No. 15-40238

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C. L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS; ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA; STATE OF TENNESSEE,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION; RONALD D. VITIELLO, DEPUTY CHIEF OF U.S. BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION; SARAH R. SALDAÑA, DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; LEON RODRIGUEZ, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendants-Appellants*.

On Appeal from the United States District Court
for the Southern District of Texas, No. 1:14-cv-254

BRIEF FOR 181 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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April 6, 2015

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1, in addition to those disclosed in the parties' certificates of interested persons, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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/s/ Seth P. Waxman
SETH P. WAXMAN

April 6, 2015

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici are 181 Members of the U.S. House of Representatives, who file this brief by consent of the parties pursuant to Federal Rule of Appellate Procedure 29(a).[1] A complete list of amici is set forth in the Appendix. Among them are:

- Rep. Nancy Pelosi, Democratic Leader
- Rep. Steny Hoyer, Democratic Whip
- Rep. James E. Clyburn, Assistant Democratic Leader
- Rep. Xavier Becerra, Democratic Caucus Chair
- Rep. Joseph Crowley, Democratic Caucus Vice-Chair
- Rep. John Conyers, Jr., Ranking Member, Committee on the Judiciary
- Rep. Zoe Lofgren, Ranking Member, Subcommittee on Immigration and Border Security of the Committee on the Judiciary

As Members of Congress responsible, under Article I of the Constitution, for enacting legislation that will then be enforced by the Executive Branch pursuant to its authority and responsibility under Article II, amici have an obvious and distinct interest in ensuring that the Executive enforces the laws in a manner that is rational, effective, and faithful to congressional intent. Where Congress has chosen to vest an executive officer with discretionary authority to determine how the law should be enforced, it has a strong interest in ensuring that federal courts

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel hereby confirms that (i) no party's counsel has authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (iii) no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

honor that deliberate choice. Those interests extend to the Executive's enforcement of the Nation's immigration laws.

As representatives of diverse communities across the United States, amici have witnessed how an approach to enforcement of the immigration laws that does *not* focus on appropriate priorities, such as felons or national security threats, undermines confidence in the Nation's immigration laws, wastes resources, and needlessly divides families. Amici regard the actions of the Executive Branch challenged in this suit as appropriate measures to ensure that the Department of Homeland Security's limited enforcement resources are directed toward the removal of persons who pose actual threats to public safety.

Amici also regard these actions as squarely within the Executive's discretion to determine how best to enforce the immigration laws. As Members of Congress, amici well understand the importance of ensuring that the Executive does not exceed its constitutional or statutory authority. But Congress also understands that the Executive is often better positioned than Congress to determine how to adjust to circumstances when implementing a statutory scheme, particularly a law-enforcement one like the Immigration and Nationality Act. Congress therefore regularly vests the Executive with broad discretion to determine how to enforce such statutes—and rarely has it done so more clearly than it has with regard to the Nation's immigration laws.

Because amici regard the Executive's actions as a permissible exercise of the discretion that Congress has statutorily committed to it, they urge the Court to vacate the preliminary injunction entered by the district court.

INTRODUCTION

The district court's decision preliminarily enjoining the Secretary's Deferred Action Memorandum impairs Congress's ability to commit the enforcement of a federal statute to the Executive Branch's discretion. For decades, Congress has vested first the Attorney General and more recently the Secretary of Homeland Security with express and implied discretion to enforce the Immigration and Nationality Act (INA). Congress has granted the Secretary discretionary authority to establish regulations, issue instructions, create enforcement policies, set enforcement priorities, authorize the employment of noncitizens, and "perform such other acts as he deems necessary for carrying out his authority." As this Court has held in rejecting a prior challenge by the State of Texas to the Executive's immigration enforcement practices, Congress has "commit[ted] enforcement of the INA to [the Secretary's] discretion." *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997). The Secretary's issuance of the Deferred Action Memorandum is a rational and practical means of exercising that authority.

Contrary to the court's ruling, the issuance of the Deferred Action Memorandum is unreviewable under the Administrative Procedure Act (APA) and

fulfills the Executive's constitutional duty to faithfully execute the law. And even if it were reviewable under the APA, the issuance of the Memorandum would not trigger the APA's notice-and-comment requirements. The ruling below rests on fundamentally incorrect premises about the Memorandum and its relationship to the immigration laws that Congress has enacted.

