No. 18-15068

Consolidated Case Nos. 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:17cv5211-WHA

BRIEF OF FORMER FEDERAL IMMIGRATION AND HOMELAND SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

Amici served in senior positions in the federal agencies charged with enforcement of U.S. immigration laws under both Democratic and Republican administrations.

T. Alexander Aleinikoff served as the General Counsel, and then the executive associate commissioner for programs, of the Immigration and Naturalization Service ("INS") from 1994 to 1997. INS is the predecessor agency to the federal offices within the U.S. Department of Homeland Security ("DHS") that now have responsibility for enforcing the nation's immigration laws.

Roxana Bacon served as Chief Counsel of U.S. Citizenship and Immigration Services ("USCIS") from 2009 to 2011.

Seth Grossman served as Chief of Staff to the General Counsel of DHS from 2010 to 2011, Deputy General Counsel of DHS from 2011 to 2013, and as Counselor to the Secretary at the same agency in 2013.

[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Stephen H. Legomsky served as Chief Counsel of USCIS from 2011 to 2013 and as Senior Counselor to the Secretary of DHS on immigration issues from July to October 2015.

John R. Sandweg served as Acting Director of Immigration and Customs Enforcement ("ICE") from 2013 to 2014, as Acting General Counsel of DHS from 2012 to 2013, as Senior Counselor to the Secretary of DHS from 2010 to 2012, and as Chief of Staff to the General Counsel of the same agency from 2009 to 2010.

Paul Virtue served as General Counsel of the INS from 1998 to 1999. He also served as Executive Associate Commissioner of INS from 1997 until 1998 and as Deputy General Counsel from 1988 until 1997.

As former leaders of the nation's primary immigration enforcement agencies, amici are familiar with the historical underpinnings of deferred action policies like DACA. Amici's relevant experience includes first-hand administration of other deferred action policies and testimony before Congress explaining these policies and their benefits. Amici's experience reveals the vital role that these policies play in facilitating the rational and humane enforcement of federal immigration law, which has historically established laudable policy objectives that have been backed with inadequate resources. Because the Executive Branch has lacked the resources to take action against every person residing in the United States who may be removable, it has seen fit to prioritize enforcement

against those who pose threats to public safety or national security over enforcement as to others. Amici's experience thereby teaches that reasoned use of deferred action policies in the immigration context can further the national security interests, humanitarian values, and rule of law principles underlying federal immigration legislation.

SUMMARY OF ARGUMENT

For more than half of a century, Administrations of both Republican and Democratic Presidents have implemented policies designed to delay—in many cases indefinitely—the enforcement of deportation and other requirements created by federal immigration legislation. As this Court has recognized, "it is well settled that the Secretary can exercise deferred action" in the immigration context. *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017). The Executive Branch has relied on these "deferred action" policies to improve the efficiency and effectiveness of immigration law enforcement by focusing scarce resources on the highest-priority cases. These deferred action policies are rational and humane, and they serve important national interests.

The Deferred Action for Childhood Arrivals ("DACA") program is a prime example of such a policy. Announced in a June 15, 2012 memorandum from then-Secretary of Homeland Security Janet Napolitano, DACA has deferred deportation and other enforcement proceedings for children and young adults who have lived

in this country continuously since mid-2007 and who have met certain other conditions. *See* Janet A. Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012), *available at* https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf ("Napolitano Memorandum"). As the Napolitano Memorandum explains, the "exercise of prosecutorial discretion" is "especially justified" as to these young people—widely known as Dreamers—because they "were brought to this country as children and know only this country as home" and generally "lacked the intent to violate the law," and as such are "low priority cases[.]" *Id.* at 1–2. The Napolitano Memorandum also explains that "many of these young people have already contributed to our country in significant ways." *Id.* at 2.

