PETITION FOR RULEMAKING SUBMITTED TO THE DEPARTMENT OF HOMELAND SECURITY

February 4, 2014

On behalf of Petitioners:

National Day Laborer Organizing Network

Anibal Fuentes Aguilar

Bertha Avila

Hector Danilo Ruiz

Jose Mejia

Jose Luis Piscil

Noemi Romero

Marisela de Jesus Mendoza Sandres

Gilda Holguin, Clinical Law Student
Thomas Chew, Clinical Law Student
Peter Markowitz, Associate Clinical Professor of Law
Kathryn O. Greenberg Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, rm 1109
New York, NY 10003
Tel: 212-790-0340
Fax: 212-790-0256

Attorneys for NDLON
**STATEMENT OF PETITION**

The National Day Laborer Organizing Network, along with Anibal Fuentes Aguilar, Bertha Avila, Hector Danilo Ruiz, Jose Mejia, Jose Luis Piscil, and Noemi Romero hereby petition the Department of Homeland Security (“DHS”), pursuant to 5 U.S.C. § 553(e), to adopt a rule suspending deportations of undocumented immigrant workers and their spouses, parents, and children and to grant such individuals deferred action status. The proposed rule promotes family unity and recognizes that immigrants have earned the right to membership in our nation’s community. Suspending the deportation of these individuals promotes the prudent allocation of government resources and prevents the unnecessary deportation of those who are contributing to our economy and are part of our community.

The President, acting through DHS, has the authority to grant temporary relief, in the form of deferred action, to those who today are living in the shadows with little to no recourse to obtain legal status in the current immigration system. The Constitution places the “executive power” of the United States in the President and vests him with authority to execute the laws.¹ The Supreme Court has long recognized that this power includes the “absolute discretion” to determine when and how enforcement resources should be allocated.² This President, like many before him, has utilized this power in the immigration realm, and in a wide variety of other administrative arenas, to determine that certain categories of enforcement actions are not in our national interest. Consistent with the Constitution, with the Supreme Court’s dictates and with historical practice, it is squarely within this President’s power to determine that it is not in our

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¹ See U.S. CONST. Art. 2, § 1; U.S. CONST. Art. 2, § 3.
nation’s interest to squander our resources deporting millions of workers and families who may benefit from near-term congressional immigration reform. In providing this relief, the President could also provide Congress with the time necessary to work towards immigration reform.

Immediate suspension of deportations for this broad class of individuals is not only within the President’s authority, it is also the best way to move our nation toward a legislative solution to the immigration crisis devastating our nation’s families and inhibiting our nation’s economic vitality. The nation’s current mass deportation policy is anomalous in our history. More deportations have occurred in the last ten years than in the previous 110 years.\(^3\) The President’s emphasis on deportation as the centerpiece of our nation’s immigration policy has perpetuated a misperception that immigration is primarily a law enforcement and national security issue. In elevating this misperception, the Administration’s mass deportation policy has become an impediment to a comprehensive solution to the nation’s immigration crisis. The proposed rule will help to set the national dialogue in the right direction and frame the immigration issue more accurately as an issue of family unity, economic vitality and national self-identity. The real story of unauthorized immigration is a story about families desperate to reunite and a nation dependent upon immigrant labor but unwilling to provide those laborers full membership in our national community. Immigrants build, feed, and care for America. Mass deportations inhibit economic growth and divide families.

**STATEMENT OF INTEREST**

National Day Laborer Organizing Network (NDLON)

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NDLON is a non-profit network founded in 2001 that today includes forty-three local member organizations. The main goal of NDLON is to improve the lives of day laborers in the United States. NDLON works to unify and strengthen its member organizations to be more strategic and effective in their efforts to develop leadership, mobilize, and organize day laborers in order to protect and expand their civil, labor and human rights. NDLON launched the Not One More Deportation Campaign to unite organizations, artists, and allies to confront unjust immigration laws that tear families apart. The campaign aims to support day laborers and other immigrants who have worked and supported this nation and are now fighting to stay in the United States and combat the injustice created by destructive immigration laws. NDLON seeks to change the narrative of current immigration policy away from the criminalization of immigrants to an inclusive understanding of immigrants as hardworking people who build, feed, and care for America. NDLON believes undocumented workers and families have earned the right to legal status through their contributions to the United States and should be protected from unjust deportations.

Bertha Avila

Bertha Avila is the mother of five United States citizen children. She came to the United States over 20 years ago and is currently undocumented. Originally from El Salvador, she came to the United States young, alone and desperate for a better future. She started working in Mexico when she was very young, but the money she made was never enough to provide the basic necessities of life. She saw the United States as a place of opportunity where she could escape a life of poverty.
On November 16, 2012, Bertha was stopped by immigration officers on her way to a baptism from her home in Arizona to California with her family. Her vehicle was pulled over after a check-point because officers claimed it looked “suspicious.” Bertha and her family believe this “suspicion” was no more than thinly veiled racial profiling. Bertha recalls her daughters, ages 4, 12 and 16, crying inconsolably as she was taken away. They knew all too well, even at their young age, the fragility of family life for immigrants living in the United States. Over the next six months, Bertha was detained at the Yuba County Detention Facility in Marysville, California and the Eloy Detention Center in Eloy, Arizona.

During that time, Bertha’s children did not know if they would ever see their mother again. Meanwhile, Bertha was denied access to medical attention and basic necessities. She suffers from asthma but was denied her medication by the officers. She cannot get escape the memories of how cold it was in the detention center and how she was forced to choose between a sweater and a shirt, because she was not permitted both. She also remembers being harassed by her cellmates, and crying because her complaints were not being addressed by ICE officials. She recalls that there were times when she wanted to stop fighting to stay in this country because the conditions in detention were so inhumane, but thinking about her children gave her the strength to carry on. Bertha was released from detention after six months with the help of Puente Human Rights Movement, a grassroots organization in Arizona that seeks to empower immigrants to improve their lives. However, she is still in removal proceedings and her case is pending.

Despite all the struggles she went through being away from her children, Bertha has found a voice in her community. She is very involved with different projects including “Stand for Children,” which encourages mothers to take a greater interest in their children’s education and organizes programs in schools, and the Parent’s Association at her daughter’s school. She
also volunteers to take care of children while their parents take English classes. This work makes her very happy because her children give her the strength to keep going despite the horrors she experienced while in detention. One of her most fervent dreams “to make a difference against injustices.” By sharing her story, Bertha hopes that what happened to her can be avoided and other workers and their families can be allowed to stay in the United States, the place they call home. The rule proposed in this petition would ensure that Bertha’s children will not lose their mother.

**Hector Danilo Ruiz**

Hector Danilo Ruiz is a member of the New Orleans Congress of Day Laborers and the father of a two young United States citizen daughters. He has lived in the United States for over nine years and is undocumented. On November 11, 2013, he was arrested in front of his wife and children as part of the Criminal Alien Removal Initiative (CARI), a pilot program operating in New Orleans. At the time, he and his family were on their way to a weekly bible study group. When they pulled into the parking lot, immigration agents approached in an unmarked van, entered the home where the bible study was being held, and questioned all of the men present. They handcuffed Hector while his children and wife watched from the parking lot. Hector was detained at an immigration detention center in Basile, Louisiana for one month. He has now been released, but is scheduled to be deported at the end of February.

While Hector was detained, his wife, Marisela, struggled to support herself and her children. On her own, she could not afford to pay the rent, and she and her daughters were on the verge of being evicted from her apartment several times. The children have been having
nightmares after seeing their father’s arrest, and Hector and Marisela are concerned about their mental health.