Moreover, although the district court purported to rule narrowly on procedural grounds under the APA and to focus its analysis on the accommodations that may accompany deferred action, *see, e.g.*, Memorandum Opinion and Order (Op.) 70, 85, the rationale and implications of its ruling are much broader. The Deferred Action Memorandum calls for the use of deferred action—an administrative decision to forbear removal of a particular immigrant for a certain period—to implement the Secretary's immigration enforcement priorities in a predictable and orderly fashion. Although the district court conceded that the Secretary has unreviewable discretion to set enforcement priorities, the effect of its ruling is to contravene Congress's decision to commit to the Secretary the discretion to set enforcement priorities and to determine how best to implement those priorities—including, if necessary, by channeling how subordinate agency personnel exercise their own discretion in enforcing federal law. The ruling therefore threatens the Executive's ability to enforce statutes, within resource

constraints, in a manner that remains faithful to Congress's intent, and in turn threatens Congress's ability to enact effective legislation.

BACKGROUND

On November 20, 2014, the Secretary of Homeland Security issued several related memoranda concerning removal of undocumented immigrants. One memorandum directs that enforcement "[r]esources should be dedicated … to the removal of aliens" fitting within three priority levels—the first for "threats to national security, border security, and public safety," the second for "misdemeanants and new immigration violators," and the third for "other immigration violations." Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement (ICE), et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* 3-5 (Nov. 20, 2014) (Priorities Memorandum). Undocumented immigrants who do not fit within a priority group, the Priorities Memorandum states, may still be removed where agency field personnel judge that removal "would serve an important federal interest." *Id*. at 5.

Another such memorandum—the Deferred Action Memorandum, whose implementation the court enjoined—"establish[es] a process … for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who" meet certain criteria, including that they "are not an

enforcement priority as reflected in" the Priorities Memorandum. Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodriguez, Director, U.S. Citizenship and Immigration Services (USCIS), et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* 4 (Nov. 20, 2014). The Deferred Action Memorandum provides that deferred action pursuant to the Memorandum should be granted for three years. *Id*. at 5.[2]

As the Deferred Action Memorandum acknowledges, certain practical accommodations may also be available, under pre-existing laws and policies, to those who receive deferred action pursuant to the Deferred Action Memorandum, just as they are to those who receive deferred action under other circumstances. For instance, anyone who receives deferred action may apply for employment authorization by "establish[ing] an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); *see* Deferred Action Memorandum 4-5.

[2] The Deferred Action Memorandum also expands a similar policy, called Deferred Action for Childhood Arrivals (DACA), in three respects. Deferred Action Memorandum 3-4. Although the district court also enjoined the expansion of DACA, this brief does not deal specifically with that policy expansion, as the court's analysis and thus its errors were the same with respect to both policies. *See* Op. 123 n.111.

Neither the Deferred Action Memorandum, nor any individual immigrant's receipt of deferred action or an accompanying accommodation, makes an immigrant's status lawful. Indeed, the Deferred Action Memorandum emphasizes that it confers "no substantive right, immigration status or pathway to citizenship," and that deferred action may be "terminated at any time at the agency's discretion." Deferred Action Memorandum 2, 5. Furthermore, the entire Memorandum may be rescinded at any time by the Secretary or a successor.

ARGUMENT

The Deferred Action Memorandum is not reviewable under the APA because (1) the setting of enforcement priorities and policies is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and (2) the Secretary has not abdicated his enforcement duties. The availability of accommodations to some recipients of deferred action under pre-existing authority does not alter that conclusion. Moreover, even if the Deferred Action Memorandum were reviewable, notice and comment were not required because the Memorandum merely guides the exercise of discretion by subordinate agency personnel and explains how agency personnel are to carry out the agency's priorities—it is thus a classic example of a "general statement[] of policy." *Id*. § 553(b)(3)(A).

I. THE DEFERRED ACTION MEMORANDUM IS WITHIN THE SECRETARY'S STATUTORILY VESTED DISCRETION

Congress has vested the Secretary of Homeland Security with broad discretion to determine how best to implement the immigration laws, including the particular decisions embodied in the Deferred Action Memorandum. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (explaining that a "principal feature of the removal system is the broad discretion exercised by immigration officials," including as to "whether it makes sense to pursue removal at all"); *Johns v. Department of Justice*, 653 F.2d 884, 890 (5th Cir. Aug. 1981) (Secretary "is given discretion by express statutory provisions, in some situations, to ameliorate the rigidity of the deportation laws. In other instances, as the result of implied authority, he exercises discretion nowhere granted expressly.").

