No. 15-40238

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS, ET AL.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants

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

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES

Page(s)

FEDERAL REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

INTEREST OF AMICI CURIAE[1]

Amici Curiae are 109 immigration law professors, all of whom have substantial expertise and interest in the proper interpretation and enforcement of the immigration laws. Amici have, collectively, more than 1,500 years of experience in immigration law, and many have participated in congressional and national discussion about the administrative actions at issue in this litigation. *See, e.g.*, Written Testimony of Stephen H. Legomsky before the United States House of Representatives Committee on the Judiciary (Feb. 25, 2015), https://lofgren.house.gov/uploadedfiles/legomsky_testimony.pdf ("Legomsky Testimony"); Open Letter by Scholars and Teachers of Immigration Law (Mar. 13, 2015), https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf ; Open Letter by Scholars and Teachers of Immigration Law (Nov. 25, 2014), https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf. Amici believe they can, in light of their knowledge and experience, offer the Court valuable perspectives on the issues raised by this case. A full list of amici appears in the Appendix.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made such a monetary contribution. The parties have consented to the filing of this amicus curiae brief.

INTRODUCTION

Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") and expansion of Deferred Action for Childhood Arrivals ("DACA") are well within the Secretary of the Department of Homeland Security's (the "Secretary") express statutory authority to establish national immigration-enforcement policies and priorities as well as the Secretary's broad discretion in enforcing United States immigration laws. DAPA and expanded DACA are based on considerations peculiarly within the Secretary's expertise; are not inconsistent with congressional policies underlying immigration-law statutes; follow longstanding administrative practices that Congress has never prohibited or restricted; constitute considered priority-setting and exercises of prosecutorial discretion, not abdication of the Secretary's responsibilities; and, while providing general criteria for deferred-action decisions, require the exercise of enforcement discretion on a case-by-case basis. The district court's findings to the contrary should be rejected, and its grant of a preliminary injunction should be reversed.

ARGUMENT

I. The Secretary Has Broad Discretion in Enforcing Immigration Laws

A federal executive agency typically has "absolute discretion" to decide whether a violation of the law it administers warrants an enforcement action. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). This discretion arises from the fact

that, given limited resources, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Id.* Decisions not to pursue an enforcement action thus involve "a complicated balancing" of factors "peculiarly within [the agency's] expertise." *Id.* After identifying a violation of law, agencies must balance "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* Because an agency is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," judicial review of non-enforcement decisions is presumptively unavailable. *Id.* at 831-32. In *Chaney*, the Supreme Court likened agency non-enforcement decisions to "the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Id.* at 832.

This rule has special relevance for federal immigration policy, particularly with respect to removal decisions and deferred action. *See* 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 4 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf ("OLC Op."). By

statute, the Secretary is "responsible" for "establishing national immigration enforcement *policies and priorities*," a mandate that expressly envisions the exercise of prosecutorial discretion. 6 U.S.C. § 202(5) (emphasis added). In accordance with this mandate, Congress has afforded the Secretary 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 immigration laws. 8 U.S.C. § 1103(a)(3) (emphasis added). These broad grants of authority are of course subject to any specific statutory constraints, but as discussed below the plaintiffs have failed to identify any statutory provisions that the challenged executive actions violate.

Congressional appropriations acts have, moreover, made clear that non-enforcement is one of the acts the Secretary must take in setting immigration-enforcement policies and priorities. For decades, Congress has afforded the administration enough money to pursue only a small fraction of the undocumented population. *See* Legomsky Testimony at 3. Congress is well aware that there are about 11 million undocumented immigrants living in the United States, and that current appropriations enable the administration to pursue fewer than 400,000 of those immigrants per year, less than 4 percent of the full population. *Id.* Congressional appropriations thus leave prosecutorial discretion unavoidable for the vast majority of violations. Indeed, the appropriations acts do more than render

prosecutorial discretion unavoidable: they mandate a specific priority for the removal of criminal offenders and dictate sub-priorities that depend on the severity of the crime. *Id.* In light of the overwhelming and unmistakable constraints on full enforcement, Congress has left it to the Secretary to set other enforcement policies and priorities.

