Not Responsive Records

From: "Houlton, Tyler" (b)(6) per DHS
Date: December 23, 2017 at 6:08:55 PM CST
To: "Houlton, Tyler" (b)(6) per DHS >
Subject: DHS Statement on Immigration Backgrounds of Recent Terror-Related Suspects

Attributable to DHS Acting Press Secretary Tyler Q. Houlton:

"The Department of Homeland Security can confirm the suspect involved in a terror attack in Harrisburg, Pennsylvania and another suspect arrested on terror-related money laundering charges were both beneficiaries of extended family chain migration.

Ahmed Amin El-Mofty was a naturalized U.S. citizen who was admitted to the United States from Egypt on a family-based immigrant visa. El-Mofty was killed yesterday in a shootout after allegedly opening fire and targeting police at multiple locations in Harrisburg, Pennsylvania. The long chain of migration that led to the suspect's admission into the United States was initiated years ago by a distant relative of the suspect. One of the most recent links in that chain was an extended family member admitted into the United States from Egypt on an F24 visa.

Separately, Zoobia Shahnaz, who has been charged with laundering bitcoins to support ISIS, is a naturalized U.S. citizen who came to the United States from Pakistan on an F43 visa. The F43 visa is available to the children of F41 visa holders who were sponsored by other family members that obtained citizenship.

These incidents highlight the Trump administration's concerns with extended family chain migration. Both chain migration and the diversity visa lottery program have been exploited by terrorists to attack our country. Not only are the programs less effective at driving economic growth than merit-based immigration systems used by nearly all other countries, the programs make it more difficult to keep dangerous people out of the United States and to protect the safety of every American."

On background, please contact the FBI for further questions on the investigation.

Tyler Q. Houlton
Press Secretary (Acting)
Department of Homeland Security
(b)(6) per DHS

From: Watts, Brad (Judiciary-Rep) [mailto:[redacted] (b) (6)
Sent: Wednesday, January 3, 2018 7:41 PM
To: Watts, Brad (Judiciary-Rep) [redacted] (b) (6)
Subject: Law360: ICE Must Release 300 Iraqi Detainees, Mich. Judge Says

ICE Must Release 300 Iraqi Detainees, Mich. Judge Says

Share us on: By **Kelly Knaub**

Law360, New York (January 3, 2018, 4:18 PM EST) -- A Michigan federal judge ruled Tuesday that the U.S. government must release by Feb. 2 nearly 300 Iraqi detainees who have been in custody for at least six months unless an immigration judge finds that a detainee is either a flight risk or a threat to public safety.

U.S. District Judge Mark A. Goldsmith issued the ruling nearly two months after the American Civil Liberties Union urged the court to release the group on the ground that their detention violates the Immigration and Nationality Act and is unconstitutional.

The ACLU argued in early November that Immigration and Customs Enforcement has refused to release the Iraqis despite a July 24 order halting their deportation and pressed the court to release them under orders of supervision, unless ICE can show that they will likely be deported soon or have their cases reviewed, or can show that they are a flight risk or danger to their community.

Judge Goldsmith sided with the organization on Tuesday, saying he will grant relief by creating a way for detainees who are entitled to bond hearings to have them.

"Our legal tradition rejects warehousing human beings while their legal rights are being determined, without an opportunity to persuade a judge that the norm of monitored freedom should be followed," the judge said.

In the same opinion, Judge Goldsmith denied the government's bid to dismiss the Iraqis' detention claims, saying the court has already ruled that the detainees not only state a plausible claim for relief but are likely to succeed on the merits.

The judge also granted a bid for certification of three subclasses of detainees and appointed Margo Schlanger of the ACLU Fund of Michigan and Kimberly Scott of Miller Canfield Paddock & Stone PLC as class counsel. The proposed primary class — which consists of Iraqi nationals in the U.S. who had final removal orders at any time between March 1, 2017, and June 24, 2017 — has not yet been certified, according to the order, which noted that the plaintiffs amended the class to extend through June 24 in a supplemental brief to protect individuals who had not received final orders of removal by

June 24 in a supplemental brief to protect individuals who had not received final orders of removal by March 1.

A conference is scheduled for Jan. 11 to address any issues raised by the opinion.

The ACLU also asked the court to clarify its July 24 order so that members of the proposed class who filed motions to reopen their immigration cases before receiving their newly disclosed immigration records are protected from deportation for three months after they receive the files.

Judge Goldsmith said Tuesday that relief regarding the files will be addressed separately.

"The government has caused Iraqi families immense suffering by detaining their loved ones unnecessarily for months," Judy Rabinovitz, deputy director of the ACLU's Immigrants' Rights Project, said in a statement Tuesday, adding that the "ruling shows that enough is enough."

"Now, everyone is that much closer to being released and home with their families where they belong," Rabinovitz said.

A U.S. Department of Justice official told Law360 that the agency "is disappointed with the decision, and is reviewing it to determine next steps."

On July 24, Judge Goldsmith found that the nearly 1,400 Iraqi immigrants with prior criminal convictions, who were detained from their homes during immigration sweeps and in many cases were transferred from their home states, had seen their access to legal options prohibitively restricted, according to the ruling. The Trump administration filed an appeal of the order with the Sixth Circuit in late September.

Many of the immigrants had long been on lists for deportation, but Iraq refused to accept them, so they had no real reason to incur the cost and risk of reopening their administrative immigration proceedings to contest the orders, the judge said.

But as conditions in Iraq rapidly deteriorated and a sudden diplomatic deal this spring between the U.S. and Iraq started the deportation gears turning, few of the immigrants had a chance to take action on their cases before ICE swept in and detained them, severing their access to legal resources, Judge Goldsmith found.

Keeping them from contesting their deportation orders and then speedily shipping them back to Iraq would violate their due process rights, according to the order.

A group of 100 Detroit-based Iraqi nationals with prior criminal convictions initially filed a habeas corpus putative class action petition on June 15, seeking to block ICE from deporting them, court records show.

Immigration sweeps began with little notice after the U.S. in March struck a deal with Iraq that made it easier for the federal government to ship people back to their country of origin, according to filings in the case.

ICE began arresting the Iraqi immigrants on June 11, saying that the country had "agreed to take them back," according to the petition. After their arrest, the detainees were transferred to detention centers in Arizona, Louisiana and Ohio, according to court documents.

Many of the immigrants are Chaldean Christians, who are known targets of persecution in the region, making them eligible for protection from removal under the INA and the Convention Against Torture, as well as the Fifth Amendment's due process clause, the petitioners have argued.

