

NO. 15-40238

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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STATE OF TEXAS, ET AL.,

*Plaintiffs-Appellees,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

Civil No. 1:14-cv-00254

The Honorable Andrew S. Hanen, District Judge

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BRIEF FOR *AMICI CURIAE*  
BUSINESSES IN SUPPORT OF RESPONDENTS-APPELLANTS  
AND IN SUPPORT OF REVERSAL

---

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

**The Amici**, who do not have a financial interest in the outcome of this case, but are nonetheless interested in the outcome of the legal issue they address, are:

American Apparel, Inc.<sup>1</sup>

Capital City Fruit, Inc.<sup>2</sup>

Farmers Investment Co.<sup>3</sup>

Latin-American Chamber of Commerce of Utah<sup>4</sup>

Marek Brothers Construction, Inc.<sup>5</sup>

New Solutions Group, LLC<sup>6</sup>

Nisei Farmers League<sup>7</sup>

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<sup>1</sup> American Apparel, Inc., a Delaware corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in American Apparel, Inc.

<sup>2</sup> Capital City Fruit, Inc., an Iowa corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in Capital City Fruit, Inc.

<sup>3</sup> Farmers Investment Co., an Arizona corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in Farmers Investment Co.

<sup>4</sup> The Latin-American Chamber of Commerce of Utah, a Utah corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in the Latin-American Chamber of Commerce of Utah.

<sup>5</sup> Marek Brothers Construction, Inc., a Texas corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in the Marek Brothers Construction, Inc.

<sup>6</sup> New Solutions Group, LLC, a Michigan corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. no publicly held corporation has ten percent or greater ownership interest in New Solutions Group, LLC.

<sup>7</sup> Nisei Farmers League, a California corporation, has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has ten percent or greater ownership interest in Nisei Farmers League.

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Governor Paul R. LePage, State of Maine

Governor Patrick L. McCrory, State of North Carolina

Governor C.L. “Butch” Otter, State of Idaho

Honorable Andrew S. Hanen

Jeh Johnson, Secretary of the Department of Homeland Security

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

León Rodríguez, Director of U.S. Citizenship and Immigration Services

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

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## **IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>8</sup>**

American Apparel, Inc. has been serving customers in the apparel industry since 1999. It employs 10,000 workers worldwide and over 5,000 in the Los Angeles area, making it the largest employer of professional apparel workers in the United States. Many talented and experienced individuals could become available to American Apparel and other companies under the challenged immigration guidance.

Capital City Fruit, Inc., is a third-generation family-owned business based in Norwalk, Iowa. Capital City Fruit employs 147 employees and delivers fresh fruit and vegetables across a 7-state region. Approximately 38% of its workforce is made up of immigrants. Capital City Fruit has utilized E-Verify since 1997 to verify work authorization status. Unfortunately, many applicants that Capital City Fruit wishes to hire are not authorized to work in the United States. This is a major issue constraining Capital City Fruit's ability to grow because it is unable to hire the necessary workers. Capital City Fruit believes that a worker permit system would enable it to support more jobs and grow at a faster rate.

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<sup>8</sup> Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both the Defendants-Appellants and the Plaintiffs-Appellees have consented in writing to the filing of this brief.

Farmers Investment Co. (“FICO”) is the largest integrated pecan grower and processor in the United States. Operating near the United States-Mexico border, FICO depends on a supply of qualified permanent and seasonal workers, as well as a flow of commerce between the United States, Mexico, and other countries. Furthermore, FICO employs second and third generation immigrants whose families are directly affected by immigration policies.

The Latin-American Chamber of Commerce of Utah has chapters in Utah, Weber, and Salt Lake Counties, and represents over 10,000 businesses in Utah. The Latin-American Chamber of Commerce of Utah fosters economic development, wealth creation, prosperity, and connections for our members and the Hispanic business community in Utah through training, networking meetings, and creative annual business functions. The Latin-American Chamber of Commerce of Utah is the largest ethnic chamber in the state.