Hector and Marisela began working with the Congress of Day Laborers to fight the deportation of Hector and others like him who were arrested through CARI, which has operated as an indiscriminate stop and frisk program targeting Latinos throughout New Orleans in an attempt to identify people with past immigration or criminal histories. Marisela describes her husband as a hard-working man, a good father, and a person of deep faith and commitment to the church. Although he has made mistakes in the past, and has one disturbing the peace conviction and prior immigration violations, his family needs him. The regulation proposed in this petition would ensure that Hector is able to remain in the United States, and to support his family.

Jose Mejia

Jose Mejia came to the United States over 13 years ago and is currently undocumented. Jose is a day laborer and hard-working father of three United States citizen children. Last October, he was arrested by Maricopa County Sheriff Arpaio while loading his work materials into a truck for his construction work at 4:30 in the morning at Sonoran Concrete. Sheriff Arpaio arrested Jose for “identity theft,” based on false documents Jose allegedly used to be able to work to allow his family to survive, and to contribute to the economy. The charges against Jose are a brutal example of the how our nation has moved toward criminalizing the basic life activities of undocumented immigrants. After Jose was detained for four months in Durango Jail in Phoenix, Arizona, the Department of Homeland Security, in collaboration with Sheriff Arpaio, transferred him to immigration detention. Jose was detained at Eloy Detention Center for an additional four months before being released on June 10, 2013. While detained,
Jose reports that he and other immigrants “were treated worse than criminals” and were discriminated against because they did not speak English.

Jose’s strength to overcome his struggles has come from his wife and three children. He dreams of one day becoming a United States Citizen. Staying in the United States is important to Jose because the effect his deportation would have on his family would be catastrophic. If he were ever deported from the United States, he would face an impossible choice: leave his family forever or deprive his United States citizen children of the opportunities this nation provides. In addition, his oldest daughter has a serious heart condition. For her, moving to a different country would signify less access to medical treatment, incomparable to the medical help she is able to get in the United States. Jose’s fear highlights the fears of all immigrant workers who have families and live in the United States and consider it to be their home. Like Bertha, Jose is actively involved with Puente and their fight to help immigrants facing deportation proceedings.

Jose’s deportation case was closed after Puente rallied community support for his case, however DHS could reinitiate proceedings and detention at any time. Jose also remains with an identity theft charge on his record. The rule proposed in this petition would ensure that Jose’s family will remain intact.

Noemi Romero

Noemi Romero is a 21-year-old undocumented resident of Glendale, Arizona. She was three years old when her family brought her to the United States from Mexico in September of 1995. In June of 2012, Noemi discovered she was eligible for the Deferred Action for Childhood arrivals program (DACA). In late 2012 she started working to raise the money for DACA’s application fees. But her worksite was soon raided by local police, under the direction of Sheriff
Joe Arpaio. Like Jose, Noemi was arrested and charged with identity theft for providing false identification in order to work. She was detained for two months by local police and then transferred to ICE custody where she remained for another month. ICE threatened her with deportation to Mexico, a country she does not even remember. After the community rallied in Noemi’s support, her deportation case was closed through a grant of prosecutorial discretion. However due to her conviction for working with false documents, she is ineligible for DACA.

Noemi thus remains undocumented and in indefinite limbo. Although she’s a high school graduate who speaks perfect English, because of her immigration status Noemi is unable to attend college in Arizona. State universities in the Arizona charge three times the normal tuition for in-state undocumented applicants compared to those with legal status. Noemi would like to pursue a degree in Cosmetology or Nursing, but the law denies undocumented applicants access to federal student loans. She is tired of staying home all day but is afraid of being arrested again if she tries to go back to work.

Noemi still cannot understand why the local police arrested her and transferred her to ICE custody. Nothing about the U.S. immigration policy makes sense to Noemi. Today she feels hopeless, but finds some comfort in political activism. Noemi hopes her story will help to persuade those who can help effect change. The rule proposed in this petition would ensure that Noemi could work and continue her education and her contributions to the American economy.

**Jose Luis Piscil**

Jose Luis Piscil is a hardworking father and husband who came to the United States in 2007, when he was only 18 years old. He is currently undocumented and lives in Connecticut. Luis was arrested by local police on false charges, which were quickly dismissed. However,
through the deportation program Secure Communities, his wrongful criminal arrest became the gateway into detention. Luis vividly remembers how his hands and feet were shackled when taken into immigration custody. Fortunately, Luis’ family could pay the bond and he was released a week later. Luis recalls the week in DHS detention as the most desperate and awful week of his life – separated from his 4-year-old daughter, and his wife who was pregnant at the time, not knowing if he would ever see them again. After Luis posted bail, his son was born with a heart condition. Luis and his wife are preoccupied with their son’s medical condition. Luis’s deportation proceedings only add to their worries. They do not know how they will get adequate medical care if Luis is deported.

Luis’s removal case is currently pending in immigration court and will go in front of an immigration judge on March 16, 2014. Although ICE has the discretion to administratively close his case, they have refused to do so. Luis is the main breadwinner for his family and he firmly believes that his children need him to care for them and teach them to be good people. Luis works hard in a factory to support his family. He is also an active member of Unidad Latina en Acción, a community organization in Connecticut, which works to defend the rights of migrant workers. He hopes that one day he might achieve United States citizenship and never again fear that he will be separated from his children. His family is what gives him the strength to keep going. He worries that his wife cannot work to support the family and care for his two young children on her own. Sharing his story is a way for Luis to motivate immigrant workers to keep fighting to stay with their families. The rule proposed in this petition would ensure that Luis would remain in the United States—keeping his family intact and self-sufficient.

Anibal Fuentes Aguilar
Anibal Fuentes Aguilar is a day laborer and father living in Chicago, Illinois. In 2003, when he was only 16 years old, he traveled to the United States from Guatemala to earn money to help his parents survive. Today, he has a wife and a six-month-old United States citizen son, for whom he is the only economic provider. For years, Anibal lived in Chicago without incident. Then, on December 6, 2013 immigration agents wearing vests labeled “Police” came knocking at his door. Assuming the agents were police officers, Anibal opened the door. The immigration agents showed him a picture of a man they said they were looking for, who Anibal did not recognize. The agents then asked Anibal for his identification. After he produced it, they entered his home, guns drawn, and gathered his family in his living room. Though Anibal was not the man the agents were looking for, after discovering that Anibal had been stopped at the border years before, they detained him and placed him in deportation proceedings.

As a result of community pressure, Anibal was released with an electronic ankle bracelet under an order of supervision, and told he must leave the country by January 31st. His departure date has been extended while he waits to hear whether DHS will exercise prosecutorial discretion to stay his removal. Anibal continues to gather support from his community and day laborer organizations around the country. In Chicago, he is working with Undocumented Illinois/Organized Communities Against Deportations, a local group of undocumented young people organizing against deportations, and the Latino Union of Chicago, an organization that collaborates with low-income workers to improve social and economic conditions.

Anibal wants to stay in the United States in order to help raise his son and give him the best opportunity he can. He knows his town of San Marcos, Guatemala is very poor, and he fears the violence in the community, where his father was once kidnapped for ransom. In 2012, Anibal’s family’s home was destroyed in an earthquake, leaving him with few options if he is
forced to return. Anibal has never been convicted of a crime, and has always tried to be a good person. In 2009, he went back to Guatemala to visit his sick father. After his father and mother both passed away, he returned to the United States. It was on his way back that he was stopped at the border and ordered deported. Although this is his only offense, immigration considers him “high priority” for deportation due to this incident. This Petition would allow Anibal to remain with his family, and continue to support his son.

**LEGAL AUTHORITY**

As discussed in detail below, suspending deportations and expanding the Deferred Action for Childhood Arrival (DACA) program is good policy. In this section, petitioners explain that doing so is also wholly within the power of DHS and the President.