The petitioners are represented by Michael J. Steinberg, Kary L. Moss, Bonsitu A. Kitaba and Marian J. Aukerman of the American Civil Liberties Union of Michigan, Judy Rabinovitz, Lee Gelernt and Anand Balakrishnan of the ACLU Foundation Immigrant Rights Project, Kimberly L. Scott and Wendolyn Wrosch Richards of Miller Canfield Paddock & Stone PLC, Margo Schlanger and Samuel R. Bagenstos of the ACLU Fund of Michigan, Susan E. Reed of the Michigan Immigrant Rights Center, Nora Youkhana and Nadine Yousif of Code Legal Aid Inc., Lara Finkbeiner, Mark Doss and Mark Wasef of the International Refugee Assistance Project, Maria Martinez Sanchez of the ACLU of New Mexico, and William W. Swor of William W. Swor & Associates.

The government is represented by Vinita B. Andrapalliyal, Michael A. Celone and Joseph A. Darrow of the Department of Justice.

The case is Hamama et al. v. Adducci, case number 2:17-cv-11910, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Dave Simpson, Kat Greene and Nicole Narea. Editing by Jack Karp.

https://www.law360.com/immigration/articles/998233/ice-must-release-300-iraqi-detainees-mich-judge-says

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA,

Plaintiff,

Civil Action No.

v.

THE STATE OF ARIZONA, et al.,

Defendants.

DECLARATION OF DANIEL H. RAGSDALE

Pursuant to 28 U.S.C. § 1746, I, Daniel H. Ragsdale, declare and state as follows:

1. I am the Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security (DHS). I have served in this position since January 2010. Before that, I served as a Senior Counselor to ICE's Assistant Secretary from November 2008 until October 2009, and, prior to that, as the Chief of the ICE Enforcement Law Division from October 2006 until November 2008. From September 1999 until September 2006, I served in several positions in ICE's Office of Chief Counsel in Phoenix, Arizona. I also was designated as a Special Assistant U.S. Attorney (SAUSA), which allowed me to prosecute immigration crimes.

2. Under the supervision of ICE's Assistant Secretary, I have direct managerial and supervisory authority over the management and administration of ICE. I am closely involved in the management of ICE's human and financial resources, matters of significance to the agency, and the day-to-day operations of the agency. I make this declaration based on personal

knowledge of the subject matter acquired by me in the course of the performance of my official duties.

Overview of ICE Programs

3. ICE consists of two core operational programs, Enforcement and Removal Operations (ERO), which handles civil immigration enforcement, and Homeland Security Investigations (HSI), which handles criminal investigations. I am generally aware of the operational activities of all offices at ICE, and I am specifically aware of their activities as they affect and interface with the programs I directly supervise.

4. HSI houses the special agents who investigate criminal violations of the federal customs and immigration laws. HSI also primarily handles responses to calls from local and state law enforcement officers requesting assistance, including calls requesting that ICE transfer aliens into detention. However, because of the policy focus on devoting investigative resources towards the apprehension of criminal aliens, the responsibility of responding to state and local law enforcement is shared with, and is increasingly transitioning to, ERO to allow HSI special agents to focus more heavily on criminal investigations. On an average day in FY 2009, HSI special agents nationwide arrested 62 people for administrative immigration violations, 22 people for criminal immigration offenses, and 42 people for criminal customs offenses.

5. ERO is responsible for detaining and removing aliens who lack lawful authority to remain in the United States. On an average day, ERO officers nationwide arrest approximately 816 aliens for administrative immigration violations and remove approximately 912 aliens, including 456 criminal aliens, from the United States to countries around the globe. As of June 2, 2010, ICE had approximately 32,313 aliens in custody pending their removal proceedings or removal from the United States.

6. In addition to HSI and ERO, ICE has the Office of State and Local Coordination (OSLC) which focuses on outreach to state, local, and tribal law enforcement agencies to build positive relationships with ICE. In addition, OSLC administers the 287(g) Program, through which ICE enters into agreements with state, local, and tribal law enforcement agencies for those agencies to perform certain federal immigration enforcement functions under the supervision of federal officials. Each agreement is formalized through a Memorandum of Agreement (MOA) and authorized pursuant to Section 287(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g).

7. Consistent with its policy of focusing enforcement efforts on criminal aliens, ICE created the Secure Communities program to improve, modernize, and prioritize ICE's efforts to identify and remove criminal aliens from the United States. Through the program, ICE has leveraged biometric information-sharing to ensure accurate and timely identification of criminal aliens in law enforcement custody. The program office arranges for willing jurisdictions to access the biometric technology so they can simultaneously check a person's criminal and immigration history when the person is booked on criminal charges. When an individual in custody is identified as being an alien, ICE must then determine how to proceed with respect to that alien, including whether to lodge a detainer or otherwise pursue the alien's detention and removal from the United States upon the alien's release from criminal custody. ICE does not lodge detainers or otherwise pursue removal for every alien in custody, and has the discretion to decide whether lodging a detainer and / or pursuing removal reflects ICE's policy priorities.

ICE Initiatives and Activities in Arizona and at the Southwest Border

8. ICE has devoted substantial resources to increasing border security and combating smuggling of contraband and people. Indeed, 25 percent of all ICE special agents are stationed in the five Southwest border offices. Of those, 353 special agents are stationed in Arizona to investigate crimes, primarily cross-border crimes. ERO currently has 361 law enforcement officers in Arizona. Further, the ICE Office of the Principal Legal Advisor (OPLA) has 147 attorneys stationed in the areas of responsibility on the Southwest border, including 37 attorneys in Arizona alone to prosecute removal cases and advise ICE officers and special agents, as well as one attorney detailed to the U.S. Attorney's Office for the District of Arizona to support the prosecution of criminals identified and investigated by ICE agents. Two additional attorneys have been allocated and are expected to enter on duty as SAUSAs in the very near future.

9. ICE's attention to the Southwest Border has included the March 2009 launch of the Southwest Border Initiative to disrupt and dismantle drug trafficking organizations operating along the Southwest border. This initiative was designed to support three goals: guard against the spillover of violent crime into the United States; support Mexico's campaign to crack down on drug cartels in Mexico; and reduce movement of contraband across the border. This initiative called for additional personnel, increased intelligence capability, and better coordination with state, local, tribal, and Mexican law enforcement authorities. This plan also bolstered the law enforcement resources and information-sharing capabilities between and among DHS and the Departments of Justice and Defense. ICE's efforts on the Southwest border between March 2009 and March 2010 have resulted in increased seizures of weapons, money, and narcotics along the Southwest border as compared to the same time period between 2008 and 2009. ICE also

increased administrative arrests of criminal aliens for immigration violations by 11 percent along the Southwest border during this period.

10. ICE has focused even more closely on border security in Arizona. ICE is participating in a multi-agency operation known as the Alliance to Combat Transnational Threats (ACTT) (formerly the Arizona Operational Plan). Other federal agencies, including the Department of Defense, as well as state and local law enforcement agencies also support the ACTT. To a much smaller degree, ACTT receives support from the Government of Mexico through the Merida initiative, a United States funded program designed to support and assist Mexico in its efforts to disrupt and dismantle transnational criminal organizations, build capacity, strengthen its judicial and law enforcement institutions, and build strong and resilient communities.

