custody—

''(A) in the case of a child who does not meet the criteria listed in subsection (a)(2)(A), shall transfer the custody of such child to the Secretary of Health and Human Services not later than 30 days after determining that such child is an unaccompanied alien child who does not meet such criteria; or

''(B) in the case of child who meets the criteria listed in subsection (a)(2)(A), may transfer the custody of such child to the Secretary of Health and Human Services after determining that such child is an unaccompanied alien child who meets such criteria.''; and

(3) in subsection (c)—

(A) in paragraph (3), by inserting at the end the following:

''(D) INFORMATION ABOUT INDIVIDUALS WITH WHOM CHILDREN ARE PLACED.—

''(i) INFORMATION TO BE PROVIDED TO HOMELAND SECURITY.—Before placing a child with an individual, the Secretary of Health and Human Services shall provide to the Secretary of Homeland Security, regarding the individual with whom the child will be placed, the following information:

''(I) The name of the individual.

''(II) The social security number of the individual.

''(III) The date of birth of the individual.

''(IV) The location of the individual's residence where the child will be placed.

''(V) The immigration status of the individual, if known.

''(VI) Contact information for the individual.

''(ii) SPECIAL RULE.—In the case of a child who was apprehended on or after June 15, 2012, and before the date of the enactment of this subparagraph, who the Secretary of Health and Human Services placed with an individual, the Secretary shall provide the information listed in clause (i) to the Secretary of Homeland Security not later than 90 days after such date of enactment.

''(iii) ACTIVITIES OF THE SECRETARY OF HOMELAND SECURITY.—Not later than 30 days after receiving the information

listed in clause (i), the Secretary of Homeland Security shall—

"(I) in the case that the immigration status of an individual with whom a child is placed is unknown, investigate the immigration status of that individual; and

"(II) upon determining that an individual with whom a child is placed is unlawfully present in the United States, initiate removal proceedings pursuant to chapter 4 of title II of the Immigration and Nationality Act (8 U.S.C. 1221 et seq.)."; and

(B) in paragraph (5)—

(i) by inserting after "to the greatest extent practicable" the following: "(at no expense to the Government)"; and

(ii) by striking "have counsel to represent them" and inserting "have access to counsel to represent them".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to any unauthorized alien child apprehended on or after June 15, 2012.

SEC. 5502. SPECIAL IMMIGRANT JUVENILE STATUS FOR IMMIGRANTS UNABLE TO REUNITE WITH EITHER PARENT.

Section 101(a)(27)(J)(i) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)(i)) is amended by striking ''1 or both of the immigrant's parents'' and inserting ''either of the immigrant's parents''.

SEC. 5503. JURISDICTION OF ASYLUM APPLICATIONS.

Section 208(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1158) is amended by striking subparagraph (C).

SEC. 5504. QUARTERLY REPORT TO CONGRESS.

Not later than January 5, 2019, and every 3 months thereafter—

(1) the Attorney General shall submit a report on—

(A) the total number of asylum cases filed by unaccompanied alien children and completed by an immigration judge during the 3 month period preceding the date of the report, and the percentage of those cases in which asylum was granted; and

(B) the number of unaccompanied alien children who failed to appear for any proceeding before an immigration judge during the

3 month period preceding the date of the report; and

(2) the Secretary of Homeland Security shall submit a report on the total number of applications for asylum, filed by unaccompanied alien children, that were adjudicated during the 3 month period preceding the date of the report and the percentage of those applications that were granted.

SEC. 5505. BIANNUAL REPORT TO CONGRESS.

Not later than January 5, 2019, and every 6 months thereafter, the Attorney General shall submit a report to Congress on each crime for which an unaccompanied alien child is charged or convicted during the previous 6-month period following their release from the custody of the Secretary of Homeland Security pursuant to section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232).

SEC. 5506. CLARIFICATION OF STANDARDS FOR FAMILY DETENTION.

(a) IN GENERAL.—Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) is amended by adding at the end the following:

''(j) CONSTRUCTION.—

''(1) IN GENERAL.—Notwithstanding any other provision of law, judicial determination, consent decree, or settlement agreement, the detention of any alien child who is not an unaccompanied alien child shall be governed by sections 217, 235, 236, and 241 of the Immigration and Nationality Act (8 U.S.C. 1187, 1225, 1226, and 1231). There exists no presumption that an alien child who is not an unaccompanied alien child should not be detained, and all such determinations shall be in the discretion of the Secretary of Homeland Security.

''(2) RELEASE OF MINORS OTHER THAN UNACCOMPANIED ALIENS.—In no circumstances shall an alien minor who is not an unaccompanied alien child be released by the Secretary of Homeland Security other than to a parent or legal guardian.''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to all actions that occur before, on, or after the date of the enactment of this Act.

DIVISION C—BORDER ENFORCEMENT

SEC. 1100. SHORT TITLE.

This division may be cited as the ''Border Security for America Act of 2018''.

TITLE I—BORDER SECURITY

SEC. 1101. DEFINITIONS.

In this title:

(1) ADVANCED UNATTENDED SURVEILLANCE SENSORS.—The term ''advanced unattended surveillance sensors'' means sensors that utilize an onboard computer to analyze detections in an effort to discern between vehicles, humans, and animals, and ultimately filter false positives prior to transmission.

(2) APPROPRIATE CONGRESSIONAL COMMITTEE.—The term ''appropriate congressional committee'' has the meaning given the term in section 2(2) of the Homeland Security Act of 2002 (6 U.S.C. 101(2)).

(3) COMMISSIONER.—The term ''Commissioner'' means the Commissioner of U.S. Customs and Border Protection.

(4) HIGH TRAFFIC AREAS.—The term ''high traffic areas'' has the meaning given such term in section 102(e)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended by section 1111 of this division.

(5) OPERATIONAL CONTROL.—The term ''operational control'' has the meaning given such term in

section 2(b) of the Secure Fence Act of 2006 (8 U.S.C. 1701 note; Public Law 109–367).

(5) SECRETARY.—The term ''Secretary'' means the Secretary of Homeland Security.

(6) SITUATIONAL AWARENESS.—The term ''situational awareness'' has the meaning given such term in section 1092(a)(7) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 6 U.S.C. 223(a)(7)).

(7) SMALL UNMANNED AERIAL VEHICLE.—The term ''small unmanned aerial vehicle'' has the meaning given the term ''small unmanned aircraft'' in section 331 of the FAA Modernization and Reform Act of 2012 (Public Law 112–95; 49 U.S.C. 40101 note).

(8) TRANSIT ZONE.—The term ''transit zone'' has the meaning given such term in section 1092(a)(8) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 6 U.S.C. 223(a)(7)).

(9) UNMANNED AERIAL SYSTEM.—The term ''unmanned aerial system'' has the meaning given the term ''unmanned aircraft system'' in section 331 of the FAA Modernization and Reform Act of 2012 (Public Law 112–95; 49 U.S.C. 40101 note).

(10) UNMANNED AERIAL VEHICLE.—The term ''unmanned aerial vehicle'' has the meaning given the term ''unmanned aircraft'' in section 331 of the FAA Modernization and Reform Act of 2012 (Public Law 112–95; 49 U.S.C. 40101 note).

Subtitle A—Infrastructure and Equipment

SEC. 1111. STRENGTHENING THE REQUIREMENTS FOR BARRIERS ALONG THE SOUTHERN BORDER.

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Division C of Public Law 104–208; 8 U.S.C. 1103 note) is amended—

(1) by amending subsection (a) to read as follows:

''(a) IN GENERAL.—The Secretary of Homeland Security shall take such actions as may be necessary (including the removal of obstacles to detection of illegal entrants) to design, test, construct, install, deploy, and operate physical barriers, tactical infrastructure, and technology in the vicinity of the United States border to achieve situational awareness and operational control of the border and deter, impede, and detect illegal activity in high traffic areas.'';

(2) in subsection (b)—

(A) in the subsection heading, by striking ''FENCING AND ROAD IMPROVEMENTS'' and inserting ''PHYSICAL BARRIERS'';

(B) in paragraph (1)—

(i) in subparagraph (A)—

(I) by striking ''subsection (a)'' and inserting ''this section'';

(II) by striking ''roads, lighting, cameras, and sensors'' and inserting ''tactical infrastructure, and technology''; and

(III) by striking ''gain'' inserting ''achieve situational awareness and''; and

(ii) by amending subparagraph (B) to read as follows:

''(B) PHYSICAL BARRIERS AND TACTICAL INFRASTRUCTURE.—

''(i) IN GENERAL.—Not later than September 30, 2022, the Secretary of Homeland Security, in carrying out this section, shall deploy along the United States border the most practical and effective physical barriers and tactical infrastructure available for achieving situational

awareness and operational control of the border.

''(ii) CONSIDERATION FOR CERTAIN PHYSICAL BARRIERS AND TACTICAL INFRASTRUCTURE.—The deployment of physical barriers and tactical infrastructure under this subparagraph shall not apply in any area or region along the border where natural terrain features, natural barriers, or the remoteness of such area or region would make any such deployment ineffective, as determined by the Secretary, for the purposes of achieving situational awareness or operational control of such area or region.'';

(iii) in subparagraph (C)—

(I) by amending clause (i) to read as follows:

''(i) IN GENERAL.—In carrying out this section, the Secretary of Homeland Security shall, before constructing physical barriers in a specific area or region, consult with the Secretary of the Interior, the Secretary of Agriculture, appropriate representatives of Federal, State, local, and

tribal governments, and appropriate private property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such physical barriers are to be constructed.'';

(II) by redesignating clause (ii) as clause (iii); and

(III) by inserting after clause (i), as amended, the following new clause:

''(ii) NOTIFICATION.—Not later than 60 days after the consultation required under clause (i), the Secretary of Homeland Security shall notify the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate of the type of physical barriers, tactical infrastructure, or technology the Secretary has determined is most practical and effective to achieve situational awareness and operational control in a specific area or region and the other

alternatives the Secretary considered before making such a determination.''; and

(iv) by striking subparagraph (D);

(C) in paragraph (2)—

(i) by striking ''Attorney General'' and inserting ''Secretary of Homeland Security'';

(ii) by striking ''this subsection'' and inserting ''this section''; and

(iii) by striking ''construction of fences'' and inserting ''the construction of physical barriers''; and

(D) by amending paragraph (3) to read as follows:

''(3) AGENT SAFETY.—In carrying out this section, the Secretary of Homeland Security, when designing, constructing, and deploying physical barriers, tactical infrastructure, or technology, shall incorporate such safety features into such design, construction, or deployment of such physical barriers, tactical infrastructure, or technology, as the case may be, that the Secretary determines, in the Secretary's sole discretion, are necessary to maximize the safety and effectiveness of officers or agents of the Department of Homeland Security or of any

other Federal agency deployed in the vicinity of such physical barriers, tactical infrastructure, or technology.'';

(3) in subsection (c), by amending paragraph (1) to read as follows:

''(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements the Secretary, in the Secretary's sole discretion, determines necessary to ensure the expeditious design, testing, construction, installation, deployment, operation, and maintenance of the physical barriers, tactical infrastructure, and technology under this section. Any such decision by the Secretary shall be effective upon publication in the Federal Register.''; and

(4) by adding after subsection (d) the following new subsections:

''(e) TECHNOLOGY.—Not later than September 30, 2022, the Secretary of Homeland Security, in carrying out this section, shall deploy along the United States border the most practical and effective technology available for achieving situational awareness and operational control of the border.

''(f) LIMITATION ON REQUIREMENTS.—Nothing in this section may be construed as requiring the Secretary of Homeland Security to install tactical infrastructure, technology, and physical barriers in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain situational awareness and operational control over the international border at such location.

''(g) DEFINITIONS.—In this section:

''(1) HIGH TRAFFIC AREAS.—The term 'high traffic areas' means areas in the vicinity of the United States border that—

''(A) are within the responsibility of U.S. Customs and Border Protection; and

''(B) have significant unlawful cross-border activity, as determined by the Secretary of Homeland Security.

''(2) OPERATIONAL CONTROL.—The term 'operational control' has the meaning given such term in section 2(b) of the Secure Fence Act of 2006 (8 U.S.C. 1701 note; Public Law 109–367).

''(3) PHYSICAL BARRIERS.—The term 'physical barriers' includes reinforced fencing, border wall system, and levee walls.

''(4) SITUATIONAL AWARENESS.—The term 'situational awareness' has the meaning given such term in section 1092(a)(7) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328).

''(5) TACTICAL INFRASTRUCTURE.—The term 'tactical infrastructure' includes boat ramps, access gates, checkpoints, lighting, and roads.

''(6) TECHNOLOGY.—The term 'technology' includes border surveillance and detection technology, including the following:

''(A) Tower-based surveillance technology.

''(B) Deployable, lighter-than-air ground surveillance equipment.

''(C) Vehicle and Dismount Exploitation Radars (VADER).

''(D) 3-dimensional, seismic acoustic detection and ranging border tunneling detection technology.

''(E) Advanced unattended surveillance sensors.

''(F) Mobile vehicle-mounted and man-portable surveillance capabilities.

''(G) Unmanned aerial vehicles.

''(H) Other border detection, communication, and surveillance technology.

''(7) UNMANNED AERIAL VEHICLES.—The term 'unmanned aerial vehicle' has the meaning given the term 'unmanned aircraft' in section 331 of the FAA Modernization and Reform Act of 2012 (Public Law 112–95; 49 U.S.C. 40101 note).''.

SEC. 1112. AIR AND MARINE OPERATIONS FLIGHT HOURS.

(a) INCREASED FLIGHT HOURS.—The Secretary, after coordination with the Administrator of the Federal Aviation Administration, shall ensure that not fewer than 95,000 annual flight hours are carried out by Air and Marine Operations of U.S. Customs and Border Protection.

(b) UNMANNED AERIAL SYSTEM.—The Secretary shall ensure that Air and Marine Operations operate unmanned aerial systems on the southern border of the United States for not less than 24 hours per day for five days per week.

(c) CONTRACT AIR SUPPORT AUTHORIZATION.—The Commissioner shall contract for the unfulfilled identified air support mission critical hours, as identified by the Chief of the U.S. Border Patrol.

(d) PRIMARY MISSION.—The Commissioner shall ensure that—

(1) the primary missions for Air and Marine Operations are to directly support U.S. Border Patrol activities along the southern border of the United States and Joint Interagency Task Force South operations in the transit zone; and

(2) the Executive Assistant Commissioner of Air and Marine Operations assigns the greatest priority to support missions established by the Commissioner to carry out the requirements under this Act.

(e) HIGH-DEMAND FLIGHT HOUR REQUIREMENTS.—In accordance with subsection (d), the Commissioner shall ensure that U.S. Border Patrol Sector Chiefs—

(1) identify critical flight hour requirements; and

(2) direct Air and Marine Operations to support requests from Sector Chiefs as their primary mission.

(f) SMALL UNMANNED AERIAL VEHICLES.—

(1) IN GENERAL.—The Chief of the U.S. Border Patrol shall be the executive agent for U.S. Customs and Border Protection's use of small unmanned aerial vehicles for the purpose of meeting the U.S. Border Patrol's unmet flight hour operational requirements and to achieve situational awareness and operational control.

(2) COORDINATION.—In carrying out paragraph (1), the Chief of the U.S. Border Patrol shall—

(A) coordinate flight operations with the Administrator of the Federal Aviation Administration to ensure the safe and efficient operation of the National Airspace System; and

(B) coordinate with the Executive Assistant Commissioner for Air and Marine Operations of U.S. Customs and Border Protection to ensure the safety of other U.S. Customs and Border Protection aircraft flying in the vicinity of small unmanned aerial vehicles operated by the U.S. Border Patrol.

(3) CONFORMING AMENDMENT.—Paragraph (3) of section 411(e) of the Homeland Security Act of 2002 (6 U.S.C. 211(e)) is amended—

(A) in subparagraph (B), by striking ''and'' after the semicolon at the end;

(B) by redesignating subparagraph (C) as subparagraph (D); and

(C) by inserting after subparagraph (B) the following new subparagraph:

''(C) carry out the small unmanned aerial vehicle requirements pursuant to subsection (f)

of section 1112 of the Border Security for America Act of 2018; and''.

(g) SAVING CLAUSE.—Nothing in this section shall confer, transfer, or delegate to the Secretary, the Commissioner, the Executive Assistant Commissioner for Air and Marine Operations of U.S. Customs and Border Protection, or the Chief of the U.S. Border Patrol any authority of the Secretary of Transportation or the Administrator of the Federal Aviation Administration relating to the use of airspace or aviation safety.

SEC. 1113. CAPABILITY DEPLOYMENT TO SPECIFIC SECTORS AND TRANSIT ZONE.

(a) IN GENERAL.—Not later than September 30, 2022, the Secretary, in implementing section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by section 1111 of this division), and acting through the appropriate component of the Department of Homeland Security, shall deploy to each sector or region of the southern border and the northern border, in a prioritized manner to achieve situational awareness and operational control of such borders, the following additional capabilities:

(1) SAN DIEGO SECTOR.—For the San Diego sector, the following:

(A) Tower-based surveillance technology.

(B) Subterranean surveillance and detection technologies.

(C) To increase coastal maritime domain awareness, the following:

(i) Deployable, lighter-than-air surface surveillance equipment.

(ii) Unmanned aerial vehicles with maritime surveillance capability.

(iii) U.S. Customs and Border Protection maritime patrol aircraft.

(iv) Coastal radar surveillance systems.

(v) Maritime signals intelligence capabilities.

(D) Ultralight aircraft detection capabilities.

(E) Advanced unattended surveillance sensors.

(F) A rapid reaction capability supported by aviation assets.

(G) Mobile vehicle-mounted and man-portable surveillance capabilities.

(H) Man-portable unmanned aerial vehicles.

(I) Improved agent communications capabilities.

(2) EL CENTRO SECTOR.—For the El Centro sector, the following:

(A) Tower-based surveillance technology.

(B) Deployable, lighter-than-air ground surveillance equipment.

(C) Man-portable unmanned aerial vehicles.

(D) Ultralight aircraft detection capabilities.

(E) Advanced unattended surveillance sensors.

(F) A rapid reaction capability supported by aviation assets.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications capabilities.

(3) YUMA SECTOR.—For the Yuma sector, the following:

(A) Tower-based surveillance technology.

(B) Deployable, lighter-than-air ground surveillance equipment.

(C) Ultralight aircraft detection capabilities.

(D) Advanced unattended surveillance sensors.

(E) A rapid reaction capability supported by aviation assets.

(F) Mobile vehicle-mounted and man-portable surveillance systems.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications capabilities.

(4) TUCSON SECTOR.—For the Tucson sector, the following:

(A) Tower-based surveillance technology.

(B) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(C) Deployable, lighter-than-air ground surveillance equipment.

(D) Ultralight aircraft detection capabilities.

(E) Advanced unattended surveillance sensors.

(F) A rapid reaction capability supported by aviation assets.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications capabilities.

(5) EL PASO SECTOR.—For the El Paso sector, the following:

(A) Tower-based surveillance technology.

(B) Deployable, lighter-than-air ground surveillance equipment.

(C) Ultralight aircraft detection capabilities.

(D) Advanced unattended surveillance sensors.

(E) Mobile vehicle-mounted and man-portable surveillance systems.

(F) A rapid reaction capability supported by aviation assets.

(G) Mobile vehicle-mounted and man-portable surveillance capabilities.

(H) Man-portable unmanned aerial vehicles.

(I) Improved agent communications capabilities.

(6) BIG BEND SECTOR.—For the Big Bend sector, the following:

(A) Tower-based surveillance technology.

(B) Deployable, lighter-than-air ground surveillance equipment.

(C) Improved agent communications capabilities.

(D) Ultralight aircraft detection capabilities.

(E) Advanced unattended surveillance sensors.

(F) A rapid reaction capability supported by aviation assets.

(G) Mobile vehicle-mounted and man-portable surveillance capabilities.

(H) Man-portable unmanned aerial vehicles.

(I) Improved agent communications capabilities.

(7) DEL RIO SECTOR.—For the Del Rio sector, the following:

(A) Tower-based surveillance technology.

(B) Increased monitoring for cross-river dams, culverts, and footpaths.

(C) Improved agent communications capabilities.

(D) Improved maritime capabilities in the Amistad National Recreation Area.