Consistent with these congressional enactments, the Supreme Court has long recognized that the exercise of prosecutorial discretion plays a vital role in the immigration context. *Cf. United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (describing immigration as a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program"). As the Court recently explained in *Arizona v. United States*, "broad discretion exercised by immigration officials" is a "principal feature of the removal system." 132 S. Ct. 2492, 2499 (2012). This discretion extends to the decision "whether it makes sense to pursue removal at all." *Id.* It also extends to "each stage" of the deportation process, such that at any point the Secretary "has discretion to abandon the endeavor … for humanitarian reasons or simply for [the agency's] own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). In *Arizona*, the Court outlined the wide array of considerations that guide immigration enforcement:

> 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. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. 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. *Arizona* struck down much of the state immigration statute at issue in the case precisely because it would have interfered with the Secretary's broad discretion regarding immigration enforcement. *See id.* at 2501-07.

Agency discretion in enforcement, broad though it is, is not without limits. First, the agency's actions must be "peculiarly within its expertise," as defined by the relevant legislation. *Cf. Chaney*, 470 U.S. at 831. Second, the agency may not "disregard legislative direction in the statutory scheme that [it] administers," and thereby infringe on congressional authority. *Id.* at 833. Third, the agency presumptively may not "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). What amounts to a genuine "abdication" of statutory responsibilities will

depend on, among other things, the resource constraints confronting the agency: an agency's failure to expend resources it does not have is fundamentally different from, for instance, a refusal to expend resources Congress has appropriated for enforcement. *See* Legomsky Testimony at 15. Finally, the agency's decisions may not be arbitrary or capricious, *see* 5 U.S.C. § 706(2)(a), or violate equal protection or individual constitutional rights. As more fully elaborated below, the executive actions at issue here are well within these limits.

II. Deferred Action, as Applied to Both Individual Noncitizens and Classes of Noncitizens, Is a Well Established Form of Enforcement Discretion that Has Been Recognized by Congress, Formal Agency Regulations, and the Courts

A. The Nature of Deferred Action

Deferred action is "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14). It denotes "an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States." OLC Op. at 12 (citing *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 484). As the Secretary has explained, "[d]eferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission." Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, on 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 at 2 (Nov. 20, 2014) ("DACA/DAPA Memo"). This temporary decision "may be terminated at any time at the agency's discretion." *Id.* Further, it "confers no substantive right, immigration status or pathway to citizenship." *Id.* at 5.

Once granted, deferred action triggers eligibility for two primary benefits apart from a temporary, revocable delay of removal proceedings. Each of these benefits, like deferred action itself, "confers no lawful immigration status, [and] provides no path to lawful permanent residence or citizenship." OLC Op. at 21.

The first benefit derives from the Secretary's statutory power to prescribe which undocumented immigrants may obtain work authorization beyond those undocumented immigrants already expressly afforded such authorization by statute. *See* 8 U.S.C. § 1324a(h)(3). Congress has made clear that the Secretary's authority to grant such authorization extends broadly, including to noncitizens in removal proceedings and even to noncitizens already subject to final orders of removal. *See id.* § 1226(a)(3) (removal proceedings); *id.* § 1231(a)(7) (final orders of removal). Pursuant to this statutory authority, the Secretary has granted work authorization to various classes of undocumented immigrants, such as applicants for asylum and applicants for cancellation of removal. *See generally* 8 C.F.R. § 274a.12(c); *see also id.* § 274a.12(c)(8) (asylum), (c)(10) (cancellation of

removal). Among these classes are recipients of deferred action, so long as they can demonstrate an economic necessity for employment. *Id.* § 274a.12(c)(14).

A second benefit derives from the Secretary's additional statutory power to grant aliens "unlawfully present in the United States" a "period of stay," during which the alien will not accrue "unlawful presence" for purposes of certain admissibility rules. *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (defining "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) as the period after the expiration of the "period of stay" authorized by the Secretary). This "period of stay" does not confer lawful immigration status, notwithstanding the district court's repeated and unsupported statements that DACA and DAPA create an immigration "status." *See, e.g.*, Dist. Ct. Op. at 59 n.45, 78, 87, 87 n.67, 95 & n.76, 112 (Dkt. No. 145). Instead, it tolls the accrual of "unlawful presence," a period of time defined as a legal term of art that is relevant to an alien's eligibility for future admission. The Secretary has authorized a period of stay for deferred-action recipients, as well as for other classes of aliens lacking lawful immigration status, including certain aliens granted parole. *See* 28 C.F.R. § 1100.35(b)(d) (deferred action recipients); 8 C.F.R. § 214.14(d)(3) (U nonimmigrant status recipients granted period of stay if granted either deferred action or parole and also placed on a waiting list).