11. The ACTT began in September 2009 to address concerns about crime along the border between the United States and Mexico in Arizona. The primary focus of ACTT is conducting intelligence-driven border enforcement operations to disrupt and dismantle violent cross-border criminal organizations that have a negative impact on the lives of the people on both sides of the border. The ACTT in particular seeks to reduce serious felonies that negatively affect public safety in Arizona. These include the smuggling of aliens, bulk cash, and drugs; document fraud; the exportation of weapons; street violence; homicide; hostage-taking; money laundering; and human trafficking and prostitution.

12. In addition to the ACTT, the Federal Government is making other significant efforts to secure the border. On May 25, 2010, the President announced that he will be requesting $500 million in supplemental funds for enhanced border protection and law enforcement activities, and that he would be ordering a strategic and requirements-based

deployment of 1,200 National Guard troops to the border. This influx of resources will be utilized to enhance technology at the border; share information and support with state, local, and tribal law enforcement; provide intelligence and intelligence analysis, surveillance, and reconnaissance support; and additional training capacity.

13. ICE also is paying increasing attention to alien smuggling, along with other contraband smuggling, with the goal of dismantling large organizations. Smuggling organizations are an enforcement priority because they tend to create a high risk of danger for the persons being smuggled, and tend to be affiliated with the movement of drugs and weapons. ICE has had success of late in large operations to prosecute and deter alien smugglers and those who transport smuggled aliens. During recent operations in Arizona and Texas, ICE agents made a combined total of 85 arrests, searched 18 companies, and seized more than 100 vehicles and more than 30 firearms.

14. This summer, ICE launched a surge in its efforts near the Mexican border. This surge was a component of a strategy to identify, disrupt, and dismantle cartel operations. The focus on cartel operations is a policy priority because such cartels are responsible for high degrees of violence in Mexico and the United States—the cartels destabilize Mexico and threaten regional security. For 120 days, ICE will add 186 agents and officers to its five Southwest border offices to attack cartel capabilities to conduct operations; disrupt and dismantle drug trafficking organizations; diminish the illicit flow of money, weapons, narcotics, and people into and out of the U.S.; and enhance border security. The initiative, known as Operation Southern Resolve, is closely coordinated with the Government of Mexico, as well as Mexican and U.S. federal, state and local law enforcement to ensure maximum impact. The initiative also includes

targeting transnational gang activity, targeting electronic and traditional methods of moving illicit proceeds, and identifying, arresting, and removing criminal aliens present in the region.

15. Although ICE continues to devote significant resources to immigration enforcement in Arizona and elsewhere along the Southwest border, ICE recognizes that a full solution to the immigration problem will only be achieved through comprehensive immigration reform (CIR). Thus, ICE, in coordination with DHS and the Department's other operating components, has committed personnel and energy to advancing CIR. For example, ICE's Assistant Secretary and other senior leaders have advocated for comprehensive immigration reform during meetings with, and in written letters and statements to, advocacy groups, non-governmental organizations, members of the media, and members of Congress. Other ICE personnel have participated in working groups to develop immigration reform proposals to include in CIR and to prepare budget assessments and projections in support of those proposals.

ICE Enforcement Priorities

16. DHS is the federal department with primary responsibility for the enforcement of federal immigration law. Within DHS, ICE plays a key role in this enforcement by, among other functions, serving as the agency responsible for the investigation of immigration-related crimes, the apprehension and removal of individuals from the interior United States, and the representation of the United States in removal proceedings before the Executive Office for Immigration Review within the Department of Justice. As the department charged with enforcement of federal immigration laws, DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities. This discretion also allows ICE to forego criminal prosecutions or removal proceedings in individual cases, where such forbearance will further federal immigration priorities.

17. ICE's priorities at a national level have been refined to reflect Secretary Napolitano's commitment to the "smart and tough enforcement of immigration laws." Currently, ICE's highest enforcement priorities—meaning, the most important targets for apprehension and removal efforts—are aliens who pose a danger to national security or a risk to public safety, including: aliens engaged in or suspected of terrorism or espionage; aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; certain gang members; and aliens subject to outstanding criminal warrants.

18. Other high priorities include aliens who are recent illegal entrants and "fugitive aliens" (*i.e.*, aliens who have failed to comply with final orders of removal). The attention to fugitive aliens, especially those with criminal records, recognizes that the government expends significant resources providing procedural due process in immigration proceedings, and that the efficacy of removal proceedings is undermined if final orders of removal are not enforced. Finally, the attention to aliens who are recent illegal entrants is intended to help maintain control at the border. Aliens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority. And aliens who meet certain humanitarian criteria may not be an "enforcement" priority at all—in such humanitarian cases, federal immigration priorities may recommend forbearance in pursuing removal.

19. ICE bases its current priorities on a number of different factors. One factor is the differential between the number of people present in the United States illegally—approximately 10.8 million aliens, including 460,000 in Arizona—and the number of people ICE is resourced to remove each year—approximately 400,000. This differential necessitates prioritization to ensure that ICE expends resources most efficiently to advance the goals of protecting national security,

protecting public safety, and securing the border. Another factor is ICE's consideration of humanitarian interests in enforcing federal immigration laws, and its desire to ensure aliens in the system are treated fairly and with appropriate respect given their individual circumstances. Humanitarian interests may, in appropriate cases, support a conclusion that an alien should not be removed or detained at all. And yet another factor is ICE's recognition that immigration detainees are held for a civil purpose—namely, removal—and not for punishment. Put another way, although entering the United States illegally or failing to cooperate with ICE during the removal process is a crime, being in the United States without authorization is not itself a crime. ICE prioritizes enforcement to distinguish between aliens who commit civil immigration violations from those commit or who have been convicted of a crime.

20. Consequently, ICE is revising policies and practices regarding civil immigration enforcement and the immigration detention system to ensure the use of its enforcement personnel, detention space, and removal resources are focused on advancing these priorities. For example, ICE has two programs within ERO designed to arrest convicted criminal aliens and alien fugitives. These are the Criminal Alien Program (CAP) and the National Fugitive Operations Program (fugitive operations). ICE officers assigned to CAP identify criminal aliens who are incarcerated within federal, state, and local prisons and jails, as well as aliens who have been charged or arrested and remain in the custody of the law enforcement agency. ICE officers assigned to fugitive operations seek to locate and arrest aliens with final orders of removal. These officers also seek to locate, arrest, and remove convicted criminal aliens living at large in communities and aliens who previously have been deported but have returned unlawfully to the United States. They also present illegal reentry cases for prosecution in federal courts to deter such recidivist conduct.