Since its enactment in 1952, the INA has authorized the Secretary to "establish such regulations; … issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" to execute the INA. 8 U.S.C. § 1103(a)(3). Congress's express authorization to the Secretary to enforce the INA "places no substantive limits on the [Secretary] and commits enforcement of the INA to [his] discretion." *Texas*, 106 F.3d at 667; *see also Aleman-Fiero v. INS*, 481 F.2d 601, 602 (5th Cir. 1973) (Section 1103(a) gives the Secretary "wide discretion in effectuating" the INA); *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir.

1984) (en banc) (Section 1103(a) is "[t]he most important" of the INA's "broad grants of discretion" to the Secretary), *aff'd*, 472 U.S. 846 (1985).

This broad discretionary authority, granted to the Secretary by Congress, is sufficient to support the issuance of the Deferred Action Memorandum. Moreover, the Memorandum is authorized by additional specific grants of discretionary authority made by Congress to the Secretary, as discussed below.

A. The Secretary's Establishment Of Enforcement Policies And Priorities Is Within His Statutorily Vested Discretion

In setting policies and priorities for enforcement of the INA, the Secretary acted well within the discretion that Congress has committed to him. The broad discretionary authority to set removal policies and priorities is both explicit and implicit in the Nation's immigration laws and has been exercised also by prior Administrations of both parties in ways consistent with the Secretary's actions.[3]

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[3] *See, e.g.*, Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors et al., *Exercising Prosecutorial Discretion* 1, 5, 7 (Nov. 17, 2000) (Meissner Memorandum) (directing INS personnel to exercise discretion in enforcing the immigration laws, describing the removal of "criminal and terrorist aliens" as a high priority, and instructing personnel to "take into account the nature and severity of" an undocumented immigrant's "criminal conduct" in the exercise of their discretion); Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All Office of the Principal Legal Advisor Chief Counsel, *Prosecutorial Discretion* 8 (Oct. 24, 2005) (instructing ICE attorneys to exercise prosecutorial discretion, and stating "DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities"); Memorandum from Julie L. Myers, Assistant Secretary of Homeland

Congress well understands, as do the courts, that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). That is manifestly true of DHS's ability to enforce the immigration laws. "DHS receives sufficient funding to provide for the removal of only about 400,000 aliens per year, whereas" well more than 10 million "are unlawfully present." Brief for the United States 21, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182); *see also, e.g.*, Deferred Action Memorandum 1 ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States."). Thus, removal prioritization is both unavoidable in implementing the Nation's immigration laws—which of course is the Executive's constitutional responsibility, U.S. Const. art. II, § 1 cl. 1, § 3—and equally an "act[] [the Secretary could] deem[] necessary for carrying out his authority" to execute the INA, 8 U.S.C. § 1103(a)(3); *see also id.* § 1103(a)(1) (generally charging the Secretary "with the administration and enforcement" of the immigration laws).

Security, to All Field Office Directors and Special Agents in Charge of U.S. Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion* (Nov. 7, 2007) (directing ICE personnel to comply with the Meissner Memorandum on prosecutorial discretion).

Congress eliminated any conceivable doubt about the Executive's discretionary authority to set and implement enforcement priorities when it enacted the Homeland Security Act of 2002, which charges the Secretary with "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). That delegation reflects Congress's recognition that the Executive is better equipped than Congress to manage enforcement priorities because the Executive can adapt more nimbly to circumstances when they warrant shifts in the way that law enforcement resources are deployed. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (identifying immigration law as "'a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program'"); Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 Duke L.J. 1787, 1810 (2010) ("An administrative agency, as a structural matter, is better equipped than Congress to take into account factors that require expertise and speed to discern."); *see also Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 703 (5th Cir. 1973) ("The complex and volatile nature of problems … often causes Congress to cast its statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs. … [T]he agency is left free to respond to the demands of changing circumstances or conditions unanticipated by Congress.").

To be sure, Congress has the constitutional authority to direct enforcement priorities, and it has done so to a limited extent. In recent years, Congress has used appropriations laws to direct the Secretary to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, tit. II, 129 Stat. 39, 43 (2015). Where Congress leads, the Executive must of course follow, as the Secretary has done here. But apart from that limited direction, Congress has left the Secretary wide discretion, which it has also emphasized in recent appropriations laws. *See id.* (providing lump sum for "necessary" enforcement and removal efforts); *see also* H.R. Rep. No. 111-157, at 8 (2009) (directing DHS to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer"). The Deferred Action Memorandum both conforms to and advances Congress's directions.