President Donald J. Trump apparently agrees. Consistent with the Napolitano Memorandum, President Trump has publicly recognized that Dreamers were brought into the United States at a young age through no fault of their own, that they have contributed to our nation as students, employees, and military personnel, and that they deserve protection from deportation and other enforcement actions. *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Sept. 14, 2017, 6:28 AM), *available at* https://goo.gl/x8BicA ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving

in the military? Really!....."); Donald J. Trump (@realDonaldTrump), Twitter (Sept. 14, 2017, 6:35 AM), *available at* https://goo.gl/oGpm54 ("...They have been in our country for many years through no fault of their own - brought in by parents at young age[.]"); Elise Viebeck *et al.*, *Trump's Immigration Talks with Democrats Attract Cautious Support*, Wash. Post (Sept. 14, 2017), *available at* https://goo.gl/P8UVct (statement of Donald J. Trump) ("We're talking about taking care of people, people who were brought here, people who've done a good job."); *id.* (statement of Donald J. Trump) ("Look, 92 percent of the people agree on DACA[.]").

The only objection that President Trump has publicly lodged against DACA is not one of *policy* but rather of *process*: he apparently believes that DACA should be codified in statute through legislation passed by Congress. *See* Donald J. Trump (@realDonaldTrump), Twitter (Sept. 5, 2017, 8:38 PM), *available at* https://goo.gl/2xtSey (calling on "Congress" to "legalize DACA" within "6 months"); Donald J. Trump (@realDonaldTrump), Twitter (Feb. 10, 2018, 1:50PM), *available at* https://goo.gl/3Q9uqW ("Republicans want to fix DACA far more than Democrats do"); Donald J. Trump (@realDonaldTrump), Twitter (Mar.

20, 2018, 8:28PM), *available at* https://goo.gl/G184fa ("The Democrats do not want to help DACA. Would be so easy to make a deal!").[2]

Then-acting Secretary of Homeland Security Elaine Duke purported to rescind DACA in a September 5, 2017 memorandum, arguing that DACA is not legally authorized. *See* Elaine Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals* (Sept. 5, 2017) (ECF No. 1-1) ("Duke Memorandum"). According to the Duke Memorandum, "it is clear that the . . . DACA program should be terminated" based on: (i) a one-page letter from the Attorney General dated the day before the Duke Memorandum arguing that DACA was "effectuated . . . through executive action, without proper statutory authority" and (ii) "the Supreme Court's and the Fifth Circuit's rulings" in *Texas v. United States*, in which an equally divided Supreme Court issued a one-sentence opinion affirming the Fifth Circuit's split decision that an entirely different deferred-action

[2] *See also* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. Times (Sept. 5, 2017), *available at* https://goo.gl/UzemAv (statement of Donald J. Trump) ("I have a love for these people, and hopefully now Congress will be able to help them and do it properly[.]"); Tal Kopan, *Trump Ends DACA But Gives Congress Window to Save It*, CNN (Sept. 5, 2017), *available at* https://goo.gl/v2uSiY (statement of Donald J. Trump) ("It is now time for Congress to act! . . . As I've said before, we will resolve the DACA issue with heart and compassion—but through the lawful Democratic process[.]").

program announced years after DACA was not supported by statute. 809 F.3d 134 (5th Cir. 2015), *aff'd by equally divided court*, 136 S. Ct. 2271 (2016).[3]

The Duke Memorandum cannot be squared with the historical precedent in which DACA is well-rooted. As we explain below, the Executive Branch in both Republican and Democratic Administrations repeatedly has implemented deferred action policies, like DACA, based on the common-sense proposition that federal authorities should focus their limited resources on apprehending and deporting those who are a threat to national security, public safety, or the employment markets—not those who pose no such threats and, indeed, are making meaningful contributions to American society. This brief places DACA within that historical context, which demonstrates that the rescission of DACA is arbitrary and capricious and should be enjoined on that ground.

[3] While the legal merits of *Texas v. United States* are outside the scope of this brief, Amici note that the Duke Memorandum fails to mention that the Fifth Circuit distinguished the deferred action program at issue there (Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")) from the one at issue in this case (DACA, which was not challenged in *Texas v. United States*). 809 F.3d at 173–74 (noting material differences between DACA and DAPA and cautioning that "any extrapolation from DACA must be done carefully").

ARGUMENT

I. DEFERRED ACTION POLICIES HAVE BEEN AN INTEGRAL COMPONENT OF IMMIGRATION ENFORCEMENT FOR DECADES

For more than half a century, federal immigration officials have carefully exercised enforcement discretion for various classes of non-citizens through policies of "deferred action," "extended voluntary departure," "parole," or "deferred enforced departure." Notwithstanding the variation in terminology, these programs are fundamentally alike: all enable certain classes of otherwise deportable people to remain in (or, in the case of parole, to enter) the United States and, in most cases, to support themselves while they are present by working lawfully. As this Court has recognized, "it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States." *Brewer*, 855 F.3d at 967 (citing *Reno v. Am.-Arab Anti-Discrimination Comm'tee*, 525 U.S. 471, 483–84 (1999) ("INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience")).

