Testimony of

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Regarding a Hearing on

"The Administration's Apparent Revocation of Medical Deferred Action for Critically Ill Children."

Before the
U.S. House of Representatives Committee on Oversight and Reform
Subcommittee on Civil Rights and Civil Liberties

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Chairman Cummings, Ranking Member Jordan, Subcommittee Chairman Raskin, Subcommittee Chairman Roy, and distinguished Members of the Committee. Thank you for inviting me to appear before you today. It is an honor.

I am the Samuel Weiss Faculty Scholar, Clinical Professor of Law, and the Director of the Center for Immigrants' Rights Clinic at Penn State Law in University Park. My scholarship, teaching, and practice focus on immigration and nationality law. I have worked in the immigration field for nearly twenty years. Over the past twelve years, I have closely studied and analyzed the role of prosecutorial discretion generally, and deferred action in particular, in immigration law. My testimony was prepared in my individual capacity and does not reflect the views of the University.

My testimony focuses on the history and use of prosecutorial discretion and deferred action in particular. In my testimony, I will how show:

1. Prosecutorial discretion is an essential part of the immigration system;

2. Deferred action is a form of prosecutorial discretion in immigration law and enjoys a long history in both Republican and Democratic administrations;

3. The Department of Homeland Security ("DHS") and its predecessor have used deferred action for decades in medical and other humanitarian cases; and

4. The U.S. Citizenship and Immigration Services ("USCIS") has a long history and the expertise of handling cases for vulnerable populations and should continue to process deferred action cases.

My testimony and conclusions are drawn largely from my research in the area of prosecutorial discretion in immigration law as well as recent expert opinions on the history of deferred action.

Background

In 1999, I received my Juris Doctorate degree from the Georgetown University Law Center. Since that time, I have worked in the immigration field in the following settings: private practice, non-profit organizations, and institutions of higher education. As a practitioner, I have practiced immigration law on behalf of individuals seeking a benefit before the immigration agency as well as those challenging removal or seeking relief from removal before an immigration judge or the appellate agency. In the non-profit sector, I have drafted, reviewed, and analyzed legislative proposals on immigration and convened or participated in meetings with government officials, organizational leaders, and the public on immigration topics.

As an academic researcher, my work focuses on the role of prosecutorial discretion in immigration law and the intersections of race, national security and immigration. In the area of prosecutorial discretion in immigration law, my scholarship has served as a foundation for scholars, advocates, and government officials seeking to understand or design a strong prosecutorial discretion policy. My first book, *Beyond Deportation: The Role of Prosecutorial*

Discretion in Immigration Cases, was published by New York University Press and binds together nearly one decade of research on the role of prosecutorial discretion and deferred action in particular in immigration cases. My second book *Banned: Immigration Enforcement in the Time of Trump*, was released by New York University Press on September 10, 2019 and examines immigration enforcement and discretion in the first eighteen months of the Trump administration. I have published more than 30 articles, book chapters, and essays on immigration law, including a number discussing the use of prosecutorial discretion in immigration cases. My work has been published in eighteen law journals, including but not limited to *Washington and Lee Law Review; Emory Law Journal*; *Texas Law Review*; *Columbia Journal of Race and Law*; *Notice & Comment, Yale Journal on Regulation*; *Harvard Latino Law Review*; *Connecticut Public Interest Law Journal*; *Georgetown Immigration Law Journal*; and *Howard Law Journal*. I am the co-author of the second edition of an immigration textbook, *Immigration and Nationality Law: Problems and Solutions*, to be published by Carolina Academic Press later this year.

My scholarship on prosecutorial discretion has been cited by federal appellate court judges, including Judge Richard Posner (article on deferred action), Judge Paul J. Watford (article on the role of discretion in speed deportation), and Judge Kim McLane Wardlaw ("See generally" citation to my book *Beyond Deportation*). I have served as an expert witness on the history of deferred action as well as a co-counsel or co-author in amicus briefs and statements from immigration law scholars on the topic of prosecutorial discretion generally and deferred action in particular.

As an educator, I teach law students in the doctrinal survey course in immigration law and a specialized course in asylum and refugee law. I also supervise students in a law school clinic known as the Center for Immigrants' Rights Clinic (CIRC), which I founded. Since the Fall 2008 semester, I have supervised more than 100 students at CIRC on the following types of cases and projects: policy products on behalf of institutional clients, outreach and education with the community and local municipality, and legal support in individual cases. CIRC is a 2017 recipient of the Legal Advocacy Award by the American-Arab Anti-Discrimination Committee, and a 2019 recipient of the Light of Liberty Award for legal organization of the year by the Pennsylvania Immigration Resource Center.