Although the district court acknowledged that the Executive has discretion to set enforcement priorities, it erroneously determined that the INA nonetheless substantially circumscribes that discretion. The court's reading would permit the Secretary to set priorities on paper, but require DHS to ignore them in practice. The court pointed to certain provisions of the INA that use what it considered "mandatory commands," Op. 88-89, such as one stating that DHS "'shall order the

alien removed'" under certain circumstances, Op. 96-97 (quoting 8 U.S.C. § 1225(b)(1)(A)); *see also* Op. 89 (quoting § 1225(b)(2)(A)); Op. 97 n.78 (quoting § 1227(a)). The court's analysis is flawed in several respects.

First, § 1227(a)—on which the court relies at several points—does *not* say that the Secretary "shall" remove certain undocumented immigrants; it specifies that undocumented immigrants "shall, *upon the order of the [Secretary]*, be removed" if they fall within certain categories. (Emphasis added.) That language makes removal contingent upon the Secretary's determination that the immigrant should be removed; it does not command the Secretary to make that determination.

Second, to the extent that § 1225 directs the Secretary to place certain undocumented immigrants in removal or expedited removal proceedings, it is well settled that such provisions are to be read in a manner consistent with the Executive's traditional discretion to decide how to prioritize limited resources in a law-enforcement setting. Indeed, the district court itself recognized that the word "shall" indicates a mandate that "should be complied with only to the extent possible and to the extent one's resources allow," and that it "does not divest the Executive Branch of its inherent discretion to formulate the best means of achieving the objective." Op. 97. The Board of Immigration Appeals—which is entitled to deference in its interpretation of the INA, *see, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)—has held that § 1225(b)(1)(A) does not

actually require DHS to place the specified types of undocumented immigrants in expedited removal proceedings. *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (BIA 2011). As the Board explained, "[i]t is common for the term 'shall' to mean 'may' when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring." *Id.* at 522.[4]

More generally, the district court's analysis conflicts with decisions of both the Supreme Court and this Court recognizing the Executive's discretion under the INA not to remove removable immigrants. The Supreme Court, for example, has observed that although "Congress has specified which aliens may be removed from the United States and the procedures for doing so, … [a] principal feature of the removal system is the broad discretion exercised by immigration officials," including their discretion to "decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499; *see also Reno v. American-Arab Anti-*

[4] Courts have interpreted similarly worded statutes in the same fashion. *See Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 n.4 (2d Cir. 1973) (declining to require prosecution of alleged civil rights violations, notwithstanding 42 U.S.C. § 1987's requirement that federal authorities "are … *required* … to institute prosecutions against all persons violating" certain statutes (emphasis added) (quotation marks omitted)); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965) (denying mandamus to compel federal prosecution, notwithstanding statutory provision that U.S. Attorney in each district "*shall* … prosecute for *all* offenses against the United States" (emphasis added)).

Discrimination Comm., 525 U.S. 471, 483 (1999) (observing that "[a]t each stage" of removal, "the Executive has discretion to abandon the endeavor"); *Texas*, 106 F.3d at 667 (explaining that enforcement of the immigration laws is committed to the Executive's discretion and that "[a]n agency's decision not to take enforcement actions is unreviewable").

B. The Deferred Action Memorandum Does Not Amount To An Abdication Of The Secretary's Enforcement Duties

Congress has left entirely to the Executive's discretion not only the task of setting the Nation's immigration enforcement priorities but also the task of determining *how* to advance those priorities. *See, e.g.*, 6 U.S.C. § 202(5) (delegating authority to establish enforcement "policies" in addition to "priorities"); 8 U.S.C. § 1103(a)(3). The Secretary has exercised this broad discretion through the Priorities Memorandum and the Deferred Action Memorandum, which focus DHS's enforcement resources in a rational manner consistent with the effective administration of the laws.

The district court erred in regarding the Deferred Action Memorandum as establishing "a blanket policy of non-enforcement," Op. 94, and thus as an "abdication" of the Executive's enforcement duty, Op. 60; *see also, e.g.*, Op. 98. According to the court, the Secretary "establish[ed] a national rule or program" applying to "over four million individuals" and "impose[d] specific, detailed and immediate obligations upon DHS personnel" that did not "'genuinely leave[] the

agency and its [employees] free to exercise discretion.'" Op. 92, 110. That analysis misconstrued both the Deferred Action Memorandum and the discretion that Congress has vested in the Secretary.

1. The Deferred Action Memorandum does not actually grant deferred action to any undocumented immigrant, let alone four million. Rather, the Memorandum directs DHS personnel to examine each case on its own merits. The Memorandum directs the USCIS to "establish a process … for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis." Deferred Action Memorandum 4. It explains precisely the sort of individual determination that DHS personnel are to undertake: After listing five criteria that must be met to be considered for deferred action, the Memorandum specifies that an applicant may obtain deferred action only if he or she also "present[s] no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." *Id.* Thus, the Memorandum channels DHS personnel's exercise of discretion by articulating certain required, but not necessarily sufficient, factors, and otherwise directs DHS employees to exercise their authority in a rational manner attentive to the facts of each case.

