No. 15-40238

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; PAUL R. LEPAGE, Governor, State of Maine; PATRICK L. MCCRORY, Governor, State of North Carolina; C. L. "BUTCH" OTTER, Governor, State of Idaho; PHIL BRYANT, Governor, State of Mississippi; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS; ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA; STATE OF TENNESSEE

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection; SARAH R. SALDANA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,

Defendants-Appellants.

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

BRIEF OF *AMICI CURIAE* MEMBERS OF UNITED STATES SENATE IN SUPPORT OF DEFENDANTS-APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Circuit Rule 29-2, the undersigned counsel of record certifies that, in addition to the persons disclosed in the parties' certificates of interested persons, the following persons have an interest in the *amicus* brief:

Members of United States Senate:

Senator Richard Blumenthal

Senator Christopher A. Coons

Senator Mazie K. Hirono

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TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

IDENTITY AND INTERESTS OF THE *AMICI CURIAE* 2

ARGUMENT 3

I. THE DISTRICT COURT'S RULING IMPROPERLY IMPAIRS THE SECRETARY'S LEGITIMATE EXERCISE OF ENFORCEMENT DISCRETION 4

II. THE DEFERRED ACTION AUTHORITY ENJOYS LONG-STANDING CONGRESSIONAL APPROVAL AND COMPLEMENTS LEGISLATIVE EFFORTS TO REFORM THE IMMIGRATION SYSTEM 7

III. THE DISTRICT COURT ERRED BY CONSTRUING THE RELEVANT PROVISIONS OF THE INA AS CONSTRAINING THE SECRETARY'S ENFORCEMENT DISCRETION 17

IV. THE DISTRICT COURT ERRED IN INVALIDATING THE DAPA PROGRAM UNDER THE ADMINISTRATIVE PROCEDURE ACT 19

A. The District Court Erred in Concluding that the Secretary's Guidance Removes Discretion from Individual Officers 19

B. The District Court Further Erred by Concluding that the Secretary's Guidance Conferred Benefits, but Regardless Rules Concerning Benefits Are Exempt from the APA's Notice-And-Comment Requirements 25

C. The Secretary's Deferred Action Is Not a Substantive Rule Requiring Notice and Comment 27

CONCLUSION 32

CERTIFICATE OF COMPLIANCE 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. United States,
132 S. Ct. 2492 (2012).....5, 6, 19, 21

Armstrong v. United States,
517 U.S. 456 (1996).....4

City of Chicago v. Morales,
527 U.S. 41 (1999).....18

Clark v. Martinez,
543 U.S. 371 (2005).....5

Heckler v. Chaney,
470 U.S. 821 (1985).....4, 5, 24

Inmates of Attica Corr. Facility v. Rockefeller,
477 F.2d 375 (2d Cir. 1973).....18

Municipality of Anchorage v. United States,
980 F.2d 1320 (9th Cir. 1992).....30

Nat'l Roofing Contractors Ass'n v. Dep't of Labor,
639 F.3d 339 (7th Cir. 2011).....20

Prof'ls & Patients for Customized Care v. Shalala,
56 F.3d 592 (5th Cir. 1995).....28

Public Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n,
940 F.2d 679 (D.C. Cir. 1991).....29

Reno v. Am.-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999).....6, 18

Reno v. Flores,
507 U.S. 292 (1993).....20

Riley v. St. Luke's Episcopal Hosp.,
252 F.3d 749 (5th Cir. 2001) (*en banc*).....5

Ryder Truck Lines, Inc. v. United States,
716 F.2d 1369 (11th Cir. 1983) 28

Shell Oil Co. v. EPA,
950 F.2d 741 (D.C. Cir. 1991).....20

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538 F.2d 1211 (5th Cir. 1976) (*per curiam*).....17

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005).....18

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711 F.2d 370 (D.C. Cir. 1983).....28

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338 U.S. 537 (1950).....5

United States v. Ng,
699 F.2d 63 (2d Cir. 1983) 24

STATUTES

5 U.S.C.
§ 553(a)(2) 27
§ 553(b)(3)(A).....27

8 U.S.C.
§ 1103(a)(1) 5
§ 1103(a)(1), (3).....22
§ 1158(b)(1)(A).....6
§ 1158(d)(5)(A).....6
§ 1182(a)(9)(B)(i) 25
§ 1182(a)(9)(C)(i)(I) 25
§ 1182(d)(5)(A).....6, 9
§ 1225(b)(1)(A)(i).....17
§ 1227(a) 17
§ 1229b.....6
§ 1252(b) (1988 & Supp. II 1990) 12
§ 1254(e) (1988 & Supp. II 1990) 12
§ 1324a(h)(3) 25

Cuban Adjustment Act of 1966,
Pub. L. 89-732, § 1 (1966) 10

Immigration Act of 1990,
Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) 13, 16

Immigration Reform and Control Act of 1986,
Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986) 13

REGULATIONS

8 C.F.R.
§ 274a.12(c)(14) 25

RULES

Fed. R. App. P. 29 1

5th Cir. R. 29 1

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112 Cong. Rec. H21987
(daily ed. Sept. 19, 1966) 9, 10