In 2018, I was named and serve as the inaugural Editor-In-Chief of the American Immigration Lawyers Association (AILA) Law Journal, a partnership between AILA and Fastcase. I currently sit on the Board of Directors of the American Immigration Council and previously served as a Commissioner on the American Bar Association's Commission on Immigration. I have received multiple awards and honors, including Pro Bono Attorney of the Year by the American-Arab Anti-Discrimination Committee in 2003, leadership awards by the Department of Homeland Security's Office of Civil Rights and Civil Liberties and Office of the Inspector General in 2008, and the 2019 Elmer Friend Excellence in Teaching Award by AILA.

1. Prosecutorial discretion is an essential part of the immigration system

Prosecutorial discretion refers to the choice by the DHS and its predecessor agencies, including the Immigration and Naturalization Service ("INS"), of whether and how to enforce the full scope of immigration law against a person or group of persons. When an individual enters the

country without inspection, overstays a visa, or engages in conduct that makes her removable, they are subject to removal by DHS. This requires enforcement action (*i.e.*, prosecution) by DHS to effectuate. To illustrate, when DHS chooses not to file legally valid immigration charges against a person who is present in the United States without authorization, discretion is being exercised favorably. In other words, the question of whether to use discretion is raised only where there is a legally sufficient basis to bring immigration enforcement actions in the first place.

There are more than one dozen forms of prosecutorial discretion in federal immigration law. These forms have been outlined in several guidance documents issued by DHS and INS, including a memorandum published in 1976 by then-INS General Counsel Sam Bernsen (the "Bernsen Memo"),[1] a 2000 memorandum published by then-INS Commissioner Doris Meissner (the "Meissner Memo"),[2] a 2011 memorandum by then-Immigration and Customs Enforcement ("ICE") Commissioner John Morton (the "Morton Memo"),[3] and more recently by then-DHS Secretary Jeh Johnson (the "Johnson Memo").[4] The memoranda list at least 15 types of prosecutorial discretion. The most commonly used forms are:

- Deciding whether to issue, serve, file, or cancel a Notice to Appear;
- Deciding whom to stop, question, and arrest;
- Deciding whom to detain or release;
- Deciding whether to settle, dismiss, appeal, or join in a motion on a case; and
- Deciding whether to grant deferred action, parole, or a stay of removal.

The concept behind prosecutorial discretion is entrenched in the prioritization of limited government resources and compassion for individuals without a lawful immigration status who present strong equities in their cases. When DHS decides not to take enforcement actions against a mother caring for an ill child, a student affected by a natural disaster back home, or a teenager who came to the United States as a baby and calls America home, prosecutorial discretion is being exercised favorably with respect to that individual.

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[1] Memorandum from Sam Bernsen, General Counsel, Immigration and Naturalization Service, to Commissioner, Immigration and Naturalization Service, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976) (on file with U.S. Immigration and Customs Enforcement), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

[2] Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, (Nov. 17, 2000) (on file with author).

[3] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, (June 17, 2011) (on file with U.S. Immigration and Customs Enforcement), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[4] Memorandum from Jeh Charles Johnson, Secretary of U.S. Department of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, and Alan D. Bersin, Acting Assistant Secretary for Policy, U.S. Department of Homeland Security, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, (Nov. 20, 2014) (on file with the U.S. Department of Homeland Security), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

Prosecutorial discretion in immigration law has been recognized repeatedly by federal courts and former agency heads.[5] The basis for this discretion is inherent to agency enforcement action as well as statutory authority.

A review of the immigration statute, the Immigration and Nationality Act ("INA"), also makes clear that Congress authorizes DHS to use its discretion. Section 103 delegates the administration and enforcement of immigration law to DHS, 8 U.S.C. § 1103(a)(1), and INA section 242 prohibits judicial review of three specific acts of prosecutorial discretion (commencement of proceedings, adjudication of cases, and execution of removal orders), *id.* § 1252(g).

The Homeland Security Act delegates the establishment of national immigration enforcement policies and priorities to the DHS Secretary. 6 U.S.C. § 202(5).

The Supreme Court has also explicitly recognized the use of discretion in immigration law. In *Arizona v. United States*, 567 U.S. 387 (2012), the Court concluded that several anti-immigration provisions in an Arizona statute overreached into federal domain over immigration matters and explained that "a principal feature of the removal system is the broad discretion exercised by immigration officials" in relation to how "federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Id.* at 396.