Amici have identified dozens of examples of deferred action policies. *See, e.g.*, Andorra Bruno *et al.*, *Analysis of June 15, 2012 DHS Memorandum,*

Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 20–23, Cong. Research Serv. (July 13, 2012), *available at* https://edsource.org/wp-content/uploads/old/Deferred-Action-Congressional-Research-Service-Report1.pdf ("CRS Analysis"). Amici highlight here a handful of salient examples.

Eisenhower Administration. In 1956, President Eisenhower "paroled" approximately one thousand foreign-born children who had been adopted by American citizens overseas but who were barred entry into the United States by statutory quotas. *See* American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* at 3 (Oct. 2014), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/executive_grants_of_temporary_immigration_relief_1956-present_final_0.pdf ("AIC Report"); President Dwight D. Eisenhower, *Statement by the President Concerning the Entry into the United States of Adopted Foreign-Born Orphans* (Oct. 26, 1956), *available at* https://goo.gl/Ff9nCL ("Eisenhower Statement"). The President explained that he had been "particularly concerned over the hardship" the quotas imposed, especially on members of the Armed Forces who were "forced to leave their adopted children behind" after completing tours of duty. Eisenhower Statement. The President adopted the parole policy "pending action by Congress to amend the law." *Id*.

As the Cold War entered its second decade, the Eisenhower Administration began to use the parole power as an instrument of foreign policy. For example, President Eisenhower ordered the parole of Cubans fleeing their country's oppressive communist regime. The Kennedy, Johnson, and Nixon Administrations continued that parole program, which ultimately allowed over six hundred thousand otherwise ineligible persons to enter the United States. *See* AIC Report at 3.

Ford & Carter Administrations. The Ford and Carter Administrations each granted "extended voluntary departure" to certain classes of immigrants, many of whom came from war-torn or communist countries. Under the Ford and Carter Administrations' deferred action policies, immigration officials "temporarily suspend[ed] enforcement" of the immigration laws for "particular group[s] of aliens." *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc); *accord* AIC Report at 3–5; CRS Analysis at 20–21.

Reagan Administration. The Reagan Administration continued and broadened the use of deferred action. CRS Analysis at 21–22. Under the Reagan Administration, the INS promulgated a regulation enabling beneficiaries of deferred action to apply for work authorization. 46 Fed. Reg. 25,080, 25,081 (May 5, 1981). This regulation remains in effect and applies to present-day deferred action recipients. 8 C.F.R. § 274a.12(c)(14); *see also* 8 C.F.R. § 274a.12(a)(11)

(allowing work authorization for persons "whose enforced departure from the United States has been deferred").

President Reagan's Administration also established the "Family Fairness" program following passage of the Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3445 (1986). At the time, IRCA provided a pathway to lawful status for certain people who otherwise were illegally present in the United States, *see id*., but the statute was silent as to whether INS should continue to deport the relatives of people who might qualify for lawful status under the new law. *See INS Reverses Family Fairness Policy,* 67 No. 6 Interpreter Releases 153 (Feb. 5, 1990), *available at* https://www.prwatch.org/files/interpreter_ releases_feb_5_1990.pdf ("What to do when some but not all members of an alien family qualify for legalization has been a controversial issue since the beginning of the amnesty program.").

Confronted with that issue, INS Commissioner Alan Nelson acknowledged that there was "nothing in [IRCA or the legislative history] that would indicate Congress wanted to provide immigration benefits to others who didn't meet the basic criteria, including the families of legalized aliens." Alan C. Nelson, *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), *reprinted as* 64 No. 41 Interpreter Releases 1191, 1201 ("Nelson Statement"). INS therefore lacked

express statutory authority to grant resident status to anyone who did not qualify for it on their own merits. *Id*. Under the reasoning of the Duke Memorandum, this would have ended the inquiry.