(E) Advanced unattended surveillance sensors.

(F) A rapid reaction capability supported by aviation assets.

(G) Mobile vehicle-mounted and man-portable surveillance capabilities.

(H) Man-portable unmanned aerial vehicles.

(I) Improved agent communications capabilities.

(8) LAREDO SECTOR.—For the Laredo sector, the following:

(A) Tower-based surveillance technology.

(B) Maritime detection resources for the Falcon Lake region.

(C) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(D) Increased monitoring for cross-river dams, culverts, and footpaths.

(E) Ultralight aircraft detection capability.

(F) Advanced unattended surveillance sensors.

(G) A rapid reaction capability supported by aviation assets.

(H) Man-portable unmanned aerial vehicles.

(I) Improved agent communications capabilities.

(9) RIO GRANDE VALLEY SECTOR.—For the Rio Grande Valley sector, the following:

(A) Tower-based surveillance technology.

(B) Deployable, lighter-than-air ground surveillance equipment.

(C) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(D) Ultralight aircraft detection capability.

(E) Advanced unattended surveillance sensors.

(F) Increased monitoring for cross-river dams, culverts, footpaths.

(G) A rapid reaction capability supported by aviation assets.

(H) Increased maritime interdiction capabilities.

(I) Mobile vehicle-mounted and man-portable surveillance capabilities.

(J) Man-portable unmanned aerial vehicles.

(K) Improved agent communications capabilities.

(10) BLAINE SECTOR.—For the Blaine sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Coastal radar surveillance systems.

(C) Increased maritime interdiction capabilities.

(D) Mobile vehicle-mounted and man-portable surveillance capabilities.

(E) Advanced unattended surveillance sensors.

(F) Ultralight aircraft detection capabilities.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications capabilities.

(11) SPOKANE SECTOR.—For the Spokane sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Increased maritime interdiction capabilities.

(C) Mobile vehicle-mounted and man-portable surveillance capabilities.

(D) Advanced unattended surveillance sensors.

(E) Ultralight aircraft detection capabilities.

(F) Completion of six miles of the Bog Creek road.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications systems.

(12) HAVRE SECTOR.—For the Havre sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Mobile vehicle-mounted and man-portable surveillance capabilities.

(C) Advanced unattended surveillance sensors.

(D) Ultralight aircraft detection capabilities.

(E) Man-portable unmanned aerial vehicles.

(F) Improved agent communications systems.

(13) GRAND FORKS SECTOR.—For the Grand Forks sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Mobile vehicle-mounted and man-portable surveillance capabilities.

(C) Advanced unattended surveillance sensors.

(D) Ultralight aircraft detection capabilities.

(E) Man-portable unmanned aerial vehicles.

(F) Improved agent communications systems.

(14) DETROIT SECTOR.—For the Detroit sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Coastal radar surveillance systems.

(C) Increased maritime interdiction capabilities.

(D) Mobile vehicle-mounted and man-portable surveillance capabilities.

(E) Advanced unattended surveillance sensors.

(F) Ultralight aircraft detection capabilities.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications systems.

(15) BUFFALO SECTOR.—For the Buffalo sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Coastal radar surveillance systems.

(C) Increased maritime interdiction capabilities.

(D) Mobile vehicle-mounted and man-portable surveillance capabilities.

(E) Advanced unattended surveillance sensors.

(F) Ultralight aircraft detection capabilities.

(G) Man-portable unmanned aerial vehicles.

(H) Improved agent communications systems.

(16) SWANTON SECTOR.—For the Swanton sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Mobile vehicle-mounted and man-portable surveillance capabilities.

(C) Advanced unattended surveillance sensors.

(D) Ultralight aircraft detection capabilities.

(E) Man-portable unmanned aerial vehicles.

(F) Improved agent communications systems.

(17) HOULTON SECTOR.—For the Houlton sector, the following:

(A) Increased flight hours for aerial detection, interdiction, and monitoring operations capability.

(B) Mobile vehicle-mounted and man-portable surveillance capabilities.

(C) Advanced unattended surveillance sensors.

(D) Ultralight aircraft detection capabilities.

(E) Man-portable unmanned aerial vehicles.

(F) Improved agent communications systems.

(18) TRANSIT ZONE.—For the transit zone, the following:

(A) Not later than two years after the date of the enactment of this Act, an increase in the number of overall cutter, boat, and aircraft hours spent conducting interdiction operations over the average number of such hours during the preceding three fiscal years.

(B) Increased maritime signals intelligence capabilities.

(C) To increase maritime domain awareness, the following:

(i) Unmanned aerial vehicles with maritime surveillance capability.

(ii) Increased maritime aviation patrol hours.

(D) Increased operational hours for maritime security components dedicated to joint counter-smuggling and interdiction efforts with other Federal agencies, including the Deployable Specialized Forces of the Coast Guard.

(E) Coastal radar surveillance systems with long range day and night cameras capable of providing full maritime domain awareness of the United States territorial waters surrounding Puerto Rico, Mona Island, Desecheo Island, Vieques Island, Culebra Island, Saint Thomas, Saint John, and Saint Croix.

(b) TACTICAL FLEXIBILITY.—

(1) SOUTHERN AND NORTHERN LAND BORDERS.—

(A) IN GENERAL.—Beginning on September 30, 2021, or after the Secretary has deployed at least 25 percent of the capabilities required in each sector specified in subsection (a), whichever comes later, the Secretary may deviate from such capability deployments if the Secretary determines that such deviation is required to achieve situational awareness or operational control.

(B) NOTIFICATION.—If the Secretary exercises the authority described in subparagraph (A), the Secretary shall, not later than 90 days after such exercise, notify the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives regarding the deviation under such subparagraph that is the subject of such exercise. If the Secretary makes any changes to such deviation, the Secretary shall, not later than 90 days after any such change, notify such committees regarding such change.

(2) TRANSIT ZONE.—

(A) NOTIFICATION.—The Secretary shall notify the Committee on Homeland Security

and Governmental Affairs of the Senate, the Committee on Commerce, Science, and Transportation of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on Transportation and Infrastructure of the House of Representatives regarding the capability deployments for the transit zone specified in paragraph (18) of subsection (a), including information relating to—

(i) the number and types of assets and personnel deployed; and

(ii) the impact such deployments have on the capability of the Coast Guard to conduct its mission in the transit zone referred to in paragraph (18) of subsection (a).

(B) ALTERATION.—The Secretary may alter the capability deployments referred to in this section if the Secretary—

(i) determines, after consultation with the committees referred to in subparagraph (A), that such alteration is necessary; and

(ii) not later than 30 days after making a determination under clause (i), notifies the committees referred to in such subparagraph regarding such alteration, including information relating to—

(I) the number and types of assets and personnel deployed pursuant to such alteration; and

(II) the impact such alteration has on the capability of the Coast Guard to conduct its mission in the transit zone referred to in paragraph (18) of subsection (a).

(c) EXIGENT CIRCUMSTANCES.—

(1) IN GENERAL.—Notwithstanding subsection (b), the Secretary may deploy the capabilities referred to in subsection (a) in a manner that is inconsistent with the requirements specified in such subsection if, after the Secretary has deployed at least 25 percent of such capabilities, the Secretary determines that exigent circumstances demand such an inconsistent deployment or that such an inconsistent deployment is vital to the national security interests of the United States.

(2) NOTIFICATION.—The Secretary shall notify the Committee on Homeland Security of the House of Representative and the Committee on Homeland Security and Governmental Affairs of the Senate not later than 30 days after making a determination under paragraph (1). Such notification shall include a detailed justification regarding such determination.

SEC. 1114. U.S. BORDER PATROL ACTIVITIES.

The Chief of the U.S. Border Patrol shall prioritize the deployment of U.S. Border Patrol agents to as close to the physical land border as possible, consistent with border security enforcement priorities and accessibility to such areas.

SEC. 1115. BORDER SECURITY TECHNOLOGY PROGRAM MANAGEMENT.

(a) IN GENERAL.—Subtitle C of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et seq.) is amended by adding at the end the following new section:

"SEC. 435. BORDER SECURITY TECHNOLOGY PROGRAM MANAGEMENT.

''(a) MAJOR ACQUISITION PROGRAM DEFINED.—In this section, the term 'major acquisition program' means an acquisition program of the Department that is estimated by the Secretary to require an eventual total ex-

penditure of at least $300,000,000 (based on fiscal year 2017 constant dollars) over its life cycle cost.

''(b) PLANNING DOCUMENTATION.—For each border security technology acquisition program of the Department that is determined to be a major acquisition program, the Secretary shall—

''(1) ensure that each such program has a written acquisition program baseline approved by the relevant acquisition decision authority;

''(2) document that each such program is meeting cost, schedule, and performance thresholds as specified in such baseline, in compliance with relevant departmental acquisition policies and the Federal Acquisition Regulation; and

''(3) have a plan for meeting program implementation objectives by managing contractor performance.

''(c) ADHERENCE TO STANDARDS.—The Secretary, acting through the Under Secretary for Management and the Commissioner of U.S. Customs and Border Protection, shall ensure border security technology acquisition program managers who are responsible for carrying out this section adhere to relevant internal control standards identified by the Comptroller General of the United States. The Commissioner shall provide information, as needed,

to assist the Under Secretary in monitoring management of border security technology acquisition programs under this section.

''(d) PLAN.—The Secretary, acting through the Under Secretary for Management, in coordination with the Under Secretary for Science and Technology and the Commissioner of U.S. Customs and Border Protection, shall submit to the appropriate congressional committees a plan for testing, evaluating, and using independent verification and validation resources for border security technology. Under the plan, new border security technologies shall be evaluated through a series of assessments, processes, and audits to ensure—

''(1) compliance with relevant departmental acquisition policies and the Federal Acquisition Regulation; and

''(2) the effective use of taxpayer dollars.''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by inserting after the item relating to section 433 the following new item:

''Sec. 435. Border security technology program management.''.

(c) PROHIBITION ON ADDITIONAL AUTHORIZATION OF APPROPRIATIONS.—No additional funds are authorized to be appropriated to carry out section 435 of the Homeland Security Act of 2002, as added by subsection

(a). Such section shall be carried out using amounts otherwise authorized for such purposes.

SEC. 1116. REIMBURSEMENT OF STATES FOR DEPLOYMENT OF THE NATIONAL GUARD AT THE SOUTHERN BORDER.

(a) IN GENERAL.—With the approval of the Secretary and the Secretary of Defense, the Governor of a State may order any units or personnel of the National Guard of such State to perform operations and missions under section 502(f) of title 32, United States Code, along the southern border for the purposes of assisting U.S. Customs and Border Protection to achieve situational awareness and operational control of the border.

(b) ASSIGNMENT OF OPERATIONS AND MISSIONS.—

(1) IN GENERAL.—National Guard units and personnel deployed under subsection (a) may be assigned such operations and missions specified in subsection (c) as may be necessary to secure the southern border.

(2) NATURE OF DUTY.—The duty of National Guard personnel performing operations and missions described in paragraph (1) shall be full-time duty under title 32, United States Code.

(c) RANGE OF OPERATIONS AND MISSIONS.—The operations and missions assigned under subsection (b) shall include the temporary authority to—

(1) construct reinforced fencing or other physical barriers;

(2) operate ground-based surveillance systems;

(3) operate unmanned and manned aircraft;

(4) provide radio communications interoperability between U.S. Customs and Border Protection and State, local, and tribal law enforcement agencies;

(5) construct checkpoints along the Southern border to bridge the gap to long-term permanent checkpoints; and

(6) provide intelligence support.

(d) MATERIEL AND LOGISTICAL SUPPORT.—The Secretary of Defense shall deploy such materiel, equipment, and logistical support as may be necessary to ensure success of the operations and missions conducted by the National Guard under this section.

(e) REIMBURSEMENT REQUIRED.—

(1) IN GENERAL.—The Secretary of Defense shall reimburse States for the cost of the deployment of any units or personnel of the National Guard to perform operations and missions in full-time State

Active Duty in support of a southern border mission. The Secretary of Defense may not seek reimbursement from the Secretary for any reimbursements paid to States for the costs of such deployments.

(2) LIMITATION.—The total amount of reimbursements under this section may not exceed $35,000,000 for any fiscal year.

SEC. 1117. NATIONAL GUARD SUPPORT TO SECURE THE SOUTHERN BORDER.

(a) IN GENERAL.—The Secretary of Defense, with the concurrence of the Secretary, shall provide assistance to U.S. Customs and Border Protection for purposes of increasing ongoing efforts to secure the southern border.

(b) TYPES OF ASSISTANCE AUTHORIZED.—The assistance provided under subsection (a) may include—

(1) deployment of manned aircraft, unmanned aerial surveillance systems, and ground-based surveillance systems to support continuous surveillance of the southern border; and

(2) intelligence analysis support.

(c) MATERIEL AND LOGISTICAL SUPPORT.—The Secretary of Defense may deploy such materiel, equipment, and logistics support as may be necessary to ensure the effectiveness of the assistance provided under subsection (a).

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for the Department of Defense $75,000,000 to provide assistance under this section. The Secretary of Defense may not seek reimbursement from the Secretary for any assistance provided under this section.

(e) REPORTS.—

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act and annually thereafter, the Secretary of Defense shall submit a report to the appropriate congressional defense committees (as defined in section 101(a)(16) of title 10, United States Code) regarding any assistance provided under subsection (a) during the period specified in paragraph (3).

(2) ELEMENTS.—Each report under paragraph (1) shall include, for the period specified in paragraph (3), a description of—

(A) the assistance provided;

(B) the sources and amounts of funds used to provide such assistance; and

(C) the amounts obligated to provide such assistance.

(3) PERIOD SPECIFIED.—The period specified in this paragraph is—

(A) in the case of the first report required under paragraph (1), the 90-day period beginning on the date of the enactment of this Act; and

(B) in the case of any subsequent report submitted under paragraph (1), the calendar year for which the report is submitted.

SEC. 1118. PROHIBITIONS ON ACTIONS THAT IMPEDE BORDER SECURITY ON CERTAIN FEDERAL LAND.

(a) PROHIBITION ON INTERFERENCE WITH U.S. CUSTOMS AND BORDER PROTECTION.—

(1) IN GENERAL.—The Secretary concerned may not impede, prohibit, or restrict activities of U.S. Customs and Border Protection on covered Federal land to carry out the activities described in subsection (b).

(2) APPLICABILITY.—The authority of U.S. Customs and Border Protection to conduct activities described in subsection (b) on covered Federal land applies without regard to whether a state of emergency exists.

(b) AUTHORIZED ACTIVITIES OF U.S. CUSTOMS AND BORDER PROTECTION.—

(1) IN GENERAL.—U.S. Customs and Border Protection shall have immediate access to covered

Federal land to conduct the activities described in paragraph (2) on such land to prevent all unlawful entries into the United States, including entries by terrorists, unlawful aliens, instruments of terrorism, narcotics, and other contraband through the southern border or the northern border.

(2) ACTIVITIES DESCRIBED.—The activities described in this paragraph are—

(A) the execution of search and rescue operations;

(B) the use of motorized vehicles, foot patrols, and horseback to patrol the border area, apprehend illegal entrants, and rescue individuals; and

(C) the design, testing, construction, installation, deployment, and operation of physical barriers, tactical infrastructure, and technology pursuant to section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by section 1111 of this division).

(c) CLARIFICATION RELATING TO WAIVER AUTHORITY.—

(1) IN GENERAL.—The activities of U.S. Customs and Border Protection described in subsection

(b)(2) may be carried out without regard to the provisions of law specified in paragraph (2).

(2) PROVISIONS OF LAW SPECIFIED.—The provisions of law specified in this section are all Federal, State, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the following laws:

(A) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(C) The Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) (commonly referred to as the ''Clean Water Act'').

(D) Division A of subtitle III of title 54, United States Code (54 U.S.C. 300301 et seq.) (formerly known as the ''National Historic Preservation Act'').

(E) The Migratory Bird Treaty Act (16 U.S.C. 703 et seq.).

(F) The Clean Air Act (42 U.S.C. 7401 et seq.).

(G) The Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa et seq.).

(H) The Safe Drinking Water Act (42 U.S.C. 300f et seq.).

(I) The Noise Control Act of 1972 (42 U.S.C. 4901 et seq.).

(J) The Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(K) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.).

(L) Chapter 3125 of title 54, United States Code (formerly known as the ''Archaeological and Historic Preservation Act'').

(M) The Antiquities Act (16 U.S.C. 431 et seq.).

(N) Chapter 3203 of title 54, United States Code (formerly known as the ''Historic Sites, Buildings, and Antiquities Act'').

(O) The Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.).

(P) The Farmland Protection Policy Act (7 U.S.C. 4201 et seq.).

(Q) The Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(R) The Wilderness Act (16 U.S.C. 1131 et seq.).

(S) The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

(T) The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd et seq.).

(U) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a et seq.).

(V) The Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).

(W) Subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the ''Administrative Procedure Act'').

(X) The Otay Mountain Wilderness Act of 1999 (Public Law 106–145).

(Y) Sections 102(29) and 103 of the California Desert Protection Act of 1994 (Public Law 103–433).

(Z) Division A of subtitle I of title 54, United States Code (formerly known as the ''National Park Service Organic Act''.

(AA) The National Park Service General Authorities Act (Public Law 91–383, 16 U.S.C. 1a–1 et seq.).

(BB) Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978 (Public Law 95–625).

(CC) Sections 301(a) through (f) of the Arizona Desert Wilderness Act (Public Law 101–628).

(DD) The Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(EE) The Eagle Protection Act (16 U.S.C. 668 et seq.).

(FF) The Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.).

(GG) The American Indian Religious Freedom Act (42 U.S.C. 1996).

(HH) The Religious Freedom Restoration Act (42 U.S.C. 2000bb).

(II) The National Forest Management Act of 1976 (16 U.S.C. 1600 et seq.).

(JJ) The Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. 528 et seq.).

(3) APPLICABILITY OF WAIVER TO SUCCESSOR LAWS.—If a provision of law specified in paragraph (2) was repealed and incorporated into title 54, United States Code, after April 1, 2008, and before

the date of the enactment of this Act, the waiver described in paragraph (1) shall apply to the provision of such title that corresponds to the provision of law specified in paragraph (2) to the same extent the waiver applied to that provision of law.

(4) SAVINGS CLAUSE.—The waiver authority under this subsection may not be construed as affecting, negating, or diminishing in any manner the applicability of section 552 of title 5, United States Code (commonly referred to as the ''Freedom of Information Act''), in any relevant matter.

(d) PROTECTION OF LEGAL USES.—This section may not be construed to provide—

(1) authority to restrict legal uses, such as grazing, hunting, mining, or recreation or the use of backcountry airstrips, on land under the jurisdiction of the Secretary of the Interior or the Secretary of Agriculture; or

(2) any additional authority to restrict legal access to such land.

(e) EFFECT ON STATE AND PRIVATE LAND.—This section shall—

(1) have no force or effect on State lands or private lands; and

(2) not provide authority on or access to State lands or private lands.

(f) TRIBAL SOVEREIGNTY.—Nothing in this section may be construed to supersede, replace, negate, or diminish treaties or other agreements between the United States and Indian tribes.

(g) MEMORANDA OF UNDERSTANDING.—The requirements of this section shall not apply to the extent that such requirements are incompatible with any memorandum of understanding or similar agreement entered into between the Commissioner and a National Park Unit before the date of the enactment of this Act.

(h) DEFINITIONS.—In this section:

(1) COVERED FEDERAL LAND.—The term ''covered Federal land'' includes all land under the control of the Secretary concerned that is located within 100 miles of the southern border or the northern border.

(2) SECRETARY CONCERNED.—The term ''Secretary concerned'' means—

(A) with respect to land under the jurisdiction of the Department of Agriculture, the Secretary of Agriculture; and

(B) with respect to land under the jurisdiction of the Department of the Interior, the Secretary of the Interior.

SEC. 1119. LANDOWNER AND RANCHER SECURITY ENHANCEMENT.

(a) ESTABLISHMENT OF NATIONAL BORDER SECURITY ADVISORY COMMITTEE.—The Secretary shall establish a National Border Security Advisory Committee, which—

(1) may advise, consult with, report to, and make recommendations to the Secretary on matters relating to border security matters, including—

(A) verifying security claims and the border security metrics established by the Department of Homeland Security under section 1092 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 6 U.S.C. 223); and

(B) discussing ways to improve the security of high traffic areas along the northern border and the southern border; and

(2) may provide, through the Secretary, recommendations to Congress.