Marek Brothers Construction, Inc., is a privately-held construction company in Texas that employs over 1,000 individuals. Founded in 1938, Marek Brothers Construction, Inc. now provides construction services to eight cities in Texas. Marek Brothers Construction, Inc. has advocated for changes to the United States’ immigration policies because the company has faced labor shortages as it struggles to find workers to field full construction crews and to resist competitive disadvantages from peer construction firms who hire undocumented workers.

New Solutions Group, LLC (“NSG”) has been serving customers in the economic development and planning industry since 2009. NSG clients include chambers of commerce, state economic development agencies, and a variety of non-profit organizations focused on urban regional development. NSG has developed expertise on a number of topics, including revitalizing cities, community development, school reform, and immigration economic development. In particular, NSG has conducted extensive research on the positive impacts of immigrants on Midwestern economies.

The Nisei Farmers League is a grower-driven organization dedicated to protecting the rights and livelihood of farmers and farmworkers. The Nisei Farmers League educates its members about labor, immigration, housing, transportation, water, regulations and farmworker safety and other issues impacting our industry. The Nisei Farmers League also maintains a close working relationship with local, state, and federal governments to assure that grower interests are adequately understood and defended.

## **PRELIMINARY STATEMENT**

Businesses benefit from clarity in the law, from a level playing field, and from a robust civil society. The deferred action initiatives announced by the federal government on November 20, 2014 (hereinafter the “2014 Guidance”) further all of these goals, and help to foster a positive environment for businesses.

*Amici* are concerned that the district court has misapplied the Administrative Procedure Act (“APA”) in a manner that damages, rather than improves, the climate for businesses. It improperly enjoined policies of the Department of Homeland Security that clarified law enforcement priorities by identifying certain categories of low-priority undocumented immigrants eligible for a case-by-case exercise of deferred action—a long-standing form of prosecutorial discretion in the immigration context. By making the government’s enforcement priorities more transparent, the 2014 Guidance reduced uncertainties that currently bedevil many of the nation’s businesses. For example, greater transparency helps to level the playing field between employers making diligent efforts to follow the laws and their less scrupulous competitors. It also reduces workforce disruption by giving certain low-priority undocumented noncitizens the opportunity to obtain temporary work authorization. Further, the 2014 Guidance contributes to a positive social environment in which businesses can thrive and flourish. Not surprisingly, then,

the Department's policies are expected to generate significant positive economic effects.

Such transparency-enhancing policy frameworks are encouraged by the APA—and they certainly do not violate the APA. Indeed, the law is clear that general policy statements concerning exercises of enforcement discretion are subject neither to the APA's notice and comment rulemaking procedures nor to judicial review.

The 2014 Guidance therefore does not violate the APA, and the district court misconstrued the APA and undermined its objectives by concluding otherwise. If left undisturbed, the district court's decision will significantly injure the nation's business community.

## **ARGUMENT**

### **I. Uncertainty In Law Enforcement Against Undocumented Immigrants Harms Businesses.**

Immigrants, including undocumented immigrants, are inseparable from the nation's economic infrastructure. Notably, undocumented immigrants comprise over 5 percent of the domestic labor force. *See* Pia Orrenius, *Immigrant Legalization Offers Range of Economic Gains, Some Fiscal Costs*, Fed. Reserve Bank of Dallas, at 8 (2015). And our businesses continue to rely on immigrants' skills. *See* Patrick Oakford, *Administrative Action on Immigration Reform: The Fiscal Benefits of Temporary Work Permits*, Center For American Progress (Sept.

2014); *see also* U.S. Chamber of Commerce, *Immigration Myths and Facts*, 2, 4-5 (2013) (finding that immigrants are “invaluable” in sustaining U.S. economic growth in the face of an aging U.S. workforce and impending retirements).

But—for the reasons detailed below—the uncertain prospect of removal facing undocumented immigrants imposes significant uncertainties and costs on our businesses. Providing guidance on how the federal government intends to prioritize its immigration enforcement resources helps the nation’s businesses to stabilize and improve their operations.