It is beyond dispute—and it is not disputed in this litigation—that the Secretary has authority to decide what categories of noncitizens are eligible for work authorization and when "unlawful presence" accrues. As this Court has explained, the Secretary's discretion is "unfettered" where, as here, the Secretary has been granted discretionary authority to grant relief by a statute that does not "restrict the considerations which may be relied upon." *Perales v. Casillas*, 903 F.2d 1043, 1050 (5th Cir. 1990) (finding the Secretary's decisions to grant work authorization had been "committed to agency discretion by law" and finding such decisions not subject to judicial review). In any event, the executive actions challenged here did not change existing rules regarding either the availability of work authorization or the non-accrual of "unlawful presence" for purposes of the admissibility requirements identified above. Instead, DAPA and the expansion of DACA increased the number of people who will receive deferred action, and thus the number of people who may be eligible for the benefits that have long been available to certain recipients of deferred action. The legal criteria for those benefits and the legal effects of deferred action remain unchanged.

B. The History of Deferred Action

Deferred action has not only long been expressly recognized by the formal regulations described; it has also long been accepted—and, indeed, endorsed— by Congress and the courts. Dating back to at least the 1970s, deferred action was

originally termed "non-priority status," a reflection of the fact that it denotes a decision by the Secretary that the removal of certain noncitizens is not an enforcement priority. *See* OLC Op. at 13. While deferred action "developed without express statutory authorization," for decades it has been a "regular practice." *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 484-85. The Supreme Court and the lower federal courts have affirmed the practice as within the Secretary's enforcement discretion. *See id.* (noting that the Secretary has discretion to employ deferred action "for humanitarian reasons or simply for [the Secretary's] own convenience"); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) ("The decision to grant or withhold nonpriority status [the prior term for deferred action] therefore lies within the particular discretion of the INS …."); *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983) (holding that deferred action is "firmly within the discretion of the INS").

Both deferred action and similar forms of discretionary relief from removal have been made available to large classes of noncitizens, not just to individual citizens on an ad hoc basis. One common analog to deferred action is "extended voluntary departure," a "discretionary suspension of deportation proceedings applicable to particular groups of aliens." *Hotel & Rest. Emp. Union, Local 25 v. Attorney General*, 804 F.2d 1256, 1261 (D.C. Cir. 1986), *vacated on other grounds*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc). Between 1956 and 1972, for

example, the INS granted extended voluntary departure to certain noncitizens from the Eastern Hemisphere who had filed satisfactory professional visa petitions but were nonetheless subject to deportation given limits on available visas. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979-80 (E.D. Pa. 1977). Later in the 1970s, the INS granted extended voluntary departure to nurses eligible for H-1 visas. *See* Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses, 43 Fed. Reg. 2776-01, 2776 (Jan. 19, 1978). Since 1956, moreover, there have been "more than two dozen instances" of INS grants of "parole, temporary protected status, deferred enforced departure, [and] extended voluntary departure to large numbers of nationals of designated foreign states." OLC Op. at 14.

Of special relevance here, both the Reagan and Bush I administrations employed these forms of discretionary relief in order to defer removal of noncitizens who would be separated from lawfully present family members. In 1986, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, which granted lawful immigration status to roughly 3 million people but consciously did *not* confer such status on their noncitizen family members who were not independently eligible for lawful status. In 1987, the Reagan administration nonetheless adopted a "Family Fairness" initiative, granting reprieves from deportation to noncitizen children who were living with parents granted lawful immigration status under IRCA. *See* Memorandum from

Gene McNary, Commissioner, INS to Regional Commissioners, INS, on Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 at 1 (Feb. 2 1990) ("Family Fairness Memorandum"). The Bush I administration expanded this policy, granting additional deportation reprieves, as well as work authorization, to the children and spouses of individuals who were granted lawful immigration status under IRCA. *Id.* at 1-2; OLC Op. at 14. At the time, the administration predicted that approximately 1.5 million children and spouses—roughly 40 percent of the then 3.5 million undocumented immigrants in the United States—would be eligible for these benefits. OLC Op. at 31; Immigration Policy Center, *Reagan-Bush Family Fairness: A Chronological History* (Dec. 9, 2014), http://www.immigrationpolicy.org/just-facts/reagan-bush-family-fairness-chronological-history; *see also* Legomsky Testimony at 23-25 (refuting misinformation about the intended scope of IRCA and the size of the group eligible under the Family Fairness initiatives, and elaborating the parallels between these initiatives and DAPA and DACA).