125 Cong. Rec. H11979
(daily ed. Dec. 13, 1979) 12

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(daily ed. Feb. 6, 1990) 15

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89th Cong. (Aug. 10, 1966) 9, 10

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Modernization Act of 2013, S. 744, 113th Cong. (June 27, 2013) 16

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96-608 (1979).....11, 12
102-123 (1991).....13

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S. 358, 101st Cong. (as passed by Senate, July 13, 1989).....16

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Memorandum from Jeh Charles Johnson, Sec'y of Homeland Security, for Leon Rodriguez, Dir., U.S. Citizenship and Immigration Services, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* (Nov. 20, 2014).....8, 29, 30, 31

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United States Attorneys' Manual
9-27.001 23
9-28.1000 26

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29, United States Senators Richard Blumenthal, Christopher A. Coons, Mazie K. Hirono, and Sheldon Whitehouse respectfully submit this brief as *amici curiae* in support of Defendants-Appellants.[1] *Amici* are past or present Chairmen and Ranking Members of the Senate Judiciary Committee's subcommittee with jurisdiction over administrative procedure ("Administrative Law Subcommittee").

In the *amici*'s view, the Secretary of Homeland Security's ("the Secretary's") exercise of his deferred action authority with respect to undocumented immigrants — the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") and the expansion of Deferred Action for Childhood Arrivals ("DACA") — is a legitimate exercise of the federal Executive's prosecutorial discretion in the administration of immigration laws. Deferred action is a long-standing instrument in the Secretary's enforcement toolkit, and it has consistently enjoyed congressional acquiescence and approval. Indeed, Congress has previously instructed the Executive to consider certain categories of individuals for deferred action. Congress has never required that the

[1] All parties to this appeal have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation of submission of this brief; and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

deferred action authority be embodied in formal notice-and-comment rulemaking; on the contrary, deferred action's flexible character enables the use of this authority in a way that complements congressional legislative actions. For these reasons, *amici* respectfully request that this Court vacate the district court's preliminary injunction.

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici Curiae Senators Richard Blumenthal, Christopher A. Coons, Mazie K. Hirono, and Sheldon Whitehouse are members of the United States Senate, representing the States of Connecticut, Delaware, Hawaii, and Rhode Island, respectively. As Members of Congress, *amici* have an interest in ensuring that the Executive Branch enforces the laws enacted by Congress in a rational and effective manner, and that the Executive's enforcement priorities are consistent with congressional intent. Where Congress has vested the Executive with discretion in the execution of the law — as it has done with respect to the immigration laws — federal courts should honor that decision.

Amici are past or present Chairmen and Ranking Members of the Administrative Law Subcommittee. Senators Blumenthal and Whitehouse are current members and former Chairmen of the Subcommittee; Senator Coons is the current Ranking Member; and Senator Hirono is a former Chairwoman. The Subcommittee has jurisdiction over administrative practices and procedures,

including agency rulemaking and adjudication and judicial review of agency actions. *Amici* therefore have a strong interest in ensuring administrative agencies' adherence to the administrative law requirements and proper standards for judicial review of agencies' actions. Under *amici*'s leadership, the subcommittee has been active in examining the problem of regulatory delay and improvements in the efficiency and responsiveness of the federal regulatory system. *See, e.g.*, *Justice Delayed: The Human Cost of Regulatory Paralysis: Hearing Before the Subcomm. on Oversight, Federal Rights and Agency Action of the S. Comm. on the Judiciary*, 113th Cong., S. Hrg. 113-344 (Aug. 1, 2013). The district court's decision below is of special concern to *amici* because its reasoning could limit the agencies' ability to manage the exercise of discretion by their employees.

Amici represent states whose residents will benefit from the Secretary's legitimate exercise of his deferred action authority. The grant of deferred action will make its recipients eligible to work legally, reducing the exploitation of undocumented workers, and improving wages and working conditions. It will also enhance public safety by encouraging deferred action recipients not to fear contact with law enforcement when reporting crimes. In addition, the new deferred action initiative will reduce the likelihood of deportation for certain parents of U.S. citizens and lawful permanent residents, as well as specified childhood arrivals, and enable them to seek jobs, pay taxes, and support their families.

ARGUMENT

I. THE DISTRICT COURT'S RULING IMPROPERLY IMPAIRS THE SECRETARY'S LEGITIMATE EXERCISE OF ENFORCEMENT DISCRETION.

The President's constitutional duty under the Take Care Clause has never entailed an absolute duty to bring every violator of the law to justice. To the contrary, enforcement discretion is the "'special province'" of the Executive Branch precisely because the Attorney General and law enforcement personnel are "the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Armstrong v. United States*, 517 U.S. 456, 464 (1996) (quoting U.S. Const. art. II, § 3). Enforcement of the law in a given circumstance may be impracticable, impossible, unjust, contrary to the national interest, or an inefficient use of agency resources, and thus "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." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

In exercising this discretion, the agency must "balanc[e] … a number of factors which are peculiarly within its expertise," such as "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and … whether the agency has enough resources to

undertake the action at all." *Id.* As this Court has recognized, "[t]he Executive Branch has extraordinarily wide discretion in deciding whether to prosecute. Indeed, that discretion is checked only by other constitutional provisions such as the prohibition against racial discrimination and a narrow doctrine of selective prosecution." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 (5th Cir. 2001) (*en banc*).