21. Likewise, in keeping with the Secretary's policy determination that immigration enforcement should be "smart and tough" by focusing on specific priorities, ICE issued a new strategy regarding worksite enforcement. This strategy shift prioritized the criminal investigation and prosecution of employers and de-emphasized the apprehension and removal of illegal aliens working in the United States without authorization. Although Federal law does not make it a distinct civil or criminal offense for unauthorized aliens merely to seek employment in the U.S., such aliens may be removed for being in the U.S. illegally. ICE's new strategy acknowledges that many enter the United States illegally because of the opportunity to work. Thus, the strategy seeks to address the root causes of illegal immigration and to do the following: (i) penalize employers who knowingly hire illegal workers; (ii) deter employers who are tempted to hire illegal workers; and (iii) encourage all employers to take advantage of well-crafted compliance tools. At the same time, the policy recognizes that humanitarian concerns counsel against focusing enforcement efforts on unauthorized workers. The strategy permits agents to exercise discretion and work with the prosecuting attorney to assess how to best proceed with respect to illegal alien witnesses. One of the problems with Arizona Senate Bill 1070 (SB 1070) is that it will divert focus from this "smart and tough" focus on employers to responses to requests from local law enforcement to apprehend aliens not within ICE's priorities.

22. In addition to refocusing ICE's civil enforcement priorities, ICE has also refocused the 287(g) program so that state and local jurisdictions with which ICE has entered into agreements to exercise federal immigration authority do so in a manner consistent with ICE's priorities. The mechanism for this refocusing has been a new MOA with revised terms and conditions. Jurisdictions that already had agreements were required to enter into this revised MOA in October of 2009. Also, ICE opted not to renew 287(g) agreements with task force

officers with the Maricopa County Sheriff's Office and officers stationed within the Los Angeles County Sheriff's Office's jail. These decisions were based on inconsistency between the expectations of the local jurisdiction and the priorities of ICE.

23. ICE communicates its enforcement priorities to state and local law enforcement officials in a number of ways. With respect to the 287(g) program, the standard MOA describes the focus on criminals, with the highest priority on the most serious offenders. In addition, when deploying interoperability technology through the Secure Communities program, local jurisdictions are advised of ICE's priorities in the MOA and in outreach materials.

24. In addition to the dissemination of national civil enforcement priorities to the field, the refocusing of existing ICE programs, and other efforts to prioritize immigration enforcement to most efficiently protect the border and public safety, the Assistant Secretary and his senior staff routinely inform field locations that they have the authority and should exercise discretion in individual cases. This includes when deciding whether to issue charging documents, institute removal proceedings, release or detain aliens, place aliens on alternatives to detention (*e.g.,* electronic monitoring), concede an alien's eligibility for relief from removal, move to terminate cases where the alien may have some other avenue for relief, stay deportations, or defer an alien's departure.

25. The Assistant Secretary has communicated to ICE personnel that discretion is particularly important when dealing with long-time lawful permanent residents, juveniles, the immediate family members of U.S. citizens, veterans, members of the armed forces and their families, and others with illnesses or special circumstances.

26. ICE exercises prosecutorial discretion throughout all the stages of the removal process—investigations, initiating and pursuing proceedings, which charges to lodge, seeking

termination of proceedings, administrative closure of cases, release from detention, not taking an appeal, and declining to execute a removal order. The decision on whether and how to exercise prosecutorial discretion in a given case is largely informed by ICE's enforcement priorities. During my tenure at ICE as an attorney litigating administrative immigration cases, as well as my role as a SAUSA prosecuting criminal offenses and in my legal and management roles at ICE headquarters, I am aware of many cases where ICE has exercised prosecutorial discretion to benefit an alien who was not within the stated priorities of the agency or because of humanitarian factors. For example, ICE has released an individual with medical issues from detention, terminated removal proceedings to allow an alien to regularize her immigration status, declined to assert the one year filing deadline in order to allow an individual to apply for asylum before the immigration judge, and terminated proceedings for a long-term legal permanent resident who served in the military, among numerous other examples.

27. ICE's exercise of discretion in enforcement decisions has been the subject of several internal agency communications. For example, Attachment A is a true and accurate copy of a November 7, 2007 memorandum from ICE Assistant Secretary Julie Myers to ICE Field Office Directors and ICE Special Agents in Charge. Pursuant to this memorandum, ICE agents and officers should exercise prosecutorial discretion when making administrative arrests and custody determinations for aliens who are nursing mothers absent any statutory detention requirement or concerns such as national security or threats to public safety. Attachment B is a true and accurate copy, omitting attachments thereto, of an October 24, 2005 memorandum from ICE Principal Legal Advisor William J. Howard to OPLA Chief Counsel as to the manner in which prosecutorial discretion is exercised in removal proceedings. Attachment C is a true and accurate copy of a November 17, 2000 memorandum from Immigration and Naturalization

Service (INS) Commissioner Doris Meissner to various INS personnel concerning the exercise of prosecutorial discretion. The Assistant Secretary also outlined in a recent memorandum to all ICE employees the agency's civil immigration enforcement priorities relating to the apprehension, detention, and removal of aliens (available at http://www.ice.gov/doclib/civil enforcement priorities.pdf).

28. In sum, ICE does not seek to arrest, detain, remove, or refer for prosecution, all aliens who may be present in the United States illegally. ICE focuses its enforcement efforts in a manner that is intended to most effectively further national security, public safety, and security of the border, and has affirmative reasons not to seek removal or prosecution of certain aliens.

International Cooperation with ICE Enforcement

29. ICE cooperates with foreign governments to advance our criminal investigations of transnational criminal organizations (such as drug cartels, major gangs, and organized alien smugglers) and to repatriate their citizens and nationals who are facing deportation. With respect to our criminal investigations, ICE's Office of International Affairs has 63 offices in 44 countries staffed with special agents who, among other things, investigate crime. In Mexico alone, ICE has five offices consisting of a total of 38 personnel. Investigators in ICE attaché offices investigate cross-border crime, including crime that affects Arizona and the rest of the Southwest. In addition, they work with foreign governments to secure travel documents and clearance for ICE to remove aliens from the United States. ICE negotiates with foreign governments to expedite the removal process, including negotiating electronic travel document arrangements. International cooperation for ICE is critical.

30. International cooperation advances ICE's goal of making the borders more secure. To address cross-border crime at the Southwest border, ICE is cooperating very closely with the

Government of Mexico in particular. Two prime examples of ICE and Mexican cooperation include Operation Armas Cruzadas, designed to improve information sharing and to identify, disrupt, and dismantle criminal networks engaged in weapons smuggling, and Operation Firewall, as part of which Mexican customs and ICE-trained Mexican Money Laundering-Vetted Units target the illicit flow of money out of Mexico on commercial flights and in container shipments.