2. In any event, it is well within the Secretary's discretion to use deferred action as a mechanism for furthering his enforcement priorities, as the Deferred Action Memorandum does. As the Secretary concluded, the Deferred

Action Memorandum particularly advances the interests underlying the Secretary's prioritization by encouraging lower priority individuals "to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority [he] may grant), and be counted." Deferred Action Memorandum 3.

Like similar processes for staying the removal of undocumented immigrants, deferred action—a qualified and temporary reprieve from removal—is a long-established, appropriate, and congressionally approved means by which Administrations of both political parties have exercised enforcement discretion under the immigration laws. There is no statutory requirement that the Secretary leave low-priority undocumented immigrants in perpetual limbo as to whether they will be removed, any more so than in the criminal or regulatory context, where agencies such as the Justice Department and the SEC provide nonprosecution or nonenforcement letters to potential targets to inform them of the agency's discretionary determination not to enforce the law against them. *See, e.g.*, Department of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks (Aug. 29, 2013); Letter from Mark M. Attar, Senior Special Counsel, SEC Division of Trading and Markets, to Christopher M. Salter, Allen & Overy LLP (Mar. 12, 2015) (explaining conditions under which SEC staff would not recommend enforcement against certain conduct by broker-dealers).

Although deferred action began "'without express statutory authorization,'" it long ago became a "regular practice." *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 484. Indeed, regulations recognizing deferred action have existed continuously since the 1980s. *See, e.g.*, 8 C.F.R. § 109 (1982) (noncitizens with deferred action eligible to apply for work authorization); *id*. § 274a.12(c)(14) (1988) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority"); *id*. § 245a.2(b)(5) (1988) (immigrants placed in deferred action before January 1, 1982 and meeting other criteria could apply for adjustment to temporary residence status). The Executive has afforded deferred action and other forms of temporary reprieve both in discrete individual cases and in broader policies affecting numerous individuals.

In 1987, for example, the Administration of President Ronald Reagan established the Family Fairness Program, a policy by which local INS district directors could exercise discretion not to remove a substantial number of children of immigrants whose status had become lawful under the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986), as well as certain spouses of such immigrants. The Family Fairness Program provided that "INS district directors [could] exercise the Attorney General's authority to indefinitely defer deportation of anyone for specific humanitarian reasons." Alan C. Nelson, INS Commissioner, *Legalization and Family Fairness—An Analysis* (Oct. 21, 1987) ,

appended to 64 Interpreter Releases No. 41, 1190, 1203 (Oct. 26, 1987). In February 1990, President George H.W. Bush expanded the program to apply to a greater number of spouses, specified that employment authorization also could be granted, and provided further policy guidance "to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens." Gene McNary, INS Commissioner, *Family Fairness: Guidelines For Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), *appended to* 67 Interpreter Releases No. 6, 153, 164 (Feb. 5, 1990). The Family Fairness Program, like the Secretary's guidance here, did not directly grant anyone relief from enforcement. Rather, it articulated guidelines to channel the discretion of enforcement personnel in deciding whether to grant voluntary departure to individual immigrants within a broad category and thereby stay the prospect of immediate removal—a power that district directors already had. *See Angeles v. Ilchert*, 700 F. Supp. 1048, 1051-1052 (N.D. Cal. 1988).

Not only has Congress long been aware of the Executive's practice of granting deferred action; it has also long relied on that practice, both in enacted legislation and in the course of the legislative process. Congress has enacted laws listing "approved deferred action status" as a basis for issuance of driver's license, Emergency Supplemental Appropriations Act for Defense, the Global War on

Terror, and Tsunami Relief, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 312 (May 11, 2005) (codified at 49 U.S.C. § 30301 note), and providing that the "denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for ... deferred action," 8 U.S.C. § 1227(d)(2). And for decades, the Executive has granted deferred action or stays of removal to undocumented immigrants at the request of congressional committees during their consideration of private bills for an immigrant's relief from the immigration laws. *See, e.g.*, Maguire, *Immigration: Public Legislation and Private Bills* 20, 253-255 (1997); Letter from Elliot Williams, ICE, to Hon. Elton Gallegly, Chairman, Subcommittee on Immigration Policy and Enforcement, Committee on Judiciary, U.S. House of Representatives (Nov. 9, 2011) (stating that "[p]ursuant to the agreement between DHS and Congress, … [DHS] will temporarily grant deferred action to the beneficiary" of a private bill for the relief of an undocumented immigrant, and noting that under 8 C.F.R. § 274a.12(c)(14), the beneficiary could "file for work authorization"); Subcommittee on Immigration and Border Security of the Committee on the Judiciary, U.S. House of Representatives, 113th Cong., *Rules of Procedure and Statement of Policy for Private Immigration Bills*, Rule 5 ("In the past, the Department of Homeland Security has honored requests for departmental reports by staying deportation until final action is taken on the private bill.").