Consistent with his constitutional powers, the President, acting through the Department of Homeland Security (DHS)\(^4\), may suspend the deportations of millions of low-priority undocumented American workers and families—such as those who would have benefited from the Senate’s immigration reform bill (S.744)—because the Executive alone may determine how best to allocate the resources Congress provides to DHS. Such prioritization is necessary as a matter of practicality and has been implicitly endorsed by Congress, insofar as Congress has not, cannot and should not allocate sufficient resources to deport the 11-12 million undocumented individuals living in the United States. Indeed the President’s Administration has actively exercised this power in enacting the DACA program and through a series of prosecutorial

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\(^4\) The constitutional powers vested in the President are carried out both directly by the President and through executive agencies, such as DHS, acting on the President’s behalf. See *Myers v. United States*, 272 U.S. 52, 117 (1926), *overruled on other ground* (“The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court”).
discretion initiatives. There is nothing legally novel about the rule proposed in this petition. Issuing a rule expanding the deferred action program to include a broad class of American workers and families is fully within DHS’s power, acting pursuant to the constitutional executive power of the President and consistent with its statutory power pursuant to 8 U.S.C. § 103(a).

There are two legal issues presented by the instant petition. First, whether the President has the power to temporarily suspend, or decline to prosecute, the deportation of a broad class of undocumented workers and families who may benefit from near-term congressional action. Second, whether the President has the power to grant deferred action status to this same class of individuals. Section one below explains how the President’s power to decline to initiate or prosecute deportation proceedings is firmly grounded in the constitutional powers assigned to him as those powers have been interpreted by the Supreme Court and as those powers have been exercised in a wide range of administrative arenas by every modern president. Section two demonstrates that there would be nothing legally novel about exercising this power to prioritize enforcement in the immigration realm, as both this President and many before him have done so throughout our nation’s history. Section three explains how Congress has implicitly endorsed this power and has explicitly endorsed the unilateral authority of the Executive to grant deferred action and similar statuses to undocumented individuals whom the President declines to deport.

I. The Constitution Vests Power in the Executive to Determine Whether to Initiate Administrative Enforcement Actions

The President’s power to determine how, when and whether violations of the law will be prosecuted is a central component of the executive power entrusted to him by the vesting clause in Article II of the Constitution. It is a basic tenet of the separation of powers that the President has the authority to enforce the laws as he sees fit and necessary for the best interest of the

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5 U.S. CONST. Art. II § 1.
nation. The Constitution gives the President alone the power to “take Care that the Laws be faithfully executed.”\(^6\) The President’s power to prioritize enforcement is sometimes referred to as “prosecutorial discretion.” As the Congressional Research Service has explained, prosecutorial discretion is the “wide latitude” to determine “when, whom, how and even whether to prosecute apparent violations of the law.”\(^7\) There is no realm of law enforcement where the Executive is mandated to prosecute every violation of law. Such a requirement would be unworkable in a world of limited resources and unconstitutional in a government premised on the separation of powers. Accordingly, the President has the power, authority, and indeed the responsibility to prioritize the enforcement resources made available to him.

The Supreme Court, in *Heckler v. Chaney*, explained that it has “recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s *absolute discretion*.”\(^8\) In *Heckler*, the Court likened the decision of an agency to decline to initiate administrative proceedings against someone 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*, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”\(^9\) The Court also went on to say that courts must grant substantial deference to the Executive’s choice regarding how to allocate enforcement resources, as the Executive is best suited to make these determinations.\(^10\) Similarly, in *Lincoln v. Vigil*, the Court explained that “the allocation of funds from a lump-sum appropriation is another

\(^6\) U.S. CONST. Art. II, § 3.  
\(^7\) Kate M. Manuel & Todd Garvey, CONG. RESEARCH SERV., R42924, Prosecutorial Discretion in Immigration Enforcement: Legal Issues 1 (2013).  
\(^9\) Id. at 832 (emphasis added).  
\(^10\) Id. at 842.
administrative decision traditionally committed to agency discretion.” Accordingly, courts are generally precluded from even reviewing the determination of the Executive Branch not to initiate enforcement proceedings.

Indeed, while the Executive is generally required to follow mandates imposed by Congress, “[i]n light of the President's Article II prosecutorial discretion, Congress may not mandate that the President prosecute a certain kind of offense or offender.” Moreover, the Immigration and Nationality Act does not even purport to impose a mandate on DHS to deport any specific individual or category of individuals. And even assuming, arguendo, that it did, prioritizing enforcement in the face of limited resources or conflicting policy interests would not constitute an abdication of that duty. As Judge Kavanaugh of the D.C. Circuit Court of Appeals explained in In Re Aiken County, et al., “One of the greatest unilateral powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior – more precisely, the power [] not to seek charges against violators of federal law.”

In the immigration realm, the President’s authority over enforcement prioritization is further enhanced because immigration policy has unique foreign policy implications and the Supreme Court has recognized the “plenary and exclusive power of the President as the sole

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12 See United States v. Cox, 342 F.2d 167, 171 (1965) (stating that “as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”) See also, United States v. Nixon, 418 U.S. 683, 693 (1974) (stating Executive has the exclusive authority and absolute discretion to decide whether to prosecute a case).
13 See In re Aiken County, et al. 725 F.3d 255, 263-64 (D.C. Cir. 2013) (granting writ of mandamus against the Nuclear Regulatory Commission “for defying law enacted by Congress…[and] doing so without any legal basis” because “This case does not involve a Commission decision not to prosecute violations of federal law. Rather, this case involves a Commission decision not to follow a law mandating that the Commission take certain non-prosecutorial action. So the Executive's power of prosecutorial discretion provides no support for the Commission's inaction and disregard of federal law here.”)
organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”\textsuperscript{16} The Supreme Court recently explicitly emphasized how the President’s foreign affairs powers bear upon the Executive ’s prosecutorial discretion in the immigration enforcement realm.\textsuperscript{17} In \textit{Arizona v. United States}, the Court explained that “[t]he 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.”\textsuperscript{18} Given the foreign policy implications of our nation’s deportation programs, discussed \textit{infra}, the President’s foreign policy powers are an additional source of constitutional authority for executive discretion.

Thus, the decision of the President and DHS to decline to deport even a broad swath of the undocumented population is squarely within the Executive ’s unreviewable and constitutionally protected “absolute discretion” both because he alone can determine when, how and whether to initiate enforcement proceedings and because that power is at its zenith in the immigration realm given its sensitive foreign policy implications.

There is ample historical precedent of past Presidential administrations making policy determinations not to initiate administrative enforcement proceedings against broad classes of conduct proscribed by statute. The Reagan administration’s systematic under-enforcement of antitrust laws by the Department of Justice, (DOJ) is one such example.\textsuperscript{19} Reagan’s DOJ, because of policy concerns about the law’s impact, brought only a fraction of the Carter Administration’s cases for civil, criminal monopoly and civil restraint-of-trade cases.\textsuperscript{20}

\textsuperscript{17} \textit{Arizona v. United States}, 132 S. Ct., 2492, 2499 (2012).
\textsuperscript{18} \textit{Id}.
\textsuperscript{20} \textit{Id.} at 947.
Similarly, because of policy concerns, the George W. Bush Administration systematically under-enforced aspects of the administrative work of the Environmental Protection Agency (EPA), the Food and Drug Administration, (FDA), and the Department of Labor (DOL). A June 2006 report by the United States House of Representatives Committee on Government Reform found the “number of warning letters issued by the [FDA] for violations of federal requirements ha[d] fallen by over 50%, from 1,154 in 2000 to 535 in 2005, a 15-year low.” The decrease in warning letters did not appear to be the result of increased compliance by manufacturers as “The number of violations by food and drug manufacturers observed by FDA agents during field inspections remained relatively constant.” Only a change in enforcement priorities explains the discrepancy. Similarly, a 2008 report issued by the Government Accountability Office (GAO) found that the Bush Administration's DOL de-emphasized enforcing employment and voting rights laws but prioritized regulating labor unions, enforcing the prohibition on sex trafficking and combating various forms of religious discrimination.