31. Also to improve border security and combat cross-border crime, ICE is engaged in other initiatives with the Government of Mexico. For instance, ICE is training Mexican customs investigators. ICE also provides Mexican law enforcement officers and prosecutors training in human trafficking, child sexual exploitation, gang investigations, specialized investigative techniques, and financial crimes. ICE has recruited Mexican federal police officers to participate in five of the ICE-led Border Enforcement Security Task Forces (BESTs). The BEST platform brings together multiple law enforcement agencies at every level to combat cross-border crime, including crime touching Arizona. Sharing information and agents is promoting more efficient and effective investigations. ICE has benefited from the Government of Mexico's increased cooperation, including in recent alien smuggling investigations that resulted in arrests in Mexico and Arizona.

32. In addition to the importance of cooperation from foreign governments in criminal investigations, ICE also benefits from good relationships with foreign governments in effecting removals of foreign nationals. Negotiating removals, including country clearance, to approvals and securing travel documents, is a federal matter and often one that requires the cooperation of the country that is accepting the removed alien. ICE removes more nationals of Mexico than of any other country. In FY 2009, ICE removed or returned approximately 275,000

Mexican nationals, which constitutes more than 70 percent of all removals and returns. Not all countries are equally willing to repatriate their nationals. Delays in repatriating nationals of foreign countries causes ICE financial and operational challenges, particularly when the aliens are detained pending removal. Federal law limits how long ICE can detain an alien once the alien is subject to a final order of removal. Therefore, difficulties in persuading a foreign country to accept a removed alien runs the risk of extending the length of time that a potentially dangerous or criminal alien remains in the United States. Thus, the efficient operation of the immigration system relies on cooperation from foreign governments.

Reliance on Illegal Aliens in Enforcement and Prosecution

33. ICE agents routinely rely on foreign nationals, including aliens unlawfully in the United States, to build criminal cases, including cases against other aliens in the United States illegally. Aliens who are unlawfully in the United States, like any other persons, may have important information about criminals they encounter—from narcotics smugglers to alien smugglers and beyond—and routinely support ICE's enforcement activities by serving as confidential informants or witnesses. When ICE's witnesses or informants are illegal aliens who are subject to removal, ICE can exercise discretion and ensure the alien is able to remain in the country to assist in an investigation, prosecution, or both. The blanket removal or incarceration of all aliens unlawfully present in Arizona or in certain other individual states would interfere with ICE's ability to pursue the prosecution or removal of aliens who pose particularly significant threats to public safety or national security. Likewise, ICE can provide temporary and long-term benefits to ensure victims of illegal activity are able to remain in the United States.

34. Tools relied upon by ICE to ensure the cooperation of informants and witnesses include deferred action, stays of removal, U visas for crime victims, T visas for victims of human

trafficking, and S visas for significant cooperators against other criminals and to support investigations. These tools allow aliens who otherwise would face removal to remain in the United States either temporarily or permanently, and to work in the United States in order to support themselves while here. Many of these tools are employed in situations where federal immigration policy suggests an affirmative benefit that can only be obtained by not pursuing an alien's removal or prosecution. Notably, utilization of these tools is a dynamic process between ICE and the alien, which may play out over time. An alien who ultimately may receive a particular benefit—for example, an S visa—may not immediately receive that visa upon initially coming forward to ICE or other authorities, and thus at a given time may not have documentation or evidence of the fact that ICE is permitting that alien to remain in the United States.

35. Although ICE may rely on an illegal alien as an informant in any type of immigration or custom violation it investigates, this is particularly likely in alien smuggling and illegal employment cases. Aliens who lack lawful status in the United States are routinely witnesses in criminal cases against alien smugglers. For example, in an alien smuggling case, the smuggled aliens are in a position to provide important information about their journey to the United States, including how they entered, who provided them assistance, and who they may have paid. If these aliens were not available to ICE, special agents would not be positioned to build criminal cases against the smuggler. ICE may use a case against the smuggler to then build a larger case against others in the smuggling organization that assisted the aliens across the border.

36. ICE also relies heavily on alien informants and witnesses in illegal employment cases. In worksite cases, the unauthorized alien workers likewise have important insight and

information about the persons involved in the hiring and employment process, including who may be amenable to a criminal charge.

37. ICE also relies heavily on alien informants and cooperators in investigations of transnational gangs, including violent street gangs with membership and leadership in the United States and abroad. Informants and cooperating witnesses help ICE identify gang members in the United States and provide information to support investigations into crimes the gang may be committing. In some cases, this includes violent crime in aid of racketeering, narcotics trafficking, or other crimes.

38. During my years at ICE, I have heard many state and local law enforcement and immigration advocacy groups suggest that victims and witnesses of crime may hesitate to come forward to speak to law enforcement officials if they lack lawful status. The concern cited is that, rather than finding redress for crime, victims and witnesses will face detention and removal from the United States. To ensure that illegal aliens who are the victims of crimes or have witnessed crimes come forward to law enforcement, ICE has a robust outreach program, particularly in the context of human trafficking, to assure victims and witnesses that they can safely come forward against traffickers without fearing immediate immigration custody, extended detention, or removal. If this concern manifested itself—and if crime victims became reluctant to come forward—ICE would have a more difficult time apprehending, prosecuting, and removing particularly dangerous aliens.

Potential Adverse Impact of SB 1070 on ICE's Priorities and Enforcement Activities

39. I am aware that the State of Arizona has enacted new immigration legislation, known as SB 1070. I have read SB 1070, and I am generally familiar with the purpose and

provisions of that legislation. SB 1070 will adversely impact ICE's operational activities with respect to federal immigration enforcement.

40. I understand that section two of SB 1070 generally requires Arizona law enforcement personnel to inquire as to the immigration status of any individual encountered during "any lawful stop, detention or arrest" where there is a reasonable suspicion to believe that the individual is unlawfully present in the United States. I also understand that section two contemplates referral to DHS of those aliens confirmed to be in the United States illegally.

41. As a federal agency with national responsibilities, the burdens placed by SB 1070 on the Federal Government will impair ICE's ability to pursue its enforcement priorities. For example, referrals by Arizona under this section likely would be handled by either the Special Agent in Charge (SAC) Phoenix (the local HSI office), or the Field Office Director (FOD) Phoenix (the local ERO office). Both offices currently have broad portfolios of responsibility. Notably, SAC Phoenix is responsible for investigating crimes at eight ports of entry and two international airports. FOD Phoenix is responsible for two significant detention centers located in Florence and Eloy, Arizona, and a large number of immigration detainees housed at a local county jail in Pinal County, Arizona. FOD Phoenix also has a fugitive operations team, a robust criminal alien program, and it manages the 287(g) programs in the counties of Maricopa, Yavapai, and Pinal, as well as at the Arizona Department of Corrections.