(b) CONSIDERATION OF VIEWS.—The Secretary shall consider the information, advice, and recommendations of

the National Border Security Advisory Committee in formulating policy regarding matters affecting border security.

(c) MEMBERSHIP.—The National Border Security Advisory Committee shall consist of at least one member from each State who—

(1) has at least five years practical experience in border security operations; or

(2) lives and works in the United States within 80 miles from the southern border or the northern border.

(d) NONAPPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the National Border Security Advisory Committee.

SEC. 1120. ERADICATION OF CARRIZO CANE AND SALT CEDAR.

(a) IN GENERAL.—Not later than September 30, 2022, the Secretary, after coordinating with the heads of the relevant Federal, State, and local agencies, shall begin eradicating the carrizo cane plant and any salt cedar along the Rio Grande River that impedes border security operations.

(b) EXTENT.—The waiver authority under subsection (c) of section 102 of the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note), as amended by section 1111 of this division, shall extend to activities carried out pursuant to this section.

SEC. 1121. SOUTHERN BORDER THREAT ANALYSIS.

(a) THREAT ANALYSIS.—

(1) REQUIREMENT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit to the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a Southern border threat analysis.

(2) CONTENTS.—The analysis submitted under paragraph (1) shall include an assessment of—

(A) current and potential terrorism and criminal threats posed by individuals and organized groups seeking—

(i) to unlawfully enter the United States through the Southern border; or

(ii) to exploit security vulnerabilities along the Southern border;

(B) improvements needed at and between ports of entry along the Southern border to prevent terrorists and instruments of terror from entering the United States;

(C) gaps in law, policy, and coordination between State, local, or tribal law enforcement, international agreements, or tribal agreements that hinder effective and efficient border security, counterterrorism, and anti-human smuggling and trafficking efforts;

(D) the current percentage of situational awareness achieved by the Department along the Southern border;

(E) the current percentage of operational control achieved by the Department on the Southern border; and

(F) traveler crossing times and any potential security vulnerability associated with prolonged wait times.

(3) ANALYSIS REQUIREMENTS.—In compiling the Southern border threat analysis required under this subsection, the Secretary shall consider and examine—

(A) the technology needs and challenges, including such needs and challenges identified as a result of previous investments that have not fully realized the security and operational benefits that were sought;

(B) the personnel needs and challenges, including such needs and challenges associated with recruitment and hiring;

(C) the infrastructure needs and challenges;

(D) the roles and authorities of State, local, and tribal law enforcement in general border security activities;

(E) the status of coordination among Federal, State, local, tribal, and Mexican law enforcement entities relating to border security;

(F) the terrain, population density, and climate along the Southern border; and

(G) the international agreements between the United States and Mexico related to border security.

(4) CLASSIFIED FORM.—To the extent possible, the Secretary shall submit the Southern border threat analysis required under this subsection in unclassified form, but may submit a portion of the threat analysis in classified form if the Secretary determines such action is appropriate.

(b) U.S. BORDER PATROL STRATEGIC PLAN.—

(1) IN GENERAL.—Not later than 180 days after the submission of the threat analysis required

under subsection (a) or June 30, 2018, and every five years thereafter, the Secretary, acting through the Chief of the U.S. Border Patrol, shall issue a Border Patrol Strategic Plan.

(2) CONTENTS.—The Border Patrol Strategic Plan required under this subsection shall include a consideration of—

(A) the Southern border threat analysis required under subsection (a), with an emphasis on efforts to mitigate threats identified in such threat analysis;

(B) efforts to analyze and disseminate border security and border threat information between border security components of the Department and other appropriate Federal departments and agencies with missions associated with the Southern border;

(C) efforts to increase situational awareness, including—

(i) surveillance capabilities, including capabilities developed or utilized by the Department of Defense, and any appropriate technology determined to be excess by the Department of Defense; and

(ii) the use of manned aircraft and unmanned aerial systems, including camera and sensor technology deployed on such assets;

(D) efforts to detect and prevent terrorists and instruments of terrorism from entering the United States;

(E) efforts to detect, interdict, and disrupt aliens and illicit drugs at the earliest possible point;

(F) efforts to focus intelligence collection to disrupt transnational criminal organizations outside of the international and maritime borders of the United States;

(G) efforts to ensure that any new border security technology can be operationally integrated with existing technologies in use by the Department;

(H) any technology required to maintain, support, and enhance security and facilitate trade at ports of entry, including nonintrusive detection equipment, radiation detection equipment, biometric technology, surveillance systems, and other sensors and technology that the Secretary determines to be necessary;

(I) operational coordination unity of effort initiatives of the border security components of the Department, including any relevant task forces of the Department;

(J) lessons learned from Operation Jumpstart and Operation Phalanx;

(K) cooperative agreements and information sharing with State, local, tribal, territorial, and other Federal law enforcement agencies that have jurisdiction on the Northern border or the Southern border;

(L) border security information received from consultation with State, local, tribal, territorial, and Federal law enforcement agencies that have jurisdiction on the Northern border or the Southern border, or in the maritime environment, and from border community stakeholders (including through public meetings with such stakeholders), including representatives from border agricultural and ranching organizations and representatives from business and civic organizations along the Northern border or the Southern border;

(M) staffing requirements for all departmental border security functions;

(N) a prioritized list of departmental research and development objectives to enhance the security of the Southern border;

(O) an assessment of training programs, including training programs for—

(i) identifying and detecting fraudulent documents;

(ii) understanding the scope of enforcement authorities and the use of force policies; and

(iii) screening, identifying, and addressing vulnerable populations, such as children and victims of human trafficking; and

(P) an assessment of how border security operations affect border crossing times.

SEC. 1122. AMENDMENTS TO U.S. CUSTOMS AND BORDER PROTECTION.

(a) DUTIES.—Subsection (c) of section 411 of the Homeland Security Act of 2002 (6 U.S.C. 211) is amended—

(1) in paragraph (18), by striking ''and'' after the semicolon at the end;

(2) by redesignating paragraph (19) as paragraph (21); and

(3) by inserting after paragraph (18) the following new paragraphs:

''(19) administer the U.S. Customs and Border Protection public private partnerships under subtitle G;

''(20) administer preclearance operations under the Preclearance Authorization Act of 2015 (19 U.S.C. 4431 et seq.; enacted as subtitle B of title VIII of the Trade Facilitation and Trade Enforcement Act of 2015; 19 U.S.C. 4301 et seq.); and''.

(b) OFFICE OF FIELD OPERATIONS STAFFING.—Subparagraph (A) of section 411(g)(5) of the Homeland Security Act of 2002 (6 U.S.C. 211(g)(5)) is amended by inserting before the period at the end the following: ''compared to the number indicated by the current fiscal year work flow staffing model''.

(c) IMPLEMENTATION PLAN.—Subparagraph (B) of section 814(e)(1) of the Preclearance Authorization Act of 2015 (19 U.S.C. 4433(e)(1); enacted as subtitle B of title VIII of the Trade Facilitation and Trade Enforcement Act of 2015; 19 U.S.C. 4301 et seq.) is amended to read as follows:

''(B) a port of entry vacancy rate which compares the number of officers identified in subparagraph (A) with the number of officers

at the port at which such officer is currently assigned.''.

(d) DEFINITION.—Subsection (r) of section 411 of the Homeland Security Act of 2002 (6 U.S.C. 211) is amended—

(1) by striking ''this section, the terms'' and inserting the following: ''this section:

''(1) the terms'';

(2) in paragraph (1), as added by subparagraph (A), by striking the period at the end and inserting ''; and''; and

(3) by adding at the end the following new paragraph:

''(2) the term 'unmanned aerial systems' has the meaning given the term 'unmanned aircraft system' in section 331 of the FAA Modernization and Reform Act of 2012 (Public Law 112–95; 49 U.S.C. 40101 note).''.

SEC. 1123. AGENT AND OFFICER TECHNOLOGY USE.

In carrying out section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by section 1111 of this division) and section 1113 of this division, the Secretary shall, to the greatest extent practicable, ensure that technology deployed to gain situational awareness and operational control of the bor-

der be provided to front-line officers and agents of the Department of Homeland Security.

SEC. 1124. INTEGRATED BORDER ENFORCEMENT TEAMS.

(a) IN GENERAL.—Subtitle C of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et seq.), as amended by section 1115 of this division, is further amended by adding at the end the following new section:

"SEC. 436. INTEGRATED BORDER ENFORCEMENT TEAMS.

''(a) ESTABLISHMENT.—The Secretary shall establish within the Department a program to be known as the Integrated Border Enforcement Team program (referred to in this section as 'IBET').

''(b) PURPOSE.—The Secretary shall administer the IBET program in a manner that results in a cooperative approach between the United States and Canada to—

''(1) strengthen security between designated ports of entry;

''(2) detect, prevent, investigate, and respond to terrorism and violations of law related to border security;

''(3) facilitate collaboration among components and offices within the Department and international partners;

''(4) execute coordinated activities in furtherance of border security and homeland security; and

''(5) enhance information-sharing, including the dissemination of homeland security information among such components and offices.

''(c) COMPOSITION AND LOCATION OF IBETS.—

''(1) COMPOSITION.—IBETs shall be led by the United States Border Patrol and may be comprised of personnel from the following:

''(A) Other subcomponents of U.S. Customs and Border Protection.

''(B) U.S. Immigration and Customs Enforcement, led by Homeland Security Investigations.

''(C) The Coast Guard, for the purpose of securing the maritime borders of the United States.

''(D) Other Department personnel, as appropriate.

''(E) Other Federal departments and agencies, as appropriate.

''(F) Appropriate State law enforcement agencies.

''(G) Foreign law enforcement partners.

''(H) Local law enforcement agencies from affected border cities and communities.

''(I) Appropriate tribal law enforcement agencies.

''(2) LOCATION.—The Secretary is authorized to establish IBETs in regions in which such teams can contribute to IBET missions, as appropriate. When establishing an IBET, the Secretary shall consider the following:

''(A) Whether the region in which the IBET would be established is significantly impacted by cross-border threats.

''(B) The availability of Federal, State, local, tribal, and foreign law enforcement resources to participate in an IBET.

''(C) Whether, in accordance with paragraph (3), other joint cross-border initiatives already take place within the region in which the IBET would be established, including other Department cross-border programs such as the Integrated Cross-Border Maritime Law Enforcement Operation Program established under section 711 of the Coast Guard and Maritime Transportation Act of 2012 (46 U.S.C. 70101 note) or the Border Enforcement Security Task Force established under section 432.

''(3) DUPLICATION OF EFFORTS.—In determining whether to establish a new IBET or to expand an existing IBET in a given region, the Secretary shall ensure that the IBET under consideration does not duplicate the efforts of other existing interagency task forces or centers within such region, including the Integrated Cross-Border Maritime Law Enforcement Operation Program established under section 711 of the Coast Guard and Maritime Transportation Act of 2012 (46 U.S.C. 70101 note) or the Border Enforcement Security Task Force established under section 432.

''(d) OPERATION.—

''(1) IN GENERAL.—After determining the regions in which to establish IBETs, the Secretary may—

''(A) direct the assignment of Federal personnel to such IBETs; and

''(B) take other actions to assist Federal, State, local, and tribal entities to participate in such IBETs, including providing financial assistance, as appropriate, for operational, administrative, and technological costs associated with such participation.

''(2) LIMITATION.—Coast Guard personnel assigned under paragraph (1) may be assigned only for the purposes of securing the maritime borders of the United States, in accordance with subsection (c)(1)(C).

''(e) COORDINATION.—The Secretary shall coordinate the IBET program with other similar border security and antiterrorism programs within the Department in accordance with the strategic objectives of the Cross-Border Law Enforcement Advisory Committee.

''(f) MEMORANDA OF UNDERSTANDING.—The Secretary may enter into memoranda of understanding with appropriate representatives of the entities specified in subsection (c)(1) necessary to carry out the IBET program.

''(g) REPORT.—Not later than 180 days after the date on which an IBET is established and biannually thereafter for the following six years, the Secretary shall submit to the appropriate congressional committees, including the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate, and in the case of Coast Guard personnel used to secure the maritime borders of the United States, additionally to the Committee on Transportation and Infrastructure of the House of Representatives, a report that—

''(1) describes the effectiveness of IBETs in fulfilling the purposes specified in subsection (b);

''(2) assess the impact of certain challenges on the sustainment of cross-border IBET operations, including challenges faced by international partners;

''(3) addresses ways to support joint training for IBET stakeholder agencies and radio interoperability to allow for secure cross-border radio communications; and

''(4) assesses how IBETs, Border Enforcement Security Task Forces, and the Integrated Cross-Border Maritime Law Enforcement Operation Program can better align operations, including interdiction and investigation activities.''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by adding after the item relating to section 435 the following new item:

''Sec. 436. Integrated Border Enforcement Teams.''.

SEC. 1125. TUNNEL TASK FORCES.

The Secretary is authorized to establish Tunnel Task Forces for the purposes of detecting and remediating tunnels that breach the international border of the United States.

SEC. 1126. PILOT PROGRAM ON USE OF ELECTROMAGNETIC SPECTRUM IN SUPPORT OF BORDER SECURITY OPERATIONS.

(a) IN GENERAL.—The Commissioner of U.S. Customs and Border Protection, in consultation with the Assistant Secretary of Commerce for Communications and Information, shall conduct a pilot program to test and evaluate the use of electromagnetic spectrum by U.S. Customs and Border Protection in support of border security operations through—

(1) ongoing management and monitoring of spectrum to identify threats such as unauthorized spectrum use, and the jamming and hacking of United States communications assets, by persons engaged in criminal enterprises;

(2) automated spectrum management to enable greater efficiency and speed for U.S. Customs and Border Protection in addressing emerging challenges in overall spectrum use on the United States border; and

(3) coordinated use of spectrum resources to better facilitate interoperability and interagency cooperation and interdiction efforts at or near the United States border.

(b) REPORT TO CONGRESS.—Not later than 180 days after the conclusion of the pilot program conducted under

subsection (a), the Commissioner of U.S. Customs and Border Protection shall submit to the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Commerce, Science, and Transportation of the Senate a report on the findings and data derived from such program.

SEC. 1127. HOMELAND SECURITY FOREIGN ASSISTANCE.

(a) IN GENERAL.—Subtitle C of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et seq.), as amended by sections 1115 and 1124 of this division, is further amended by adding at the end the following new section:

"SEC. 437. SECURITY ASSISTANCE.

''(a) IN GENERAL.—The Secretary, with the concurrence of the Secretary of State, may provide to a foreign government, financial assistance and, with or without reimbursement, security assistance, including equipment, training, maintenance, supplies, and sustainment support.

''(b) DETERMINATION.—The Secretary may only provide financial assistance or security assistance pursuant to subsection (a) if the Secretary determines that such assistance would enhance the recipient government's capacity to—

''(1) mitigate the risk or threat of transnational organized crime and terrorism;

''(2) address irregular migration flows that may affect the United States, including any detention or removal operations of the recipient government; or

''(3) protect and expedite legitimate trade and travel.

''(c) LIMITATION ON TRANSFER.—The Secretary may not—

''(1) transfer any equipment or supplies that are designated as a munitions item or controlled on the United States Munitions List, pursuant to section 38 of the Foreign Military Sales Act (22 U.S.C. 2778); or

''(2) transfer any vessel or aircraft pursuant to this section.

''(d) RELATED TRAINING.—In conjunction with a transfer of equipment pursuant to subsection (a), the Secretary may provide such equipment-related training and assistance as the Secretary determines necessary.

''(e) MAINTENANCE OF TRANSFERRED EQUIPMENT.—The Secretary may provide for the maintenance of transferred equipment through service contracts or other means, with or without reimbursement, as the Secretary determines necessary.

''(f) REIMBURSEMENT OF EXPENSES.—

''(1) IN GENERAL.—The Secretary may collect payment from the receiving entity for the provision of security assistance under this section, including equipment, training, maintenance, supplies, sustainment support, and related shipping costs.

''(2) TRANSFER.—Notwithstanding any other provision of law, to the extent the Secretary does not collect payment pursuant to paragraph (1), any amounts appropriated or otherwise made available to the Department of Homeland Security may be transferred to the account that finances the security assistance provided pursuant to subsection (a).

''(g) RECEIPTS CREDITED AS OFFSETTING COLLECTIONS.—Notwithstanding section 3302 of title 31, United States Code, any reimbursement collected pursuant to subsection (f) shall—

''(1) be credited as offsetting collections to the account that finances the security assistance under this section for which such reimbursement is received; and

''(2) remain available until expended for the purpose of carrying out this section.

''(h) RULE OF CONSTRUCTION.—Nothing in this section may be construed as affecting, augmenting, or diminishing the authority of the Secretary of State.''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by inserting after the item relating to section 436 the following new item:

''Sec. 437. Security assistance.''.

Subtitle B—Personnel

SEC. 1131. ADDITIONAL U.S. CUSTOMS AND BORDER PROTECTION AGENTS AND OFFICERS.

(a) BORDER PATROL AGENTS.—Not later than September 30, 2022, the Commissioner shall hire, train, and assign sufficient agents to maintain an active duty presence of not fewer than 26,370 full-time equivalent agents.

(b) CBP OFFICERS.—In addition to positions authorized before the date of the enactment of this Act and any existing officer vacancies within U.S. Customs and Border Protection as of such date, the Commissioner shall hire, train, and assign to duty, not later than September 30, 2022—

(1) sufficient U.S. Customs and Border Protection officers to maintain an active duty presence of not fewer than 27,725 full-time equivalent officers; and

(2) 350 full-time support staff distributed among all United States ports of entry.

(c) AIR AND MARINE OPERATIONS.—Not later than September 30, 2022, the Commissioner shall hire, train, and assign sufficient agents for Air and Marine Operations of U.S. Customs and Border Protection to maintain not fewer than 1,675 full-time equivalent agents and not fewer than 264 Marine and Air Interdiction Agents for southern border air and maritime operations.

(d) U.S. CUSTOMS AND BORDER PROTECTION K–9 UNITS AND HANDLERS.—

(1) K–9 UNITS.—Not later than September 30, 2022, the Commissioner shall deploy not fewer than 300 new K–9 units, with supporting officers of U.S. Customs and Border Protection and other required staff, at land ports of entry and checkpoints, on the southern border and the northern border.

(2) USE OF CANINES.—The Commissioner shall prioritize the use of canines at the primary inspection lanes at land ports of entry and checkpoints.

(e) U.S. CUSTOMS AND BORDER PROTECTION HORSEBACK UNITS.—

(1) INCREASE.—Not later than September 30, 2022, the Commissioner shall increase the number of horseback units, with supporting officers of U.S.

Customs and Border Protection and other required staff, by not fewer than 100 officers and 50 horses for security patrol along the Southern border.

(2) HORSEBACK UNIT SUPPORT.—The Commissioner shall construct new stables, maintain and improve existing stables, and provide other resources needed to maintain the health and well-being of the horses that serve in the horseback units of U.S. Customs and Border Protection.

(f) U.S. CUSTOMS AND BORDER PROTECTION SEARCH TRAUMA AND RESCUE TEAMS.—Not later than September 30, 2022, the Commissioner shall increase by not fewer than 50 the number of officers engaged in search and rescue activities along the southern border.

(g) U.S. CUSTOMS AND BORDER PROTECTION TUNNEL DETECTION AND TECHNOLOGY PROGRAM.—Not later than September 30, 2022, the Commissioner shall increase by not fewer than 50 the number of officers assisting task forces and activities related to deployment and operation of border tunnel detection technology and apprehensions of individuals using such tunnels for crossing into the United States, drug trafficking, or human smuggling.

(h) AGRICULTURAL SPECIALISTS.—Not later than September 30, 2022, the Secretary shall hire, train, and

assign to duty, in addition to the officers and agents authorized under subsections (a) through (g), 631 U.S. Customs and Border Protection agricultural specialists to ports of entry along the southern border and the northern border.

(i) OFFICE OF PROFESSIONAL RESPONSIBILITY.—Not later than September 30, 2022, the Commissioner shall hire, train, and assign sufficient Office of Professional Responsibility special agents to maintain an active duty presence of not fewer than 550 full-time equivalent special agents.