The Secretary enjoys broad discretion in enforcing the immigration laws. The Secretary is "charged with the administration and enforcement of [the Immigration and Nationality Act of 1952 ("INA")] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1); *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005). That charge necessarily affords the Secretary discretion over whether and when to enforce the immigration laws against particular aliens through removal. As the Supreme Court has recognized, immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted), and "the broad discretion exercised by immigration officials" is a "principal feature of the removal system," *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). Not only does the INA authorize certain forms of discretionary relief from removal, *see e.g.*, 8 U.S.C. §§ 1158(b)(1)(A),

1182(d)(5)(A), 1229b, but "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. Thereafter, in "'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders,'" federal immigration officials have "discretion to abandon the endeavor." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (alterations in original).

As the Supreme Court has recognized, the decision whether to remove an alien turns on a number of concerns. They may include relative public danger: "Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime." *Arizona*, 132 S. Ct. at 2499. The prosecuting official may consider the individual's equities, such as "whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service." *Id.* Other decisions may turn on federal policy or international relations concerns. *Id*. Deferred action — which forms the legal basis for the DAPA and DACA initiatives — is the Executive's longstanding means "of exercising that discretion for humanitarian reasons or simply for its own convenience." *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-84.[2]

[2] The arguments presented in this brief with respect to DAPA apply also to the Secretary's decision to expand DACA.

II. THE DEFERRED ACTION AUTHORITY ENJOYS LONG-STANDING CONGRESSIONAL APPROVAL AND COMPLEMENTS LEGISLATIVE EFFORTS TO REFORM THE IMMIGRATION SYSTEM.

The Secretary's deferred action authority is a long-standing method of exercising executive discretion in the administration of the immigration laws. On numerous occasions over the past decades, Administrations of both parties have exercised deferred action (or similar discretionary authority) both on an individual basis and with respect to broad categories — refugees fleeing oppressive regimes, victims of human trafficking, victims of violence against women, and spouses and children of immigrants granted legal status by congressional legislation. *See* U.S. Br. 7-8; *infra* at 9-15.

The district court gave short shrift to this long-standing practice, opining (without examining specific exercises of deferred action authority) that it consisted solely of "smaller-scaled grants," and therefore any congressional acquiescence in such practice would be "unpersuasive." Op. 101-02. As an initial matter, the district court minimized the scope of some of the past discretionary programs. Congressional testimony and reports presented to Congress indicated that the individuals eligible for the 1990 "Family Fairness" program may have numbered 1.5 million — a significant percentage of the total illegal immigrant population at the time, and comparable to the DAPA initiative. *See infra* at 15 n.3. In any event,

the district court never explained why the difference in the programs' size is outcome-determinative, even if their essential features are the same.

The prior programs had the same attributes that the district judge found objectionable — namely, specific threshold eligibility criteria for a defined category of individuals, express toleration of an immigrant's continued presence in the United States, the opportunity to obtain work authorization, and suspension of accrual of unlawful presence. Congress was aware of these features of deferred action, yet — far from objecting — actually commended the Executive's exercise of this authority and subsequently enacted legislation endorsing or codifying such programs, thereby providing permanent relief to these immigrant populations. *See* U.S. Br. 8; *infra* at 9-10, 12-13, 15-16.

As the district court acknowledged, deferred action, in one form or another, has existed since at least the 1960s. Op. 15; *see also* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Security, for Leon Rodriguez, Dir., U.S. Citizenship and Immigration Services, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 2 n.1 (Nov. 20, 2014) ("Guidance"). Throughout the decades, the Executive — frequently, with express congressional approval — has granted this discretionary relief from removal to various immigrant populations.

One of the earliest instances was the influx of Cuban refugees from the Castro revolution in the early 1960s. To cope with this challenge, the Executive instituted a program of admitting these individuals into the United States or deferring their removal. 112 Cong. Rec. H21987, H21990, H21994 (daily ed. Sept. 19, 1966) (statements of Reps. Feighan, Moore, and Fascell). The majority of Cuban refugees were admitted through discretionary parole (which is statutorily authorized, *see* 8 U.S.C. § 1182(d)(5)(A)), but many were granted indefinite voluntary departure — administrative relief similar to deferred action, under which a person technically deportable is authorized to stay in the United States with no time limitation. *See* William M. Mitchell, *The Cuban Refugee Program*, Social Security Bulletin, Mar. 1962, at 4, http://www.ssa.gov/policy/docs/ssb/v25n3/v25n3p3.pdf; *Adjustment of Status for Cuban Refugees*, Hearing Before the Subcomm. No. 1 of the H. Comm. on the Judiciary, 89th Cong. (Aug. 10, 1966) – Serial No. 20 at 14 (statement of George Ball, Under Secretary of State).