It has been the norm for Presidents, consistent with their visions of the best interest of the nation, to systematically deprioritize certain categories of enforcement. Any assertion that the current Administration’s mass deportation policies are mandated by law is belied by the consistent recent practice of prior Administrations which routinely de-emphasized enforcement programs they viewed as harmful to the country.

23 Id. at i.
II. Presidents and their Administrations Have, Throughout Our Nation’s History, Made Categorical Prioritized Enforcement Determinations in Immigration Matters When the Public Interest So Demanded

The Executive Branch has a very long history of using categorical prosecutorial discretion in immigration matters when it is in the best interest of the nation to limit or delay enforcement. The most notable use of prosecutorial discretion through categorical prioritized enforcement is by President Obama himself, when, acting through DHS, he implemented the Deferred Action for Childhood Arrivals or DACA program. On June 15, 2012 Secretary of Homeland Security Janet Napolitano released a memo directing immigration officials to exercise prosecutorial discretion to those who came to the United States when they were very young, did not have felony convictions, or a conviction of a significant misdemeanor, and did not pose a threat to national security.\(^{25}\) It is important to note that similar to this program proposed herein, DACA is only meant to last for a temporary period and operates by designating certain immigrants as low priority for enforcement of deportation proceedings.\(^{26}\) DACA is consistent with good policy as it defers the deportations of those who are a key part of American society and call America their home. As Cecilia Muñoz, White House Director of the Domestic Policy Council, stated “Young deserving people who are Americans in every way but on paper are not this Administration’s priority for removal.”\(^{27}\) DACA, while not giving permanent relief,

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\(^{26}\) Id.

demonstrates good public policy by not using resources to deport young people who can only contribute to the American way of life.

Moreover, President Obama was by no means the first President to make categorical prioritized enforcement determinations in the immigration realm. Such programs date back to World War II when President Roosevelt created the Bracero Program to bring Mexican workers into the United States.\textsuperscript{28} The need for workers increased when “U.S. intervention in World War II created a domestic man-power shortage, the American government recognized the need to allow more temporary Mexican workers into the United States.”\textsuperscript{29} President Roosevelt, acting on his own, helped ease the crisis by creating the Bracero program, which “enabled the country to maintain agricultural production levels during the wartime shortage while promoting a bilateral immigration policy that advanced relations with Mexico in the spirit of the United States’ Good Neighbor Policy.”\textsuperscript{30} It is extremely important to note that the Bracero Program “operated for its first seven months as a bilateral agreement with no express congressional authorization”\textsuperscript{31} thus demonstrating the enormous authority wielded by the Executive to act in the interest of the nation.

While such an extensive labor program has not been instituted since, the Executive Branch has continued to use its power in the immigration arena. Several mechanisms have also been developed that allow the Executive to exercise an enormous amount of unitary power over those allowed to stay in the United States. One of these schemes is Extended Voluntary Departure (EVD) which was not established through statute but allows “the AG in his discretion

\textsuperscript{29} Maria Elena Bickerton, Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program, 79 TEXAS L. REV. 895, 899 (2001)
\textsuperscript{30} “Importantly, Roosevelt established the program without first seeking consent from Congress (or initiating public debate for that matter).” Cox & Rodriguez, supra note 28 at 487.
\textsuperscript{31} Id. at 488.
to temporarily enjoin the removal [of individuals] from particular countries who fear return because of sudden political changes in their countries of origin or other reasons.”

EVD was utilized by President Kennedy in 1960 in relation to Cuban refugees and it has subsequently been extended to peoples from other countries on numerous occasions when the Attorney General has directed immigration authorities “not to begin deportation proceedings against [certain] aliens or, if an alien already received a deportation order, not to enforce departure.”

The program has benefitted the citizens of Dominican Republic, Chile, Cuba, Poland, Cambodia, Vietnam, and various other countries with such designations being made by the administrations of Presidents Johnson, Nixon, Ford, and Reagan.

In *Hotel and Restaurant Employees Union, Local 25 v. Smith*, the D.C. Circuit Court of Appeals affirmed the unilateral power of the Executive to make such categorical prioritized enforcement decisions, noting that:

> The attorney general enjoys broad latitude in enforcing immigration laws. The decision to withhold EVD falls within this broad mandate. . . . [Because] where, as here, Congress has not seen fit to limit the agency’s discretion to suspend enforcement of a statute as to a particular group of aliens, we cannot review facially legitimate exercise of that discretion.

The court’s strong words confirm the extent of the discretion that the agency wields in the immigration context.

In 1990, President Bush similarly used his discretion to defer the deportations of Chinese nationals through Executive Order 12711 instructing the Attorney General to defer the enforced departure of all Chinese nationals until January 1, 1994.

Executive Order 12711 granted “enhanced consideration under the immigration laws for individuals

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from any country who express a lack of fear of persecution upon return to their country related to that country’s policy of forced abortion or coerced sterilization.”  

37 DHS has also limited enforcement of immigration laws in times of transcending emergencies, where exceptions are needed. During the tragedy of Hurricane Katrina, DHS stated that it would not sanction employers that hired individuals who were not able to produce the required identifying documents because of the destruction that Hurricane Katrina had caused in violation of Section 247(A) of the Immigration and Nationality Act.  

38 Presidents have also used “parole powers” to benefit large groups of immigrants in need of protection from deportation, including Cubans in 1980 and 1994 and Haitian orphans in 2010.  

39 Thus, history is peppered with examples of Presidents making categorical prioritized immigration enforcement determinations. It is also entirely devoid of judicial decisions striking down such presidential action.

Beyond the DACA program, the Obama Administration has made categorical prioritized enforcement determinations through a series of prosecutorial discretion memos issued by John Morton, the former director of Immigration and Customs Enforcement (ICE). The first of these memos directed officers to consider certain factors in deciding who would get the benefit of the exercise of discretion and prioritized “[t]he removal of aliens who pose a danger to national security or a risk of public safety [as] ICE’s highest immigration enforcement priority.”  

40 This memo established as its highest

37 Id.
38 “DHS announced September 6th it will not sanction employers for hiring victims of Hurricane Katrina who, at this time, are unable to provide I-9 documentation normally required under Section 247A of the Immigration and Nationality Act.” Department of Homeland Security, List of Government Waivers and Dispensations Authorized for Hurricane Katrina Response (Sept. 21, 2005) available at www.hSDL.org/view&did=456310.
enforcement priority those who posed a danger to society. The Morton Memos targeted this group as the area where ICE would direct most of its resources.\textsuperscript{41} On June 17, 2011, ICE issued two additional memos, the first of which established the factors to look at for prosecutorial discretion such as length of residence in the U.S. of the non citizen, criminal history, if the non citizen was pregnant or had a pregnant spouse among other factors.\textsuperscript{42} The second memo established a policy of not commencing removal proceedings against individuals who could be witnesses or victims of crime.\textsuperscript{43} Another memo issued on December 21, 2012 specified that ICE agents should issue detainers only when they have reason to believe a noncitizen is subject to removal and has a felony or three or more misdemeanor convictions; or has an outstanding order of removal, among other factors.\textsuperscript{44} These memos, while not subject to the same bright line rules established in the DACA program, are no less examples of categorical prioritized enforcement decisions as they establish a broad class of individuals not to be deported. To be sure, these memos were dramatically less effective than the DACA program because they left significant discretion in the hands of resistant line-level DHS officers. But, critically, the distinction between bright line categories, as in DACA, or broad factors to be weighed, as in the Morton memos, does not alter the legal analysis. Both programs designate broad classes of people who should not be deported and thus both are prime examples of the President’s broad absolute discretion to establish categorical prioritized enforcement programs in the immigration realm.