42. Neither the SAC nor the FOD offices in Phoenix are staffed to assume additional duties. Inquiries from state and local law enforcement officers about a subject's immigration status could be routed to the Law Enforcement Support Center in Vermont or to agents and officers stationed at SAC or FOD Phoenix. ICE resources are currently engaged in investigating criminal violations and managing the enforcement priorities and existing enforcement efforts,

and neither the SAC nor FOD Phoenix are scheduled for a significant increase in resources to accommodate additional calls from state and local law enforcement. Similarly, the FOD and SAC offices in Arizona are not equipped to respond to any appreciable increase in requests from Arizona to take custody of aliens apprehended by the state.

43. Moreover, ICE's detention capacity is limited. In FY 2009, FOD Phoenix was provided with funds to detain no more than approximately 2,900 detention beds on an average day. FOD Phoenix uses that detention budget and available bed space not only for aliens arrested in Arizona, but also aliens transferred from Los Angeles, San Francisco, and San Diego. Notably, the President's budget for FY 2011 does not request an increase in money to purchase detention space. And with increasing proportions of criminal aliens in ICE custody and static bed space, the detention resources will be directed to those aliens who present a danger to the community and the greatest risk of flight.

44. Thus, to respond to the number of referrals likely to be generated by enforcement of SB 1070 would require ICE to divert existing resources from other duties, resulting in fewer resources being available to dedicate to cases and aliens within ICE's priorities. This outcome is especially problematic because ICE's current priorities are focused on national security, public safety, and security of the border. Diverting resources to cover the influx of referrals from Arizona (and other states, to the extent similar laws are adopted) could, therefore, mean decreasing ICE's ability to focus on priorities such as protecting national security or public safety in order to pursue aliens who are in the United States illegally but pose no immediate or known danger or threat to the safety and security of the public.

45. An alternative to responding to the referrals from Arizona, and thus diverting resources, is to largely disregard referrals from Arizona. But this too would have adverse

consequences in that it could jeopardize ICE's relationships with state and local law enforcement agencies (LEAs). For example, LEAs often request ICE assistance when individuals are encountered who are believed to be in the United States illegally. Since ICE is not always available to immediately respond to LEA calls, potentially removable aliens are often released back into the community. Historically, this caused some LEAs to complain that ICE was unresponsive. In September 2006, to address this enforcement gap, the FOD office in Phoenix created the Law Enforcement Agency Response (LEAR) Unit, a unit of officers specifically dedicated to provide 24-hour response, 365 days per year. ICE's efforts with this project to ensure better response to LEAs would be undermined if ICE is forced to largely disregard referrals from Arizona, and consequently may result in LEAs being less willing to cooperate with ICE on various enforcement matters, including those high-priority targets on which ICE enforcement is currently focused.

46. In addition to section two of SB 1070, I understand that the stated purpose of the act is to "make attrition through enforcement the public policy of all state and local government agencies in Arizona," and that the "provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." To this end, I understand that section three of SB 1070 authorizes Arizona to impose criminal penalties for failing to carry a registration document, that sections four and five, along with existing provisions of Arizona law, prohibit certain alien smuggling activity, as well as the transporting, concealing, and harboring of illegal aliens, and that section six authorizes the warrantless arrest of certain aliens believed to be removable from the United States.

47. The Arizona statute does not appear to make any distinctions based on the circumstances of the individual aliens or to take account of the Executive Branch's determination with respect to individual aliens, such as to not pursue removal proceedings or grant some form of relief from removal. Thus, an alien for whom ICE deliberately decided for humanitarian reasons not to pursue removal proceedings or not to refer for criminal prosecution, despite the fact that the alien may be in the United States illegally, may still be prosecuted under the provisions of the Arizona law. DHS maintains the primary interest in the humane treatment of aliens and the fair administration of federal immigration laws. The absence of a federal prosecution does not necessarily indicate a lack of federal resources; rather, the Federal Government often has affirmative reasons for not prosecuting an alien. For example, ICE may exercise its discretionary authority to grant deferred action to an alien in order to care for a sick child. ICE's humanitarian interests would be undermined if that alien was then detained or arrested by Arizona authorities for being illegally present in the United States.

48. Similarly, certain aliens who meet statutory requirements may seek to apply for asylum in the United States, pursuant to 8 U.S.C. § 1158, based on their having been persecuted in the past or because of a threat of future persecution. The asylum statute recognizes a policy in favor of hospitality to persecuted aliens. In many cases, these aliens are not detained while they pursue protection, and they do not have the requisite immigration documents that would provide them lawful status within the United States during that period. Under SB 1070, these aliens could be subjected to detention or arrest based on the state's priorities, despite the fact that affirmative federal policy supports not detaining or prosecuting the alien.

49. Additionally, some aliens who do not qualify for asylum may qualify instead for withholding of removal under 8 U.S.C. § 1231(b)(3). Similar to asylum, withholding of removal

provides protection in the United States for aliens who seek to escape persecution. Arizona's detention or arrest of these aliens would not be consistent with the Government's desire to ensure their humanitarian treatment.

50. Further, there are many aliens in the United States who seek protection from removal under the federal regulatory provisions at 8 C.F.R. § 208.18 implementing the Government's non-*refoulement* obligations under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In many cases, these aliens are not detained while they pursue CAT protection. Under SB 1070, these aliens could be subjected to detention or arrest based on the state's priorities. The detention or arrest of such aliens would be inconsistent with the Government's interest in ensuring their humane treatment, especially where such aliens may have been subject to torture before they came to the U.S.

51. Application of SB 1070 also could undermine ICE's efforts to secure the cooperation of confidential informants, witnesses, and victims who are present in the United States without legal status. The stated purpose of SB 1070, coupled with the extensive publicity surrounding this law, may lead illegal aliens to believe, rightly or wrongly, that they will be subject to immigration detention and removal if they cooperate with authorities, not to mention the possibility that they may expose themselves to sanctions under Arizona law if they choose to cooperate with authorities. Consequently, SB 1070 very likely will chill the willingness of certain aliens to cooperate with ICE. Although ICE has tools to address those concerns, SB 1070 would undercut those efforts, and thus risks ICE's investigation and prosecution of criminal activity, such as that related to illegal employment, the smuggling of contraband or people, or human trafficking.

52. Moreover, just as the ICE offices in Arizona are not staffed to respond to additional inquiries about the immigration status of individuals encountered by Arizona, or to and arrest or detain appreciably more aliens not within ICE's current priorities, the offices are not staffed to provide personnel to testify in Arizona state criminal proceedings related to a defendant's immigration status, such as a "Simpson Hearing" where there is indication that a person may be in the United States illegally and the prosecutor invokes Arizona Revised Statute § 13-3961(A)(a)(ii) (relating to determination of immigration status for purposes of bail). In some federal criminal immigration cases, Assistant United States Attorneys call ICE special agents to testify to provide such information as a person's immigration history or status. If ICE agents are asked to testify in a significant number of state criminal proceedings, as contemplated under SB 1070, they will be forced either to divert resources from federal priorities, or to refuse to testify in those proceedings, thus damaging their relationships with the state and local officials whose cooperation is often of critical importance in carrying out federal enforcement priorities.