Although some members of Congress questioned whether this expansive use was consistent with congressional intent that discretionary relief be reserved for "emergency and individual and isolated situations," *id.* at 37 (statement of Rep. Arch A. Moore, Jr.), others praised this use as "a very wise thing," "in keeping with the basic philosophy that the Congress has demonstrated," and a "humane" measure, *id.* at 39-40 (statement of Rep. Peter W. Rodino, Jr.). As the Attorney

General testified, the Administration was confident that the "wide latitude" with which it used its discretionary authority "ha[d] support … within the Congress, and within the United States." *Id.* at 35 (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States).

Similar to potential DAPA beneficiaries, the Cuban refugees paroled into the United States or granted indefinite voluntary departure were not provided with a dedicated pathway to permanent resident status. *See* John F. Thomas, *Cuban Refugees in the United States*, Int'l Migration Rev. 46, 55 (1966). In response, Congress passed the Cuban Adjustment Act of 1966, authorizing Cuban nationals "admitted or paroled into the United States" to adjust to lawful permanent resident status. Pub. L. 89-732, § 1 (1966). This legislation stemmed from congressional desire to make permanent the discretionary relief from deportation granted to Cuban refugees. *See, e.g.*, H.R. Rep. No. 89-1978, at 10 (1966); 112 Cong. Rec. H21987 (daily ed. Sept. 19, 1966). Thus, the discretionary relief granted by the Executive not only met with congressional approval, but served as a precursor to a permanent legislative solution.

The Executive's subsequent use of parole with respect to refugee admissions and the eventual enactment of the Refugee Act of 1980 tell a similar story. The Executive utilized parole for several other refugee populations in the 1960s and 1970s, including Chinese refugees from Hong Kong and Macao, Czechoslovakian

refugees in the aftermath of the failed 1968 Velvet Revolution, Jewish refugees from the Soviet Union, and refugees from Vietnam, Cambodia, and Laos. *See, e.g.*, H.R. Rep. No. 96-608, at 4-6 (1979). Indeed, because of the limitations of the existing refugee law, "refugee admissions have had to be made on an ad hoc basis — principally through the use of the Attorney General's discretionary parole authority." *The Refugee Act of 1979: Hearing on H.R. 2816 Before the Subcomm. on Int'l Operations of the H. Comm. on Foreign Affairs*, 96th Cong. 151 (May 16, 1979) (statement of J. Kenneth Fasick, Dir., Int'l Div., U.S. Gen. Accounting Office); *see also The Refugee Act of 1979: Hearing on H.R. 2816 Before the Subcomm. on Int'l Operations of the H. Comm. on Foreign Affairs*, 96th Cong. 83-84 (Sept. 19, 1979) (statement of Dale F. Swartz, D.C. Lawyers' Comm. for Civil Rights Under Law) ("The inadequacies of our general refugee law has led [*sic*] to the use of the parole authority for Indochinese, for Cubans, for Hungarians, for a whole host of groups."); H.R. Rep. No. 96-608, at 5 (1979) ("These inadequacies have long been recognized by the legislative and executive branches and led to a concerted effort in this Congress to enact remedial legislation.").

Congress recognized that the Executive's use of the parole authority was necessary given the limitations in the existing law, and not only approved of such use, but ultimately voted to replace this ad hoc discretionary system with "a comprehensive statutory procedure for the admission of refugees" — the Refugee

Act of 1980. *See, e.g.*, 125 Cong. Rec. H11979-80 (daily ed. Dec. 13, 1979) (statement of Rep. Clement Zablocki); H.R. Rep. No. 96-608, at 57 (additional views of Rep. Robert McClory); *id.* at 59 (separate views of Rep. M. Caldwell Butler).

In addition to parole, the Executive used its discretionary extended voluntary departure authority to grant a temporary status to aliens whose lives might have been jeopardized by returning to their countries of origin because of political oppression, internal instability, or natural disaster. This authority was not specifically stated in the INA; rather, the Executive derived it from the voluntary departure statute that (before its amendment in 1996) permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart, without imposing a time limit for the departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990). Over time, extended voluntary departure has been granted to citizens of at least fourteen nations. *See* María Cristina García, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* 89 (2006).

Congress has never disapproved of the Executive's use of this authority; indeed, members of Congress praised the Attorney General for providing timely administrative relief in exigent situations. *See* Conference Rep. on S. 358, Immigration Act of 1990, 136 Cong. Rec. S17110 (daily ed. Oct. 26, 1990) (statement of Sen. Slade Gorton) (praising the President for not "stand[ing] idle"

when “action was crucial” after the Tiananmen Square demonstrations, but instead granting deferred departure to “all Chinese nationals and their dependents who were in the United States during or after the massacre of their standard bearers”). Again, the Executive’s action was a precursor to a more regularized legislative solution. Congress “codif[ied]” extended voluntary departure in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), establishing the temporary protected status program for immigrants unable to safely return to their home countries because of extraordinary conditions. H.R. Rep. No. 102-123, at *2 (1991).