The Reagan Administration, however, knew that INS was not legally required to deport all such persons, even if INS was prohibited from granting them permission to work. That is, the Reagan Administration recognized the distinction between: (a) granting individuals permanent resident status, which the Attorney General could not do without express statutory authorization, and (b) merely deferring removal actions against certain persons unlawfully present, which the Attorney General was empowered to do by law. *See* Nelson Statement. As Commissioner Nelson stated:

> INS is exercising the Attorney General's discretion by allowing minor children to remain in the United States even though they do not qualify on their own, but whose parents (or single parent in the case of divorce or death of spouse) have qualified under the provisions of IRCA. The same discretion is to be exercised as well in other cases which have specific humanitarian considerations.

Id.

G.H.W. Bush Administration. President George H.W. Bush's Administration expanded the Family Fairness Program in 1990, when INS Commissioner Gene McNary instructed that "[v]oluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the

legalized alien, who can establish" that they meet certain criteria, including residence in the United States for a specified period of time and the lack of a felony conviction. Gene McNary, *Family Fairness* at 1 (Feb. 2, 1990), *reprinted as* 67 No. 6 Interpreter Releases 153, 165 App'x I ("McNary Memorandum"). The INS also made clear that anyone who qualified under the Family Fairness program was eligible to work. *Id*. Contemporaneous government estimates indicated that as many as 1.5 million people would be eligible under the expanded program. *See Immigration Act of 1989: Hearing before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary* at 49, 101st Cong. (Feb. 21, 1990); *see also id.* at 56. Publicly available estimates indicate that this figure equates to approximately 40% of immigrants without documentation in the United States at the time. *See* Jeffrey S. Passel *et al.*, *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* at 4 & 7, Pew Research Center (Sept. 2014), *available at* http://assets.pewresearch.org/wp-content/uploads/sites/7/2014/09/2014-09-03_Unauthorized-Final.pdf.[4]

[4] Although fewer people ultimately applied for Family Fairness than the Administration predicted—largely because the subsequently-enacted Immigration Act of 1990 offered preferable remedies—neither the Administration nor Congress viewed the anticipated scale of the program as undermining its legality. *See* Written Testimony of Stephen H. Legomsky before the Committee on the Judiciary, U.S. House of Representatives, at 24–25 (Feb. 25, 2015), *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/Legomsky-Testimony.pdf ("Legomsky Testimony"). Professor Legomsky's testimony, *id.* at 23–24, also

President Bush later reaffirmed the Executive's prosecutorial discretion in a signing statement accompanying his approval of the Immigration Act of 1990. The underlying Act authorized the Attorney General to grant "temporary protected status" to allow otherwise deportable persons to remain in the United States "because of their particular nationality or region of foreign state of nationality." Pub. L. No. 101-649, § 302, 104 Stat. 4978 (1990). President Bush objected to language purporting to make this the "exclusive" avenue for providing such relief, stating: "I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions." *See* President George H.W. Bush, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990), *available at* https://goo.gl/utuLxg.

Clinton Administration. President Clinton's Administration deferred action as to persons without documentation who might prove eligible for permanent relief through the Violence Against Women Act. *See* Paul W. Virtue, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997), *available at* http://library.niwap.org/wp-content/uploads/2015/pdf/CONF-VAWA-Gov-SuppltlGuidanceSec384-

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rebuts the criticism that the Family Fairness program as administered by the G.H.W. Bush Administration was merely an attempt to fill an inadvertent statutory gap.

05.06.1997.pdf ("Virtue Memorandum") (noting that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action").

President Clinton also directed the Attorney General to defer enforced departure of Liberian nationals who had received temporary protected status and were living in the United States. CRS Analysis at 23.

G.W. Bush Administration. President George W. Bush continued the Clinton Administration's deferred action policy toward certain Liberians by directing the Secretary of Homeland Security to defer the enforced departure of Liberian nationals and certain habitual residents of Liberia who were present in the United States under temporary protected status as of September 12, 2007. 72 Fed. Reg. 53,596 (Sept. 19, 2007).

President Bush also deferred action as to foreign students affected by Hurricane Katrina who were unable to fulfill their F-1 visa full-time student requirement, and he simultaneously suspended employer verification requirements for those students as well. U.S. Citizenship and Immig. Serv., *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina, Frequently Asked Questions* (Nov. 25, 2005), *available at* https://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_FAQ.pdf.