53. Enforcement of SB 1070 also threatens ICE's cooperation from foreign governments. For example, the Government of Mexico, a partner to ICE in many law enforcement efforts and in repatriation of Mexican nationals, has expressed strong concern about Arizona's law. On May 19, 2010, President Barack Obama and Mexican President Felipe Calderón held a joint news conference, during which President Calderón criticized the Arizona immigration law, saying it criminalized immigrants. President Calderón reiterated these concerns to a joint session of the United States Congress on May 20, 2010. Any decrease in participation and support from the Government of Mexico will hinder ICE efforts to prioritize and combat cross-border crime.

54. The Government of Mexico is not the only foreign nation that has expressed concern about SB 1070. Should there be any decreased cooperation from foreign governments in response to Arizona's enforcement of SB 1070, the predictable result of such decreased cooperation would be an adverse impact on the effectiveness and efficiency of ICE's enforcement activities, which I have detailed above.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed the 1st day of July 2010 in Washington, D.C.

Daniel H. Ragsdale
Executive Associate Director
Management and Administration
U.S. Immigration and Customs Enforcement

ATTACHMENT A

Office of the Assistant Secretary

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

NOV - 7 2007

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge

FROM: Julie L. Myers
Assistant Secretary

SUBJECT: Prosecutorial and Custody Discretion

This memorandum serves to highlight the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers. The commitment by ICE to facilitate an end to the "catch and release" procedure for illegal aliens does not diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to meritorious health related cases and caregiver issues.

The process for making discretionary decisions is outlined in the attached memorandum of November 7, 2000, entitled "Exercising Prosecutorial Discretion." Field 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.

For example, in situations where officers are considering taking a nursing mother into custody, the senior ICE field managers should consider:

- Absent any statutory detention requirement or concerns such as national security, threats to public safety or other investigative interests, the nursing mother should be released on an Order of Recognizance or Order of Supervision and the Alternatives to Detention programs should be considered as an additional enforcement tool;
- In situations where ICE has determined, due to one of the above listed concerns or a statutory detention requirement to take a nursing mother into custody, the field personnel should consider placing a mother with her non-U.S. citizen child in the T. Don Hutto or Berks family residential center, provided there are no medical or legal issues that preclude their removal and they meet the placement factors of the facility. For a nursing mother with a U.S. citizen child, the pertinent state social service agencies should be contacted to identify and address any caregiver issues the alien mother might have in order to maintain the unity of the mother and child if the above listed release condition can be met;
- The decision to detain nursing mothers shall be reported through the programs' operational chain of command.

Requests for Headquarters assistance to address arrests and custody determinations as they relate to this issue may be addressed to the appropriate Assistant Director for Operations within OI or DRO.

Attachment

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 7 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately

[1] For example, standards and procedures for placing an alien in deferred action are provided in the Standard Operating Procedures for Enforcement Officers' Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[1] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[1] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases where individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always so easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

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.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. 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.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

ATTACHMENT B

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

As you know, when Congress abolished the Immigration and Naturalization Service and divided its functions among U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (CIS), the Office of the Principal Legal Advisor (OPLA) was given exclusive authority to prosecute all removal proceedings. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002) ("the legal advisor * * * shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review"). Complicating matters for OPLA is that our cases come to us from CBP, CIS, and ICE, since all three bureaus are authorized to issue Notices to Appear (NTAs).

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

Since the NTA-issuing authorities are no longer all under the same roof, adhering to INS OGC's attorney-client model would minimize our efficiency. This is particularly so since we are litigating our hundreds of thousands of cases per year with only 600 or so attorneys; that our case preparation time is extremely limited, averaging about 20 minutes a case; that our caseload will increase since Congress is now providing more resources for border and interior immigration enforcement; that many of the cases that come to us from NTA-issuers lack supporting evidence like conviction documents; that we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets; that we have growing collateral duties such as

assisting the Department of Justice with federal court litigation; that in many instances we lack sufficient staff to adequately brief Board appeals or oppositions to motions to reopen; and that the opportunities to exercise prosecutorial discretion arise at many different points in the removal process.

To elaborate on this last point, the universe of opportunities to exercise prosecutorial discretion is large. Those opportunities arise in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs or what charges and evidence to base them on. They arise in the course of litigating the NTA in immigration court, when we may want, among other things, to move to dismiss a case as legally insufficient, to amend the NTA, to decide not to oppose a grant of relief, to join in a motion to reopen, or to stipulate to the admission of evidence. They arise after the immigration judge has entered an order, when we must decide whether to appeal all or part of the decision. Or they may arise in the context of DRO's decision to detain aliens, when we must work closely with DRO in connection with defending that decision in the administrative or federal courts. In the 50-plus immigration courtrooms across the United States in which we litigate, OPLA's trial attorneys continually face these and other prosecutorial discretion questions. Litigating with maximum efficiency requires that we exercise careful yet quick judgment on questions involving prosecutorial discretion. This will require that OPLA's trial attorneys become very familiar with the principles in this memorandum and how to apply them.

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

Given the complexity of immigration law, a complexity that federal courts at all levels routinely acknowledge in published decisions, your expert assistance to the U.S. Attorneys is critical.[1] It is all the more important because the decision whether to

[1] As you know, if and when your resources permit it, I encourage you to speak with your respective United States Attorneys' Offices about having those Offices designate Special Assistant U.S. Attorneys from OPLA's ranks to handle both civil and criminal federal court immigration litigation. The U.S.

proceed with litigating a case in the federal courts must be gauged for reasonableness, lest, in losing the case, the courts award attorneys' fees against the government pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it 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.

* * * * * * * * * *

With this background in mind, I am directing that all OPLA attorneys apply the following principles of prosecutorial discretion:

1) Prosecutorial Discretion Prior to or in Lieu of NTA Issuance:

In the absence of authority to cancel NTAs, we should engage in client liaison with CBP, CIS (and ICE) via, or in conjunction with, CIS/CBP attorneys on the issuance of NTAs. We should attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.

It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons exist, a stayed removal order might yield enhanced law enforcement cooperation. See Attachment A (Memorandum from Wesley Lee, ICE Acting Director, Office of Detention and Removal, Alien Witnesses and Informants Pending Removal (May 18, 2005)); see also Attachment B (Detention and Removal Officer's Field Manual, Subchapters 20.7 and 20.8, for further explanation on the criteria and procedures for stays of removal and deferred action).