Just like the DAPA initiative, the Executive’s prior exercises of its discretionary authority to defer removal of undocumented immigrants contained guidelines setting forth the eligibility criteria and structuring the exercise of discretion in individual cases. Congress welcomed the adoption of such agency-wide guidelines. The 1987-1991 “Family Fairness” program, which authorized extended voluntary departure for spouses and children of immigrants who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (“IRCA”), is a telling example. The Family Fairness program was instituted through internal agency guidance, not a formal notice-and-comment regulation. *See* Memorandum from Gene McNary, Comm’r, INS, for Regional Comm’rs, INS, *Family Fairness: Guidelines for*

Voluntary Departure Under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990). The original 1987 guidance instructed that voluntary departure should be granted to minor children of legalized aliens, but that spouses had to show "compelling or humanitarian factors" to obtain such relief. *INS Reverses Fairness Policy*, 67(6) Interpreter Releases 153, 153 (Feb. 5, 1990). Members of Congress (as well as the public) criticized this policy for failing to articulate guidelines for the exercise of this enforcement discretion, resulting in an inconsistent application. *See, e.g.*, 135 Cong. Rec. S7764 (daily ed. July 12, 1989) (statement of Sen. Alan Cranston) ("[T]he policy does not set adequate guidelines for local INS district directors to follow. Specifically, there is no clear guidance regarding which circumstances would constitute 'compelling or humanitarian factors' which would protect individuals from deportation."); *id.* (statement of Sen. John H. Chafee) ("The trouble with the family fairness doctrine is that it is unevenly applied."); *id.* at S7766 (statement of Sen. Alan K. Simpson) (agreeing with the need "to ensure uniform application of an existing policy" through administrative guidelines).

In response, the Executive decided to "'set a uniform policy'" by promulgating new guidelines setting forth a series of factors to guide the exercise of discretion by the INS enforcement personnel. *INS Reverses Fairness Policy*, 67(6) Interpreter Releases at 153 (quoting INS Commissioner Gene McNary).

Members of Congress praised these guidelines as ensuring a fair and uniform application of the individual officers' discretion in deciding whether to grant extended voluntary departure. For instance, Senator Chafee, who had previously sponsored a legislative amendment to remedy the lack of uniformity in the policy's implementation, commended the new guidelines for establishing "a clear and uniform policy for granting voluntary departure statute to those spouses and children of qualified aliens" under IRCA, and for as "provid[ing] coherence and sensibility for our immigration policy." 136 Cong. Rec. S929-30 (daily ed. Feb. 6, 1990). Similarly here, the Secretary's guidance in the implementation of the DAPA initiative is a proper exercise of his authority to ensure uniform application of the policy. These guidelines do not vitiate the policy's discretionary character.[3]

The district court observed that the DAPA initiative is being instituted in the absence of congressional action. Op. 3, 8-9, 99. But the Executive's exercise of its discretionary authority to defer removal of illegal immigrants often has

[3] The INS Commissioner testified at the time that the number of individuals eligible for the Family Fairness program may amount to 1.5 million — approximately 40% of the immigrants legalized under IRCA. *See Immigration Act of 1989 (Part 2): Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 56-58 (Feb. 21, 1990) (statement of Gene McNary, Comm'r, INS). Indeed, press reports quoted the office of Senator Chafee, the sponsor of the legislation that subsequently codified this policy, as indicating that Congress understood "that about 1.5 million family members would be affected, based on several recent immigration reports made available to senators." Josh Getlin, *Senate Acts to Protect Families in Amnesty Plan*, Los Angeles Times, July 13, 1989.

preceded congressional reform of the immigration system. Thus, in July 1989, after the institution of the Family Fairness program, the Senate passed a bill prohibiting deportation of spouses and children of those legalized under IRCA. *See* S. 358, 101st Cong. (as passed by Senate, July 13, 1989). This legislation, however, did not pass the House, and the Administration then instituted the Family Fairness program with respect to spouses and children through the February 1990 guidance until Congress enacted the Immigration Act of 1990, Pub. L. No. 101-649 (Nov. 29, 1990), which enabled these individuals to eventually obtain legal status. 104 Stat. 5029 (Section 301, "Family Unity").

Here, too, the Senate has been active in attempting to reform the broken immigration system, most recently with the passage of the bipartisan Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (June 27, 2013). Unfortunately, the House has deadlocked over the legislative solution to the immigration problem that would have provided many undocumented immigrants (including the intended deferred action beneficiaries) with legal status and a path to citizenship. While *amici* remain optimistic that a legislative solution will eventually be found, the deferred action initiative is an executive recognition of the reality that, given the funding constraints that preclude deportation, *see infra* at 30, many potential beneficiaries

of these legislative efforts will remain in the meantime in the United States, providing them with temporary relief from deportation until Congress acts.

Long-standing congressional acquiescence in, and approval of, the Executive's exercise of deferred action authority on a categorical basis supports DAPA. DAPA reflects policies that enjoy public and congressional approval, such as an emphasis on family unity, focus on criminals, and protection of relatives of U.S. citizens and permanent residents. As this Court has observed, "[t]he decision to grant or withhold nonpriority status [as deferred action used to be called] therefore lies within the particular discretion of the [immigration agencies]," and the Court has firmly "decline[d] to hold that the agency has no power to create and employ such a category for its own administrative convenience." *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (*per curiam*). An invalidation of the DAPA initiative would infringe upon a well-established tradition of the Executive's exercise of its discretionary authority in the immigration sphere, and contravene congressional approval of that authority.