**A. Deferred Action Helps To Level The Regulatory Playing Field Among Employers.**

Opaque and uncertain enforcement efforts targeting undocumented immigrants have created an environment of perverse incentives—one where even the most scrupulous businesses suffer competitive disadvantages. By identifying populations of undocumented immigrants who are not a high priority for removal—and allowing them to seek deferred action and temporary work authorization—the federal government will help to level the playing field between law-abiding businesses and their less punctilious counterparts.

Businesses complying with immigration laws suffer when their competitors benefit from the work of undocumented immigrants—labor that is often accessed below market wages or even below minimum wages. Giovanni Peri, *Rationalizing U.S. Immigration Policy: Reforms for Simplicity, Fairness, and Economic Growth*,



Brookings Institute, at 17 (2014). Worse yet, law-abiding businesses must compete with counterparts that sometimes skirt labor and health regulations. After all, undocumented immigrants—as long as they remain under a perpetual and uncertain threat of removal—are less likely to complain about unsafe or unclean workplaces, let alone about violations of unemployment insurance laws. *See* Oded Stark, *Work Effort, Moderation in Expulsion, and Illegal Migration*, 11 Rev. Dev. Econ. 585, 585-90 (2007); *see also* Fiscal Policy Institute, *Three Ways Immigration Reform Would Make the Economy More Productive* (2013), available at <http://fiscalpolicy.org/wp-content/uploads/2013/06/3-ways-reform-would-improve-productivity.pdf>.

Meanwhile, foregoing payroll taxes, workers' compensation, and unemployment insurance payments can save unscrupulous employers as much as 25 to 30 percent of wages—an especially unfair outcome in the labor-intensive industries that employ many undocumented immigrants. *See* Fiscal Policy Institute, *supra* at 10. And undocumented immigrants comprise 33 percent of the service industry labor force and 15 percent of the construction labor force. Jeffrey S. Passel & D'Vera Cohn, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Falls Since 2007*, Pew Research Ctr., at 8 (2015), available at <http://www.pewhispanic.org/2015/03/26/share-of-unauthorized-immigrant-workers-in-production-construction-jobs-falls-since-2007/>.

This uneven playing field is not merely theoretical. A recent study from the Federal Reserve Bank of Atlanta found that construction businesses that did not employ undocumented immigrants experienced greater failure rates. J. David Brown et al., *Does Employing Undocumented Workers Give Firms a Competitive Advantage?*, Fed. Reserve Bank of Atlanta (Nov. 2012), *available at* [https://www.frbatlanta.org/research/publications/wp/2012/12\\_02.aspx](https://www.frbatlanta.org/research/publications/wp/2012/12_02.aspx). Similar results were observed in the manufacturing and hospitality industries. *Id.*

By clarifying its enforcement priorities and providing the opportunity for temporary work authorization to certain low-priority undocumented immigrants, the 2014 Guidance creates a more level, competitive environment that offers law-abiding enterprises an opportunity to access a broader domestic workforce on fair terms. That is good for business.

#### **B. Deferred Action Helps To Reduce Workforce Disruption.**

By making its enforcement priorities more clear, and making employment authorization available to certain low-priority undocumented immigrants, the federal government also enhances the stability of our workforce. Foreign-born workers account for more than a quarter of the workforce in the accommodation, agriculture, construction, and food services industries, among others. Audrey Singer, *Immigrant Workers in the U.S. Labor Force*, Brookings Institution (Mar. 15, 2012). Even as many employers in these fields struggle with labor shortages,

they must also cope with significant workforce disruptions when the government asserts discrepancies between documents presented by workers and agency records. Valid employment authorization documents issued to deferred action recipients will benefit these employers because valid documents are less likely to trigger a discrepancy.