(j) U.S. CUSTOMS AND BORDER PROTECTION OFFICE OF INTELLIGENCE.—Not later than September 30, 2022, the Commissioner shall hire, train, and assign sufficient Office of Intelligence personnel to maintain not fewer than 700 full-time equivalent employees.

(k) GAO REPORT.—If the staffing levels required under this section are not achieved by September 30, 2022, the Comptroller General of the United States shall conduct a review of the reasons why such levels were not achieved.

SEC. 1132. U.S. CUSTOMS AND BORDER PROTECTION RETENTION INCENTIVES.

(a) IN GENERAL.—Chapter 97 of title 5, United States Code, is amended by adding at the end the following:

"§ 9702. U.S. Customs and Border Protection temporary employment authorities

''(a) DEFINITIONS.—In this section—

''(1) the term 'CBP employee' means an employee of U.S. Customs and Border Protection described under any of subsections (a) through (h) of section 1131 of the Border Security for America Act of 2018;

''(2) the term 'Commissioner' means the Commissioner of U.S. Customs and Border Protection;

''(3) the term 'Director' means the Director of the Office of Personnel Management;

''(4) the term 'Secretary' means the Secretary of Homeland Security; and

''(5) the term 'appropriate congressional committees' means the Committee on Oversight and Government Reform, the Committee on Homeland Security, and the Committee on Ways and Means of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Finance of the Senate.

''(b) DIRECT HIRE AUTHORITY; RECRUITMENT AND RELOCATION BONUSES; RETENTION BONUSES.—

''(1) STATEMENT OF PURPOSE AND LIMITATION.—The purpose of this subsection is to allow U.S. Customs and Border Protection to expeditiously meet the hiring goals and staffing levels required by section 1131 of the Border Security for America Act of 2018. The Secretary shall not use this authority beyond meeting the requirements of such section.

''(2) DIRECT HIRE AUTHORITY.—The Secretary may appoint, without regard to any provision of sections 3309 through 3319, candidates to positions in the competitive service as CBP employees if the Secretary has given public notice for the positions.

''(3) RECRUITMENT AND RELOCATION BONUSES.—The Secretary may pay a recruitment or relocation bonus of up to 50 percent of the annual rate of basic pay to an individual CBP employee at the beginning of the service period multiplied by the number of years (including a fractional part of a year) in the required service period to an individual (other than an individual described in subsection (a)(2) of section 5753) if—

''(A) the Secretary determines that conditions consistent with the conditions described in paragraphs (1) and (2) of subsection (b) of such section 5753 are satisfied with respect to the individual (without regard to the regulations referenced in subsection (b)(2)(B(ii)(I) of such section or to any other provision of that section); and

''(B) the individual enters into a written service agreement with the Secretary—

''(i) under which the individual is required to complete a period of employment as a CBP employee of not less than 2 years; and

''(ii) that includes—

''(I) the commencement and termination dates of the required service period (or provisions for the determination thereof);

''(II) the amount of the bonus; and

''(III) other terms and conditions under which the bonus is payable, subject to the requirements of this subsection, including—

''(aa) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

''(bb) the effect of a termination described in item (aa).

''(4) RETENTION BONUSES.—The Secretary may pay a retention bonus of up to 50 percent of basic pay to an individual CBP employee (other than an individual described in subsection (a)(2) of section 5754) if—

''(A) the Secretary determines that—

''(i) a condition consistent with the condition described in subsection (b)(1) of such section 5754 is satisfied with respect to the CBP employee (without regard to any other provision of that section);

''(ii) in the absence of a retention bonus, the CBP employee would be likely to leave—

''(I) the Federal service; or

''(II) for a different position in the Federal service, including a position in another agency or component

of the Department of Homeland Security; and

''(B) the individual enters into a written service agreement with the Secretary—

''(i) under which the individual is required to complete a period of employment as a CBP employee of not less than 2 years; and

''(ii) that includes—

''(I) the commencement and termination dates of the required service period (or provisions for the determination thereof);

''(II) the amount of the bonus; and

''(III) other terms and conditions under which the bonus is payable, subject to the requirements of this subsection, including—

''(aa) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

''(bb) the effect of a termination described in item (aa).

''(5) RULES FOR BONUSES.—

''(A) MAXIMUM BONUS.—A bonus paid to an employee under—

''(i) paragraph (3) may not exceed 100 percent of the annual rate of basic pay of the employee as of the commencement date of the applicable service period; and

''(ii) paragraph (4) may not exceed 50 percent of the annual rate of basic pay of the employee.

''(B) RELATIONSHIP TO BASIC PAY.—A bonus paid to an employee under paragraph (3) or (4) shall not be considered part of the basic pay of the employee for any purpose, including for retirement or in computing a lump-sum payment to the covered employee for accumulated and accrued annual leave under section 5551 or section 5552.

''(C) PERIOD OF SERVICE FOR RECRUITMENT, RELOCATION, AND RETENTION BONUSES.—

''(i) A bonus paid to an employee under paragraph (4) may not be based on

any period of such service which is the basis for a recruitment or relocation bonus under paragraph (3).

''(ii) A bonus paid to an employee under paragraph (3) or (4) may not be based on any period of service which is the basis for a recruitment or relocation bonus under section 5753 or a retention bonus under section 5754.

''(c) SPECIAL RATES OF PAY.—In addition to the circumstances described in subsection (b) of section 5305, the Director may establish special rates of pay in accordance with that section to assist the Secretary in meeting the requirements of section 1131 of the Border Security for America Act of 2018. The Director shall prioritize the consideration of requests from the Secretary for such special rates of pay and issue a decision as soon as practicable. The Secretary shall provide such information to the Director as the Director deems necessary to evaluate special rates of pay under this subsection.

''(d) OPM OVERSIGHT.—

''(1) Not later than September 30 of each year, the Secretary shall provide a report to the Director on U.S. Custom and Border Protection's use of authorities provided under subsections (b) and (c). In

each report, the Secretary shall provide such information as the Director determines is appropriate to ensure appropriate use of authorities under such subsections. Each report shall also include an assessment of—

''(A) the impact of the use of authorities under subsections (b) and (c) on implementation of section 1131 of the Border Security for America Act of 2018;

''(B) solving hiring and retention challenges at the agency, including at specific locations;

''(C) whether hiring and retention challenges still exist at the agency or specific locations; and

''(D) whether the Secretary needs to continue to use authorities provided under this section at the agency or at specific locations.

''(2) CONSIDERATION.—In compiling a report under paragraph (1), the Secretary shall consider—

''(A) whether any CBP employee accepted an employment incentive under subsection (b) and (c) and then transferred to a new location or left U.S. Customs and Border Protection; and

"(B) the length of time that each employee identified under subparagraph (A) stayed at the original location before transferring to a new location or leaving U.S. Customs and Border Protection.

"(3) DISTRIBUTION.—In addition to the Director, the Secretary shall submit each report required under this subsection to the appropriate congressional committees.

"(e) OPM ACTION.—If the Director determines the Secretary has inappropriately used authorities under subsection (b) or a special rate of pay provided under subsection (c), the Director shall notify the Secretary and the appropriate congressional committees in writing. Upon receipt of the notification, the Secretary may not make any new appointments or issue any new bonuses under subsection (b), nor provide CBP employees with further special rates of pay, until the Director has provided the Secretary and the appropriate congressional committees a written notice stating the Director is satisfied safeguards are in place to prevent further inappropriate use.

"(f) IMPROVING CBP HIRING AND RETENTION.—

"(1) EDUCATION OF CBP HIRING OFFICIALS.—Not later than 180 days after the date of the enactment of this section, and in conjunction with the

Chief Human Capital Officer of the Department of Homeland Security, the Secretary shall develop and implement a strategy to improve the education regarding hiring and human resources flexibilities (including hiring and human resources flexibilities for locations in rural or remote areas) for all employees, serving in agency headquarters or field offices, who are involved in the recruitment, hiring, assessment, or selection of candidates for locations in a rural or remote area, as well as the retention of current employees.

''(2) ELEMENTS.—Elements of the strategy under paragraph (1) shall include the following:

''(A) Developing or updating training and educational materials on hiring and human resources flexibilities for employees who are involved in the recruitment, hiring, assessment, or selection of candidates, as well as the retention of current employees.

''(B) Regular training sessions for personnel who are critical to filling open positions in rural or remote areas.

''(C) The development of pilot programs or other programs, as appropriate, consistent with authorities provided to the Secretary to address

identified hiring challenges, including in rural or remote areas.

''(D) Developing and enhancing strategic recruiting efforts through the relationships with institutions of higher education, as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), veterans transition and employment centers, and job placement program in regions that could assist in filling positions in rural or remote areas.

''(E) Examination of existing agency programs on how to most effectively aid spouses and families of individuals who are candidates or new hires in a rural or remote area.

''(F) Feedback from individuals who are candidates or new hires at locations in a rural or remote area, including feedback on the quality of life in rural or remote areas for new hires and their families.

''(G) Feedback from CBP employees, other than new hires, who are stationed at locations in a rural or remote area, including feedback on the quality of life in rural or remote areas for those CBP employees and their families.

''(H) Evaluation of Department of Homeland Security internship programs and the usefulness of those programs in improving hiring by the Secretary in rural or remote areas.

''(3) EVALUATION.—

''(A) IN GENERAL.—Each year, the Secretary shall—

''(i) evaluate the extent to which the strategy developed and implemented under paragraph (1) has improved the hiring and retention ability of the Secretary; and

''(ii) make any appropriate updates to the strategy under paragraph (1).

''(B) INFORMATION.—The evaluation conducted under subparagraph (A) shall include—

''(i) any reduction in the time taken by the Secretary to fill mission-critical positions, including in rural or remote areas;

''(ii) a general assessment of the impact of the strategy implemented under paragraph (1) on hiring challenges, including in rural or remote areas; and

''(iii) other information the Secretary determines relevant.

''(g) INSPECTOR GENERAL REVIEW.—Not later than two years after the date of the enactment of this section, the Inspector General of the Department of Homeland Security shall review the use of hiring and pay flexibilities under subsections (b) and (c) to determine whether the use of such flexibilities is helping the Secretary meet hiring and retention needs, including in rural and remote areas.

''(h) REPORT ON POLYGRAPH REQUESTS.—The Secretary shall report to the appropriate congressional committees on the number of requests the Secretary receives from any other Federal agency for the file of an applicant for a position in U.S. Customs and Border Protection that includes the results of a polygraph examination.

''(i) EXERCISE OF AUTHORITY.—

''(1) SOLE DISCRETION.—The exercise of authority under subsection (b) shall be subject to the sole and exclusive discretion of the Secretary (or the Commissioner, as applicable under paragraph (2) of this subsection), notwithstanding chapter 71 and any collective bargaining agreement.

''(2) DELEGATION.—The Secretary may delegate any authority under this section to the Commissioner.

''(j) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to exempt the Secretary or the Director from applicability of the merit system principles under section 2301.

''(k) SUNSET.—The authorities under subsections (b) and (c) shall terminate on September 30, 2022. Any bonus to be paid pursuant to subsection (b) that is approved before such date may continue until such bonus has been paid, subject to the conditions specified in this section.''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 97 of title 5, United States Code, is amended by adding at the end the following:

''9702. U.S. Customs and Border Protection temporary employment authorities.''.

SEC. 1133. ANTI-BORDER CORRUPTION REAUTHORIZATION ACT.

(a) SHORT TITLE.—This section may be cited as the ''Anti-Border Corruption Reauthorization Act of 2018''.

(b) HIRING FLEXIBILITY.—Section 3 of the Anti-Border Corruption Act of 2010 (6 U.S.C. 221) is amended by striking subsection (b) and inserting the following new subsections:

''(b) WAIVER AUTHORITY.—The Commissioner of U.S. Customs and Border Protection may waive the application of subsection (a)(1)—

''(1) to a current, full-time law enforcement officer employed by a State or local law enforcement agency who—

''(A) has continuously served as a law enforcement officer for not fewer than three years;

''(B) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers for arrest or apprehension;

''(C) is not currently under investigation, has not been found to have engaged in criminal activity or serious misconduct, has not resigned from a law enforcement officer position under investigation or in lieu of termination, and has not been dismissed from a law enforcement officer position; and

''(D) has, within the past ten years, successfully completed a polygraph examination as a condition of employment with such officer's current law enforcement agency;

''(2) to a current, full-time Federal law enforcement officer who—

''(A) has continuously served as a law enforcement officer for not fewer than three years;

''(B) is authorized to make arrests, conduct investigations, conduct searches, make seizures, carry firearms, and serve orders, warrants, and other processes;

''(C) is not currently under investigation, has not been found to have engaged in criminal activity or serious misconduct, has not resigned from a law enforcement officer position under investigation or in lieu of termination, and has not been dismissed from a law enforcement officer position; and

''(D) holds a current Tier 4 background investigation or current Tier 5 background investigation; and

''(3) to a member of the Armed Forces (or a reserve component thereof) or a veteran, if such individual—

''(A) has served in the Armed Forces for not fewer than three years;

''(B) holds, or has held within the past five years, a Secret, Top Secret, or Top Secret/Sensitive Compartmented Information clearance;

''(C) holds, or has undergone within the past five years, a current Tier 4 background investigation or current Tier 5 background investigation;

''(D) received, or is eligible to receive, an honorable discharge from service in the Armed Forces and has not engaged in criminal activity or committed a serious military or civil offense under the Uniform Code of Military Justice; and

''(E) was not granted any waivers to obtain the clearance referred to subparagraph (B).

''(c) TERMINATION OF WAIVER AUTHORITY.—The authority to issue a waiver under subsection (b) shall terminate on the date that is four years after the date of the enactment of the Border Security for America Act of 2018.''.

(c) SUPPLEMENTAL COMMISSIONER AUTHORITY AND DEFINITIONS.—

(1) SUPPLEMENTAL COMMISSIONER AUTHORITY.—Section 4 of the Anti-Border Corruption Act of 2010 is amended to read as follows:

"SEC. 4. SUPPLEMENTAL COMMISSIONER AUTHORITY.

''(a) NON-EXEMPTION.—An individual who receives a waiver under section 3(b) is not exempt from other hiring requirements relating to suitability for employment and eligibility to hold a national security designated position, as determined by the Commissioner of U.S. Customs and Border Protection.

''(b) BACKGROUND INVESTIGATIONS.—Any individual who receives a waiver under section 3(b) who holds a current Tier 4 background investigation shall be subject to a Tier 5 background investigation.

''(c) ADMINISTRATION OF POLYGRAPH EXAMINATION.—The Commissioner of U.S. Customs and Border Protection is authorized to administer a polygraph examination to an applicant or employee who is eligible for or receives a waiver under section 3(b) if information is discovered before the completion of a background investigation that results in a determination that a polygraph examination is necessary to make a final determination regarding suitability for employment or continued employment, as the case may be.''.

(2) REPORT.—The Anti-Border Corruption Act of 2010, as amended by paragraph (1), is further amended by adding at the end the following new section:

"SEC. 5. REPORTING.

"(a) ANNUAL REPORT.—Not later than one year after the date of the enactment of this section and annually thereafter while the waiver authority under section 3(b) is in effect, the Commissioner of U.S. Customs and Border Protection shall submit to Congress a report that includes, with respect to each such reporting period—

"(1) the number of waivers requested, granted, and denied under section 3(b);

"(2) the reasons for any denials of such waiver;

"(3) the percentage of applicants who were hired after receiving a waiver;

"(4) the number of instances that a polygraph was administered to an applicant who initially received a waiver and the results of such polygraph;

"(5) an assessment of the current impact of the polygraph waiver program on filling law enforcement positions at U.S. Customs and Border Protection; and

"(6) additional authorities needed by U.S. Customs and Border Protection to better utilize the polygraph waiver program for its intended goals.

"(b) ADDITIONAL INFORMATION.—The first report submitted under subsection (a) shall include—

"(1) an analysis of other methods of employment suitability tests that detect deception and could

be used in conjunction with traditional background investigations to evaluate potential employees for suitability; and

''(2) a recommendation regarding whether a test referred to in paragraph (1) should be adopted by U.S. Customs and Border Protection when the polygraph examination requirement is waived pursuant to section 3(b).''.

(3) DEFINITIONS.—The Anti-Border Corruption Act of 2010, as amended by paragraphs (1) and (2), is further amended by adding at the end the following new section:

''SEC. 6. DEFINITIONS.

''In this Act:

''(1) FEDERAL LAW ENFORCEMENT OFFICER.—The term 'Federal law enforcement officer' means a 'law enforcement officer' defined in section 8331(20) or 8401(17) of title 5, United States Code.

''(2) SERIOUS MILITARY OR CIVIL OFFENSE.—The term 'serious military or civil offense' means an offense for which—

''(A) a member of the Armed Forces may be discharged or separated from service in the Armed Forces; and

''(B) a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Court-Martial, as pursuant to Army Regulation 635–200 chapter 14–12.

''(3) TIER 4; TIER 5.—The terms 'Tier 4' and 'Tier 5' with respect to background investigations have the meaning given such terms under the 2012 Federal Investigative Standards.

''(4) VETERAN.—The term 'veteran' has the meaning given such term in section 101(2) of title 38, United States Code.''.

(d) POLYGRAPH EXAMINERS.—Not later than September 30, 2022, the Secretary shall increase to not fewer than 150 the number of trained full-time equivalent polygraph examiners for administering polygraphs under the Anti-Border Corruption Act of 2010, as amended by this subtitle.

SEC. 1134. TRAINING FOR OFFICERS AND AGENTS OF U.S. CUSTOMS AND BORDER PROTECTION.

(a) IN GENERAL.—Subsection (l) of section 411 of the Homeland Security Act of 2002 (6 U.S.C. 211) is amended to read as follows:

''(l) TRAINING AND CONTINUING EDUCATION.—

"(1) MANDATORY TRAINING.—The Commissioner shall ensure that every agent and officer of U.S. Customs and Border Protection receives a minimum of 21 weeks of training that are directly related to the mission of the U.S. Border Patrol, Air and Marine, and the Office of Field Operations before the initial assignment of such agents and officers.

"(2) FLETC.—The Commissioner shall work in consultation with the Director of the Federal Law Enforcement Training Centers to establish guidelines and curriculum for the training of agents and officers of U.S. Customs and Border Protection under subsection (a).

"(3) CONTINUING EDUCATION.—The Commissioner shall annually require all agents and officers of U.S. Customs and Border Protection who are required to undergo training under subsection (a) to participate in not fewer than eight hours of continuing education annually to maintain and update understanding of Federal legal rulings, court decisions, and Department policies, procedures, and guidelines related to relevant subject matters.

"(4) LEADERSHIP TRAINING.—Not later than one year after the date of the enactment of this sub-

section, the Commissioner shall develop and require training courses geared towards the development of leadership skills for mid- and senior-level career employees not later than one year after such employees assume duties in supervisory roles.''.

(b) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Commissioner shall submit to the Committee on Homeland Security and the Committee on Ways and Means of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Finance of the Senate a report identifying the guidelines and curriculum established to carry out subsection (l) of section 411 of the Homeland Security Act of 2002, as amended by subsection (a) of this section.

(c) ASSESSMENT.—Not later than four years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Committee on Homeland Security and the Committee on Ways and Means of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Finance of the Senate a report that assesses the training and education, including continuing education, required under subsection (l) of section 411 of

the Homeland Security Act of 2002, as amended by subsection (a) of this section.

Subtitle C—Grants

SEC. 1141. OPERATION STONEGARDEN.

(a) IN GENERAL.—Subtitle A of title XX of the Homeland Security Act of 2002 (6 U.S.C. 601 et seq.) is amended by adding at the end the following new section:

"SEC. 2009. OPERATION STONEGARDEN.

"(a) ESTABLISHMENT.—There is established in the Department a program to be known as 'Operation Stonegarden', under which the Secretary, acting through the Administrator, shall make grants to eligible law enforcement agencies, through the State administrative agency, to enhance border security in accordance with this section.

"(b) ELIGIBLE RECIPIENTS.—To be eligible to receive a grant under this section, a law enforcement agency—

"(1) shall be located in—

"(A) a State bordering Canada or Mexico; or

"(B) a State or territory with a maritime border; and

"(2) shall be involved in an active, ongoing, U.S. Customs and Border Protection operation co-

ordinated through a U.S. Border Patrol sector office.