3. It is not only permissible but desirable for the Secretary to exercise his statutorily vested discretion through generally applicable guidelines aimed at those who exercise his delegated authority. Nothing requires the Secretary to leave individual deferred-action determinations to the unguided judgment of line officers, any more than the Attorney General is required to leave prosecution decisions to the unfettered judgment of each Assistant United States Attorney. To the contrary, it is fully consistent with rational enforcement practice—and the faithful execution of the laws—for the head of an agency to provide clear guidance to the field as to the exercise of enforcement discretion. That is especially true in the context of immigration, where Congress has *directed* the Secretary to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Indeed, the publication of guidance as to the exercise of discretion in removal and other immigration proceedings has become routine. *See supra* note 3.

The district court's understanding would call into question the longstanding and routine issuance of enforcement guidance not only by DHS but also by other executive departments and agencies. The Department of Justice, for example, promulgates extensive guidance regarding line prosecutors' exercise of enforcement discretion. *See, e.g.*, U.S. Attorneys' Manual ch. 9-2.031 (setting forth "guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based

on substantially the same act(s) or transactions involved in a prior state or federal proceeding"); *id.* ch. 9-111.120 (setting value thresholds for the government to institute forfeiture proceedings for various types of assets). The Justice Department further cabins the discretion of line prosecutors by directing them to "charge … the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." *Id.* ch. 9-27.300; *see also* Memorandum from Eric H. Holder, Jr., to All Federal Prosecutors, *Department Policy on Charging and Sentencing* (May 19, 2010). Other agencies similarly notify line personnel (and the public) of their centralized enforcement priorities. *See, e.g.*, Securities and Exchange Commission Enforcement Manual § 2.1.1 (listing considerations a Director may consider in ranking investigations by order of priority and designating an investigation as a "National Priority Matter").

No one has an interest in haphazard, standardless, or incompetent enforcement of the laws, least of all the body that writes those laws. Impairing the Executive's ability to define general criteria for the exercise of discretion would undermine Congress's ability to enact effective legislation. From Congress's perspective, rational agency guidance on the exercise of case-by-case enforcement discretion is to be lauded rather than condemned. Congress's interest is for the Executive to allocate limited enforcement resources in a rational, non-arbitrary,

and effective manner. This interest is served by centralized guidance that harmonizes and makes predictable the Executive's enforcement policies and priorities; it is disserved by haphazard enforcement that may vary from person to person and region to region according to the predilections of particular enforcement agents. Moreover, the Executive's announcement of general principles to guide discretionary decisions aids Congress's performance of its legislative function in the future by providing Congress with more valuable information about how the Executive is executing the law than could be gleaned from purely ad hoc enforcement decisions. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) (A "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." (internal quotation marks omitted)).

C. The Pre-Existing Accommodations Available To Undocumented Immigrants Against Whom Action Is Deferred Are Within The Secretary's Statutorily Vested Discretion

The district court also deemed the Deferred Action Memorandum to exceed the Secretary's discretion insofar as it, in the court's view, "awards certain benefits" to qualifying low-priority undocumented immigrants. Op. 7; *see also, e.g.*, Op. 92, 94. The court was mistaken for two reasons. First, the Memorandum merely creates a process for facilitating case-by-case deferred action determinations, which may in turn—under existing policies—render the recipient

of deferred action eligible for certain practical accommodations; it does not "award[]" any "benefits" or even change the criteria for obtaining these accommodations. Second, allowing for those accommodations is well within the Secretary's statutorily vested authority.