Additionally, the George W. Bush Administration enacted regulations that deferred action as to crime victims petitioning for U nonimmigrant status, allowing

those petitioners to apply for employment authorization and shielding them from accruing unlawful presence while their petitions are pending. 72 Fed. Reg. 53,014, 53,027 (Sept. 17, 2007); *see* 8 C.F.R. § 214.14(d)(3). Before these regulations were enacted, USCIS issued guidance clarifying that U nonimmigrant status petitioners could receive deferred action even while in removal proceedings. William R. Yates, *Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings* at 1 (May 6, 2004), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/uprcd050604.pdf.

II. DEFERRED ACTION POLICIES ADVANCE IMPORTANT POLICY OBJECTIVES, INCLUDING THE EFFECTIVE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

Administrations of both political parties repeatedly have defended deferred action policies by invoking straightforward and consistent legal and policy arguments. As Executive Branch officials charged with enforcing U.S. immigration laws have explained, deferred action policies make the most efficient use of limited enforcement resources, promote humanitarian values, and promote consistent enforcement of federal immigration laws.

A. Deferred Action Policies Make the Most Efficient Use of Limited Enforcement Resources

Congress has not allocated to DHS and DOJ sufficient resources to remove *every single person* who has violated our nation's immigration laws. *See* Bo Cooper, *INS Exercise of Prosecutorial Discretion* at 2 (July 11, 2000), *available at* http://library.niwap.org/wp-content/uploads/2015/IMM-Gov-ProsDisc-7.11.00.pdf ("Cooper Memorandum") ("[L]imitations in available enforcement resources . . . make it impossible for a law enforcement agency to prosecute all offenses that come to its attention."); U.S. Dep't of Justice, Circular Letter No. 107 (Sep. 20, 1909), *quoted in* Sam Bernsen, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* at 1 (Jul. 15, 1976), *available at* https://www.ice.gov/doclib/foia/ prosecutorial-discretion/service-exercise-pd.pdf ("Bernsen Memorandum") ("There simply are not enough resources to enforce all of the rules and regulations presently on the books."). Administrations therefore have been put to a choice as to which cases warrant attention and resources.

The Executive Branch historically has chosen to focus scarce resources on the most pressing cases. As early as 1909, a Department of Justice ("DOJ") circular advised officers not to proceed in immigration cases unless "some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country." *See* Bernsen Memorandum at 4. More recent deferred

action policies have reflected a similar judgment. *See, e.g.*, Napolitano Memorandum at 1 ("[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."); Doris Meissner, *Exercising Prosecutorial Discretion* at 4 (Nov. 17, 2000), *reprinted as* 77 No. 46 Interpreter Releases 1661, App. I, *available at* http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf ("Meissner Memorandum") ("Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. . . . An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.").

DACA, too, reflects a choice to focus law enforcement resources on the highest priority cases. Thus, like the deferred action policies that came before it, DACA directs the government's limited resources to prosecuting individuals who pose the greatest threats to public safety instead of those who do not pose such

threats, who belong to families residing in the United States, who often have come to the United States through no fault of their own, and who have developed strong ties to this country and to their communities.

The need for deliberate resource management and prioritization has grown more acute as increasingly sophisticated threats to the United States have emerged, and thus the number of potential targets for enforcement actions has surged. In the years after the September 11, 2001 terrorist attacks, the Principal Legal Advisor of ICE under President George W. Bush, William J. Howard, emphasized that "we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets[.]" William J. Howard, *Prosecutorial Discretion* at 1 (Oct. 24, 2005), *available at* http://library.niwap.org/wp-content/uploads/IMM-Gov-ICEMemoProsDiscretion-10.24.05.pdf ("Howard Memorandum"). He elaborated:

> It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers in both narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

Id. at 8.