''(c) PERMITTED USES.—The recipient of a grant under this section may use such grant for—

''(1) equipment, including maintenance and sustainment costs;

''(2) personnel, including overtime and backfill, in support of enhanced border law enforcement activities;

''(3) any activity permitted for Operation Stonegarden under the Department of Homeland Security's Fiscal Year 2017 Homeland Security Grant Program Notice of Funding Opportunity; and

''(4) any other appropriate activity, as determined by the Administrator, in consultation with the Commissioner of U.S. Customs and Border Protection.

''(d) PERIOD OF PERFORMANCE.—The Secretary shall award grants under this section to grant recipients for a period of not less than 36 months.

''(e) REPORT.—For each of fiscal years 2018 through 2022, the Administrator shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives a report that contains informa-

tion on the expenditure of grants made under this section by each grant recipient.

''(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated $110,000,000 for each of fiscal years 2018 through 2022 for grants under this section.''.

(b) CONFORMING AMENDMENT.—Subsection (a) of section 2002 of the Homeland Security Act of 2002 (6 U.S.C. 603) is amended to read as follows:

''(a) GRANTS AUTHORIZED.—The Secretary, through the Administrator, may award grants under sections 2003, 2004, and 2009 to State, local, and tribal governments, as appropriate.''.

(c) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by inserting after the item relating to section 2008 the following:

''Sec. 2009. Operation Stonegarden.''.

Subtitle D—Authorization of Appropriations

SEC. 1151. AUTHORIZATION OF APPROPRIATIONS.

In addition to amounts otherwise authorized to be appropriated, there are authorized to be appropriated for each of fiscal years 2018 through 2022, $24,800,000,000 to implement this title and the amendments made by this title, of which—

(1) $9,300,000,000 shall be used by the Department of Homeland Security to construct physical barriers pursuant to section 102 of the Illegal Immigration and Immigrant Responsibility Act of 1996, as amended by section 1111 of this division;

(2) $1,000,000,000 shall be used by the Department to improve tactical infrastructure pursuant to such section 102, as amended by such section 1111;

(3) $5,800,000,000 shall be used by the Department to carry out section 1112 of this division;

(4) $200,000,000 shall be used by the Coast Guard for deployments of personnel and assets under paragraph (18) of section 1113(a) of this division; and

(5) $8,500,000,000 shall be used by the Department to carry out section 1131 of this division.

TITLE II—EMERGENCY PORT OF ENTRY PERSONNEL AND INFRASTRUCTURE FUNDING

SEC. 2101. PORTS OF ENTRY INFRASTRUCTURE.

(a) ADDITIONAL PORTS OF ENTRY.—

(1) AUTHORITY.—The Administrator of General Services may, subject to section 3307 of title 40, United States Code, construct new ports of entry

along the northern border and southern border at locations determined by the Secretary.

(2) CONSULTATION.—

(A) REQUIREMENT TO CONSULT.—The Secretary and the Administrator of General Services shall consult with the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Transportation, and appropriate representatives of State and local governments, and Indian tribes, and property owners in the United States prior to determining a location for any new port of entry constructed pursuant to paragraph (1).

(B) CONSIDERATIONS.—The purpose of the consultations required by subparagraph (A) shall be to minimize any negative impacts of constructing a new port of entry on the environment, culture, commerce, and quality of life of the communities and residents located near such new port.

(b) EXPANSION AND MODERNIZATION OF HIGH-PRIORITY SOUTHERN BORDER PORTS OF ENTRY.—Not later than September 30, 2021, the Administrator of General Services, subject to section 3307 of title 40, United States Code, and in coordination with the Secretary, shall expand

or modernize high-priority ports of entry on the southern border, as determined by the Secretary, for the purposes of reducing wait times and enhancing security.

(c) PORT OF ENTRY PRIORITIZATION.—Prior to constructing any new ports of entry pursuant to subsection (a), the Administrator of General Services shall complete the expansion and modernization of ports of entry pursuant to subsection (b) to the extent practicable.

(d) NOTIFICATIONS.—

(1) RELATING TO NEW PORTS OF ENTRY.—Not later than 15 days after determining the location of any new port of entry for construction pursuant to subsection (a), the Secretary and the Administrator of General Services shall jointly notify the Members of Congress who represent the State or congressional district in which such new port of entry will be located, as well as the Committee on Homeland Security and Governmental Affairs, the Committee on Finance, the Committee on Commerce, Science, and Transportation, and the Committee on the Judiciary of the Senate, and the Committee on Homeland Security, the Committee on Ways and Means, the Committee on Transportation and Infrastructure, and the Committee on the Judiciary of the House of Representatives. Such notification shall include in-

formation relating to the location of such new port of entry, a description of the need for such new port of entry and associated anticipated benefits, a description of the consultations undertaken by the Secretary and the Administrator pursuant to paragraph (2) of such subsection, any actions that will be taken to minimize negative impacts of such new port of entry, and the anticipated time-line for construction and completion of such new port of entry.

(2) RELATING TO EXPANSION AND MODERNIZATION OF PORTS OF ENTRY.—Not later than 180 days after enactment of this Act, the Secretary and the Administrator of General Services shall jointly notify the Committee on Homeland Security and Governmental Affairs, the Committee on Finance, the Committee on Commerce, Science, and Transportation, and the Committee on the Judiciary of the Senate, and the Committee on Homeland Security, the Committee on Ways and Means, the Committee on Transportation and Infrastructure, and the Committee on the Judiciary of the House of Representatives of the ports of entry on the southern border that are the subject of expansion or modernization pursuant to subsection (b) and the Sec-

retary's and Administrator's plan for expanding or modernizing each such port of entry.

(e) RULE OF CONSTRUCTION.—Nothing in this section may be construed as providing the Secretary new authority related to the construction, acquisition, or renovation of real property.

SEC. 2102. SECURE COMMUNICATIONS.

(a) IN GENERAL.—The Secretary shall ensure that each U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement officer or agent, if appropriate, is equipped with a secure radio or other two-way communication device, supported by system interoperability, that allows each such officer to communicate—

(1) between ports of entry and inspection stations; and

(2) with other Federal, State, tribal, and local law enforcement entities.

(b) U.S. BORDER PATROL AGENTS.—The Secretary shall ensure that each U.S. Border Patrol agent or officer assigned or required to patrol on foot, by horseback, or with a canine unit, in remote mission critical locations, and at border checkpoints, has a multi- or dual-band encrypted portable radio.

(c) LTE CAPABILITY.—In carrying out subsection (b), the Secretary shall acquire radios or other devices

with the option to be LTE-capable for deployment in areas where LTE enhances operations and is cost effective.

SEC. 2103. BORDER SECURITY DEPLOYMENT PROGRAM.

(a) EXPANSION.—Not later than September 30, 2021, the Secretary shall fully implement the Border Security Deployment Program of the U.S. Customs and Border Protection and expand the integrated surveillance and intrusion detection system at land ports of entry along the southern border and the northern border.

(b) AUTHORIZATION OF APPROPRIATIONS.—In addition to amounts otherwise authorized to be appropriated for such purpose, there is authorized to be appropriated $33,000,000 for fiscal year 2018 to carry out subsection (a).

SEC. 2104. PILOT AND UPGRADE OF LICENSE PLATE READERS AT PORTS OF ENTRY.

(a) UPGRADE.—Not later than one year after the date of the enactment of this Act, the Commissioner of U.S. Customs and Border Protection shall upgrade all existing license plate readers on the northern and southern borders on incoming and outgoing vehicle lanes.

(b) PILOT PROGRAM.—Not later than 90 days after the date of the enactment of this Act, the Commissioner of U.S. Customs and Border Protection shall conduct a one-month pilot program on the southern border using li-

cense plate readers for one to two cargo lanes at the top three high-volume land ports of entry or checkpoints to determine their effectiveness in reducing cross-border wait times for commercial traffic and tractor-trailers.

(c) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall report to the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, and the Committee on Finance of the Senate, and the Committee on Homeland Security, and Committee on the Judiciary, and the Committee on Ways and Means of the House of Representatives the results of the pilot program under subsection (b) and make recommendations for implementing use of such technology on the southern border.

(d) AUTHORIZATION OF APPROPRIATIONS.—In addition to amounts otherwise authorized to be appropriated for such purpose, there is authorized to be appropriated $125,000,000 for fiscal year 2018 to carry out subsection (a).

SEC. 2105. NON-INTRUSIVE INSPECTION OPERATIONAL DEMONSTRATION.

(a) IN GENERAL.—Not later than six months after the date of the enactment of this Act, the Commissioner shall establish a six-month operational demonstration to deploy a high-throughput non-intrusive passenger vehicle

inspection system at not fewer than three land ports of entry along the United States-Mexico border with significant cross-border traffic. Such demonstration shall be located within the pre-primary traffic flow and should be scalable to span up to 26 contiguous in-bound traffic lanes without re-configuration of existing lanes.

(b) REPORT.—Not later than 90 days after the conclusion of the operational demonstration under subsection (a), the Commissioner shall submit to the Committee on Homeland Security and the Committee on Ways and Means of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Finance of the Senate a report that describes the following:

(1) The effects of such demonstration on legitimate travel and trade.

(2) The effects of such demonstration on wait times, including processing times, for non-pedestrian traffic.

(3) The effectiveness of such demonstration in combating terrorism and smuggling.

SEC. 2106. BIOMETRIC EXIT DATA SYSTEM.

(a) IN GENERAL.—Subtitle B of title IV of the Homeland Security Act of 2002 (6 U.S.C. 211 et seq.)

is amended by inserting after section 415 the following new section:

"SEC. 416. BIOMETRIC ENTRY-EXIT.

''(a) ESTABLISHMENT.—The Secretary shall—

''(1) not later than 180 days after the date of the enactment of this section, submit to the Committee on Homeland Security and Governmental Affairs and the Committee on the Judiciary of the Senate and the Committee on Homeland Security and the Committee on the Judiciary of the House of Representatives an implementation plan to establish a biometric exit data system to complete the integrated biometric entry and exit data system required under section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (8 U.S.C. 1365b), including—

''(A) an integrated master schedule and cost estimate, including requirements and design, development, operational, and maintenance costs of such a system, that takes into account prior reports on such matters issued by the Government Accountability Office and the Department;

''(B) cost-effective staffing and personnel requirements of such a system that leverages

existing resources of the Department that takes into account prior reports on such matters issued by the Government Accountability Office and the Department;

''(C) a consideration of training programs necessary to establish such a system that takes into account prior reports on such matters issued by the Government Accountability Office and the Department;

''(D) a consideration of how such a system will affect arrival and departure wait times that takes into account prior reports on such matter issued by the Government Accountability Office and the Department;

''(E) information received after consultation with private sector stakeholders, including the—

''(i) trucking industry;

''(ii) airport industry;

''(iii) airline industry;

''(iv) seaport industry;

''(v) travel industry; and

''(vi) biometric technology industry;

''(F) a consideration of how trusted traveler programs in existence as of the date of the

enactment of this section may be impacted by, or incorporated into, such a system;

''(G) defined metrics of success and milestones;

''(H) identified risks and mitigation strategies to address such risks;

''(I) a consideration of how other countries have implemented a biometric exit data system; and

''(J) a list of statutory, regulatory, or administrative authorities, if any, needed to integrate such a system into the operations of the Transportation Security Administration; and

''(2) not later than two years after the date of the enactment of this section, establish a biometric exit data system at the—

''(A) 15 United States airports that support the highest volume of international air travel, as determined by available Federal flight data;

''(B) 10 United States seaports that support the highest volume of international sea travel, as determined by available Federal travel data; and

''(C) 15 United States land ports of entry that support the highest volume of vehicle, pedestrian, and cargo crossings, as determined by available Federal border crossing data.

''(b) IMPLEMENTATION.—

''(1) PILOT PROGRAM AT LAND PORTS OF ENTRY FOR NON-PEDESTRIAN OUTBOUND TRAFFIC.—Not later than six months after the date of the enactment of this section, the Secretary, in collaboration with industry stakeholders, shall establish a six-month pilot program to test the biometric exit data system referred to in subsection (a)(2) on non-pedestrian outbound traffic at not fewer than three land ports of entry with significant cross-border traffic, including at not fewer than two land ports of entry on the southern land border and at least one land port of entry on the northern land border. Such pilot program may include a consideration of more than one biometric mode, and shall be implemented to determine the following:

''(A) How a nationwide implementation of such biometric exit data system at land ports of entry shall be carried out.

''(B) The infrastructure required to carry out subparagraph (A).

''(C) The effects of such pilot program on legitimate travel and trade.

''(D) The effects of such pilot program on wait times, including processing times, for such non-pedestrian traffic.

''(E) The effects of such pilot program on combating terrorism.

''(F) The effects of such pilot program on identifying visa holders who violate the terms of their visas.

''(2) AT LAND PORTS OF ENTRY FOR NON-PEDESTRIAN OUTBOUND TRAFFIC.—

''(A) IN GENERAL.—Not later than five years after the date of the enactment of this section, the Secretary shall expand the biometric exit data system referred to in subsection (a)(2) to all land ports of entry, and such system shall apply only in the case of non-pedestrian outbound traffic.

''(B) EXTENSION.—The Secretary may extend for a single two-year period the date specified in subparagraph (A) if the Secretary certifies to the Committee on Homeland Security and Governmental Affairs and the Committee on the Judiciary of the Senate and the Com-

mittee on Homeland Security and the Committee on the Judiciary of the House of Representatives that the 15 land ports of entry that support the highest volume of passenger vehicles, as determined by available Federal data, do not have the physical infrastructure or characteristics to install the systems necessary to implement a biometric exit data system.

''(3) AT AIR AND SEA PORTS OF ENTRY.—Not later than five years after the date of the enactment of this section, the Secretary shall expand the biometric exit data system referred to in subsection (a)(2) to all air and sea ports of entry.

''(4) AT LAND PORTS OF ENTRY FOR PEDESTRIANS.—Not later than five years after the date of the enactment of this section, the Secretary shall expand the biometric exit data system referred to in subsection (a)(2) to all land ports of entry, and such system shall apply only in the case of pedestrians.

''(c) EFFECTS ON AIR, SEA, AND LAND TRANSPORTATION.—The Secretary, in consultation with appropriate private sector stakeholders, shall ensure that the collection of biometric data under this section causes the least possible disruption to the movement of people or cargo in air, sea, or land transportation, while fulfilling the goals of im-

proving counterterrorism efforts and identifying visa holders who violate the terms of their visas.

''(d) TERMINATION OF PROCEEDING.—Notwithstanding any other provision of law, the Secretary shall, on the date of the enactment of this section, terminate the proceeding entitled 'Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure; United States Visitor and Immigrant Status Indicator Technology Program (''US–VISIT'')', issued on April 24, 2008 (73 Fed. Reg. 22065).

''(e) DATA-MATCHING.—The biometric exit data system established under this section shall—

''(1) match biometric information for an individual, regardless of nationality, citizenship, or immigration status, who is departing the United States against biometric data previously provided to the United States Government by such individual for the purposes of international travel;

''(2) leverage the infrastructure and databases of the current biometric entry and exit system established pursuant to section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (8 U.S.C. 1365b) for the purpose described in paragraph (1); and

''(3) be interoperable with, and allow matching against, other Federal databases that—

''(A) store biometrics of known or suspected terrorists; and

''(B) identify visa holders who violate the terms of their visas.

''(f) SCOPE.—

''(1) IN GENERAL.—The biometric exit data system established under this section shall include a requirement for the collection of biometric exit data at the time of departure for all categories of individuals who are required by the Secretary to provide biometric entry data.

''(2) EXCEPTION FOR CERTAIN OTHER INDIVIDUALS.—This section shall not apply in the case of an individual who exits and then enters the United States on a passenger vessel (as such term is defined in section 2101 of title 46, United States Code) the itinerary of which originates and terminates in the United States.

''(3) EXCEPTION FOR LAND PORTS OF ENTRY.—This section shall not apply in the case of a United States or Canadian citizen who exits the United States through a land port of entry.

''(g) COLLECTION OF DATA.—The Secretary may not require any non-Federal person to collect biometric data, or contribute to the costs of collecting or administering the biometric exit data system established under this section, except through a mutual agreement.

''(h) MULTI-MODAL COLLECTION.—In carrying out subsections (a)(1) and (b), the Secretary shall make every effort to collect biometric data using multiple modes of biometrics.

''(i) FACILITIES.—All facilities at which the biometric exit data system established under this section is implemented shall provide and maintain space for Federal use that is adequate to support biometric data collection and other inspection-related activity. For non-federally owned facilities, such space shall be provided and maintained at no cost to the Government. For all facilities at land ports of entry, such space requirements shall be coordinated with the Administrator of General Services.

''(j) NORTHERN LAND BORDER.—In the case of the northern land border, the requirements under subsections (a)(2)(C), (b)(2)(A), and (b)(4) may be achieved through the sharing of biometric data provided to U.S. Customs and Border Protection by the Canadian Border Services Agency pursuant to the 2011 Beyond the Border agreement.

''(k) FAIR AND OPEN COMPETITION.—The Secretary shall procure goods and services to implement this section via fair and open competition in accordance with the Federal Acquisition Regulations.

''(l) OTHER BIOMETRIC INITIATIVES.—Nothing in this section may be construed as limiting the authority of the Secretary to collect biometric information in circumstances other than as specified in this section.

''(m) CONGRESSIONAL REVIEW.—Not later than 90 days after the date of the enactment of this section, the Secretary shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on the Judiciary of the Senate, the Committee on Homeland Security of the House of Representatives, and Committee on the Judiciary of the House of Representatives reports and recommendations regarding the Science and Technology Directorate's Air Entry and Exit Re-Engineering Program of the Department and the U.S. Customs and Border Protection entry and exit mobility program demonstrations.

''(n) SAVINGS CLAUSE.—Nothing in this section shall prohibit the collection of user fees permitted by section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c).''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by inserting after the item relating to section 415 the following new item:

''Sec. 416. Biometric entry-exit.''.

SEC. 2107. SENSE OF CONGRESS ON COOPERATION BETWEEN AGENCIES.

(a) FINDING.—Congress finds that personnel constraints exist at land ports of entry with regard to sanitary and phytosanitary inspections for exported goods.

(b) SENSE OF CONGRESS.—It is the sense of Congress that, in the best interest of cross-border trade and the agricultural community—

(1) any lack of certified personnel for inspection purposes at ports of entry should be addressed by seeking cooperation between agencies and departments of the United States, whether in the form of a memorandum of understanding or through a certification process, whereby additional existing agents are authorized for additional hours to facilitate and expedite the flow of legitimate trade and commerce of perishable goods in a manner consistent with rules of the Department of Agriculture; and

(2) cross designation should be available for personnel who will assist more than one agency or department of the United States at land ports of

entry to facilitate and expedite the flow of increased legitimate trade and commerce.

SEC. 2108. AUTHORIZATION OF APPROPRIATIONS.

In addition to any amounts otherwise authorized to be appropriated for such purpose, there is authorized to be appropriated $1,250,000,000 for each of fiscal years 2018 through 2022 to carry out this title, of which—

(1) $2,000,000 shall be used by the Secretary for hiring additional Uniform Management Center support personnel, purchasing uniforms for CBP officers and agents, acquiring additional motor vehicles to support vehicle mounted surveillance systems, hiring additional motor vehicle program support personnel, and for contract support for customer service, vendor management, and operations management; and

(2) $250,000,000 per year shall be used to implement the biometric exit data system described in section 416 of the Homeland Security Act of 2002, as added by section 2106 of this division.

SEC. 2109. DEFINITION.

In this title, the term ''Secretary'' means the Secretary of Homeland Security.

TITLE III—VISA SECURITY AND INTEGRITY

SEC. 3101. VISA SECURITY.

(a) VISA SECURITY UNITS AT HIGH RISK POSTS.—Paragraph (1) of section 428(e) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)) is amended—

(1) by striking ''The Secretary'' and inserting the following:

''(A) AUTHORIZATION.—Subject to the minimum number specified in subparagraph (B), the Secretary''; and

(2) by adding at the end the following new subparagraph:

''(B) RISK-BASED ASSIGNMENTS.—

''(i) IN GENERAL.—In carrying out subparagraph (A), the Secretary shall assign, in a risk-based manner, and considering the criteria described in clause (ii), employees of the Department to not fewer than 75 diplomatic and consular posts at which visas are issued.