In recent years, the Secretary has granted discretionary relief to a number of classes of undocumented immigrants through deferred-action policies similar to those at issue here. These classes have included (1) noncitizens who, following abuse by their lawfully present spouses, self-petitioned for lawful immigration status under the Violence Against Women Act of 1994; (2) applicants for certain

visas (known as "T" visas and "U" visas) under the Victims of Trafficking and Violence Protection Act of 2000; (3) foreign students unable to maintain the "full course of study" required for their student visas as a result of school closures following Hurricane Katrina; (4) widows and widowers of citizens whose visa applications had not been adjudicated at the time of their spouse's death; and, (5) under DACA, which is not challenged in this lawsuit, certain noncitizens who had been brought to the United States as children. OLC Op. at 15-18. Each of these deferred action policies, like DAPA and expanded DACA, created specific criteria for eligibility but left room for the Secretary to exercise case-by-case discretion. *See id.* As with any deferred-action policy, each of these policies triggered, under other laws and regulations, the benefits for deferred-action recipients summarized above: eligibility to apply for work authorization and temporary non-accrual of "unlawful presence" for purposes of certain admissibility rules.

Congress, aware of these and other uses of deferred action, has "never acted to disapprove or limited the practice," and it has never acted to stop deferred action from triggering either work authorization or temporary non-accrual of "unlawful presence." OLC Op. at 18. Indeed, Congress has enacted legislation that assumes the availability of deferred action and, in fact, expressly extends the scope of deferred action. Some of these enactments have ratified the existing classes of noncitizens that have been subjected to deferred action. *See* Victims of Trafficking

and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)) (endorsing deferred action and work authorization for self-petitioners under the Violence Against Women Act and expanding eligibility to include children under the age of 21); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 204 (codified at 8 U.S.C. § 1227(d)(1), (2) (stating that the Secretary may grant an "administrative stay" of removal for T and U visa applicants, and that the denial of a request for an administrative stay shall not preclude an application for deferred action)). Still other enactments have identified additional classes of individuals that Congress has stated should be eligible for deferred action. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b) (certain family members of lawful residents killed on September 11, 2001); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d) (certain family members of citizens killed in combat). Congress further affirmed deferred action in the REAL ID Act of 2005, which provided that certain state IDs are acceptable for federal purposes when their holders have deferred-action status. Pub. L. 109-13, div. B (codified at 49 U.S.C. § 30301 note).

The courts, meanwhile, have consistently recognized that the Secretary may implement deferred-action policies based on general categorical criteria like those specified under DAPA and expanded DACA. *See, e.g.*, *Am.-Arab Anti-*

Discrimination Comm., 525 U.S. at 484-85 (quoting a treatise on immigration law that listed various "humanitarian reasons" in guiding when deferred action is appropriate); *Pasquini*, 700 F.2d at 661 (listing five general criteria officers considered in granting deferred action and finding that immigration officials had discretion to employ the criteria); *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979) (same). Absent such criteria, immigration officers would have little guidance as to how to exercise their discretion in a manner consistent with the Secretary's "national immigration enforcement policies and priorities." *See* 6 U.S.C. § 202(5).

III. The Secretary Adopted DAPA and the Expansion of DACA Based Upon Considerations that Are Peculiarly within the Secretary's Expertise

DAPA and the expansion of DACA are the result of just the kind of "complicated balancing" that is "peculiarly within [the agency's] expertise" and thus its discretion. *See Chaney*, 470 U.S. at 831. Three considerations are paramount: (1) the severe resource constraints confronting the Secretary's immigration enforcement efforts; (2) humanitarian considerations that have long guided deferred-action policies and immigration policy more generally; and (3) the importance of consistency in the Secretary's enforcement of the immigration laws.