\textsuperscript{41} Id.
\textsuperscript{43} Memorandum from John Morton, Director of ICE, to all Field Office Directors, all Special Agents in charge, and all Chief Counsel (June 17, 2011) available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.
\textsuperscript{44} Memorandum of John Morton, Director of ICE (Dec. 21, 2012), to all Field Office Directors, all Special Agents in charge, and all Chief Counsel available at http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.
Most recently, the United States Citizenship and Immigration Services released a memorandum on November 15, 2013 establishing a program to grant parole in place to spouses, children, and parents of active duty members of the armed services under INA § 212(d)(5)(A). The Obama Administration also recently granted deferred enforced departure to Liberians after the temporary protected status of that country ended in 2007. While these are just a few examples of policies enacted by immigration enforcement agencies, they are powerful reminders of the Executive Branch’s unilateral authority to deprioritize broad categories immigration enforcement.

III. Congress Has Endorsed a Wide Range of Prioritized Enforcement Mechanisms and has Delegated Broad Discretion to the Executive to Determine the Proper Allocation of Immigration Enforcement Resources

The examples set forth supra of categorical prioritized immigration enforcement programs are grounded not only in the Executive’s constitutional powers. Congress has also explicitly and implicitly endorsed most of the discretionary enforcement mechanisms utilized by the Executive. Through broad and specific delegations of authority, Congress has vested the President and DHS with broad power, not only to designate low priority individuals who will not be subject to removal but further to grant them various forms of provisional status akin to deferred action. Section 103(a) of the INA expressly delegates to the Secretary of Homeland Security the “administration and enforcement of the INA and all other laws relating to the


immigration and naturalization of aliens.”\textsuperscript{47} INA section 103(a)’s broad delegation of enforcement to the Secretary of Homeland Security gives the President more than enough room to fashion an executive solution that expands the criteria for deferred action.

In addition to § 103(a), the INA contains a variety of mechanisms crafted to grant categorical benefits through non-enforcement. The parole power is explicitly endorsed in INA § 212(d)(5)(A). In addition, in INA § 244(b), Congress explicitly endorses the Executive’s power to grant Temporary Protected Status. Moreover, in regard to the range of non-statutory discretion mechanism repeatedly employed by Presidents over long periods of our history—such as Extended Voluntary Departure (EVD), Deferred Enforcement Departure (DED), and Deferred Action—they have become a “gloss on Executive Power . . . a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned.”\textsuperscript{48} Past practice by itself does not create power, but “long-continued practice, known to and acquiesced in by Congress, [raises] a presumption that the action had been taken in pursuance of its consent.”\textsuperscript{49}

Indeed, Congress has done more than silently acquiesce to these non-statutory mechanisms. Congress has explicitly affirmed the validity of these mechanisms. Most critically, in identifying permissible evidence related to immigration status for the purpose of obtaining a federally recognized state driver’s license or identification card, Congress specifically included proof of “deferred action” as a valid form of proof; thereby endorsing the Executive’s authority to grant such status.\textsuperscript{50}

\textsuperscript{47} INA §103(a).
Indeed, the entire structure of the statutory scheme and appropriations contains an implicit broad delegation of discretion to the Executive to allocate resources toward whomever the Executive determines should be prioritized.\(^{51}\) The INA makes millions deportable. Beyond the 11-12 million undocumented, millions of immigrants with legal status can be deported for the most minor transgressions. It is not realistic that we can or should provide enough resources to deport everyone statutorily removable. Therefore, broad categorical prioritization is necessary.

IV. Congressional Appropriations for Detention and Removal Operations Do Not Limit the President’s Authority to Suspend Deportations and Grant Deferred Action

Congressional appropriations for detention and removal operations do not alter the above analysis. Contrary to widely publicized statements from some Obama Administration officials,\(^{52}\) congressional appropriations do not, and could not, establish a deportation quota. Nor do they limit the President’s authority to suspend deportations and grant deferred action to a broad class of undocumented workers and families. Congress cannot order the President to deport any person or group of people without infringing on the prosecutorial discretion authority granted him by Article II of the Constitution. Moreover, even assuming, *arguendo*, that Congress could pass legislation mandating deportations, it could not impose such a mandate through appropriations. And, finally, even if it could, the Consolidated Appropriations Act of 2014, Public Law No. 113-76 does not purport to impose any such quotas. Instead, it uses broad, permissive language, leaving the President with tremendous discretion.

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\(^{51}\) “Congress intended that the Executive Branch determine who must be removed and who may permissibly remain.” *United States v. Alabama*, 691 F.3d 1269, 1295 (11th Cir. 2012).

\(^{52}\) See, e.g., Testimony of DHS Sec. Janet Napolitano, Senate Hearing 112-513, Oct. 19, 2011 (“It costs in the neighborhood of $23,000 to $30,000 to actually remove somebody. That is our cost. That does not include Justice Department costs. The Congress gives us the ability to finance removals of 400,000 people a year.”); Cecilia Munoz: “*Even Broken Laws Have to be Enforced,*” Frontline, Oct. 18, 2011, available at [http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/cecilia-munoz-even-broken-laws-have-to-be-enforced/](http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/cecilia-munoz-even-broken-laws-have-to-be-enforced/) (“As long as Congress gives us the money to deport 400,000 people a year, that’s what the administration is going to do.”).
As described above, the Constitution vests broad and unilateral discretion in the Executive to determine whether to initiate administrative enforcement actions. Congress cannot negate this discretion by mandating that the President initiate certain prosecutions. Rather, “[t]he Executive’s exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive.” Thus, “[a]fter enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President’s prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed . . .” This principle applies no less in the context of appropriations than it does in relation to any other legislation.

In considering the President’s discretionary authority, it is important to recognize the distinction between his “discretion not to enforce a law against private parties” and his “discretion not to follow a law imposing a mandate or prohibition on the Executive Branch.” The former is constitutionally protected, the latter is not. Accordingly, if a statute imposes a mandate on the executive to itself take some action (unrelated to initiating enforcement actions), including as a general matter spending mandates, the President may not disregard that mandate. However, any statute mandating the use of funds to prosecute certain individuals or groups would unconstitutionally interfere with the President’s prosecutorial discretion authority. Thus, it

53 See discussion supra at pp. 12-16.
55 In re Aiken County, et al., 725 F.3d 255, 264 (D.C. Cir. 2013) (Opinion of Kavanaugh, J); see also id at 262-63 (collecting cases).
56 Id. at 266.
would be invalid. To the extent it sought to impose a “deportation quota,” it would also run afoul of law enforcement officers’ constitutional obligation to make arrests based on individualized probable cause determinations. Put simply, Congress cannot through appropriations make an end run around the constitutional limits of its legislative powers.

To be sure, the Congress has a unique power to appropriate funds. While no power of the Executive can override the sole authority of the Congress to disburse funds from the United States Treasury, this does not mean that the Executive must, in all circumstances, spend all money allocated by the Congress. As the Supreme Court has explained, the bright line prohibition against unauthorized Executive disbursements of funds exists to “prevent[] fraud and corruption,” a concern not implicated when the Executive fails to spend all allocated monies. Just as with any legislation, the Executive must generally follow Congress’ dictates to spend funds as appropriated. But the general rule gives way when the Executive determines not to spend certain funds because, consistent with its unique executive constitutional authority, it determines not to initiate enforcement actions against certain individuals.