1. The district court faulted the Secretary for granting undocumented immigrants "legal status," declaring that "[t]he award of legal status and all that it entails is an impermissible refusal to *follow* the law." Op. 87 n.67; *see also, e.g.*, Op. 95 n.76. The court erroneously conflated "legal status" and "legal presence." *See, e.g.*, Op. 95 & n.76. As this Court has recognized, those are distinct terms of art in immigration law. Legal *status* implies "a right protected by law," whereas legal *presence* merely reflects the "exercise of discretion by a public official," *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013); *see also Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013) ("[U]nlawful presence and unlawful status are distinct concepts[.]").[5] Although immigrants who receive deferred action are

[5] *Dhuka* and *Chaudhry* involved the Attorney General's discretionary decision to suspend certain immigrants' accrual of "unlawful presence" for purposes of statutory restrictions on admissibility upon subsequent reentry. *See* 8 U.S.C. § 1182(a)(9)(B); Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS et al. to Field Leadership, *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* 33, 42 (May 6, 2009). Such suspension, which is available to recipients of deferred action, does not "make the alien's status lawful." *Id*. at 42.

regarded as lawfully present for some purposes, the Deferred Action Memorandum makes clear that neither the Memorandum nor receipt of deferred action confers "any form of legal status," "substantive right, immigration status, or pathway to citizenship," as "[o]nly an Act of Congress can confer these rights." Deferred Action Memorandum 2, 5. Nor does the Memorandum confer "immunity" from the immigration laws or any other kind of permanent status, Op. 87, as deferred action may be "terminated at any time at the agency's discretion," Deferred Action Memorandum 2, 5.[6]

2. The district court also faulted the Deferred Action Memorandum for "awarding" undocumented immigrants "the right to work." Op. 92. This conclusion misconstrues the Memorandum and neglects the long-settled statutory and regulatory structure governing work authorization for immigrants.

[6] Congress's failure in recent years to enact comprehensive immigration reform legislation should not be interpreted to imply congressional disapproval of the enforcement discretion exercised through the Deferred Action Memorandum. The designation of certain undocumented immigrants as low priorities for removal does substantially less than such legislation would do. The bill passed by the Senate in 2013 would have created a program through which certain undocumented immigrants could gain legal status and eventually apply to become lawful permanent residents. *See* S. 744, 113th Cong. §§ 2101-2106 (2013). The Deferred Action Memorandum, by contrast, does not purport to confer legal status on any undocumented immigrant. Congress's failure to act on such legislation does not preclude the Executive from developing and implementing criteria for enforcing the existing immigration laws in a rational and effective manner.

As an initial matter, the Deferred Action Memorandum does not grant anyone a work authorization. Instead, a longstanding regulation, 8 C.F.R. § 274a.12(c)(14), permits undocumented immigrants granted deferred action to apply for work authorization. Approval is not automatic: the immigrant must "establish[] an economic necessity for employment," *id.*, and USCIS reviews the immigrant's annual income, annual expenses, and assets to determine whether he or she satisfies this requirement, *see* USCIS, *Instructions for I-765, Application for Employment Authorization* (Aug. 6, 2014).

More generally, Congress has long vested the Executive with "broad discretion to determine when noncitizens may work in the United States." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014). The relevant statutory text—which the district court never addressed—provides that a noncitizen is "unauthorized" for purposes of employment if the noncitizen is neither "lawfully admitted for permanent residence" nor "authorized to be … employed by this chapter *or by the [Secretary]*." 8 U.S.C. § 1324a(h)(3) (emphasis added). This Court has noted that this provision is "permissive rather than mandatory" and does not "set[] constraints on the agency's discretion." *Perales v. Casillas*, 903 F.2d 1043, 1048-1049 (5th Cir. 1990). Accordingly, this

Court held that "the agency's decision to grant … work authorization has been committed to agency discretion by law." *Id.* at 1045.[7]

Acting under its general authority to administer the INA, the Executive first adopted the precursor to 8 C.F.R. § 274a.12(c)(14) in 1981, even before the enactment of § 1324a(h)(3) in 1986. *See* Employment Authorization; Revision to Classes of Aliens Eligible, 46 Fed. Reg. 55,920 (Nov. 13, 1981). The 1981 regulation specifically provided that noncitizens granted deferred action (as well as those granted extended voluntary departure) were eligible to apply for work authorization. *See id.* at 55,921. That regulation formalized a longstanding administrative practice: Through extended voluntary departure, the Executive allowed significant numbers of undocumented immigrants to remain—and work—in the United States for extended periods in the 1960s, 1970s and 1980s. *See* USCIS, Adjudicator's Field Manual, ch. 38.2. By the time Congress revised the immigration laws in 1986, it was well aware of the Executive's practice. *See, e.g.*,

[7] Congress may choose to constrain the agency's discretion on this subject, and it has done so in limited instances. *See, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (directing the Secretary to grant work authorization to certain categories of noncitizens); *id.* § 1226(a)(3) (directing the Secretary not to grant work authorization to certain categories of noncitizens). None of those specific directives is implicated by the regulation permitting recipients of deferred action to apply for work authorization, and Congress has otherwise left intact the Secretary's broad discretion set forth in § 1324a(h)(3).