The agriculture, dairy, and food service industries, in particular, suffer from an acute shortage of workers. In 2009, the National Milk Producers Federation concluded from survey data that “[i]mmigrant labor is a major contributor to the economic viability” of many American dairy farms. Nat’l Milk Producers Fed’n, *The Economic Impacts of Immigration on U.S. Dairy Farms* 12 (June 2009). Despite this, one-fifth of dairy farmers surveyed reported experiencing a labor shortage during the prior two years. *Id.* at 7. Today, “[m]any owners of the largest dairies say that they’re unable to find employees” due to a lack of willing workers. Luke Runyon, *Without immigration fix, many dairies struggle to find employees*, Harvest Public Media (Feb. 3, 2015), <http://harvestpublicmedia.org/article/without-immigration-fix-many-dairies-struggle-find-employees>.

Similarly, the Department of Agriculture has cautioned that domestic “fruit and vegetable producers have reason to be concerned about the cost and availability of labor to harvest their crops,” and that “[a]ny potential immigration reform could have significant impacts on the U.S. fruit and vegetable industry.”

Linda Calvin & Philip Martin, *Labor-Intensive U.S. Fruit and Vegetable Industry Competes in a Global Market*, U.S. Dep't of Agric. (Dec. 1, 2010). The owner of a large California farm labor contracting company described current immigration policies as “a farce”; due to the lack of available workers, he can often only provide crews that are half the size of those requested by farmers. Jennifer Medina, *California Farmers Short of Labor, and Patience*, N.Y. Times, Mar. 30, 2014, at A15. Indeed, a recent report estimated that “[l]abor [shortages] alone can explain as much as \$3.3 billion in missed GDP growth in 2012,” and “\$1.3 billion in farm income that wasn’t realized that year.” Stephen Bronas, *No Longer Home Grown: How Labor Shortages Are Increasing America’s Reliance on Imported Fresh Produce and Slowing U.S. Economic Growth*, Partnership for a New Am. Econ. & The Agric. Coalition for Immigration Reform, at 5 (2014), <http://www.renewoureconomy.org/wp-content/uploads/2014/03/no-longer-home-grown.pdf>.

Steps being taken by the federal government to make employment authorization available to a targeted population will help to stabilize labor supplies in these, and many other, industries. Having a larger pool of workers with valid work authorization will make worksite disruptions less common, even if an audit does occur. Even when apparently documented workers appear to fill business needs, the most scrupulous employers still often have difficulty ascertaining the

veracity of work authorization documents. For example, Monty Moran, the co-Chief Executive Officer of Chipotle—one of the nation’s fastest growing fast-food chains<sup>9</sup>—emphasized that even for employers who earnestly endeavor to follow the law, immigration audits cause “a lot of disruption and instability,” noting that the company dismissed hundreds of workers who could not provide other evidence of work authorization following an audit in Minnesota. Sasha Aslanian, *Chipotle Exec. Responds to Minn. Immigration Audit*, Minn. Public Radio (Jan. 25, 2011), <http://www.mprnews.org/story/2011/01/25/chipotle-immigrant-workers>.

By clarifying its enforcement priorities and giving certain low-priority undocumented immigrants the opportunity to obtain temporary work authorization, the federal government is helping to reduce uncertainty, labor shortages, and workplace disruptions. And that, too, is good for business.

### **C. Deferred Action Contributes To A Positive Social Environment In Which Businesses Can Thrive And Flourish.**

By clarifying its enforcement priorities and providing temporary work authorization to certain low-priority undocumented immigrants, the federal government promotes a fair and robust civil society—interests strongly shared by the business community. *See* Timothy L. Fort & Cindy A. Schipani, *The Role of*

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<sup>9</sup> *See The 9 Fastest-Growing Fast-Food Restaurant Chains*, Forbes.com, <http://www.forbes.com/pictures/geeg45kedg/6-chipotle/> (last visited Mar. 31, 2015) (listing Chipotle as one of the 9 fastest-growing fast-food restaurant chains and noting that 185 U.S. units were added in 2013).