Even if we assume, for the sake of argument, that Congress could order the President to deport people, it could not do so through appropriations legislation. Appropriations acts “have

58 Train, 420 U.S. 35, and related cases from the Nixon era reviewing executive “impoundments” are thus inappropriate to the question of the President’s authority to suspend deportations. Those cases dealt with the President’s authority to refuse to spend funds appropriated by Congress for specific domestic programs, such as highway construction, disaster relief loans, and water pollution control efforts. See, e.g., Note, Protecting the Fisc: Executive Impoundment and Congressional Power, 82 Yale L.J. 1636, 1637 n.6 (1973). The programs at issue did not purport to mandate the initiation of enforcement actions against private individuals. Courts reviewing such impoundments were not faced with the question whether the President would be required to comply with a statute that mandated the expenditure of funds to prosecute violations of federal law.
60 Richmond, 496 U.S. at 427. Moreover, the plain language of the Appropriations Clause itself dictates a prohibition against unauthorized spending but no collar obligation to spend all appropriated funds. U.S. CONST., Art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); cf. Knote, 95 U.S. at 154 (“However large, therefore, may be the power of pardon possessed by the President . . . it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.”).
the limited and specific purpose of providing funds for authorized programs.”62 Per the rules of Congress, appropriations acts cannot make changes to existing law.63 As described above, the Immigration and Nationality Act does not mandate any particular level of deportations, nor does it mandate the deportation of particular individuals or categories of individuals.64 An appropriations act cannot create such a mandate where the authorizing legislation does not.

Finally—again assuming for the sake of argument—even if an appropriations act could mandate a certain level of deportations, the Consolidated Appropriations Act of 2014, Public Law No. 113-76 does not. To the contrary, the Act simply appropriates a lump sum for detention and removal operations and directs DHS to prioritize the deportations of immigrants convicted of serious crimes.65 The Act leaves it to DHS to decide on the proper allocation of funds within detention and removal operations, including identifying which criminal convictions should trigger prioritized enforcement.66 It would be entirely consistent with the Act for DHS to spend the bulk of allocated funds on improving removal operations by training line officers to respect civil and constitutional rights, improving detention conditions, and ensuring that due process protections are provided at all steps of the deportation process.67

63 Rules of the House of Representatives XXI(2)(b) (“A provision changing existing law may not be reported in a general appropriation bill . . .); Standing Rules of the Senate XVI (“The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation . . .”)
64 See discussion supra at note 14 and accompanying text.
65 See H.R. 3547-247 (“[O]f the total amount provided, not less than $2,785,096,000 is for detention and removal operations, including transportation of unaccompanied minor aliens.”); id. (“[T]he Secretary of Homeland Security shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”).
66 See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (“[T]he allocation of funds from a lump-sum appropriation is another administrative decision traditionally committed to agency discretion.”)
67 Much attention has been affording in recent months to the ill-advised “bed mandate” including in recent appropriation acts. See, e.g., H.R. 3547-247 (“Provided further, That funding made available under this heading shall maintain a level of not less than 34,000 beds through September 30, 2014.”); see Editorial Board, Detention Must be Paid, N.Y. TIMES (Jan.20, 2014); Robert M. Morgenthau, Immigrants Jailed Just to Hit a Number: A Cruel Homeland Security Quota, N.Y. Daily News, opinion (Ja. 19, 2014). Some have suggested that by mandating a certain number of immigrants be detained daily, Congress has de facto mandated a high level of deportations. As an initial matter, these arguments misread the plain language of the appropriation. The appropriations bill does not mandate that any immigrants be detained. Rather, at most, it imposes an obligation on DHS to maintain access to 34,000 beds on any given day. More importantly, it appears from the drafting that Congress knew that any such
Congressional appropriations thus leave intact the President’s broad discretion to determine “when, whom, how and even whether to prosecute apparent violations of the law.”

We turn now to the question how the President should exercise that discretion.

PUBLIC INTEREST

As described above, the President has the power to defer the deportations of large groups of people by re-prioritizing enforcement. Taking care that the laws be faithfully executed, it is the President’s responsibility to give shape and character to the type of enforcement agencies practice. It is in the nation’s public interest and consistent with the constitutional and statutory authority of the Executive not to divert immigration resources toward low-priority immigrants workers and families for whom there is a realistic chance of near-term congressional legalization. Current deportation policy entirely fails to protect the nation’s public interest.

I. The Problem: The Unprecedented Dragnet Mass Deportation System

The United States is in the midst of a massive deportation dragnet that is anomalous in our nation’s history and in tension with our identity as a nation of immigrants. In the past decade the number of deportations per year has more than doubled, now reaching nearly 400,000 deportations per year. Indeed, there have been more deportations in the past ten years than in arrest or detention quota would be both unprecedented and unconstitutionally. See discussion supra at pp.12-16, 25-26. To square this appropriations language with the President’s constitutional prosecutorial discretion authority and the constitutional requirement that arrests and detentions be based upon individualized determinations of probable cause and individualized bond determinations, it must be interpreted to mean only that DHS must maintain access to 34,000 detention beds, not that those beds must actually be filled with immigration detainees.

Kate M. Manuel & Todd Garvey, CONG. RESEARCH SERV., R42924, Prosecutorial Discretion in Immigration Enforcement: Legal Issues 1 (2013).

the previous 110 years combined. From January 2009 to the end of 2013, in a mere five years, the Obama administration was responsible for having deported almost two million immigrants. The escalating pace of deportations inflicts a tremendous financial and social toll on the United States. Immigrants, regardless of their immigration status, are critical to the current and future well being of the American economy. Brutal deportation policies divide and devastate American families.

According to a September 2013 report released by the Pew Research Center Hispanic Trends Project, there are an estimated 11.7 million undocumented immigrants living in the United States. The U.S. population includes approximately 40.4 million foreign born individuals. That number represents 13% of the total U.S. population. This percentage remains below the U.S. peak, which occurred during 1890 to 1920, when immigration was dominated by arrivals from Europe. Today’s immigrants hail predominantly from Latin America and Asia.

Recent mass deportation policies have contributed to a factually inaccurate and politically harmful narrative that immigration is primarily a public safety and national security issue. Programs like Secure Communities, 287(g) and the Criminal Alien Program (CAP)—all of which draft local police into federal immigration enforcement—fuel record-breaking deportation numbers while undermining public safety criminalizing immigrants, eroding public trust in law

70 Id.
74 Id., at 2.
75 Id., at 2.
enforcement and obscuring the fact that immigration policy is essentially about family unity, economic vitality, political equality, and national self-identity.

Several of the petitioners, including Noemi Romero and Jose Mejia, were exposed to deportation proceedings only because of the abuses of local police. Although ICE has scaled back the implementation of 287(g) programs, the Obama Administration has aggressively expanded Secure Communities in its place, such that it is now operational in all jurisdictions in the United States. Secure Communities inserts mandatory civil immigration checks into the earliest stages of the criminal justice process, before individuals have even been formally charged, let alone convicted, of any crime. The Criminal Alien Program (CAP) physically inserts DHS officers into local criminal justice systems in much the same way Secure Communities digitally infiltrates our criminal justice systems. Through Secure Communities and CAP, DHS asks local police and jails to hold suspected immigration violators for federal authorities. All of these programs cultivate racial profiling by the police and erode public trust of law enforcement officers within immigrant communities.

Ostensibly the goal of ICE’s partnerships with local law enforcement has been to prioritize immigration enforcement towards immigrants who pose a serious threat to public safety, however the most recent deportation numbers show that in 2012, almost half of the number of deported had no criminal record whatsoever. Even among those who had criminal convictions, the vast majority were for minor offenses many, like Noemi and Jose, who were convicted for such “crimes” as working or driving. In 2011, John Morton, then director of ICE

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issued several memoranda claiming to prioritize the removal of “aliens who pose a danger to national security or a risk to public safety.” In spite of the Morton memos, ICE continues to deport large numbers of individuals with no record of criminal history. A recent study demonstrated that:

Case-by-case data from Immigration and Customs Enforcement (ICE) show that no more than 14 percent of the detainers issued by the government in FY 2012 and the first four months of FY 2013 met the agency’s stated goal of targeting individuals who pose a serious threat to public safety or national security. In fact, roughly half of the 347,691 individuals subject to an ICE detainer (47.7 percent) had no record of a criminal conviction, not even a minor traffic violation.