H.R. Rep. No. 99-682, at 72 (1986) (noting extended voluntary departure).[8] Yet rather than disapproving the practice, Congress enacted § 1324a(h)(3), expressly confirming the Executive's broad discretionary authority over employment authorization and validating the regulation under which persons who receive deferred action may apply for work authorization.

II. THE DEFERRED ACTION MEMORANDUM WAS ISSUED VALIDLY UNDER THE APA

The district court held that the Deferred Action Memorandum is reviewable under the APA and that it is likely invalid because the Secretary did not afford the public the requisite notice and opportunity for comment. The discussion above shows that both of these conclusions are incorrect.

A. The Issuance Of The Deferred Action Memorandum Is Unreviewable Under The APA

The issuance of the Deferred Action Memorandum is unreviewable under the APA because the matters it covers are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Memorandum does not dictate whether any particular immigrant will be granted deferred action or work authorization (or any

[8] The agency's practice was a matter of public knowledge and debate at that time. Shortly before Congress enacted § 1324a(h)(3), the Immigration and Naturalization Service published a petition by a private group that contended the agency was exceeding its authority in authorizing the employment of undocumented immigrants. *See* Employment Authorization, 51 Fed. Reg. 39,385 (Oct. 28, 1986).

of the other accommodations on which the district court and the States have focused). But even if it did, it would still be unreviewable. "[A]n agency's decision not to take enforcement action should be presumed immune from judicial review," as it "has traditionally been 'committed to agency discretion.'" *Heckler*, 470 U.S. at 832. That is certainly true of the Executive's nonenforcement decisions under the immigration laws, as this Court has already held. *Texas*, 106 F.3d at 667.

To be sure, this presumption of unreviewability "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," *Heckler*, 470 U.S. at 833, but as discussed above, the Deferred Action Memorandum does not implicate any relevant statutory guidelines. The Supreme Court has suggested that the presumption might also be rebutted where the agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Id*. at 833 n.4 (quotation marks omitted). But the Deferred Action Memorandum facilitates enforcement by directing agency resources to the removal of higher-priority immigrants; by no means does it abandon enforcement altogether.

The fact that individuals against whom DHS defers action are eligible to apply for various accommodations under pre-existing authority does not alter this analysis. Both the establishment of immigration enforcement policies and

individual decisions to defer action remain committed to agency discretion. And regardless, as explained above, Congress has vested the Secretary with discretion to provide the accommodations, and there are no "meaningful standards" that a court could apply in "defining the limits of that discretion." *Heckler*, 470 U.S. at 834. Indeed, this Court has already held that the Executive's "decision to grant ... work authorization has been committed to agency discretion by law." *Perales*, 903 F.2d at 1045.[9]

B. The Issuance Of The Deferred Action Memorandum Is Not Subject To The APA's Notice-And-Comment Requirements

The district court also erred in concluding that the Memorandum violates the APA because the Memorandum constitutes a substantive rule, such that the public was entitled to formal notice and an opportunity to comment on it. As explained above, although the Memorandum specifies certain necessary conditions for the forbearance of removal proceedings, it leaves the ultimate act to the case-by-case judgment of enforcement personnel, who must determine whether any "*other* factors … make[] the grant of deferred action inappropriate" in an individual case. Deferred Action Memorandum 4 (emphasis added). Further, as also explained

[9] Similarly, the Deferred Action Memorandum fulfills the Executive's constitutional duty to faithfully execute the law. It does not dictate a policy of non-enforcement. Rather, it sets out a rational framework for exercising statutorily granted discretion that advances the goals of the immigration laws in a manner consistent with their terms. *See Heckler*, 470 U.S. at 831-832.

above, the Memorandum does not change *anyone's* immigration status or grant *anyone* an accommodation, such as employment authorization.[10]

CONCLUSION

This Court should vacate the preliminary injunction.

Respectfully submitted.

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[10] Moreover, the regulations under which employment is authorized have already been subject to notice and comment—several times. *See* Proposed Rules for Employment Authorization for Certain Aliens, 44 Fed. Reg. 43,480 (July 25, 1979); Employment Authorization, 45 Fed. Reg. 19,563 (Mar. 26, 1980); Employment Authorization, 51 Fed. Reg. 39,385 (Oct. 28, 1986); Control of Employment of Aliens, 52 Fed. Reg. 8762 (Mar. 19, 1987).

APPENDIX

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,973 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
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April 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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