III. THE DISTRICT COURT ERRED BY CONSTRUING THE RELEVANT PROVISIONS OF THE INA AS CONSTRAINING THE SECRETARY'S ENFORCEMENT DISCRETION.

In rejecting the Secretary's exercise of discretion, the district court relied on two provisions of the INA — 8 U.S.C. § 1225(b)(1)(A)(i) and 8 U.S.C. § 1227(a) — which the court construed as "indicat[ing] a congressional mandate that does

not confer discretion," but rather one that requires removal of all undocumented immigrants found within the United States, leaving the Executive with only "discretion to formulate the best means to achieving the objective." Op. 97. But the Supreme Court has instructed that a reading of mandatory language as affording "*no* discretion … flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (emphasis in original); *see also Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973) (mandatory language in law enforcement statutes "has never been thought to preclude the exercise of prosecutorial discretion").

Emphasizing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands," the Supreme Court explained that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). Indeed, due to "'insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally.'" *Id.* (quoting ABA Standards for Criminal Justice).

This reasoning applies with special force to immigration statutes, because concerns about invading the executive's enforcement discretion "are greatly magnified in the deportation context." *Am.-Arab Anti-Discrimination Comm.*, 525

U.S. at 486, 490. As the Supreme Court observed, "[a] principal feature of the removal system is the broad discretion exercised by immigration officers … Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499.

IV. THE DISTRICT COURT ERRED IN INVALIDATING THE DAPA PROGRAM UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The district court also erred in invoking the Administrative Procedure Act ("APA") to invalidate DAPA. First, as an exercise of enforcement discretion, DAPA is exempt from judicial review under the APA. Second, DAPA is not a benefits program, as the district court erroneously thought, but even if it were, it would be exempt from the APA's notice-and-comment requirements. Third, DAPA on its face allows the immigration officer discretion to deny deferred action to an eligible applicant; it is therefore independently exempt from the APA's notice-and-comment requirements as a policy statement that guides agency practice and procedure, not a binding substantive rule, and any challenge to DAPA based on its future implementation is unripe.

A. The District Court Erred in Concluding that the Secretary's Guidance Removes Discretion from Individual Officers.

The district court opined that the discretion under the DAPA program was merely a pretext because it asserted that the Secretary's guidance established "binding" criteria for the exercise of discretion by individual officers. Op. 106-09

& n.101. The district court's premise — that agency-wide guidance somehow renders the discretionary character of the Secretary's action suspect — is plainly wrong. Courts have recognized that agencies need to make policy decisions at the agency level to direct the use of discretion. *See, e.g.*, *Nat'l Roofing Contractors Ass'n v. Dep't of Labor*, 639 F.3d 339, 341-42 (7th Cir. 2011) ("The Secretary committed to paper the criteria for allowing regulatory violations to exist without redress, a step essential to control her many subordinates. This does not make the exercise less discretionary."); *Shell Oil Co. v. EPA*, 950 F.2d 741, 764-65 (D.C. Cir. 1991) (the EPA policy of "not tak[ing] enforcement actions in a whole class of cases" was an unreviewable exercise of discretion because the agency "retain[ed] sufficient flexibility to properly carry out its statutory responsibilities").

Indeed, it is the unique expertise of the agency *as a whole* that warrants judicial non-interference with that exercise of discretion. Given their complex regulatory mandates, agencies must structure and guide the exercise of discretion by their personnel. As long as individual officers retain the ability to exercise appropriate enforcement discretion on a case-by-case basis, an agency-wide framework for making such individualized, discretionary assessments does not exceed the bounds of an agency's discretion in enforcing the law. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (an agency's use of "reasonable presumptions

and generic rules" is not incompatible with a requirement to make individualized determinations).

Such agency-wide guidance is particularly appropriate in the immigration context. As the Supreme Court observed, "[s]ome discretionary decisions involve policy choices that bear on this Nation's international relations. … The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities." *Arizona*, 132 S. Ct. at 2499. In addition, congressional funding of immigration enforcement is sufficient to remove only a fraction of the illegal immigrant population, *infra* at 30, and the Secretary must choose how the agency will utilize these limited funds. After all, "[i]t is the agency, not each individual enforcement officer, that has the responsibility to make these decisions about resource allocation and overall policy." David A. Martin, *A Defense of Immigration-Enforcement Discretion*, 122 YALE L.J. ONLINE 167, 183 (2012). Agency-wide guidance also ensures that the enforcement discretion will be implemented fairly and uniformly across the agency — one of the concerns that Congress has identified in the course of its past exercises of discretionary immigration enforcement authority. *See supra* at 14-15.

Deferred action is an important element of the enforcement arsenal, and the Secretary's guidance represents a laudable effort to structure the exercise of that

discretion in a large agency. Such discretion, after all, *belongs* to the Secretary. Congress charged the Secretary "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," and vested him with broad authority to "establish such regulations; … *issue such instructions*; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(1), (3) (emphasis added).