As explained above, the Secretary has extraordinarily scarce resources with which to pursue removal of the 11 million undocumented immigrants in the United States—enough to remove fewer than 400,000 of them, or less than 4 percent.

Even this estimate overstates the agency's capacity for removal, given that its resources must also be used for border security and given that "non-Mexican nationals comprise an increasingly large percentage of unauthorized entries and require significantly more resources per removal." Legomsky Testimony at 15. Indeed, Congress has long funded enforcement far below the level that would be required for full enforcement. Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law* 3 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf. Immigration enforcement, therefore, is selective by necessity and this selectivity is clearly intended by Congress: the Secretary must prioritize the removal of some classes of people and accordingly deprioritize other classes.

In setting these priorities in DAPA and expanded DACA, the Secretary exercised his discretion in a manner that expressly incorporates the priorities mandated by Congress. The policy places the highest priority on people with significant criminal records and those who present dangers to national security, public safety, and border security. People without such risk factors who are parents of lawful residents or who were brought to the United States as children rank among the lowest of congressional priorities. DAPA and the expanded DACA prevent the expenditure of scarce agency resources on such low-priority

individuals so that the Secretary can best pursue high-priority targets. By soliciting identifying information from applicants for deferred action, the policies also give the Secretary an inexpensive means of gathering such information about noncitizens who, while presently low-priority, might later commit acts that make them high-priority removal targets. *See* Legomsky Testimony at 25.

DAPA and expanded DACA also further congressional policies of keeping parents together with their lawfully present children and affording weight to strong family and community ties. *See 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."); *Arizona*, 132 S. Ct. at 2499 (noting that the "equities of an individual case" for immigration enforcement purposes turn on factors "including whether the alien has children born in the United States" or "long ties to the community"). For instance, Congress has provided that the Secretary has discretion to afford lawful status to parents who have been continuously present in the country for at least ten years and whose removal would cause hardship to their U.S. citizen children. *See* 8 U.S.C. § 1229b(b)(1); *see also id.* § 1182(h)(1)(A) (allowing discretionary relief even for noncitizens who had committed certain crimes, so long as they occurred more than 15 years previously). It has provided that parents of U.S. citizens may obtain

family-based immigrant visas. *See id.* § 1151(b)(2)(A)(i). Indeed, parents of lawful permanent residents also have a path to obtain such visas, albeit a lengthier one. *See id.* §§ 1427(a) & 1430(a) (providing a path from legal permanent residence to U.S. citizenship, whereby eligibility generally accrues within three or five years). The Secretary's recent actions thus provide interim humanitarian relief for certain noncitizens to whom Congress has given a prospective entitlement to lawful immigration status, achievement of which takes considerable time. DAPA and expanded DACA also draw on the same humanitarian concerns that have long animated deferred-action decisions, recognized and endorsed by Congress. *See Pasquini*, 700 F.2d at 661 (noting five humanitarian criteria employed in such decisions: "(1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States -- affect [sic] of expulsion; (5) criminal, immoral or subversive activities or affiliations").

Finally, DAPA and expanded DACA promote consistency in the Secretary's enforcement of the immigration laws. Before the Secretary adopted DAPA and DACA, agency memoranda had directed immigration officials to employ similar enforcement priorities. These priorities, however, have been applied haphazardly and ignored by field officers. *See* Motomura, *supra* at 7 (describing the "enforcement rank-and-file's" response to pre-DACA prosecutorial discretion

guidelines). DAPA and expanded DACA ensure that the Secretary's policies will be applied in a uniform, predictable, and non-discriminatory manner, while still leaving room for discretion based on the facts of individual cases.

IV. DAPA and Expanded DACA Constitute Priority-Setting and the Exercise of Enforcement Discretion, Not Abdication of the Secretary's Duty to Enforce the Immigration Laws

The only specific provision of the Immigration and Nationality Act that the district court found to be violated by the administration's actions is 8 U.S.C. § 1225. Dist. Ct. Op. at 96-98. Under section 1225, "all aliens … who are applicants for admission … *shall* be inspected by immigration officers," and, if the immigration officer determines that an alien who is an applicant for admission "is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a [removal] proceeding." 8 U.S.C. § 1225(a)(3), (b)(2)(A) (emphases added). The district court concluded that DAPA and expanded DACA violated this provision because, in that court's view, "the word 'shall' is imperative" and the Secretary's "duty of removing illegal aliens" cannot be made consistent with "giv[ing] them legal presence and work permits." Dist. Ct. Op. at 97.