*Business in Fostering Peaceful Societies* 13-25 (2004). Businesses do not thrive in an environment of instability and social unrest; instead, they are “more likely to flourish when societies practice integrity virtues that foster harmonious relationships.” *Id.* at 21.

The 2014 Guidance helps to promote such a positive social environment—and thereby generates economic benefits. First, by clarifying that certain undocumented immigrant parents are a low priority for deportation, the Guidance helps preserve the nuclear family, which several studies have shown to foster children’s growth and development. *See, e.g.,* Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 *Hisp. J. of Behav. Sci.* 341, 342-43 (2010). Keeping families together allows for a more stable workforce, since many of the noncitizens who would be deemed a low priority under the 2014 Guidance are parents of U.S. citizens or lawful permanent residents. This benefits businesses by improving the well-being of their workers. *See id.* at 345-46, 355-56. Second, the 2014 Guidance allows the Department of Homeland Security to more effectively focus its removal resources on noncitizens who actually pose a threat to public safety and national security, which leads to a more secure environment in which businesses can flourish. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 210 (D.D.C. 2014) (“Halting these deferred action programs would inhibit the ability of

DHS to focus on its statutorily proscribed [*sic*] enforcement priorities (national security, border security, and public safety)’’); *see also* Fort & Schipani, *supra* at 19-21 (discussing the negative impact of violence on business). Third, the 2014 Guidance will improve public safety by encouraging noncitizens accorded deferred action—who might otherwise fear coming forward—to cooperate with state and local law enforcement officers. *See* Brief of Appellants at 53. These and other benefits from the 2014 Guidance contribute to a healthy and safe social climate for businesses to thrive.

**D. Deferred Action Will Generate Positive Economic Effects.**

It is therefore hardly surprising that the 2014 Guidance is anticipated to deliver significant positive economic effects for the United States. And it is well established that a growing economy offers a wealth of secondary benefits for individual businesses, such as increased confidence to make capital investments. *See* Neil Shaw, *Why Business Investment Could Break Out*, Wall St. J. (Jan. 12, 2014), *available at* <http://www.wsj.com/articles/SB1000142405270230375440457931284072898654>.

The administrative actions on immigration announced by the federal government on November 20, 2014 are projected to raise the Gross Domestic Product by between 0.4 percent and 0.9 percent within 10 years—an additional \$90 billion to \$210 billion in real growth. *See* Council of Econ. Advisers, *The*

*Economic Effects of Administrative Action on Immigration* 6-7 & Table 2 (2014).

The policy also removes from the shadows of uncertainty and instability \$15.8 billion in GDP that individuals eligible for deferred action contribute to the United States economy each year. *See* Raul Hinojosa-Ojeda, *From the Shadows to the Mainstream: Estimating the Economic Impact of Presidential Administrative Action and Comprehensive Immigration Reform*, N. Am. Integration & Dev. Ctr., at 32 (2014).

In addition, the 2014 Guidance will have significant positive effects for the United States workforce, which will expand by nearly 150,000 workers over the next ten years. *See* Council of Econ. Advisers, *supra* at 2. These actions will also diversify the workforce by increasing female participation, *id.*, because while most undocumented men work, many undocumented women do not, *see* Orrenius, *supra* at 8.

Moreover, recent studies have shown that “immigrants promote productivity and innovation, both directly and indirectly through positive spillover effects on native workers.” *See* Nat’l Econ. Council et al., *The Economic Benefits of Fixing Our Broken Immigration System*, at 6-7, 9 (July 2013). Immigration reform measures have helped to attract entrepreneurs to the United States to start businesses and invest in our economy. *See id.* at 6, 9 (noting that immigrant-owned small businesses generated a total of \$776 billion in receipts and employed



an estimated 4.7 million people in 2007); *see also* Bus. Roundtable, *Contributing to American Growth: The Economic Case for Immigration Reform* 9 (2014).