''(ii) CRITERIA DESCRIBED.—The criteria referred to in clause (i) are the following:

''(I) The number of nationals of a country in which any of the diplomatic and consular posts referred to in clause (i) are located who were identified in United States Government databases related to the identities of known or suspected terrorists during the previous year.

''(II) Information on the cooperation of such country with the counterterrorism efforts of the United States.

''(III) Information analyzing the presence, activity, or movement of terrorist organizations (as such term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))) within or through such country.

''(IV) The number of formal objections based on derogatory information issued by the Visa Security Advisory Opinion Unit pursuant to paragraph (10) regarding nationals of a country in which any of the diplomatic

and consular posts referred to in clause (i) are located.

''(V) The adequacy of the border and immigration control of such country.

''(VI) Any other criteria the Secretary determines appropriate.

''(iii) RULE OF CONSTRUCTION.—The assignment of employees of the Department pursuant to this subparagraph is solely the authority of the Secretary and may not be altered or rejected by the Secretary of State.''.

(b) COUNTERTERROR VETTING AND SCREENING.—Paragraph (2) of section 428(e) of the Homeland Security Act of 2002 is amended—

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following new subparagraph:

''(C) Screen any such applications against the appropriate criminal, national security, and terrorism databases maintained by the Federal Government.''.

(c) TRAINING AND HIRING.—Subparagraph (A) of section 428(e)(6) of the Homeland Security Act of 2002 is amended by—

(1) striking ''The Secretary shall ensure, to the extent possible, that any employees'' and inserting ''The Secretary, acting through the Commissioner of U.S. Customs and Border Protection and the Director of U.S. Immigration and Customs Enforcement, shall provide training to any employees''; and

(2) striking ''shall be provided the necessary training''.

(d) PRE-ADJUDICATED VISA SECURITY ASSISTANCE AND VISA SECURITY ADVISORY OPINION UNIT.—Subsection (e) of section 428 of the Homeland Security Act of 2002 is amended by adding at the end the following new paragraphs:

''(9) REMOTE PRE-ADJUDICATED VISA SECURITY ASSISTANCE.—At the visa-issuing posts at which employees of the Department are not assigned pursuant to paragraph (1), the Secretary shall, in a risk-based manner, assign employees of the Department to remotely perform the functions required under paragraph (2) at not fewer than 50 of such posts.

''(10) VISA SECURITY ADVISORY OPINION UNIT.—The Secretary shall establish within U.S. Immigration and Customs Enforcement a Visa Security Advisory Opinion Unit to respond to requests from the Secretary of State to conduct a visa security review using information maintained by the Department on visa applicants, including terrorism association, criminal history, counter-proliferation, and other relevant factors, as determined by the Secretary.''.

(e) DEADLINES.—The requirements established under paragraphs (1) and (9) of section 428(e) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)), as amended and added by this section, shall be implemented not later than three years after the date of the enactment of this Act.

SEC. 3102. ELECTRONIC PASSPORT SCREENING AND BIOMETRIC MATCHING.

(a) IN GENERAL.—Subtitle B of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et seq.), as amended by section 2106 of this division, is further amended by adding at the end the following new sections:

"SEC. 420. ELECTRONIC PASSPORT SCREENING AND BIOMETRIC MATCHING.

''(a) IN GENERAL.—Not later than one year after the date of the enactment of this section, the Commissioner of U.S. Customs and Border Protection shall—

''(1) screen electronic passports at airports of entry by reading each such passport's embedded chip; and

''(2) to the greatest extent practicable, utilize facial recognition technology or other biometric technology, as determined by the Commissioner, to inspect travelers at United States airports of entry.

''(b) APPLICABILITY.—

''(1) ELECTRONIC PASSPORT SCREENING.—Paragraph (1) of subsection (a) shall apply to passports belonging to individuals who are United States citizens, individuals who are nationals of a program country pursuant to section 217 of the Immigration and Nationality Act (8 U.S.C. 1187), and individuals who are nationals of any other foreign country that issues electronic passports.

''(2) FACIAL RECOGNITION MATCHING.—Paragraph (2) of subsection (a) shall apply, at a minimum, to individuals who are nationals of a program country pursuant to section 217 of the Immigration and Nationality Act.

''(c) ANNUAL REPORT.—The Commissioner of U.S. Customs and Border Protection, in collaboration with the Chief Privacy Officer of the Department, shall issue to the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate an annual report through fiscal year 2021 on the utilization of facial recognition technology and other biometric technology pursuant to subsection (a)(2). Each such report shall include information on the type of technology used at each airport of entry, the number of individuals who were subject to inspection using either of such technologies at each airport of entry, and within the group of individuals subject to such inspection at each airport, the number of those individuals who were United States citizens and legal permanent residents. Each such report shall provide information on the disposition of data collected during the year covered by such report, together with information on protocols for the management of collected biometric data, including timeframes and criteria for storing, erasing, destroying, or otherwise removing such data from databases utilized by the Department.

"SEC. 420A. CONTINUOUS SCREENING BY U.S. CUSTOMS AND BORDER PROTECTION.

''The Commissioner of U.S. Customs and Border Protection shall, in a risk based manner, continuously screen individuals issued any visa, and individuals who are nationals of a program country pursuant to section 217 of the Immigration and Nationality Act (8 U.S.C. 1187), who are present, or are expected to arrive within 30 days, in the United States, against the appropriate criminal, national security, and terrorism databases maintained by the Federal Government.''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by inserting after the item relating to section 419 the following new items:

''Sec. 420. Electronic passport screening and biometric matching.
''Sec. 420A. Continuous screening by U.S. Customs and Border Protection.''.

SEC. 3103. REPORTING OF VISA OVERSTAYS.

Section 2 of Public Law 105–173 (8 U.S.C. 1376) is amended—

(1) in subsection (a)—

(A) by striking ''Attorney General'' and inserting ''Secretary of Homeland Security''; and

(B) by inserting before the period at the end the following: '', and any additional information that the Secretary determines necessary

for purposes of the report under subsection (b)''; and

(2) by amending subsection (b) to read as follows:

''(b) ANNUAL REPORT.—Not later than June 30, 2018, and not later than June 30 of each year thereafter, the Secretary of Homeland Security shall submit to the Committee on Homeland Security and the Committee on the Judiciary of the House of Representatives and to the Committee on Homeland Security and Governmental Affairs and the Committee on the Judiciary of the Senate a report providing, for the preceding fiscal year, numerical estimates (including information on the methodology utilized to develop such numerical estimates) of—

''(1) for each country, the number of aliens from the country who are described in subsection (a), including—

''(A) the total number of such aliens within all classes of nonimmigrant aliens described in section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)); and

''(B) the number of such aliens within each of the classes of nonimmigrant aliens, as well as the number of such aliens within each of the

subclasses of such classes of nonimmigrant aliens, as applicable;

''(2) for each country, the percentage of the total number of aliens from the country who were present in the United States and were admitted to the United States as nonimmigrants who are described in subsection (a);

''(3) the number of aliens described in subsection (a) who arrived by land at a port of entry into the United States;

''(4) the number of aliens described in subsection (a) who entered the United States using a border crossing identification card (as such term is defined in section 101(a)(6) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(6))); and

''(5) the number of Canadian nationals who entered the United States without a visa whose authorized period of stay in the United States terminated during the previous fiscal year, but who remained in the United States.''.

SEC. 3104. STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM VERIFICATION.

Not later than 90 days after the date of the enactment of this Act, the Secretary of Homeland Security shall ensure that the information collected under the program

established under section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1372) is available to officers of U.S. Customs and Border Protection for the purpose of conducting primary inspections of aliens seeking admission to the United States at each port of entry of the United States.

SEC. 3105. SOCIAL MEDIA REVIEW OF VISA APPLICANTS.

(a) IN GENERAL.—Subtitle C of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et seq.), as amended by sections 1115, 1124, and 1127 of this division, is further amended by adding at the end the following new sections:

"SEC. 438. SOCIAL MEDIA SCREENING.

''(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this section, the Secretary shall, to the greatest extent practicable, and in a risk based manner and on an individualized basis, review the social media accounts of certain visa applicants who are citizens of, or who reside in, high-risk countries, as determined by the Secretary based on the criteria described in subsection (b).

''(b) HIGH-RISK CRITERIA DESCRIBED.—In determining whether a country is high-risk pursuant to subsection (a), the Secretary shall consider the following criteria:

''(1) The number of nationals of the country who were identified in United States Government databases related to the identities of known or suspected terrorists during the previous year.

''(2) The level of cooperation of the country with the counter-terrorism efforts of the United States.

''(3) Any other criteria the Secretary determines appropriate.

''(c) COLLABORATION.—To carry out the requirements of subsection (a), the Secretary may collaborate with—

''(1) the head of a national laboratory within the Department's laboratory network with relevant expertise;

''(2) the head of a relevant university-based center within the Department's centers of excellence network; and

''(3) the heads of other appropriate Federal agencies.

''SEC. 439. OPEN SOURCE SCREENING.

''The Secretary shall, to the greatest extent practicable, and in a risk based manner, review open source information of visa applicants.''

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002, as amended by this division is further amended by inserting after the item relating to section 437 the following new items:

''Sec. 438. Social media screening.
''Sec. 439. Open source screening.''.

TITLE IV—TRANSNATIONAL CRIMINAL ORGANIZATION ILLICIT SPOTTER PREVENTION AND ELIMINATION

SEC. 4101. SHORT TITLE.

This title may be cited as the ''Transnational Criminal Organization Illicit Spotter Prevention and Elimination Act''.

SEC. 4102. UNLAWFULLY HINDERING IMMIGRATION, BORDER, AND CUSTOMS CONTROLS.

(a) BRINGING IN AND HARBORING OF CERTAIN ALIENS.—Section 274(a) of the Immigration and Nationality Act (8 U.S.C. 1324(a)) is amended—

(1) in subsection (a)(2), by striking ''brings to or attempts to'' and inserting the following: ''brings to or attempts or conspires to''; and

(2) by adding at the end the following:

''(5) In the case of a person who has brought aliens into the United States in violation of this sub-

section, the sentence otherwise provided for may be increased by up to 10 years if that person, at the time of the offense, used or carried a firearm or who, in furtherance of any such crime, possessed a firearm.''.

(b) AIDING OR ASSISTING CERTAIN ALIENS TO ENTER THE UNITED STATES.—Section 277 of the Immigration and Nationality Act (8 U.S.C. 1327) is amended—

(1) by inserting after ''knowingly aids or assists'' the following: ''or attempts to aid or assist''; and

(2) by adding at the end the following: ''In the case of a person convicted of an offense under this section, the sentence otherwise provided for may be increased by up to 10 years if that person, at the time of the offense, used or carried a firearm or who, in furtherance of any such crime, possessed a firearm.''.

(c) DESTRUCTION OF UNITED STATES BORDER CONTROLS.—Section 1361 of title 18, United States Code, is amended—

(1) by striking ''If the damage'' and inserting the following:

''(1) Except as otherwise provided in this section, if the damage''; and

(2) by adding at the end the following:

''(2) If the injury or depredation was made or attempted against any fence, barrier, sensor, camera, or other physical or electronic device deployed by the Federal Government to control the border or a port of entry or otherwise was intended to construct, excavate, or make any structure intended to defeat, circumvent, or evade any such fence, barrier, sensor camera, or other physical or electronic device deployed by the Federal Government to control the border or a port of entry, by a fine under this title or imprisonment for not more than 15 years, or both.

''(3) If the injury or depredation was described under paragraph (2) and, in the commission of the offense, the offender used or carried a firearm or, in furtherance of any such offense, possessed a firearm, by a fine under this title or imprisonment for not more than 20 years, or both.''.

DIVISION D—LAWFUL STATUS FOR CERTAIN CHILDHOOD ARRIVALS

SEC. 1101. DEFINITIONS.

In this division:

(1) IN GENERAL.—Except as otherwise specifically provided, the terms used in this division have the meanings given such terms in subsections (a) and (b) of section 101 of the Immigration and Nationality Act (8 U.S.C. 1101).

(2) CONTINGENT NONIMMIGRANT.—The term ''contingent nonimmigrant'' means an alien who is granted contingent nonimmigrant status under this division.

(3) EDUCATIONAL INSTITUTION.—The term ''educational institution'' means—

(A) an institution that is described in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) or is a proprietary institution of higher education (as defined in section 102(b) of such Act (20 U.S.C. 1002(b)));

(B) an elementary, primary, or secondary school within the United States; or

(C) an educational program assisting students either in obtaining a high school equivalency diploma, certificate, or its recognized equivalent under State law, or in passing a General Educational Development exam or other equivalent State-authorized exam or other applicable State requirements for high school equivalency.

(4) SECRETARY.—Except as otherwise specifically provided, the term ''Secretary'' means the Secretary of Homeland Security.

(5) SEXUAL ASSAULT OR HARASSMENT.—The term ''sexual assault or harassment'' means—

(A) conduct engaged in by an alien 18 years of age or older, which consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, and—

(i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(iii) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment;

(B) conduct constituting a criminal offense of rape, as described in section 101(a)(43)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(A));

(C) conduct constituting a criminal offense of statutory rape, or any offense of a sexual nature involving a victim under the age of 18 years, as described in section 101(a)(43)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(A));

(D) sexual conduct with a minor who is under 14 years of age, or with a minor under 16 years of age where the alien was at least 4 years older than the minor;

(E) conduct punishable under section 2251 or 2251A (relating to the sexual exploitation of children and the selling or buying of children), or section 2252 or 2252A (relating to certain activities relating to material involving the sexual exploitation of minors or relating to material constituting or containing child pornography) of title 18, United States Code; or

(F) conduct constituting the elements of any other Federal or State sexual offense requiring a defendant, if convicted, to register on a sexual offender registry (except that this provision shall not apply to convictions solely for urinating or defecating in public).

(6) VICTIM.—The term ''victim'' has the meaning given the term in section 503(e) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(e)).

SEC. 1102. CONTINGENT NONIMMIGRANT STATUS FOR CERTAIN ALIENS WHO ENTERED THE UNITED STATES AS MINORS.

(a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may grant contingent nonimmigrant status to an alien who—

(1) meets the eligibility requirements set forth in subsection (b);

(2) submits a completed application before the end of the period set forth in subsection (c)(2); and

(3) has paid the fees required under subsection (c)(5).

(b) ELIGIBILITY REQUIREMENTS.—

(1) IN GENERAL.—An alien is eligible for contingent nonimmigrant status if the alien establishes

by clear and convincing evidence that the alien meets the requirements set forth in this subsection.

(2) GENERAL REQUIREMENTS.—The requirements under this paragraph are that the alien—

(A) is physically present in the United States on the date on which the alien submits an application for contingent nonimmigrant status;

(B) was physically present in the United States on June 15, 2007;

(C) was younger than 16 years of age on the date the alien initially entered the United States;

(D) is a person of good moral character;

(E) was under 31 years of age on June 15, 2012, and at the time of filing an application under subsection (c);

(F) has maintained continuous physical presence in the United States from June 15, 2012, until the date on which the alien is granted contingent nonimmigrant status under this section;

(G) had no lawful immigration status on June 15, 2012;

(H) has requested the release to the Department of Homeland Security of all records regarding their being adjudicated delinquent in State or local juvenile court proceedings, and the Department has obtained all such records; and

(I) possesses a valid Employment Authorization Document which authorizes the alien to work as of the date of the enactment of this Act, which was issued pursuant to the June 15, 2012, U.S. Department of Homeland Security Memorandum entitled, ''Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children''.

(3) EDUCATION REQUIREMENT.—

(A) IN GENERAL.—An alien may not be granted contingent nonimmigrant status under this section unless the alien establishes by clear and convincing evidence that the alien—

(i) is enrolled in, and is in regular full-time attendance at, an educational institution within the United States; or

(ii) has acquired a diploma from a high school in the United States, has earned a General Educational Development

certificate recognized under State law, or has earned a recognized high school equivalency certificate under applicable State law.

(B) EVIDENCE.—An alien shall demonstrate compliance with clause (i) or (ii) of subparagraph (A) by providing a valid certified transcript or diploma from the educational institution the alien is enrolled in or from which the alien has acquired a diploma or certificate.

(4) GROUNDS FOR INELIGIBILITY.—An alien is ineligible for contingent nonimmigrant status if the Secretary determines that the alien—

(A) has a conviction for—

(i) an offense classified as a felony in the convicting jurisdiction;

(ii) an aggravated felony;

(iii) an offense classified as a misdemeanor in the convicting jurisdiction which involved—

(I) domestic violence (as defined in section 40002(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12291(a)));

(II) child abuse or neglect (as defined in section 40002(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12291(a)));

(III) assault resulting in bodily injury (as such term is defined in section 2266 of title 18, United States Code);

(IV) the violation of a protection order (as such term is defined in section 2266 of title 18, United States Code); or

(V) driving while intoxicated or driving under the influence (as such terms are defined in section 164(a)(2) of title 23, United States Code).

(iv) two or more misdemeanor convictions (excluding minor traffic offenses that did not involve driving while intoxicated or driving under the influence, or that did not subject any individual other than the alien to bodily injury); or

(v) any offense under foreign law, except for a purely political offense, which, if the offense had been committed in the

United States, would render the alien inadmissible under section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)) or deportable under section 237(a) of such Act (8 U.S.C. 1227(a));

(B) has been adjudicated delinquent in a State or local juvenile court proceeding for an offense equivalent to—

(i) an offense relating to murder, manslaughter, homicide, rape (whether the victim was conscious or unconscious), statutory rape, or any offense of a sexual nature involving a victim under the age of 18 years, as described in section 101(a)(43)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(A));

(ii) a crime of violence, as such term is defined in section 16 of title 18, United States Code; or

(iii) an offense punishable under section 401 of the Controlled Substances Act (21 U.S.C. 841);

(C) has a conviction for any other criminal offense, which regard to which the alien has not satisfied any civil legal judgements awarded to

any victims (or family members of victims) of the crime;

(D) is described in section 212(a)(2)(J) of the Immigration and Nationality Act (8 U.S.C. 1882(a)(2)(J)) (relating to aliens associated with criminal gangs);

(E) has been charged with a felony or misdemeanor offense (excluding minor traffic offenses that did not involve driving while intoxicated or driving under the influence, or that did not subject any individual other than the alien to bodily injury), and the charge or charges are still pending;

(F) is inadmissible under section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)), except that in determining an alien's inadmissibility—

(i) paragraphs (5), (7), and (9)(B) of such section shall not apply; and

(ii) subparagraphs (A), (D), and (G) of paragraph (6), and paragraphs (9)(C)(i)(I) and (10)(B), of such section shall not apply, except in the case of the alien unlawfully entering the United States after June 15, 2007;

(G) is deportable under section 237(a) of the Immigration and Nationality Act (8 U.S.C. 1227(a)), except that in determining an alien's deportability—

(i) subparagraph (A) of section 237(a)(1) of such Act shall not apply with respect to grounds of inadmissibility that do not apply pursuant to subparagraph (C) of such section; and

(ii) subparagraphs (B) through (D) of section 237(a)(1) and section 237(a)(3)(A) of such Act shall not apply;

(H) was, on the date of the enactment of this Act—

(i) an alien lawfully admitted for permanent residence;

(ii) an alien admitted as a refugee under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157), or granted asylum under section 208 of the Immigration and Nationality Act (8 U.S.C. 1157 and 1158); or

(iii) an alien who, according to the records of the Secretary or the Secretary of State, is lawfully present in the United

States in any nonimmigrant status (other than an alien considered to be a nonimmigrant solely due to the application of section 244(f)(4) of the Immigration and Nationality Act (8 U.S.C. 1254a(f)(4)) or the amendment made by section 702 of the Consolidated Natural Resources Act of 2008 (Public Law 110–229)), notwithstanding any unauthorized employment or other violation of nonimmigrant status;

(I) has failed to comply with the requirements of any removal order or voluntary departure agreement;

(J) has been ordered removed in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act (8 U.S.C. 1229a(b)(5)(A));

(K) has failed or refused to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability;

(L) if over the age of 18, has failed to demonstrate that he or she is able to maintain himself or herself at an annual income that is not less than 125 percent of the Federal poverty level throughout the period of admission as

a contingent nonimmigrant, unless the alien has demonstrated that the alien is enrolled in, and is in regular full-time attendance at, an educational institution within the United States;

(M) is delinquent with respect to any Federal, State, or local income or property tax liability;

(N) has failed to pay to the Treasury, in addition to any amounts owed, an amount equal to the aggregate value of any disbursements received by such alien for refunds described in section 1324(b)(2);

(O) has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service; or

(P) has at any time engaged in sexual assault or harassment.