When only limited enforcement of the immigration laws is possible given the appropriated funds, the implementing agency must necessarily prioritize enforcement. Although ultimate discretionary decisions are properly made by line officials most familiar with a given case, national standards to guide that discretion give coherence to national priorities in the enforcement of the immigration laws. The Secretary's memorandum strikes the proper balance of ensuring consideration of individual circumstances while still promoting uniformity in the treatment of similarly situated persons.

The district court's reasoning runs contrary to the long-standing tradition of agency heads managing the exercise of discretion by subordinates through guidance. For example, in the U.S. Attorneys' Manual, the Attorney General has provided guidelines for federal prosecutors to "contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of all United States

Attorney's offices and between their activities and the Department's law enforcement priorities." United States Attorneys' Manual ("USAM") 9-27.001. More recently, in keeping with decades-old practice of written guidelines that channel prosecutorial discretion, *see* Dep't of Justice Report, *United States Attorneys' Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws* 6-9, 22-24 (1979), the Attorney General issued new guidance to "prioritize prosecutions to focus on [the] most serious cases." Dep't of Justice, *Smart on Crime: Reforming The Criminal Justice System for the 21st Century*, at 2 (Aug. 12, 2013), *available at* http://www.justice.gov/sites/ default/files/ag/legacy/ 2013/08/12/smart-on-crime.pdf. To this end, the Attorney General required each district to pursue prosecutions in light of the Department of Justice's top four priorities (national security threats, violent crime, financial fraud, and protection of vulnerable individuals) and announced a change in DOJ's charging policies to reduce sentences for low-level, nonviolent drug offenders, while continuing to impose the most severe penalties on "serious, high-level, or violent drug traffickers." *Id.* at 3.

Similarly, the DOJ has issued guidance in making leniency decisions under the antitrust laws. *See* Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008), *available at* http://www.justice.gov/atr/public/criminal/239583.pdf. Finally,

the Environmental Protection Agency has issued guidance that sets out criteria for waiving certain penalties related to the gravity of the violation for new purchasers that self-disclose violations by the prior owner. *See* EPA, *Interim Approach to Applying the Audit Policy to New Owners*, 73 Fed. Reg. 44,991 (Aug. 1, 2008).

Since enforcement is a core agency function, agency heads must have the flexibility to issue and alter administrative guidance regarding enforcement priorities without delay. Because the reasons for declining enforcement are multifarious and implicate the agency's expertise and resource allocation, "an agency's decision not to prosecute or enforce … is a decision generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831. The Secretary's exercise of prosecutorial discretion is immune from judicial review under the APA unless Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion." *Id.* at 834. The INA sets forth no such constraints, and the district court should have dismissed the States' APA challenge for lack of jurisdiction. *See, e.g.*, *United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983) (a "policy [that] is merely an internal guideline for exercise of prosecutorial discretion [is] not subject to judicial review").

B. **The District Court Further Erred by Concluding that the Secretary's Guidance Conferred Benefits, but Regardless, Rules Concerning Benefits Are Exempt from the APA's Notice-And-Comment Requirements.**

The district court refused to treat the Secretary's action as an exercise of enforcement discretion because purportedly it conferred benefits without notice-and-comment rulemaking. *See, e.g.*, Op. 87. The court misconceived the guidance that the Secretary issued; it is not a new rule conferring benefits. The Secretary's memorandum defined eligibility criteria for deferred action, but the purported "benefits" that the district court identified are simply long-established consequences of *any* grant of deferred action.

First, the "benefit" that the district court believed injured the States — namely, the work authorizations that entitled recipients to apply for drivers licenses — was already authorized by a *separate* notice-and-comment regulation promulgated pursuant to undisputed statutory authority. *See* 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment"); *cf.* 8 U.S.C. § 1324a(h)(3) (vesting the Secretary with authority to determine whether aliens present in the United States are "authorized to be employed").

The second supposed benefit — the calculation of "unlawful presence" for purposes of statutory admissibility bars under 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I)— simply involves longstanding agency guidance that excludes the

period of deferred action from that calculation. *See* Memorandum for Field Leadership from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections* 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, at 7 (May 6, 2009) (listing "deferred action" as one of many nonstatutory exceptions to accumulation of unlawful presence); *id.* at 42 (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"). There is no basis to suggest that such interpretive guidance is an affirmative conferral of benefits.

Further, the fact that an individual is granted a three-year reprieve from immigration enforcement, thereby allowing the alien to remain present in the United States, does not make deferred action any less of an exercise of enforcement discretion. For example, it is common for federal criminal prosecutors to enter into deferred prosecution agreements with criminal defendants for a period of years. *See* USAM 9-28.1000 ("where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement"); *see also* Deferred Prosecution Agreement, *United States v. Bilfinger SE*, No. 13-CR-745, at 2-3, 12 (S.D. Tex. Dec. 9, 2013) (deferring prosecution on identified conduct for a period of three years and seven days subject to compliance with agreement conditions); Deferred Prosecution Agreement, *United States v.*

Community One Bank N.A., 3:11-CR-122, at 1 (W.D.N.C. Apr. 28, 2011) (deferral for 24 month term), *both available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/DP. And as the United States explains, deferred action does not itself grant any affirmative immigration status or a right to continue to violate the law; the Secretary, through his subordinates, simply declines enforcement. *See* U.S. Br. 46.