Furthermore, very recent ICE data showed that “if traffic violations (including driving while intoxicated) and marijuana possession are put aside, fully two thirds of all detainers had no record of a conviction.” The divide between the agency’s rhetoric and its actual performance is startling.

During the same period as the Obama Administration was setting deportation records, border apprehensions have fallen significantly. In 2005 the US Border Patrol reported nearly 1.2 million apprehensions of unauthorized border crossers, by 2011 that number had fallen to 340,000 – a drop of more than 70%. In order to continue inflating deportation numbers, ICE has resorted to disrupting settled immigrant communities within the United States. Stepped up immigration enforcement within the U.S. has meant upheavals to American businesses and mixed status immigrant families on a scale they have never had to endure. While the rate of unauthorized immigration has declined precipitously the taxpayer dollars being funneled into counterproductive enforcement operations has skyrocketed. The United States spent

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79 Id.
80 Id.
81 Id.
approximately 18 billion dollars on immigration enforcement between ICE and CBP in 2012 and was on schedule to do the same in 2013.\textsuperscript{83} In fact, the U.S. spent 3.5 billion dollars more policing immigration than on the combined budgets of the major criminal enforcement agencies, FBI, DEA, Secret Service, U.S. Marshal’s Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).\textsuperscript{84} As fewer immigrants choose to enter the U.S., the need for increased immigration enforcement should decline. Increasing funding to CBP and ICE makes little sense after unauthorized border crossings have dropped over 70\% since 2005. Despite this, the House has just passed an appropriations bill for 2014 that grants $16 billion out of the Department of Homeland’s Security’s $39 billion budget specifically for immigration enforcement, wasting precious resources.\textsuperscript{85}

II. The Mass Deportation System is Undermining National Economic Vitality: Immigrants Are Lynchpins of the American Economy and Have Earned A Right to Legal Status

Immigrants are linchpins to the American economy. The current mass deportation policies substantially disrupt the American economy, inhibit growth, and create substantial labor shortages in a number of critical American industries. Undocumented immigrants play a vital role in U.S. labor markets, particularly in the construction, farming, and service sectors.\textsuperscript{86} Current mass deportation policies and the Administration’s “enforcement only” approach to the general undocumented population threatens to create labor shortages in critical industries.

\textsuperscript{85}Editorial Board, \textit{Detention Must be Paid}, N.Y. TIMES (Jan.20, 2014).
resulting in increased prices for the goods and services from American consumers and instability for the American economy.

**Immigrants build America**—Nationally, there are nearly 7 million workers who work as day laborers or in other sectors of the construction industry. Of these 7 million, an estimated 14 percent are undocumented, meaning that there are more than 1 million day laborers and construction workers nationwide that lack legal status, though this likely underestimates the true count of undocumented workers in the construction industry. A recent report from the Workers Defense Project found that 50 percent of construction workers in Texas were undocumented. Despite the United States’ reliance on immigrant labor in the construction sector, these workers have not benefitted from their contribution to national progress. Their labor should earn them the right to work legally so that they can escape the shadows of the underground economy. Immigrant day laborers and construction workers have earned a right to legal status.

**Immigrants feed America**—Approximately fifty-three percent of farm workers are undocumented. Accordingly, current mass deportation policies combined with the proliferation of state anti-immigration laws have led to acute labor shortages in the agricultural sector. The fear of deportation encourages waves of undocumented immigrants to abandon their jobs. As a result, “thousands of acres of crops have been left to rot in the fields, as farmers struggle to compensate for labor shortages with domestic help.” In 2012, Washington state farmers were

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88 Id.

89 Id.


forced to leave 10% of their crops rotting on vines and trees.\textsuperscript{92} Staying true to our nation’s value of hard work means recognizing the contribution these workers make. On a daily basis, we quite literally enjoy the fruits of their labor. Immigrant farm workers have earned a right to legal status.

\textbf{Immigrants care for America}—Undocumented immigrants play a vital role in the childcare and eldercare industries. As of 2008, approximately 3.2 million individuals were employed as direct care workers in the United States.\textsuperscript{93} The demands for these services are expected to grow significantly as the U.S. population ages. An estimated 1.1 million new direct care positions will be created by 2018, increasing this workforce to 4.3 million workers.\textsuperscript{94} Immigrant women make up nearly one-fourth of the direct care workforce.\textsuperscript{95} Currently, native-born workers in the United States are not meeting the demands for long-term care, a situation that is unlikely to change as the demand for such care continues to increase. Although the numbers of undocumented immigrants within a given occupation are difficult to determine, it is estimated that within the U.S. direct care workforce, approximately one in five immigrants (21 percent) are undocumented.\textsuperscript{96} Given the frequent informal nature of much of the care work performed in this country, however, it is possible that the proportion of undocumented immigrants is higher than this estimate would suggest.\textsuperscript{97} These are the individuals we trust to care for our children and grandparents. By virtue of their labor they have earned the right to legal status.

\textsuperscript{92} Id.
\textsuperscript{94} Id. at 3.
\textsuperscript{95} Id. at 3.
\textsuperscript{96} Id. at 3.
\textsuperscript{97} Id. at 13.
Immigrants contribute to the consumer economy—In addition to the vital labor they provide to critical sectors of the American economy, undocumented workers are consumers who contribute substantially to the state and local economy through their purchasing power and the taxes they pay. There is a myth that undocumented immigrants do not pay taxes. The truth is the opposite—if we think about taxes paid as compared to government benefits received, undocumented immigrants are paying more than their fair share. A recent study found that “[u]ndocumented immigrants across the United States paid $11.2 billion in taxes in 2010.”

Many undocumented immigrants have taxes and contributions to programs like Medicaid and Social Security automatically deducted by their employers. Indeed, because of their undocumented status, many such individuals actually overpay insofar as they are fearful of filing tax returns claiming deductions and credits to which they are entitled. Moreover, undocumented immigrants pay substantial amounts of state and local sales taxes on food, clothing, health care services, utilities, housing, recreation and other items are also contributed to the local economy. By bringing undocumented immigrants out of the shadows we will further improve the tax base. America needs an immigration policy that fully recognizes the demand for these workers and accounts for them more fully. Legalization would increase our government’s revenue base and eliminate opportunities for unscrupulous employers to exploit immigrant labor, which harms all American workers. The Congressional Budget Office believes that the Senate’s S.744 bill would boost the economy and the average labor force wages would be 0.5 percent higher than under the currently immigration laws in 2033.

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The contributions immigrants make to our nation’s labor force and tax base more critical now than ever, as the baby boomer generation begins to retire. The baby boomer retirement could potentially cause two major economic crises: an ‘earned benefit crisis’ and a ‘workforce crisis.’ As one commentator explained:

The entitlement crisis involves the growing discrepancy between revenue from payroll taxes and the federal expenditures on Social Security, Medicare, and other social aid, particularly for retirees who have paid their dues. A potentially debilitating workforce crisis would also ensue when millions set to retire from a labor force that is already seeing declines in growth.100

As America’s baby boomers approach 65, immigrants are helping to keep our workforce young and growing. The oldest of the baby boomer generation have already filed for Social Security benefits. Over the next twenty years, more than seventy million Americans will follow. Subsequent generations have not sustained the growth of the baby boomers and will not have the capacity to fill the workforce void or pay for their parents’ retirement.101 This predicament can be turned into an opportunity by welcoming the undocumented populations into our national community. As one scholar recently observed, by liberalizing immigration policies, the influx of workers would “significantly mitigate the entitlement and workforce crisis and the ‘illegal’ stigma attached to millions of unauthorized immigrants would be removed.”102 These immigrants could legally join the American workforce, filling the void left by the baby boomers and contributing to Social Security coffers through their taxes. Expanding the workforce, and subsequently the economy, helps promote GDP growth and provides an answer to the baby boomer crisis. A clear path to legalization for undocumented workers and families is essential to

100 Evan Nolan, Picking Up After the Baby Boomers: Can Immigrants Carry the Load?, 24 GEO. IMMIGR. L.J. 77 (2009).
101 Id. at 80.
102 Id. at 82.
address the looming earned benefit and workforce crises resulting from our nation’s aging population.