(c) APPLICATION PROCEDURES.—

(1) IN GENERAL.—An alien may apply for contingent nonimmigrant status by submitting a completed application form via electronic filing to the Secretary during the application period set forth in paragraph (2), in accordance with the interim final rule made by the Secretary under section 1105.

(2) APPLICATION PERIOD.—The Secretary may only accept applications for contingent nonimmigrant status from aliens in the United States during the 1-year period beginning on the date on which the interim final rule is published in the Federal Register pursuant to section 1105.

(3) APPLICATION FORM.—

(A) REQUIRED INFORMATION.—The application form referred to in paragraph (1) shall collect such information as the Secretary determines to be necessary and appropriate in order to determine whether an alien meets the eligibility requirements set forth in subsection (b).

(B) INTERVIEW.—The Secretary shall conduct an in-person interview of each applicant for contingent nonimmigrant status under this section as part of the determination as to whether the alien meets the eligibility requirements set forth in subsection (b).

(4) DOCUMENTARY REQUIREMENTS.—An application filed by an alien under this section shall include the following:

(A) One or more of the following documents demonstrating the alien's identity:

(i) A passport (or national identity document) from the alien's country of origin.

(ii) A certified birth certificate along with photo identification.

(iii) A State-issued identification card bearing the alien's name and photograph.

(iv) An Armed Forces identification card issued by the Department of Defense.

(v) A Coast Guard identification card issued by the Department of Homeland Security.

(B) A certified copy of the alien's birth certificate or certified school transcript demonstrating that the alien satisfies the requirement of subsection (b)(2)(A)(iii) and (v).

(C) A certified school transcript demonstrating that the alien satisfies the requirements of subsection (b)(2)(A)(ii) and (vi).

(D) Immigration records from the Department of Homeland Security (demonstrating that the alien satisfies the requirements under subsection (b)(2)(A)(i), (ii), and (vi)).

(5) FEES.—

(A) STANDARD PROCESSING FEE.—

(i) IN GENERAL.—Aliens applying for contingent nonimmigrant status under this section shall pay a processing fee to the Department of Homeland Security in an amount determined by the Secretary.

(ii) RECOVERY OF COSTS.—The processing fee authorized under clause (i) shall be set at a level that is, at a minimum, sufficient to recover the full costs of processing the application, including any costs incurred—

(I) to adjudicate the application;

(II) to take and process biometrics;

(III) to perform national security and criminal checks;

(IV) to prevent and investigate fraud; and

(V) to administer the collection of such fee.

(iii) DEPOSIT AND USE OF PROCESSING FEES.—Fees collected under clause (i) shall be deposited into the Immigration Examinations Fee Account pursuant to

section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)).

(B) BORDER SECURITY FEE.—

(i) IN GENERAL.—Aliens applying for contingent nonimmigrant status under this section shall pay a border security fee to the Department of Homeland Security in an amount of $1,000.

(ii) USE OF BORDER SECURITY FEES.—Fees collected under clause (i) shall be available, to the extent provided in advance in appropriation Acts, to the Secretary of Homeland Security for the purposes of carrying out division C, and the amendments made by that division.

(6) ALIENS APPREHENDED BEFORE OR DURING THE APPLICATION PERIOD.—If an alien who is apprehended during the period beginning on the date of the enactment of this Act and ending on the last day of the application period described in paragraph (2) appears prima facie eligible for contingent nonimmigrant status, to the satisfaction of the Secretary, the Secretary—

(A) shall provide the alien with a reasonable opportunity to file an application under this section during such application period; and

(B) may not remove the individual until the Secretary has denied the application, unless the Secretary, in the Secretary's sole and unreviewable discretion, determines that expeditious removal of the alien is in the national security, public safety, or foreign policy interests of the United States, or the Secretary will be required for constitutional reasons or court order to release the alien from detention.

(7) SUSPENSION OF REMOVAL DURING APPLICATION PERIOD.—

(A) ALIENS IN REMOVAL PROCEEDINGS.—Notwithstanding any other provision of this division, if the Secretary determines that an alien, during the period beginning on the date of the enactment of this Act and ending on the last day of the application period described in subsection (c)(2), is in removal, deportation, or exclusion proceedings before the Executive Office for Immigration Review and is prima facie eligible for contingent nonimmigrant status under this section—

(i) the Secretary shall provide the alien with the opportunity to file an application for such status; and

(ii) upon motion by the alien and with the consent of the Secretary, the Executive Office for Immigration Review shall—

(I) provide the alien a reasonable opportunity to apply for such status; and

(II) if the alien applies within the time frame provided, suspend such proceedings until the Secretary has made a determination on the application.

(B) ALIENS ORDERED REMOVED.—If an alien who meets the eligibility requirements set forth in subsection (b) is present in the United States and has been ordered excluded, deported, or removed, or ordered to depart voluntarily from the United States pursuant to section 212(a)(6)(A)(i) or 237(a)(1)(B) or (C) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(A)(i), 1227(a)(1)(B) or (C)), the Secretary shall provide the alien with the opportunity to file an application for contingent non-

immigrant status provided that the alien has not failed to comply with any order issued pursuant to section 239 or 240B of the Immigration and Nationality Act (8 U.S.C. 1229, 1229c)

(C) PERIOD PENDING ADJUDICATION OF APPLICATION.—During the period beginning on the date on which an alien applies for contingent nonimmigrant status under subsection (c) and ending on the date on which the Secretary makes a determination regarding such application, an otherwise removable alien may not be removed from the United States unless—

(i) the Secretary makes a prima facie determination that such alien is, or has become, ineligible for contingent nonimmigrant status under subsection (b); or

(ii) the Secretary, in the Secretary's sole and unreviewable discretion, determines that removal of the alien is in the national security, public safety, or foreign policy interest of the United States.

(8) SECURITY AND LAW ENFORCEMENT CLEARANCES.—

(A) BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not grant contingent nonimmigrant status to an alien under this section unless such alien submits biometric and biographic data in accordance with procedures established by the Secretary.

(B) ALTERNATIVE PROCEDURES.—The Secretary may provide an alternative procedure for applicants who cannot provide the biometric data required under subparagraph (A) due to a physical impairment.

(C) CLEARANCES.—

(i) DATA COLLECTION.—The Secretary shall collect, from each alien applying for status under this section, biometric, biographic, and other data that the Secretary determines to be appropriate—

(I) to conduct national security and law enforcement checks; and

(II) to determine whether there are any factors that would render an alien ineligible for such status.

(ii) ADDITIONAL SECURITY SCREENING.—The Secretary, in consultation with the Secretary of State and the heads of

other agencies as appropriate, shall conduct an additional security screening upon determining, in the Secretary's opinion based upon information related to national security, that an alien is or was a citizen or resident of a region or country known to pose a threat, or that contains groups or organizations that pose a threat, to the national security of the United States.

(iii) PREREQUISITE.—The required clearances and screenings described in clauses (i)(I) and (ii) shall be completed before the alien may be granted contingent nonimmigrant status.

(9) DURATION OF STATUS AND EXTENSION.—The initial period of contingent nonimmigrant status—

(A) shall be 3 years unless revoked pursuant to subsection (e); and

(B) may be extended for additional 3-year terms if—

(i) the alien remains eligible for contingent nonimmigrant status under subsection (b);

(ii) the alien again passes background checks equivalent to the background checks described in subsection (c)(9); and

(iii) such status was not revoked by the Secretary for any reason.

(d) TERMS AND CONDITIONS OF CONTINGENT NONIMMIGRANT STATUS.—

(1) WORK AUTHORIZATION.—The Secretary shall grant employment authorization to an alien granted contingent nonimmigrant status who requests such authorization.

(2) TRAVEL OUTSIDE THE UNITED STATES.—

(A) IN GENERAL.—The status of a contingent nonimmigrant who is absent from the United States without authorization shall be subject to revocation under subsection (e).

(B) AUTHORIZATION.—The Secretary may authorize a contingent nonimmigrant to travel outside the United States and may grant the contingent nonimmigrant reentry provided that the contingent nonimmigrant—

(i) was not absent from the United States for a period of more than 15 consecutive days, or 90 days in the aggregate during each 3-year period that the alien is

in contingent nonimmigrant status, unless the contingent nonimmigrant's failure to return was due to extenuating circumstances beyond the individual's control; and

(ii) is otherwise admissible to the United States, except as provided in subsection (b)(4)(F).

(C) CLARIFICATION ON ADMISSION.—The admission to the United States of a contingent nonimmigrant after such trips as described in subparagraph (B) shall not be considered an admission for the purposes of section 245(a) of the Immigration and Nationality Act (8 U.S.C. 1255(a)).

(3) INELIGIBILITY FOR HEALTH CARE SUBSIDIES AND REFUNDABLE TAX CREDITS.—

(A) HEALTH CARE SUBSIDIES.—A contingent nonimmigrant—

(i) is not entitled to the premium assistance tax credit authorized under section 36B of the Internal Revenue Code of 1986 and shall be subject to the rules applicable to individuals who are not lawfully

present set forth in subsection (e) of such section; and

(ii) shall be subject to the rules applicable to individuals who are not lawfully present set forth in section 1402(e) of the Patient Protection and Affordable Care Act (42 U.S.C. 18071(e)).

(B) REFUNDABLE TAX CREDITS.—A contingent nonimmigrant shall not be allowed any credit under sections 24 and 32 of the Internal Revenue Code of 1986.

(4) FEDERAL, STATE, AND LOCAL PUBLIC BENEFITS.—For purposes of title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1601 et seq.), a contingent nonimmigrant shall not be considered a qualified alien under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

(5) CLARIFICATION.—An alien granted contingent nonimmigrant status under this division shall not be considered to have been admitted to the United States for the purposes of section 245(a) of the Immigration and Nationality Act (8 U.S.C. 1255(a)).

(e) REVOCATION.—

(1) IN GENERAL.—The Secretary shall revoke the status of a contingent nonimmigrant at any time if the alien—

(A) no longer meets the eligibility requirements set forth in subsection (b);

(B) knowingly uses documentation issued under this section for an unlawful or fraudulent purpose; or

(C) was absent from the United States at any time without authorization after being granted contingent nonimmigrant status.

(2) ADDITIONAL EVIDENCE.—In determining whether to revoke an alien's status under paragraph (1), the Secretary may require the alien—

(A) to submit additional evidence; or

(B) to appear for an in-person interview.

(3) INVALIDATION OF DOCUMENTATION.—If an alien's contingent nonimmigrant status is revoked under paragraph (1), any documentation issued by the Secretary to such alien under this section shall automatically be rendered invalid for any purpose except for departure from the United States.

SEC. 1103. ADMINISTRATIVE AND JUDICIAL REVIEW.

(a) EXCLUSIVE ADMINISTRATIVE REVIEW.—Administrative review of a determination of an application for

status, extension of status, or revocation of status under this division shall be conducted solely in accordance with this section.

(b) ADMINISTRATIVE APPELLATE REVIEW.—

(1) ESTABLISHMENT OF ADMINISTRATIVE APPELLATE AUTHORITY.—The Secretary shall establish or designate an appellate authority to provide for a single level of administrative appellate review of a determination with respect to applications for status, extension of status, or revocation of status under this division.

(2) SINGLE APPEAL FOR EACH ADMINISTRATIVE DECISION.—

(A) IN GENERAL.—An alien in the United States whose application for status under this division has been denied or revoked may file with the Secretary not more than 1 appeal, pursuant to this subsection, of each decision to deny or revoke such status.

(B) NOTICE OF APPEAL.—A notice of appeal filed under this subparagraph shall be filed not later than 30 calendar days after the date of service of the decision of denial or revocation.

(3) RECORD FOR REVIEW.—Administrative appellate review under this subsection shall be de novo and based only on—

(A) the administrative record established at the time of the determination on the application; and

(B) any additional newly discovered or previously unavailable evidence.

(c) JUDICIAL REVIEW.—

(1) APPLICABLE PROVISIONS.—Judicial review of an administratively final denial or revocation of, or failure to extend, an application for status under this division shall be governed only by chapter 158 of title 28, except as provided in paragraphs (2) and (3) of this subsection, and except that a court may not order the taking of additional evidence under section 2347(c) of such chapter.

(2) SINGLE APPEAL FOR EACH ADMINISTRATIVE DECISION.—An alien in the United States whose application for status under this division has been denied, revoked, or failed to be extended, may file not more than 1 appeal, pursuant to this subsection, of each decision to deny or revoke such status.

(3) LIMITATION ON CIVIL ACTIONS.—

(A) CLASS ACTIONS.—No court may certify a class under Rule 23 of the Federal Rules of Civil Procedure in any civil action filed after the date of the enactment of this Act pertaining to the administration or enforcement of the application for status under this division.

(B) REQUIREMENTS FOR AN ORDER GRANTING PROSPECTIVE RELIEF AGAINST THE GOVERNMENT.—If a court determines that prospective relief should be ordered against the Government in any civil action pertaining to the administration or enforcement of the application for status under this division, the court shall—

(i) limit the relief to the minimum necessary to correct the violation of law;

(ii) adopt the least intrusive means to correct the violation of law;

(iii) minimize, to the greatest extent practicable, the adverse impact on national security, border security, immigration administration and enforcement, and public safety;

(iv) provide for the expiration of the relief on a specific date, which allows for

the minimum practical time needed to remedy the violation; and

(v) limit the relief to the case at issue and shall not extend any prospective relief to include any other application for status under this division pending before the Secretary or in a Federal court (whether in the same or another jurisdiction).

SEC. 1104. PENALTIES AND SIGNATURE REQUIREMENTS.

(a) PENALTIES FOR FALSE STATEMENTS IN APPLICATIONS.—Whoever files an initial or renewal application for contingent nonimmigrant status under this division and knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with title 18, United States Code, or imprisoned not more than 5 years, or both.

(b) SIGNATURE REQUIREMENTS.—An applicant under this division shall sign their application, and the signature shall be an original signature. A parent or legal guardian may sign for a child or for an applicant whose physical or developmental disability or mental impairment

prevents the applicant from being competent to sign. In such a case, the filing shall include evidence of parentage or legal guardianship.

SEC. 1105. RULEMAKING.

Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue interim final regulations to implement this division, which shall take effect immediately upon publication in the Federal Register.

SEC. 1106. STATUTORY CONSTRUCTION.

Except as specifically provided, nothing in this division may be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

Executive Order 13780: *Protecting the Nation From Foreign Terrorist Entry Into the United States* Initial Section 11 Report

January 2018

I. Introduction

On March 6, 2017, President Donald J. Trump issued Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, which declared that "it is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals," and directed a series of actions to enhance the security of the American people. The actions directed by Executive Order 13780 have—among other things—raised the baseline for the vetting and screening of foreign nationals, improved our ability to prevent the entry of malicious actors, and enhanced the security of the American people.

Most of the critical national security enhancements implemented and effectuated as a result of Executive Order 13780 are classified in nature, and will remain so to prevent malicious actors from exploiting our immigration system. However, to "be more transparent with the American people and to implement more effectively policies and practices that serve the national interest," Section 11 of Executive Order 13780 requires the Secretary of Homeland Security, in consultation with the Attorney General, to collect and make publicly available the following information:

> (i) Information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;
>
> (ii) Information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;
>
> (iii) Information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and,
>
> (iv) Any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

Accordingly, subsequent to the issuance of Executive Order 13780, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) worked collaboratively to provide information responsive to the requirements of Section 11. Unless specified otherwise, this initial report includes information for the period from September 11, 2001 until the date of issuance. Notably, however, because of previous information collection and reporting practices of DHS and DOJ, some of the information provided in this initial report does not capture the full spectrum of statistics envisioned by Executive Order 13780. DHS and DOJ will endeavor to provide additional information in future reports issued pursuant to the requirements of Executive Order 13780.

II. Information Responsive to Section 11

a. Information Regarding the Number of Foreign Nationals Charged with or Convicted of Terrorism-Related Offenses, or Removed from the United States Based on Terrorism-Related or Other National Security Reasons.

According to a list maintained by DOJ's National Security Division, at least 549 individuals were convicted of international terrorism-related charges in U.S. federal courts between September 11, 2001, and December 31, 2016. An analysis conducted by DHS determined that approximately 73 percent (402 of these 549 individuals) were foreign-born. Breaking down the 549 individuals by citizenship status at the time of their respective convictions reveals that:

- 254 were not U.S. citizens;
- 148 were foreign-born, naturalized and received U.S. citizenship; and,
- 147 were U.S. citizens by birth.[1]

Information pertaining to individuals convicted of international terrorism-related offenses after December 31, 2016, as well as information pertaining to individuals not yet convicted but facing charges for international terrorism-related offenses will be provided in future reports required by Section 11.

The conviction information outlined above is based on public convictions in federal courts between September 11, 2001, and December 31, 2016 resulting from international terrorism investigations, including investigations of terrorist acts planned or committed outside the territorial jurisdiction of the United States over which Federal criminal jurisdiction exists and those within the United States involving international terrorists and terrorist groups. This information reflects defendants convicted in cases involving charged violations of federal statutes that are directly related to international terrorism,[2] as well as defendants convicted in cases involving charged violations of a variety of other statutes where the investigation involved an identified link to international terrorism.[3] This information includes both individuals who committed offenses while located in the United States and those who committed offenses while located abroad, including defendants who were transported to the United States for prosecution. It does not include individuals convicted of offenses relating to domestic terrorism, nor does it include information related to terrorism-related convictions in state courts.

In future reports, DHS and DOJ will endeavor to provide additional details pertaining to foreign nationals or naturalized U.S. citizens convicted of international terrorism-related offenses, such as their manner of entry into the United States, countries of origin, general immigration histories, and other related information. While DHS and DOJ do not yet have complete, final

[1] Information pertaining to the citizenship status of the parents of these 147 individuals was not available at the time of this report's issuance.

[2] These statutes prohibit, for example, terrorist acts abroad against United States nationals, the use of weapons of mass destruction, conspiracy to murder persons overseas, providing material support to terrorists or foreign terrorist organizations, receiving military style training from foreign terrorist organizations, and bombings of public places or government facilities.

[3] For example, these cases could include offenses such as those involving fraud, immigration, firearms, drugs, false statements, perjury, and obstruction of justice, as well as general conspiracy charges.

information about these individuals available at the time of this report's publication, the following are illustrative examples among the 402 convictions of foreign nationals or naturalized U.S. citizens:

- **Mahmoud Amin Mohamed Elhassan**, a national of Sudan, was admitted to the United States in 2012 as a family member of a lawful permanent resident from Sudan. In 2016, he pleaded guilty to attempting to provide material support to ISIS, and in 2017 was subsequently sentenced to 11 years in prison.[4]

  According to court documents, Elhassan aided and abetted the attempt of Joseph Hassan Farrokh, 29, to travel from the United States to Syria in order to fight on behalf of ISIS. As part of their plan, Farrokh would travel first, followed by Elhassan at a later date. Farrokh and Elhassan spoke in detail about their potential travel. Both men spoke openly with each other about supporting ISIS and violent jihad, with Farrokh saying on October 2, 2015, that he had no patience and wanted to go right away and "chop their heads."

  According to the statement of facts, in an effort to conceal their plans to support ISIS, Farrokh and Elhassan communicated using apps they believed were safe from law enforcement detection. In the summer of 2015, Farrokh and Elhassan talked more seriously about going to join ISIS and concluded that they needed someone to help them do so. Elhassan contacted like-minded people all over the world and the men pursued two separate plans to travel to Syria to join ISIS.

  According to the statement of facts, Farrokh and Elhassan conspired with other persons they believed would help facilitate their travel to Syria. Over the course of many meetings, the men discussed in detail their travel plans and efforts to avoid law enforcement detection, including Farrokh shaving his beard and flying out of Richmond International Airport, where they believed there would be less security. Farrokh and Elhassan agreed that Farrokh should tell his family that he intended to travel to Saudi Arabia to study.