Finally, even if the district court were correct that the Secretary's guidance involves the conferral of benefits, it would still be exempt from the notice-and-comment rulemaking requirements. *See* 5 U.S.C. § 553(a)(2) ("This section does not apply to … a matter relating to agency management or personnel or to public property, loans, grants, *benefits*, or contracts") (emphasis added). The district court simply did not consider the implications of its (erroneous) interpretation of the Secretary's guidance.

C. <u>The Secretary's Deferred Action Is Not a Substantive Rule Requiring Notice and Comment.</u>

In any event, even if the district court's conception of the Secretary's guidance were accurate, the DAPA program (and the DACA expansion) need not be promulgated according to the statutory notice-and-comment procedures of Section 553. Those procedures apply only to substantive legislative rules, and not to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A); *see also Prof'ls &*

Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 383 (D.C. Cir. 1983) (agency, using prosecutorial discretion, "could have issued, without notice and comment, a 'statement of policy' regarding its intent not to enforce the deadline").

In determining whether a rule is substantive, this Court, following the analysis of the D.C. Circuit, "focus[es] primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Prof'ls & Patients for Customized Care*, 56 F.3d at 595. A rule will be deemed substantive if it "narrowly constrict[s] the discretion of agency officials by largely determining the issue addressed." *Id. a*t 595 n.20 (internal quotation marks omitted). The "key inquiry"

> is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criteria. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Id. at 596-97 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).

It is clear on its face that the Secretary's guidance does not create binding rules. While the guidance defines criteria for eligibility for deferred action, it does not restrict the decision of line immigration officers after receiving an application and background check; indeed, it specifically provides that "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." Guidance at 5. The district court's analysis — that the mere definition of eligibility criteria extinguishes discretion in granting deferred action, and that "there is no option for granting DAPA to [someone] who does not meet each criteria," Op. 109 — is a non-sequitur. The fact that an immigrant must meet certain criteria to be eligible for consideration does not create an entitlement to deferred action, when the program specifically authorizes a case-by-case grant or denial of that relief.

The district court felt free to disregard the plain language of the Secretary's guidance by extrapolating from the experience under the existing DACA. Op. 108-09. This was improper. If the district court were concerned that DAPA might in the future be applied as a binding rule, it should have dismissed the States' challenge as unripe, and considered the issue once there was substantial evidence of DAPA's implementation. *Public Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n*, 940 F.2d 679, 683 (D.C. Cir. 1991); *see also Municipality of Anchorage*

v. United States, 980 F.2d 1320, 1324 (9th Cir. 1992) (the question of whether a rule was substantive is unripe prior to its application).

And, if an as-applied challenge were brought, the petitioners would have to do more than simply show that eligible applicants commonly or even nearly universally received benefits. *See* Op. 10. That is to be expected; in an era when the Secretary only has the resources to remove approximately 3.5% of the illegal immigrant population (400,000 out of 11.3 million), an immigration officer will rarely find cause to commence removal proceedings against immigrants who have U.S. citizen or lawful permanent resident children *and* are in none of the quite broad priority enforcement categories prescribed in the Secretary's separate guidance on enforcement priorities. *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Security, for Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al., *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 3-4 (Nov. 20, 2014). Further, to be eligible for deferred action, an applicant must have been present in the United States for at least five years. Guidance at 4. If these individuals were not a deportation priority during that time, it should be no surprise if few, if any, would be considered worth deporting now, and it is certainly no indication that the Secretary's guidance disallows discretion.

Even a showing that the vast majority of eligible DAPA applicants will likely be granted deferred action does not mean that an immigration officer lacks discretion in making that decision — the policy specifically provides that the immigration officer must determine that the applicant "present[s] no other factors that, in the exercise of discretion, makes [*sic*] the grant of deferred action inappropriate." *Id.* To succeed in an as-applied challenge to the DAPA program, the challengers would have to show that the Secretary actually nullified or overrode that discretion even where it was factually justified. No such showing was made here, nor could it have been, since the program is not yet operational. The district court should have honored the textual grant of discretion in the Secretary's guidance, but, even if it harbored suspicion that the guidance might be applied without discretion, it should have dismissed this challenge as unripe.

In summary, the Secretary's guidance is an exercise of enforcement discretion in the immigration context. The fact that the Secretary may issue work authorizations pursuant to a separate notice-and-comment regulation does not convert DAPA or DACA expansion into a benefits program, and a benefits program, in any event, would be exempt from the APA's notice-and-comment requirements. Finally, the Secretary's guidance expressly provides for unqualified discretion, on a case-by-case basis, of line immigration officers in granting

deferred action to individual applicants, and as such is not a substantive rule requiring notice and comment.

CONCLUSION

This Court should vacate the preliminary injunction entered by the district court.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29(d) AND CIRCUIT RULE 29-3

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and this Court's Circuit Rule 29-3 because this brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 6, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF.

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