Deferred action policies advance homeland security and public safety objectives by drawing the recipients out of the shadows and into the open. "These individuals provide their names, addresses, and histories, and the government performs background checks to assure public safety." Legomsky Testimony at 29. Communities are safer when individuals, including immigrants without documentation, who are either victims of crimes or witnesses to crimes "feel secure enough to report the crimes to the police rather than avoid contact for fear of being deported." *See id.* DACA, which prioritizes "threats to national security, public safety, and border security," is consistent with this approach. Jeh C. Johnson, *Exercising Prosecutorial Discretion*, at 3 (Nov. 20, 2014), *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

B. Deferred Action Policies Promote Humanitarian Values

Sound enforcement of the immigration laws also requires attention to humanitarian values. As Gene McNary, the INS Commissioner under President George H.W. Bush, explained: "It is vital that we enforce the law against illegal entry. However, we can enforce the law humanely." McNary Memorandum at 1. Immigration officials at all levels have been called upon for decades to exercise prosecutorial discretion in a manner that is effective, humane, and faithful to the rule of law. *See, e.g.*, Julie L. Myers, *Prosecutorial and Custody Discretion* at 1

(Nov. 7, 2007), *available at* http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-MyersCustody.pdf ("Myers Memorandum") (discussing treatment of nursing mothers and stating that "[f]ield agents and officers are not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process"); *see supra* Part I (discussing the Family Fairness program). The Napolitano Memorandum makes a similar argument with respect to DACA:

> Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language.

Napolitano Memorandum at 2.

Children, in particular, have been the subject of special treatment in the enforcement of immigration laws. *See, e.g.*, John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* at 5 (June 17, 2011), *available at* http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-MortonProsDiscretion.pdf (noting that "individuals present in the United States since childhood" warrant "particular care and consideration"); *see also* Jeff Weiss, *Guidelines for Children's Asylum Claims* at 2 (Dec. 10, 1998), *available at*

https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf (providing "guidance on adjudicating children's asylum claims" because of "the unique vulnerability and circumstances of children").

DACA, too, is rooted in the recognition that there are "certain young people who were brought to this country as children and know only this country as home" and that these young people generally "lacked the intent to violate the law" and thus represented a "low priority" for enforcement. Napolitano Memorandum at 1; *see also id.* (excluding from consideration any individual "convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or [who] otherwise poses a threat to national security or public safety"). In amici's experience, the best approach to achieving rational and effective enforcement of our immigration laws is to prioritize threats to public safety and national security, while simultaneously demonstrating compassion for young people who pose no substantial risks and who have developed ties to the communities in which they have lived for most of their lives.

C. Deferred Action Policies Promote Consistent Enforcement of Federal Immigration Law

The U.S. immigration system depends on the dedicated efforts of tens of thousands of federal employees—from border patrol agents and career prosecutors to the Attorney General and the Secretary of Homeland Security. These employees

frequently are called upon to make important decisions that shape the implementation and enforcement of the law, the security of the nation, the safety of the public, and the future of families. *See* Cooper Memorandum at 3 ("INS . . . exercises prosecutorial discretion thousands of times every day.").

Policy statements setting forth the Administration's enforcement priorities are necessary to coordinate these efforts in service of a common objective, namely, "to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against particular nations or people." President Ronald Reagan, *Statement on Signing the Immigration Reform and Control Act of 1986* (Nov. 6, 1986), *available at* http://www.presidency.ucsb.edu/ws/?pid=36699. Amici's experience is that policy statements such as those contained in DACA are necessary to prevent the U.S. immigration system from treating similarly situated people differently based solely on happenstance.

Policy statements that guide enforcement discretion have played an important role in promoting consistency in the treatment of individuals in the immigration system. When the Family Fairness program was created, the INS Commissioner explained that a policy statement was necessary "to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens." McNary Memorandum at 1.

Senior officials in subsequent Administrations similarly have noted the importance of deferred action policy statements as an effective tool to promote uniformity and consistency in the enforcement of the law. *See, e.g.*, Meissner Memorandum at 2 ("A statement of principles concerning discretion . . . contribute[s] to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices[.]"); Howard Memorandum at 3 ("[I]t is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating."); Cooper Memorandum at 8 ("[A]ppropriate policy guidance, reinforced by training, is necessary in order for a law enforcement agency to carry out an enforcement function properly. Such guidance serves a variety of policy goals, including promoting public confidence in the fairness and consistency of the agency's enforcement action[.]").

* * *

CONCLUSION

The district court's preliminary injunction order should be affirmed.

Respectfully submitted,

Dated: March 20, 2018

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The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 5,974 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

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