At the time of the district court's decision, the argument that section 1225 confers on the Secretary a duty of removing all undocumented immigrants had already been thoroughly discredited. *See* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris*

Kobach's Latest Crusade, 122 Yale L.J. Online 167 (Dec. 20, 2012), http://yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade. As an initial matter, section 1225 does not even facially apply to almost half of the undocumented immigrants. *Id.* at 171. These immigrants do not fall into the section's definition of an "applicant for admission" because they were legally admitted to the United States but overstayed their visas. *See* 8 U.S.C. § 1225(a)(1) (defining "applicant for admission" as "an alien present in the United States who has not been admitted or who arrives in the United States").

Even as to the remaining group of undocumented immigrants, section 1225 does not alter the Secretary's discretion in immigration enforcement. It is well established that use of the word "shall" in statutes governing law enforcement does not eliminate prosecutorial discretion absent some clear congressional statement to the contrary. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760-61 (2005) (holding that the use of the word "shall" to instruct police conduct in a criminal statute did not eliminate law enforcement discretion); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (stating that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). The Board of Immigration Appeals has applied this reasoning to uses of the word "shall" in parallel sections of section 1225 itself. *See Matter of E-R-M- & L-R-M-*,

25 I & N. Dec. 520, 522 (BIA 2011) ("It 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.").

The broader statutory scheme governing immigration law cannot be reconciled with reading section 1225 to eliminate the Secretary's enforcement discretion. Congress has expressly authorized immigration officials to use such discretion in deciding whether removal is appropriate. As explained above, it has expressly endorsed deferred action in a variety of contexts. *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (self-petitioners under the Violence Against Women Act); 8 U.S.C. § 1227(d)(1), (2) (T and U visa applicants); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b) (certain family members of 9/11 victims); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d) (certain family members of citizens killed in combat). Congress has also expressly afforded the Secretary discretion to grant parole to individuals otherwise subject to removal, 8 U.S.C. § 1182(d)(5)(A), and it has granted the Secretary authority to allow aliens to voluntarily depart the United States rather than enter removal proceedings, *see id.* § 1225(a)(4) (authorizing the Secretary to permit applicants for admissions to withdraw their applications and depart from the United States); *id.* § 1229c(a)(1) (authorizing the Secretary to grant voluntary

departure "in lieu of" removal proceedings). Given the constraints of congressional appropriations, moreover, the Secretary does not have nearly enough resources to remove every "applicant for admission" suspected of being unlawfully present; an interpretation of section 1225 that eliminated all prosecutorial discretion would thus turn all immigration officials into lawbreakers for failing to expend resources the agency does not have.

The district court's analysis regarding section 1225 fails also because it assumes that the benefits that might flow from deferred-action—possible eligibility for work authorization and temporary non-accrual of "unlawful presence" for purposes of certain admissibility rules—are inconsistent with the fact that recipients of deferred action could be subject to removal. *See* Dist. Ct. Op. at 97. As explained above, the Secretary has long had express statutory authority to confer these benefits on individuals who could be subject to removal. *See* 8 U.S.C. § 1324a(h)(3) (stating that an "unauthorized alien" may be given work authorization by the Secretary); *id.* § 1182(a)(9)(B)(ii) (defining "unlawful presence," a legal term of art relevant for future admission, such that the Secretary may toll it by authorizing a "period of stay"). At any rate, section 1225 says nothing about the benefits that may be afforded to individuals who are subject to removal. It speaks to when removal is appropriate, subject to the Secretary's discretion.

The district court's conclusory statements that the Secretary "abdicated" his statutory authorities are equally contrary to law. The exercise of prosecutorial discretion as a matter of setting priorities, with stated reasons that are both within the expertise of the agency and not inconsistent with congressional direction, does not constitute an "abdication" of the agency's "statutory responsibilities." *Cf. Chaney*, 470 U.S. at 833 n.4. Such abdication is so rare as to be unheard of: "no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause" by virtue of abdication. Kate Manuel and Tom Garvey, Congressional Research Service, *Prosecutorial Discretion in Immigration Enforcement* at 17 (Dec. 27, 2013), https://fas.org/sgp/crs/misc/R42924.pdf.