Individuals eligible for deferred action are also projected to experience a \$7.1 billion increase in wages. *See* Hinojosa-Ojeda, *supra* at 32. An estimated 167,000 new American jobs will be created as a result of this wage growth. *Id.*; *see also* Press Release, Fiscal Policy Institute, President's Immigration Action Expected to Benefit Economy (Nov. 21, 2014) (estimating that wages for those eligible for legal work status will increase by five to ten percent).

Finally, the 2014 Guidance will reduce budget deficits at the federal, state, and local levels—and lower deficits favorably influence business investment decisions. *See* Doug Elmendorf, *Effects on Economic Growth of Federal Investment and Reductions in Federal Deficits and Debt*, Congressional Budget Office (June 20, 2014) (discussing how reducing federal deficits leads to a more robust U.S. economy). The Council of Economic Advisers estimates that deferred action and related executive actions will reduce the federal deficit between \$25 billion and \$60 billion over the next 10 years. Council of Economic Advisers, *The Economic Effects of Administrative Action on Immigration*, at 2 (2014). State and local budget shortfalls will shrink by nearly a billion dollars each year. *See* Press Release, Fiscal Policy Institute, *President's Immigration Action Expected to Benefit Economy* (Nov. 21, 2014). Texas alone is expected to gain an additional

\$338 million in new revenue. *See* Silva Mathema, *The High Costs of Delaying Executive Action on Immigration*, Center for American Progress (Mar. 13, 2015).

By contrast, deporting the same individuals would cost the federal government an estimated \$50.3 billion, or about \$10,070 per deportee. *Id.*

Therefore, the federal government's recent actions—clarifying its enforcement priorities and making temporary work authorization available to certain low-priority undocumented immigrants—strengthen the American economy by expanding the workforce, promoting job creation, and advancing more stable fiscal policies among federal, state, and local governments. Preventing or delaying these policies will only withhold the tangible benefits of a more diverse, productive business environment.

## **II. The District Court's Misinterpretation of the Administrative Procedure Act Exacerbates Law Enforcement Uncertainty and Thereby Harms Businesses.**

Congress enacted the APA as a shield against opaque, arbitrary, and uncertain government action. But using the APA as a sword against the federal government's efforts to make its discretionary decisions more predictable and transparent—as the district court has used the APA here—conflicts with the statute's core objectives, which are critical to the business community.

**A. General Statements Of Policy Reduce Regulatory Uncertainty And Arbitrary Enforcement Of Statutes By Encouraging Agencies To Articulate Their Enforcement Priorities.**

When it comes to immigration policy, enforcement discretion—and policy statements articulating priorities for exercises of discretion—are indispensable government tools. The Secretary of Homeland Security is charged with “[e]stablishing national immigration enforcement policies and priorities.” 6 U.S.C. § 202(5). In addition, the Attorney General may order the removal of statutorily enumerated categories of “deportable aliens,” 8 U.S.C. § 1227, and has broad discretion to do so. As the Supreme Court recently explained, “[a] principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.” *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

Discretionary enforcement decisions of this type do not implicate the APA’s notice and comment process, nor are they subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir. 2006) (noting that “the traditional nonreviewability” of prosecutorial discretion applies to administrative enforcement); 5 U.S.C. § 701(a)(2) (precluding judicial review of agency action that is “committed to agency discretion by law”).

In particular, the Supreme Court has recognized “deferred action” as a valid exercise of discretion to enforce or withhold removal. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Deferred action is a policy whereby, “[t]o ameliorate a harsh and unjust outcome, the [government] may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.” *Id.* at 484-85 (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law & Procedure* § 72.03 [2][h] (1998) (internal quotation marks omitted)). It has been a “staple of immigration enforcement” for over twenty years, and the federal government has previously implemented deferred action programs for various other groups of individuals. *See* Brief of Appellants, at 7 (cataloguing groups of individuals to whom the Executive Branch has extended deferred action). Deferred action does not grant any permanent immigration status, let alone citizenship; under the 2014 Guidance, it is merely a temporary deferral of an alien’s removal, which can be revoked at any time in the agency’s discretion.