III. The Mass Deportation System is Devastating American Families

Family unity has been a guiding principle of our nation’s immigration system since its modern formation. Immigration policies are grounded in the assumption that families should be together. In practice however, immigration enforcement separates children from parents and spouses from each other, subsequently barring their eventual reunification, since virtually no one who has been deported is thereafter granted lawful reentry. These callous enforcement rules ignore basic human instinct. Who among us would allow any law to stand between us and our children or our spouse? The thousands of immigrants convicted of illegal entry and reentry under Operation Streamline are not criminals nefariously breaking into forbidden territory. They are often breadwinners who risk their lives to lift their families out of poverty. They are people who, after years of separation, can bear the pain no longer and risk their lives to feel the embrace of their family members.

Nationally, there are almost five million children with at least one undocumented parent.\textsuperscript{103} A large majority of these children are U.S. citizens and they comprise the youngest and most vulnerable in our society, mainly infants, toddlers and pre-schoolers.\textsuperscript{104} The number of children separated from one or both parents as a result of immigration enforcement is significant. An Urban Institute study found that for every two immigrants apprehended, one child was left behind.\textsuperscript{105} The study also found that two-thirds of affected children are U.S. citizens or legal


\textsuperscript{104} \textit{Id.} at 2.

\textsuperscript{105} \textit{Id.} at ii.
residents, which suggest the potential future costs for our country will be significant.\footnote{Id. at 2.}


Deportations shatter families and endanger the children left behind. Sometimes when undocumented parents whose children are United States citizens are deported, their children are placed in the local foster care systems. In these circumstances, family separation can last for extended periods, have devastating emotional consequences for the children, and impose enormous costs on local child welfare agencies. Applied Research Center, (ARC) conservatively estimates that over 5,000 children are currently living in foster care because their parents have been either detained or deported by federal immigration authorities.\footnote{Id. at 3.} It is unconscionable and inhumane to separate hard-working parents from their young children regardless of immigration status. American families are being torn apart by the Administration’s mass deportation policies. It is time to recognize that undocumented immigrants are not criminals but rather they are parents and children, husbands and wives, yearning to care for one another.
IV. The Mass Deportations System is Undermining Foreign Relations with Key Allies

Mass deportations have had a substantial impact on U.S. foreign relations with key Latin American allies. This is because the increased number of deportations has affected the economies and communities of source countries. Central American leaders have expressed concerns that overly punitive U.S. immigration laws could “compel the return of hundreds of thousands of immigrants from the United States, causing damage to local economies by creating strains on the job market.” While the U.S. economy is dependent on these immigrant laborers, many source countries’ economies simply cannot support the flow of deportees.

In addition, negative perceptions of the United States have increased as a result of inhumane immigration policies, detention abuses and the increasing number of deaths along the U.S. border with Mexico. This perception of the United States as the bad actor in these sad situations stem from programs implemented to stop unauthorized immigration that have instead simply resulted in immigrants traversing more dangerous conditions. Additionally, Border Patrol agents have shot and killed 20 Mexican migrants near the US-Mexico border between 2010 and 2013. Six of those shot and killed were standing in Mexico at the time.

113 Crossing the border has turned an already harrowing journey for immigrant workers seeking a better future in the United States into a passage of death with “evidence [suggesting] that border crossings have become more hazardous since the ‘Prevention through deterrence’ policy went into effect in 1995, resulting in an increase in illegal migrant deaths along the southwest border.” Blas Nunez-Neto, Border Security: The Role of U.S. Border Patrol, Cong. Research Serv. 26 (Nov. 20, 2008).
115 Id.
Mexico and other countries keep abreast of the immigration law debates in the United States that also affect their citizens and families. The way deportations separate families has become particularly relevant to foreign relations with Mexico. Yet, humane executive action in immigration has conversely resulted in good will. More humane actions on the part of the United States can go far in fostering good will with other countries and strengthening foreign relations. Conversely, our current mass deportation policies continue to undermine our relationships with key allies.

CONCLUSION

Current mass deportation policies inflict violence on American families and at the same time weaken the nation’s economy. The majority of Americans support immigration reform, and bills to legalize large segments of the undocumented population are currently being weighed in Congress. Accordingly, it is sound public policy and consistent with the President’s authority to make a categorical determination to prioritize resources away from the estimated 8 million who would benefit under the Senate's CIR bill, S.744, and away from other immigrant workers and families who may benefit from near term congressional action. A form of deferred action, similar to DACA, should be instituted to the benefit of low-priority immigrants—providing formal recognition, protection from deportation, and work authorization. During the temporary

116 Former Mexican President Felipe Calderon often denounced US immigration policy “including more deportations that have divided many families, sometimes forcing U.S. born children to build new lives in Mexico.” Traci Carl, Mexico Blasts US Immigration Policies, THE WASH. POST (Sept. 2, 2007).
117 “I would like to thank personally, and on behalf of the Mexican nation, President Barack Obama for his valuable decision by executive order to give an opportunity for young people who were not born in the United States but who arrived in that great nation before they were 16 years of age…not to be deported for at least a period of two years, so this is a clear and certain situation for them.” Remarks by Presidents Obama and Calderon After Bilateral Meeting, June 2012, published June 18, 2012 available at http://www.cfr.org/mexico/remarks-presidents-obama-calderon-after-bilateral-meeting-june-2012/p28542.
118 “Mexican and Central American officials interviewed considered migration at least as important as trade. While the economic benefits of trade and migration are comparable, migration likely has greater political impact because sp many voters have personal or family migration histories.” See Marc. R. Rosenblum, Moving Beyond the Policy of No Policy: Emigration from Mexico and Central America, 46 LAT. AMER. POL. & SOC. 91, 99 (2004)
suspension DHS should re-allocate limited funding away from these low priority individuals towards clearing the growing court backlog and reallocating resources to granting of immigration benefits like visas thereby decreasing the long wait times for authorized entry. The President has been clear that these steps are necessary to establish a functioning immigration system and the proposed prioritization would permit substantial progress toward these goals.

For these reasons and the others stated above, petitioners respectfully request that DHS issue a rule pursuant to the Administrative Procedure Act, 5 U.S.C. § 553 suspending deportations for undocumented immigrant workers and their families.\footnote{Under 5 U.S.C. § 553(b)(A), the proposed rule is “a general statement of policy” and thus notice and comment procedures are not statutorily required. General statements of policy are defined as “statements issued by an agency to [advise] the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” \textit{Lincoln v. Vigil}, 508 U.S. 182, 197 (1993) (quoting Attorney General’s manual on Administrative Procedure Act 30, n. 3). Given the urgency of the issue, with over 1000 people being deported each day, Petitioners request that DHS act in the most expeditious manner possible to enact the proposed policy. As with the DACA program, this program would be best implemented through policy statements, rather than full notice and comment rule making.}

Respectfully submitted,

\hspace{1cm} /s/  
Gilda Holguin, Clinical Law Student  
Thomas Chew, Clinical Law Student  
Peter Markowitz, Associate Clinical Professor of Law  
Kathryn O. Greenberg Immigration Justice Clinic  
Benjamin N. Cardozo School of Law  
55 Fifth Avenue, rm 1109  
New York, NY 10003  
Tel: 212-790-0340  
Fax: 212-790-0256  

\textit{Attorneys for NDLO}