2. Deferred action is one form of prosecutorial discretion and enjoys a long history in both Republican and Democratic administrations

Deferred action is one of the most common forms of prosecutorial discretion in immigration law and enjoys a long history. It is one of the few forms of prosecutorial discretion to include work authorization, the others being parole[6] and orders of supervision.[7] Historically, decisions to grant deferred action have rested on identifiable humanitarian factors for consideration.

For many years, deferred action was in operation through case-by-case determinations but not publicly understood. Previously described as "nonpriority," it operated essentially informally for much of the 20th century. In the early 1970s, as part of his effort to support his clients John Lennon and Yoko Ono, attorney Leon Wildes pursued Freedom of Information Act (FOIA) litigation to obtain deferred action records from INS. INS provided Wildes with records for 1,843 deferred actions, after which he identified five primary reasons for granting deferred action: (1)

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[5] *See, e.g.*, Bernsen Memo, *supra* note 1, at 1-3.

[6] 8 U.S.C. § 1182(d)(5)(A) ("The Attorney General may…in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission.…").

[7] Shoba S. Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. OF RACE AND L. 1, 7-8 (2016) ("Unlike deferred action, which can be granted or processed at any stage of immigration enforcement, an order of supervision may be processed after the government orders removal."); 8 U.S.C. § 1231(a)(3).

tender age, (2) elderly age, (3) mental incompetency, (4) medical infirmity, and (5) family separation if deported.[8] This data illustrates how long deferred action has operated and the significant role of medical infirmity and family separation.

Following Wildes' litigation on behalf of Lennon and Ono, INS issued guidance on deferred action through "Operations Instructions." These instructions contained factors for INS agents and officers to determine whether a case should be referred for deferred action. They included: (i) young or old age; (ii) years present in the United States; (iii) health condition requiring care in the United States; (iv) impact of removal on family in United States; and (v) criminal or other problematic conduct.[9]

The Operations Instructions noted that "[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category…."[10] In 1996, the Operations Instructions were moved into a new publication known as Standard Operating Procedures ("SOP").

When DHS was created, USCIS published an SOP for deferred action. I received the SOP through FOIA and was able to obtain the version published in 2012. The SOP details that a request for deferred action can be formally filed by the individual, a legal representative, or USCIS officers.[11] The SOP details that deferred action requests must have at least four components: an explanation supporting the request with supplemental documentation, proof of identity and nationality, any documents used to enter the U.S., and biographical information.[12] The SOP describes a three-step process that includes the field office to first prepare a memo with a case summary and recommendation, a district director to review the field office recommendation and make their recommendation, and a regional director to review and make the final determination.[13] There is no appeals process for a decision to deny or terminate deferred action.[14]

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[8] SHOBA S. WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 64 (2015).

[9] *Id.* at 187 n.8 (citing (Legacy) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, O.I. § 103.1(a)(1)(ii) (1975)).

[10] *Id.*

[11] Shoba S. Wadhia, Standard Operating Procedure for Deferred Action (non-DACA) (Mar. 7, 2012) (obtained under the Freedom of Information Act from U.S. Citizenship and Immigration Services; received Aug. 2015), *available at* http://works.bepress.com/shoba_wadhia/36/.

[12] *Id.* at 3.

[13] *Id.* at 6.

[14] The Ombudsman Office of DHS also summarizes the deferred action process: "Normally, a deferred action request is reviewed at the local office. A summary sheet explaining the positive and negative equities associated with the deferred action request is completed. The district director reviews the summary and makes a recommendation. That recommendation is forwarded to the regional director. The regional director issues a decision on the recommendation and returns the final decision to the district director so that he/she may deliver it to the requestor. Deferred action requests are not filed on a standardized application form and no fee is collected to defray the costs associated with processing deferred action requests."
JANUARY CONTRERAS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN, DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (July 11, 2011), https://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf.

In 2019, I received a new internal policy from USCIS that appears to be updated guidelines for deferred actions requests at USCIS. The policy appears to continue to allow individuals, legal representatives, or USCIS to initiate deferred action requests. The policy indicates that starting in September 2017, USCIS launched the "National Deferred Action reporting site" and "National Deferred Action Log" for its field offices to enter deferred action information.[15]

Deferred action does not provide a legal status, but the legal foundation to use it is crystal clear. This foundation is clear from opinions of federal courts, federal statutes, regulations, and memoranda published by DHS and INS. Agency regulations that have been in place for more than 30 years explicitly identify "deferred action" as one basis for work authorization. 8 C.F.R. § 274a.12(c)(14). Federal immigration law provides that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action[.]" 8 U.S.C. § 237(d)(2).