Indeed, this Court has "reject[ed] out-of-hand" a contention parallel to the one at issue here—that the federal government's "systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty." *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997). This Court rejected the plaintiffs' abdication argument in *Texas* because the plaintiffs had failed to show that the federal defendants in that case were "*doing nothing* to enforce the immigration laws," or that they had "*consciously decided* to abdicate their enforcement responsibilities." *Id.* (emphasis added). The same is true here. DAPA and the expansion of DACA reflect part of the Secretary's conscious efforts

to enforce the immigration laws by focusing the agency's scarce resources on its enforcement priorities. The agency continues to spend all the resources Congress has allocated to it for enforcement, and it oversees an enforcement regime that is more effective—as indicated by fewer unauthorized entries and more removals—than it was when this court "reject[ed] out-of-hand" the claim that the agency had abdicated its enforcement responsibilities. *Id.*; Legomsky Testimony at 6; *see also Barack Obama, Deporter-in-Chief*, The Economist (Feb. 8, 2014), http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama ("America is expelling illegal immigrants at nine times the rate of 20 years ago[,] nearly 2 [million] so far under Barack Obama, easily outpacing any previous president.") As this Court explained in *Texas*, "inadequate enforcement of immigration laws," whether "real or perceived," is not alone sufficient to show an abdication of the Secretary's enforcement duties. *Texas*, 106 F.3d at 667.

Massachusetts v. EPA, 549 U.S. 497 (2007), does not cast any doubt on the import or proper application of *Texas.* In *Massachusetts*, the Supreme Court held that the Environmental Protection Agency ("EPA") had failed to properly explain its decision not to regulate carbon dioxide emissions from motor vehicles. The Court did not find that the EPA's decision was beyond the scope of its discretion in enforcing the Clean Air Act. Instead, it simply instructed the EPA that it could

avoid taking regulatory action with respect to the emissions only if it provided "some reasonable explanation" as to why it could not or would not "exercise its discretion" to do so. *Id.* at 533. Here, there is no doubt that the Secretary has provided a reasonable explanation for his decision to exercise his enforcement discretion as outlined in DAPA and the expanded DACA, which the Secretary grounded in both agency expertise and congressional immigration priorities.

The district court's conclusion that the Secretary had abdicated his statutory duties depended on that court's erroneous assumption that deferred action "contradicts Congress' statutory goals," from which assumption the district court reasoned that deferral of removal amounts to "doing nothing to enforce the removal laws." Dist. Ct. Op. at 98-99 (citation omitted). First, an agency that has spent every penny Congress has given it for immigration enforcement, and which has removed more than 2 million people through those efforts, can hardly be described as "doing nothing." Second, as explained above, this assumption ignores decades of congressional acceptance—and endorsement—of deferred action. The district court also reasoned that the grant of DAPA and the expansion of DACA extends too broadly, to "a class of millions of individuals." *Id.* at 99. This reasoning too cannot withstand scrutiny. As set out above, the Secretary has granted deferred action and other comparable discretionary relief to numerous other large classes of individuals, and his authority to do so has been endorsed by

Congress and affirmed by the courts. Moreover, the class potentially eligible for DAPA and expanded DACA is hardly unprecedented. As noted earlier, an estimated 1.5 million undocumented immigrants, approximately 40 percent of the then undocumented population, were expected to be eligible for the Family Fairness initiative. A roughly equal proportion of the current undocumented population is predicted to be potentially eligible for DAPA and expanded DACA.

V. DAPA and Expanded DACA Establish an Enforcement Framework that Requires Individualized, Discretionary Decisions

At least two aspects of DAPA and expanded DACA require that immigration officials engage in individualized assessments of particular applications for deferred action. First, immigration officials must determine whether the individual seeking deferred action is "an enforcement priority" under the agency's November 20, 2014 prioritization memorandum. *See* DACA/DAPA Memo at 4; *see also* Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) ("Prioritization Memo"). This determination requires the exercise of individualized, discretionary judgments as to, for example, whether the person has "significantly abused the visa or visa waiver programs" and whether the person "pose[s] a danger to national security" or to "public safety." Prioritization Memo at 3-4. Second, officials must assess whether the individual seeking deferred action presents "no other factors that, in

the exercise of discretion, make[] the grant of deferred action inappropriate." DACA/DAPA Memo at 4.