The federal government’s authority to make such discretionary judgments necessarily forces individuals and businesses to navigate an uncertain environment. From time to time, the government helps alleviate this uncertainty by issuing general statements of policy that “‘advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.’” *Lincoln v. Vigil*,

508 U.S. 182, 197 (1993) (citations omitted). Such general statements of policy are commonly used in law enforcement to guide an agency's enforcement discretion and clarify its enforcement priorities for the general public. *See, e.g.*, U.S. Attorneys' Criminal Res. Manual § 9-28.200 (discussing "General Considerations of Corporate Liability" for federal prosecutors to consider when investigating corporate crime). In the context of immigration policy, general statements of policy allow the government to make transparent its current priorities or categories of potential deferred action targets.

The resulting policy statements are no more subject to notice and comment procedures or judicial review than are the discretionary judgments that these statements describe. 5 U.S.C. §553(d); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) ("In terms of reviewability, legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not."). This "reflects an unavoidable fact about legal enforcement: The 'enforcers'—the regulators—must constantly make and change priorities." Eric Posner, *Faithfully Executed: Obama's New Immigration Program is Perfectly Legal and Should Not Be Blocked*, *Slate* (Feb. 19, 2015, 3:23 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/obama\\_s\\_dapa\\_immigration\\_program\\_is\\_legal\\_judge\\_hanen\\_s\\_injunction\\_will.2.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/obama_s_dapa_immigration_program_is_legal_judge_hanen_s_injunction_will.2.html).

By imposing fewer procedural requirements for such general policy statements, the APA encourages agencies to volunteer to the public more information about how they intend to exercise their discretion—a form of openness that strongly benefits business.

**B. Deferred Action Is a Prototypical General Policy Statement.**

The 2014 Guidance at issue here is precisely the type of general policy statement that the APA wisely exempts from notice and comment and from judicial review. By undertaking to review that policy—and then by striking it down for lack of notice and comment—the district court grossly misapplied the APA.

The 2014 Guidance is a prototypical general statement of policy. It aims to reduce uncertainty and arbitrariness in the discretionary exercise of deferred action by defining a limited category of low-priority removal targets that may be eligible for relief. In particular, it makes transparent the criteria for identifying such targets, thus “advis[ing] the public prospectively of the manner in which” the federal government “proposes to exercise [its] discretionary power” to grant deferred action. *Vigil*, 508 U.S. at 197 (citation omitted). While some of the criteria are quite specific, others allow the agency to exercise a contextual and individualized review of each applicant.

Thus, the policy statement provides the public—including the business community—extensive information about the federal government’s enforcement priorities without surrendering the government’s ultimate discretion in removal judgments. Discouraging executive actions of this type, as the district court has done, makes the business environment more uncertain and risky—and subjecting them to notice and comment procedure and judicial review is antithetical to the APA.

### **CONCLUSION**

For the foregoing reasons, *amici* respectfully urge this Court to vacate the injunction entered by the district court.

Respectfully submitted,

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Dated: April 6, 2015



**FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE**

I certify that this brief has been prepared in Microsoft Word using a 14-point, proportionally spaced font, and that based on word processing software, the brief contains 3,587 words.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2015, I electronically filed the foregoing BRIEF FOR *AMICUS CURIAE* BUSINESSES IN SUPPORT OF THE RESPONDENTS-APPELLANTS, which constitutes service under the Court's rules. I also certify that I will submit seven paper copies of the foregoing brief with green covers as required by 5th Cir. R. 31.1 by Federal Express overnight delivery.

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***United States Court of Appeals***

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No. 15-40238 State of Texas, et al v. USA, et al  
USDC No. 1:14-CV-254

Dear Mr. Sloan,

The following pertains to your Amicus brief electronically filed on April 6, 2015.

You must submit the seven (7) paper copies of your brief with green covers required by 5<sup>TH</sup> CIR. R. 31.1 for **OVERNIGHT DELIVERY**.

Sincerely,

LYLE W. CAYCE, Clerk



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