Shortly after the Operations Instructions were published in 1975, several federal courts recognized the ability of INS to offer deferred action to individuals who were facing removal or who were removable.[16] In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Supreme Court specifically mentioned "deferred action" when analyzing 8 U.S.C. § 1252(g), which precludes judicial review over certain acts of prosecutorial discretion decisions.

Memoranda published by DHS provide guidance on the use of prosecutorial discretion in immigration law and in doing so identify the grant of deferred action as one such use of discretion. In 2003, then INS Associate Director of Operations Williams Yates published memoranda directing officers to use prosecutorial discretion forms like deferred action to protect victims who were eligible for eligible for certain statutory protections such as a U visa.[17] In 2005, USCIS announced a "deferred action" program for foreign academic students affected by Hurricane Katrina.[18] In 2009, USCIS announced deferred action for the widow(er)s of U.S. citizens. In announcing the decision, DHS Secretary Janet Napolitano said: "Granting deferred action to the widows and widowers of U.S. citizens who otherwise would have been denied the right to remain

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[15] Shoba S. Wadhia, Response from USCIS for Deferred Action (non-DACA) (May 22, 2019) (obtained under the Freedom of Information Act from U.S. Citizenship and Immigration Services; received May 2019), *available at* https://works.bepress.com/shoba_wadhia/46/

[16] *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1211 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 755 (8th Cir. 1976); *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977).

[17] Memorandum from William Yates, Associate Director of Operations, U.S. Citizenship and Immigration Services, to Director, Vermont Service Center, on Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003) (on file with U.S. Citizenship and Immigration Services), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf; Memorandum from William Yates, Associate Director of Operations, U.S. Citizenship and Immigration Services, to Paul Novak, Director, Vermont Service Center, on Assessment of Deferred Action Requests for Interim Relief from U Nonimmigrant Status Aliens in Removal Proceedings (May 6, 2004) (on file with U.S. Citizenship and Immigration Services), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/uprcd050604.pdf; *see also* Wadhia, *supra* note 25, at 61.

[18] Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005) (on file with U.S. Citizenship and Immigration Services), http://www.uscis.gov/files/pressrelese/F1Student_11_25_05_PR.pdf.

in the United States allows these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved."[19]

Deferred action has also been used to protect individuals applying for relief under the Violence Against Women Act (VAWA). VAWA was enacted by Congress in 1994 and twice amended to include statutory remedies for abused spouses, parents, and children; victims of crimes and domestic abuse; and victims of human trafficking. One protection under VAWA allows abused spouses and children of U.S. citizens and green card holders (lawful permanent residents) or the abused parents of U.S. citizens to file petitions for themselves with USCIS. The self-petition process is critical to victims of domestic violence and abuse because it allows them to achieve a positive immigration status without having to rely on their abuser. If the self-petition is ultimately approved, the petitioner may receive deferred action.[20]

Deferred Action for Childhood Arrivals or DACA is another form of deferred action. Announced by President Barack Obama in 2012, it requires an individual to document entry into the United States before the age of sixteen and presence in the United States since June 15, 2007.[21]

The foregoing examples are not exhaustive but demonstrate how DHS (and INS before it) has long used the instrument of deferred action and its authority under the INA to protect certain individuals and classes of people.

3. DHS and its predecessor have used deferred action for decades in medical and other humanitarian cases

The idea of using deferred action to protect a noncitizen with a serious medical condition or for other humanitarian reasons is longstanding and in fact customary. Deferred action is a long-recognized form of prosecutorial discretion in immigration law and with a strong legal foundation.

I sought deferred action records from USCIS beginning in 2009. In June 2011, I received a response to my FOIA that included a 270-page document. Several of the cases included applicants affected by an earthquake in Haiti. One data set I was able to identify included 118 deferred actions, of which 107 were approved, pending, or unknown. Nearly half of these cases involved serious medical conditions and many of the cases involved more than one "positive factor."[22] For example, deferred action was granted to a forty-seven-year-old schizophrenic who overstaying his visa, was the son of a lawful permanent resident, and had siblings who were U.S.

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[19] U.S. DEPARTMENT OF HOMELAND SECURITY, DHS ESTABLISHES INTERIM RELIEF FOR WIDOWS OF U.S. CITIZENS (June 9, 2009), https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens.

[20] WILLIAM A. KANDEL, U.S. CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 4 (May 15, 2012), https://fas.org/sgp/crs/misc/R42477.pdf.

[21] Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file with the U.S. Department of Homeland Security), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[22] SHOBA S. WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 67 (2015).

citizens.[23] Other cases involved applicants who had a U.S. citizen family member, long term residence in the United States, or were of a tender or elder age.