- **Abdurasaul Hasanovich Juraboev**, a national of Uzbekistan, was admitted to the United States as a diversity visa lottery recipient in 2011. In 2015, he pleaded guilty to conspiring to support ISIS, and in 2017 was subsequently sentenced to 15 years in prison.[5]

  According to court documents, Juraboev posted a threat on an Uzbek-language website to kill President Obama in an act of martyrdom on behalf of ISIS. In subsequent interviews by federal agents, Juraboev stated his belief in ISIS's terrorist agenda, including the establishment by force of an Islamic caliphate in Iraq and Syria. Juraboev stated that he wanted to travel to Syria to fight on behalf of

[4] Virginia Man Sentenced to 11 Years in Prison for Attempting to Provide Material Support to ISIL, THE UNITED STATES DEPARTMENT OF JUSTICE (2017), https://www.justice.gov/opa/pr/virginia-man-sentenced-11-years-prison-attempting-provide-material-support-isil.

[5] Brooklyn Man Sentenced to 15 Years in Prison for Conspiring to Provide Material Support to Terrorists, THE UNITED STATES DEPARTMENT OF JUSTICE (2016), https://www.justice.gov/usao-edny/pr/brooklyn-man-sentenced-15-years-prison-conspiring-provide-material-support-terrorists.

ISIS but lacked the means to travel. He added that, if he were unable to travel, he would engage in an act of martyrdom on U.S. soil if ordered to do so by ISIS, such as killing the President or planting a bomb on Coney Island. During the next several months, Juraboev and a co-conspirator discussed plans to travel to Syria to fight on behalf of ISIS, culminating in Juraboev's purchase on December 27, 2014, of a ticket to travel from John F. Kennedy International Airport in Queens, New York, to Istanbul, Turkey, departing on March 29, 2015.

- **Abdinassir Mohamud Ibrahim**, a national of Somalia, was admitted to the United States as a refugee in 2007. In 2015, he was sentenced to 15 years in prison for conspiring to provide material support to Al-Shabaab, a designated foreign terrorist organization, and for making a false statement in an immigration matter.[6]

  Ibrahim admitted that from about May 18, 2010, to about January 31, 2014, he knowingly conspired to provide material support and resources, specifically sending emails enlisting support for al-Shabaab and making a cash payment to a known member of al-Shabaab for the benefit of the organization. Ibrahim knew at the time that al-Shabaab was designated by the United States as a foreign terrorist organization. Ibrahim also pleaded guilty to making a false statement in an immigration matter.

  According to court documents, Ibrahim lied in his application for naturalization as he had previously lied on his request for refugee status, falsely claiming that he was of a member of a minority group in Somalia and suffered persecution as a result thereof. Ibrahim also admitted he had lied on his naturalization application by having previously lied on his refugee application by falsely claiming that he had not provided material support to a terrorist group, when he had in fact provided monetary support to a member of a terrorist organization.

- **Mohamad Saeed Kodaimati**, a national of Syria, was admitted to the United States in 2001 as a family member of a lawful permanent resident from Syria, and subsequently obtained United States citizenship through naturalization. Kodaimati entered the United States with the family member. That family member was previously admitted as the unmarried son or daughter of a lawful permanent resident, who earlier received status as the parent of a United States citizen. In 2016, Kodaimati was sentenced to 96 months in prison for making false statements in a terrorism investigation.[7]

  As part of his guilty plea, Kodaimati acknowledged that he lied in March 2015 when he stated that he did not know any members of Islamic State in Iraq, a designated foreign terrorist organization known as ISIS; that he falsely claimed that while in Syria he was never involved with Al Nusrah, also a foreign terrorist

[6] Somali Citizen Sentenced to 15 Years in Federal Prison for Conspiring to Provide Material Support to Al-Shabaab, THE UNITED STATES DEPARTMENT OF JUSTICE (2015), https://www.justice.gov/usao-wdtx/pr/somali-citizen-sentenced-15-years-federal-prison-conspiring-provide-material-support-al.

[7] San Diego Man Sentenced to 96 months in Prison for Making False Statements in an International Terrorism Investigation, THE UNITED STATES DEPARTMENT OF JUSTICE (2016), https://www.justice.gov/usao-sdca/pr/san-diego-man-sentenced-96-months-prison-making-false-statements-international.

organization; and that he again lied when he said that while in Syria he had never engaged in combat or fired a weapon at anyone.

In his plea agreement, Kodaimati admitted that he knew a member of ISIS and that while in Syria he participated in a battle against the Syrian regime, including shooting at others, in coordination with Al Nusrah fighters.

- **Ali Shukri Amin**, a national of Sudan, was admitted to the United States in 1999 as the child of a diversity visa lottery recipient, and subsequently obtained United States citizenship through naturalization. In 2015, he was sentenced to more than 11 years in prison for conspiring to provide material support and resources to ISIS.[8]

  According to court documents, Amin admitted to using Twitter to provide advice and encouragement to ISIS and its supporters. Amin provided instruction on how to use Bitcoin, a virtual currency, to mask the provision of funds to ISIS, as well as facilitating ISIS supporters seeking to travel to Syria to fight with ISIS. Additionally, Amin admitted that he assisted an 18-year-old male resident of Virginia, Reza Niknejad, to travel to Syria to join ISIS in January 2015. Niknejad was subsequently charged with conspiring to provide material support to terrorists, conspiring to provide material support to ISIS, and conspiring to kill and injure persons abroad.

- **Khaleel Ahmed,** a national of India, was admitted to the United States in 1998 as a family member of a naturalized United States citizen from India. Ahmed subsequently became a United States citizen through naturalization. In 2010, he was sentenced to more than eight years in prison for conspiring to provide material support to terrorists.[9]

  According to court documents, the criminal conspiracy involving Khaleel Ahmed and his cousin, Zubair, began no later than April 1, 2004, and continued until their arrests on February 21, 2007. As part of the conspiracy, the defendants made preparations to travel overseas in order to engage in acts that would result in the murder or maiming of U.S. military forces in either Iraq or Afghanistan. On or about May 21, 2004, the defendants traveled to Cairo, Egypt, with the intent of engaging in acts that would result in the murder or maiming of U.S. military forces in Iraq or Afghanistan. Furthermore, Zubair and Khaleel Ahmed researched the purchase of firearms, methods of obtaining firearms instruction (including at least one visit to a firing range) and methods of obtaining instruction in gunsmithing. In addition, the defendants collected videos of attacks on U.S. military forces overseas, manuals on military tactics and military manuals on weaponry.

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[8] Virginia Man Sentenced to More Than 11 Years for Providing Material Support to ISIL, THE UNITED STATES DEPARTMENT OF JUSTICE (2015), https://www.justice.gov/opa/pr/virginia-man-sentenced-more-11-years-providing-material-support-isil.

[9] Zubair and Khaleel Ahmed Sentenced for Providing Material Support to Terrorists, THE FEDERAL BUREAU OF INVESTIGATION (2010), https://archives.fbi.gov/archives/cleveland/press-releases/2010/cl071210.htm.

- **Mufid Elfgeeh**, a national of Yemen, was admitted to the United States in 1997 as a family member of a naturalized United States citizen from Yemen. Elfgeeh subsequently became a United States citizen through naturalization. The petitioning family member originally entered the United States in 1966 under the immigration classification P-51 (no longer used), as the sibling of a United States citizen over the age of 21. In 2016, Elfgeeh was sentenced to more than 22 years in prison for attempting to recruit fighters for ISIS.[10]

  According to court documents, from December 2013 through May 31, 2014, Elfgeeh actively recruited and attempted to send two individuals – both of whom were cooperating with the FBI at the time – to Syria to join and fight on behalf of ISIS. Additionally, Elfgeeh also sent $600 to a third individual in Aden, Yemen, in an effort to assist that individual in traveling from Yemen to Syria for the purpose of joining and fighting on behalf of ISIS.

  In March 2014, Elfgeeh communicated with a Syrian national alleged to be the military commander of the Green Battalion of the United Rebels of Homs-Al-Murabitun, a group of fighters located in Homs, Syria. At the time, the battalion was blockaded in Homs and needed military support, including ammunition, mortar shells and explosives that could penetrate armored vehicles, to break out. Elfgeeh facilitated communication and coordination between the battalion commander and ISIS leadership for the purpose of the commander and his battalion pledging their allegiance to and joining ISIS.

  During the course of his criminal conduct, Elfgeeh used social media to receive and disseminate information about foreign terrorist groups and their activities in Syria and other countries; to declare his support for violent jihad, ISIS and other foreign terrorist groups; to inspire and encourage others to engage in violent jihad and/or pledge allegiance to ISIS and other foreign terrorist groups; and to seek financial contributions to assist jihadist fighters.

- **Uzair Paracha**, a national of Pakistan, was admitted to the United States in 1980 as a family member of a lawful permanent resident from Pakistan. In 2006, he was sentenced to 30 years in federal prison for providing material support to al Qaeda.[11]

  The evidence at trial proved that Paracha agreed with his father, Saifullah Paracha, and two al Qaeda members, Majid Khan and Ammar Al-Baluchi, to provide support to al Qaeda by, among other things, trying to help Khan obtain a travel document that would have allowed Khan to re-enter the United States to commit a terrorist act. Statements from Khan admitted at trial revealed that, once inside the United States, Khan intended to carry out an attack on gasoline stations. In February and March 2003, Paracha posed as Khan during telephone calls with the former

[10] New York Man Sentenced to Over 22 Years in Prison for Attempting to Recruit Fighters for ISIL, THE UNITED STATES DEPARTMENT OF JUSTICE (2016), https://www.justice.gov/opa/pr/new-york-man-sentenced-over-22-years-prison-attempting-recruit-fighters-isil.

[11] Pakistani Man Convicted of Providing Material Support to al Qaeda Sentenced to 30 Years in Federal Prison, THE UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK (2006), https://www.justice.gov/archive/usao/nys/pressreleases/July06/parachasentencingpr.pdf.

Immigration and Naturalization Service (now Immigration and Customs Enforcement), called Khan's bank, and attempted to gather information about Khan's immigration paperwork via the Internet. Paracha also agreed to use Khan's credit card to make it appear that Khan was in the United States, when in fact Khan was in Pakistan. Paracha and his father had discussed with Khan and Al-Baluchi the possibility of the Parachas receiving up to $200,000 from al Qaeda in connection with the assistance Paracha was providing to Khan, which the Paracha hoped to invest in their businesses.

While DOJ is responsible for prosecuting international terrorism-related offenses in the federal courts, not all cases involving foreign nationals with a nexus to terrorism are suitable for criminal prosecution. In certain instances, the removal of an individual from the United States may be the most effective way to fulfill the national security interests of the United States.[12]

According to information available to the United States Immigration and Customs Enforcement (ICE), since September 11, 2001, there were approximately 1,716 removals of aliens with national security concerns. This number includes, but is not limited to, aliens suspected of being involved in terrorist or other security-related activities including aliens described in sections 212(a)(3) or 237(a)(4) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(3), 1227(a)(4), and aliens for whom ICE was made aware of sensitive national security information.

b. Information Regarding the Number of Foreign Nationals in the United States Who Have Been Radicalized After Entry into the United States and Who Have Engaged in Terrorism-Related Acts, or Who Have Provided Material Support to Terrorism-Related Organizations in Countries That Pose a Threat to the United States.

As of the date of this report's issuance, DHS and DOJ lack unclassified, aggregated statistical information pertaining to the timing of individual radicalization. DHS and DOJ will endeavor to provide greater clarity on the percentage of individuals who appear to have radicalized to violence after their entry into the United States. Additionally, for purposes of advancing terrorism prevention activities, DHS and DOJ will continue to explore the timing and trends related to the radicalization of such individuals.

c. Information Regarding the Number and Types of Acts of Gender-Based Violence Against Women, Including So-Called "Honor Killings," in the United States by Foreign Nationals.

According to the Bureau of Justice Statistics, between 2006 and 2015, there were approximately 1.3 million non-fatal domestic violence victimizations each year.[13] It is unclear how many were perpetrated by foreign nationals because the federal government has not recorded and tracked in an aggregated statistical manner information pertaining to gender-based violence against women committed at the federal and state level. Such offenses are overwhelmingly prosecuted at the state level, and most states currently do not track crimes in their

[12] Some individuals convicted on terrorism-related charges in the United States have since served their sentences and been released, and a portion of those were aliens who were subsequently removed. In future Section 11 reports, DHS and DOJ will work to provide a breakdown of these figures.

[13] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Police Response to Domestic Violence 2006-2015* (2017), *available at* https://www.bjs.gov/content/pub/pdf/prdv0615.pdf.

jurisdictions based on the immigration status of the offender. DHS and DOJ will work to obtain and aggregate information responsive to this requirement of Section 11.

There is no federal statute specifically prohibiting "honor killings" and the federal government lacks comprehensive data regarding incidents of such offenses at the state and local levels. Although the federal government lacks independent data regarding incidents of honor killings, a study commissioned and provided to the DOJ's Bureau of Justice Statistics in 2014 estimated that an average of 23-27 honor killings occur every year in the United States. Based on a representative sample studied through open media sources, 91 percent of the victims in honor killings in North America were murdered for being "too westernized."[14] The study further estimated that approximately 1,500 forced marriages occur every year in the United States.

Additional information is also publicly available regarding incidents of gender-based violence against women—which can occur in contexts other than so-called "honor killings," such as sex offenses, and Female Genital Mutilation (FGM).

Regarding sex offenses, the Government Accountability Office (GAO) in 2011 produced an estimate regarding the population of criminal aliens incarcerated in state prisons and local jails from fiscal years 2003 through 2009.[15] In that report, GAO estimated that over that period, aliens were convicted for 69,929 sex offenses—which, although not explicitly stated in the report, in most instances constitutes gender-based violence against women.[16]

FGM represents another form of gender-based violence against women, and is a federal criminal offense under 18 U.S.C. § 116. It, too, constitutes another crime that has not been tracked in a statistically-aggregated manner at the state level, and is largely underreported. However, a study completed in 2016 by the Centers for Disease Control estimated that 513,000 women and girls in the United States were at risk for undergoing FGM or its consequences in 2012—a number three times higher than the number estimated at risk in 1990.[17] It further noted that, although further research is necessary to gather scientifically valid data with respect to the practice in the United States, the estimated increase "was wholly a result of rapid growth in the number of immigrants from FGM/C-practicing countries living in the United States."

d. Any Other Information Relevant to Public Safety and Security as Determined by the Secretary of Homeland Security or the Attorney General, Including Information on the Immigration Status of Foreign Nationals Charged with Major Offenses.

i. *DHS Encounters with Known or Suspected Terrorists*

The United States faces a serious and persistent terror threat, and individuals with ties to terror can and will use any pathway to enter our country. Accordingly, DHS has taken significant

[14] Cynthia Helba et al., *Report on Exploratory Study into Honor Violence Measurement Methods* (2014), *available at* https://www.ncjrs.gov/pdffiles1/bjs/grants/248879.pdf.
[15] U.S. Gen. Accountability Office, GAO-11-187, *Criminal Alien Statistics—Information on Incarcerations, Arrests, and Costs* (2011), *available at* http://www.gao.gov/assets/320/316959.pdf.
[16] *Id.* at 21.
[17] Howard Goldberg et al., *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012*, 131 Public Health Reports 340–347 (2016), *available at* http://journals.sagepub.com/doi/pdf/10.1177/003335491613100218.

steps to improve the security of all potential routes used by known or suspected terrorists (KST) to travel to the United States to ensure that individuals who would do harm to Americans are identified and detected, and their plots are disrupted. These figures reflect the challenges faced by the United States and demonstrate the necessity to remain vigilant and proactive in our counterterrorism posture.

DHS is focused on keeping nefarious actors out of the United States, especially KSTs. During the course of any given year, the Department encounters thousands of terror-connected individuals attempting to reach our territory, whether by air, sea, or land. In the interest of transparency, DHS is producing recent figures detailing DHS encounters with KSTs.

In fiscal year 2017, DHS had 2,554 encounters with individuals on the terrorist watchlist (also known as the FBI's Terrorist Screening Database) traveling to the United States. Of those encounters, 335 were attempting to enter by land, 2,170 were attempting to enter by air, and 49 were attempting to enter by sea. Where consistent with the law, such individuals are denied entry into the United States, while in some cases law enforcement authorities are notified and can take appropriate action. This data only includes individuals of which the United States encountered and not all of those who may have entered or attempted to enter the country undetected.

ii. *Arrests and Removals of Aliens Convicted of Aggravated Felonies or Two or More Felonies*

DHS Components maintain a variety of statistics on foreign nationals charged with aggravated felonies[18] to include drug trafficking offenses, national security crimes, and violent crimes such as murder, rape, robbery, and kidnapping.

ICE statistics reflect that from October 1, 2011, to September 30, 2017, a total of 355,345 non-U.S. citizen offenders[19] were arrested by ICE for purposes of removal[20] after previously having been convicted of an *aggravated felony*, as defined in 8 U.S.C. § 1101(a)(43), or two or more crimes each punishable by more than one year (felony offenses). During that same period, a total of 372,098[21] non-U.S. citizen offenders were removed from the United States after conviction of an aggravated felony or two or more felonies.

iii. *Egregious Public Safety Referrals*

The United States Citizenship and Immigration Services (USCIS) and ICE work together as part of their unity of effort to expedite the removal of criminal aliens. Upon receiving a request by a foreign national for immigration-related benefits, USCIS' Fraud Detection and National Security Directorate (FDNS) refers information to ICE that indicates a foreign national is under

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[18] *See* 8 U.S.C. § 1101(a)(43).

[19] This number reflects only those aliens who ICE was able to identify and locate or encountered through enforcement operations. As a result of non-cooperation with ICE enforcement operations by some jurisdictions, a significant number of criminal aliens within this category were not identified and located or encountered by ICE and, as a consequence, were not included in this total.

[20] This represents a combination of immigration-related and criminal violations.

[21] This number reflects only those aliens who ICE was able to identify and locate or encountered through enforcement operations. As a result of non-cooperation with ICE enforcement operations by some jurisdictions, a significant number of criminal aliens within this category were not identified and located or encountered by ICE and, as a consequence, were not included in this total.

investigation, has been arrested for (without disposition), or has been convicted of an egregious felony including, but not limited to: murder; rape, firearms trafficking, child pornography, and other significant felonies.

Data from USCIS' FDNS Directorate shows that between 2007 and 2017, USCIS referred 45,858 foreign nationals who applied for immigration benefits to ICE for criminal or civil enforcement action, based on information indicating that such foreign nationals had committed egregious public safety-related offenses within the United States.

iv. *Foreign Nationals Denied Boarding on Flights Destined for the United States*

Finally, as published in the United States Customs and Border Protection's (CBP) annual "Border Security Report," the National Targeting Center (NTC), the Immigration Advisory Program (IAP), and the Regional Carrier Liaison Group (RCLG) led CBP efforts between FY 2010 and FY 2016 to identify and prevent the boarding of 73,261 foreign travelers on flights destined for the United States, who may have presented an immigration or security risk.

CBP works with industry partners to ensure the safety of the traveling public. IAP employs CBP officers at foreign airports where they review passenger information and/or assess the passenger documentation prior to their U.S.-bound flights. IAP officers make "no board" recommendations to carriers and host governments regarding passengers bound for the United States. RCLGs located in Honolulu, Miami, and New York, expand the Nation's zone of security beyond the physical U.S. borders by working with commercial carriers to prevent the boarding of passengers who may pose a security threat, have fraudulent travel documents, or are otherwise inadmissible to the United States.

III. Conclusion

DHS and DOJ play a vital role in protecting the national security of the United States, especially against terror threats. DHS actively works to block known or suspected terrorists from entering the United States and is also focused on combating terrorist radicalization and recruitment in U.S. communities. DOJ is committed to the continued investigation and criminal prosecution of terrorists and other malicious actors, as well as criminal and civil denaturalization of U.S. citizens who derive their citizenship through naturalization fraud.

DHS, in consultation with DOJ, will continue to report appropriate information regarding terrorism-related activity, as well as other information as directed under the President's Executive Order, in an effort to highlight the threats facing the United States, trends, and relevant U.S. Government actions. At the same time, DHS and DOJ urge all U.S. states to work closely with the federal government on closing the data collection gaps identified in this report in the interest of full transparency and accountability to the American people.