The application of threshold criteria that require individual judgments are just as discretionary and unreviewable as discretionary determinations made after all threshold criteria have been met. *See Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332-33 (11th Cir. 2003) (finding discretionary and unreviewable determinations of "exceptional and extremely unusual hardship," a threshold requirement for cancellation of removal); *Romero-Torrez v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) (same); *see also Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) (stating that "the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision" are the type "that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion"). A decision is no less discretionary by virtue of being made in the course of applying general agency guidelines, so long as the decision is individualized. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (holding that the use of "reasonable presumptions and generic rules" is consistent with individualized decisionmaking); *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) ("*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards.").

There is not a shred of evidence to support the district court's conclusion that the Secretary adopted these discretionary standards merely as a "pretext." Dist. Ct. Op. at 109 n.101. The district court apparently assumed that immigration officials, in implementing DAPA and the expansion of DACA, will ignore the Secretary's "clear and repeated instructions to exercise discretion in each case." Legomsky Testimony at 12. It credited the bare, unsubstantiated assertion that prior DACA applications have been "rubberstamped" for approval. *See* Dist. Ct. Op. at 11 (citing Decl. of Kenneth Palinkas ¶¶ 6, 8, 10 (Dkt. No. 64, Attach. 42)); *see also* Legomsky Testimony at 12. This assertion is simply wrong. Through 2014, roughly 38,000 DACA applications—or five percent—have been denied on the merits. *See* Decl. of Donald W. Neufeld ¶ 23 (Dkt. No. 130, Attach. 11) ("Neufeld Decl."). While a 95 percent approval rate may appear high at first blush, it hardly indicates that immigration officials have eschewed the exercise of discretion mandated by the Secretary—particularly given that undocumented individuals who are unlikely to meet DACA's criteria will tend to avoid revealing their immigration status and identifying information by submitting an application. They will also be unlikely to invest $465 in an application likely to be denied. *See* Legomsky Testimony at 12-13 & n.10. The district court did not address this fact; instead, after reciting the 95 percent figure reported by the agency, it relied on a

witness's unsupported (and incorrect) claim that the DACA approval rate was in fact 99.5 percent. *Compare* Dist. Ct. Op. at 10 *with id.* at 109 n.101.

There is likewise no evidence to support the district court's conclusion that past DACA applications have never been denied based on "an exercise of individualized discretion." Dist. Ct. Op. at 109 n.101. The district court reasoned that "the Government could not produce evidence concerning applicants who met the program's criteria but were denied" and on this basis "accept[ed] the States' evidence as correct." Dist. Ct. Op. at 11 n.8. Yet, at the district court's express request, the government had indeed submitted such evidence, explaining that DACA petitions have been denied to applicants who met the threshold DACA criteria but had submitted false statements in prior applications or had previously been removed. Neufeld Decl. ¶ 18. Meanwhile the state plaintiffs, which bore the burden of proof in their motion for a preliminary injunction, *see Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974), presented no evidence to the contrary beyond unsupported assertions. Regardless, the agency does not exercise individualized discretion only after assessing whether DACA's threshold criteria have been met. As explained above, some threshold criteria themselves require the exercise of such discretion.

Even if the state plaintiffs had been able to show that immigration officials have not exercised discretion on an individualized basis with respect to the

preexisting DACA policy (and, again, they were not), that would not warrant wholesale invalidation of policies that have not even begun yet. *See Janvey v. Alguire*, 647 F.3d 585, 601 (5th Cir. 2011) ("The party seeking a preliminary injunction must … show that the threatened harm is more than mere speculation."). If, contrary to their past practices under DACA, immigration officials systematically disobey the Secretary's requirements that they exercise individualized discretion under DAPA and the expanded DACA, some remedy might be warranted. Shutting down the policies before they have begun, based on speculation that the Secretary's subordinates will not follow the policies, systematically disobeying the Secretary's explicit instructions, defies both logic and the limits of the judicial power.

CONCLUSION

The district court's grant of a preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 6, 2015, the foregoing brief of Immigration Law Professors as Amici Curiae in Support of Affirmance was filed via the Court's CM/ECF Document Filing System. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all registered CM/ECF filing users, including counsel of record for all parties to this appeal.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 6,998 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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