In 2013, I filed a new FOIA request with USCIS for deferred action records and received a spreadsheet of deferred action cases for a four-month period. The data set contained 578 cases, 336 of which were based on a medical issue. Four cases involved individuals from Nigeria, presumably from the same family, where one of the family members had cancer. Another case involved a Mexican female who entered the United States without inspection and had two U.S. citizen children. One of her children had Down syndrome and the other had serious medical issues.[24]

I received a final data set from USCIS in January 2016 in a 27-page PDF-format.[25] The data set included 185 cases and is divided into four regions.[26] The data for each of the regions included a basis for a deferred action case in one or two words, most regularly "Family," "Medical," or "Other." Many of the deferred action requests were based on a serious medical condition by the noncitizen seeking relief or by a parent whose child suffered a serious medical condition. Below are some of the medical reasons listed in the 2016 data set:

- USC child with Leukemia
- USC child with Spina Bifida
- USC child with severe brain and bodily injuries requiring assistance
- USC child with Autism
- Child with burns over 65% of body
- USC child with cerebral palsy
- Child has Hemophilia A requiring monitoring – son granted SL6 status
- Has severe medical issues – Type 1 Diabetes, Heart valve repair/replacement, requiring monitoring
- Diagnosed as Paranoid Schizophrenia, parents are LPRs and pending I-130
- USC child(ren) has/have severe medical issues
- USC child(ren) with cerebral palsy
- USC child(ren) has/have autism and/or ADHD
- Being treated in US (or child is) for a brain tumor
- Has (or spouse has) degenerative eye disease
- USC child has Nephrotic Syndrome
- Has (or child has) Short Bowel Syndrome
- USC child has a chromosomal defect
- Doesn't want USC child to live in Mexico
- USC child has severe brain malformation, neuromuscular disease, dependent on requestor
- USC child has severe brain malformation
- USC children have heart defects, respiratory distress syndrome and anemia

[23] *Id*. at 68.
[24] *Id*. at 69.
[25] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (on file with author).
[26] *Id*.

- USC child has heart defect; may need transplant
- USC child has heart defect; but still in B-2 status
- USC child has heart defect; but failed to provide proper documentation

Many of the cases in the 2016 data set were also based on family and labeled "Family Support."[27] The foregoing research underscores just how significant the deferred action program is to individuals and families.

4. USCIS has a long history of and the expertise in handling cases for vulnerable populations and should continue to process deferred action cases

USCIS has a long history processing cases for vulnerable populations, including asylum, VAWA, U applications for victims of crime, and T applications for victims of trafficking.[28] USCIS should reinstate the humanitarian deferred action policy and should centralize deferred action cases. USCIS has more familiarity with humanitarian forms of relief than ICE. Further, work authorization applications based on a deferred action grant are already processed by USCIS, so this kind of centralization would improve efficiency.

USCIS has recently indicated that individuals may redirect their requests for deferred action to "Immigration and Customs Enforcement" or "ICE," the enforcement arm of DHS. Like USCIS, ICE has played a role in processing and granting deferred action requests, in particular to those who are in removal proceedings or with a final order of removal.[29] However, ICE has also played a significant role in arresting, detaining and deporting people who previously would have been treated favorably in the exercise of discretion.[30] Executive orders issued by the White House in January 2017 and expanded upon in fact sheets by DHS reveal a much broader set of enforcement priorities without any articulation for the humanitarian factors that should be considered when making prosecutorial discretion decisions. Cumulatively, the policies and actions by ICE provide little foundation or faith that ICE will process deferred action cases terminated by USCIS with compassion or consideration.

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[27] *Id.*

[28] *See, e.g.*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, GREEN CARD FOR VAWA SELF-PETITIONER (July 26, 2018), https://www.uscis.gov/green-card/green-card-vawa-self-petitioner; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS (June 12, 2018), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, VICTIMS OF HUMAN TRAFFICKING: T NONIMMIGRANT STATUS (May 10, 2018), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

[29] *See, e.g.*, Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 347 (2013).

[30] *See, e.g.*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (Dec. 13, 2017), https://www.ice.gov/removal-statistics/2017; AMERICAN IMMIGRATION COUNCIL, THE END OF IMMIGRATION PRIORITIES UNDER THE TRUMP ADMINISTRATION (Mar. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_pripriorit_under_the_trump_administration.pdf.

DHS should increase transparency about the deferred action program. USCIS should publish statistics about the number of and outcome in deferred action cases and provide greater notice and information to the public about how to make a deferred action request.[31] If DHS is unwilling to do this voluntarily, Congress should require the agency to publish such statistics.

Thank you.

[31] *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 152-155 (2015).