Examples:

- **Immediate Relative of Service Person**- If an alien is an immediate relative of a military service member, a favorable exercise of discretion, including not issuing an NTA, should be a prime consideration. Military service includes current or former members of the Armed Forces, including: the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts. OPLA counsel should analyze possible eligibility for citizenship under

Attorneys' Offices will benefit greatly from OPLA SAUSAs, especially given the immigration law expertise that resides in each of your Offices, the immigration law's great complexity, and the extent to which the USAOs are now overburdened by federal immigration litigation.

sections 328 and 329. See Attachment C (Memorandum from Marcy M. Forman, Director, Office of Investigations, Issuance of Notices to Appeal, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004)).

- **Clearly Approvable I-130/I-485**- Where an alien is the potential beneficiary of a clearly approvable I-130/I-485 and there are no serious adverse factors that otherwise justify expulsion, allowing the alien the opportunity to legalize his or her status through a CIS-adjudicated adjustment application can be a cost-efficient option that conserves immigration court time and benefits someone who can be expected to become a lawful permanent resident of the United States. See Attachment D (Memorandum from William J. Howard, OPLA Principal Legal Advisor, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005)).

- **Administrative Voluntary Departure**- We may be consulted in a case where administrative voluntary departure is being considered. Where an alien is eligible for voluntary departure and likely to depart, OPLA attorneys are encouraged to facilitate the grant of administrative voluntary departure or voluntary departure under safeguards. This may include continuing detention if that is the likely end result even should the case go to the Immigration Court.

- **NSEERS Failed to Register**- Where an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien's hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements. See Attachment E (Memorandum from Victor Cerda, OPLA Acting Principal Legal Advisor, Changes to the National Security Entry Exit Registration System (NSEERS)(January 8, 2004)).

- **Sympathetic Humanitarian Factors**- Deferred action should be considered when the situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. DHS has the most prosecutorial discretion at this stage of the process.

2) Prosecutorial Discretion after the Notice to Appear has issued, but before the Notice to Appear has been filed:

We have an additional opportunity to appropriately resolve a case prior to expending court resources when an NTA has been issued but not yet filed with the immigration court. This would be an appropriate action in any of the situations

identified in #1. Other situations may also arise where the reasonable and rational decision is not to prosecute the case.

Example:

- **U or T visas**- Where a "U" or "T" visa application has been submitted, it may be appropriate not to file an NTA until a decision is made on such an application. In the event that the application is denied then proceedings would be appropriate.

3) Prosecutorial Discretion after NTA Issuance and Filing:

The filing of an NTA with the Immigration Court does not foreclose further prosecutorial discretion by OPLA Counsel to settle a matter. There may be ample justification to move the court to terminate the case and to thereafter cancel the NTA as improvidently issued or due to a change in circumstances such that continuation is no longer in the government interest.[2] We have regulatory authority to dismiss proceedings. Dismissal is by regulation without prejudice. See 8 CFR §§ 239.2(c), 1239.2(c). In addition, there are numerous opportunities that OPLA attorneys have to resolve a case in the immigration court. These routinely include not opposing relief, waiving appeal or making agreements that narrow issues, or stipulations to the admissibility of evidence. There are other situations where such action should also be considered for purposes of judicial economy, efficiency of process or to promote justice.

Examples:

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[2] Unfortunately, DHS's regulations, at 8 C.F.R. 239.1, do not include OPLA's attorneys among the 38 categories of persons given authority there to issue NTAs and thus to cancel NTAs. That being said, when an OPLA attorney encounters an NTA that lacks merit or evidence, he or she should apprise the issuing entity of the deficiency and ask that the entity cure the deficiency as a condition of OPLA's going forward with the case. If the NTA has already been filed with the immigration court, the OPLA attorney should attempt to correct it by filing a form I-261, or, if that will not correct the problem, should move to dismiss proceedings without prejudice. We must be sensitive, particularly given our need to prioritize our national security and criminal alien cases, to whether prosecuting a particular case has little law enforcement value to the cost and time required. Although we lack the authority to sua sponte cancel NTAs, we can move to dismiss proceedings for the many reasons outlined in 8 CFR § 239.2(a) and 8 CFR § 1239.2(c). Moreover, since OPLA attorneys do not have independent authority to grant deferred action status, stays of removal, parole, etc., once we have concluded that an alien should not be subjected to removal, we must still engage the client entity to "defer" the action, issue the stay or initiate administrative removal.

- **Relief Otherwise Available**- We should consider moving to dismiss proceedings without prejudice where it appears in the discretion of the OPLA attorney that relief in the form of adjustment of status appears clearly approvable based on an approvable I-130 or I-140 and appropriate for adjudication by CIS. See October 6, 2005 Memorandum from Principal Legal Advisor Bill Howard, supra. Such action may also be appropriate in the special rule cancellation NACARA context. We should also consider remanding a case to permit an alien to pursue naturalization.[3] This allows the alien to pursue the matter with CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

- **Appealing Humanitarian Factors**- Some cases involve sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this, as noted above, include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. OPLA attorneys should consider these matters to determine whether an alternative disposition is possible and appropriate. Proceedings can be reinstituted when the situation changes. Of course, if the situation is expected to be of relatively short duration, the Chief Counsel Office should balance the benefit to the Government to be obtained by terminating the proceedings as opposed to administratively closing proceedings or asking DRO to stay removal after entry of an order.

- **Law Enforcement Assets/CIs**- There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States for a period of time to assist with investigation or to testify at trial. Moving to dismiss a case to permit a grant of deferred action may be an appropriate result in these circumstances. Some offices may prefer to administratively close these cases, which gives the alien the benefit of remaining and law enforcement the option of calendaring proceedings at any time. This may result in more control by law enforcement and enhanced cooperation by the alien. A third option is a stay.

4) **Post-Hearing Actions**:

Post-hearing actions often involve a great deal of discretion. This includes a decision to file an appeal, what issues to appeal, how to respond to an alien's appeal, whether to seek a stay of a decision or whether to join a motion to reopen. OPLA

[3] Once in proceedings, this typically will occur only where the alien has shown prima facie eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 CFR §1239.1(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. Matter of Cruz, 15 I&N Dec. 236 (BIA 1975); see Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA's reliance on Matter of Cruz when petitioner failed to establish prima facie eligibility.).

attorneys are also responsible for replying to motions to reopen and motions to reconsider. The interests of judicial economy and fairness should guide your actions in handling these matters.

Examples:

- **Remanding to an Immigration Judge or Withdrawing Appeals**- Where the appeal brief filed on behalf of the alien respondent is persuasive, it may be appropriate for an OPLA attorney to join in that position to the Board, to agree to remand the case back to the immigration court, or to withdraw a government appeal and allow the decision to become final.

- **Joining in Untimely Motions to Reopen**- Where a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is legally eligible to be granted that relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1003.23, strongly consider exercising prosecutorial discretion and join in this motion to reopen to permit the alien to pursue such relief to the immigration court.

- **Federal Court Remands to the BIA**- Cases filed in the federal courts present challenging situations. In a habeas case, be very careful to assess the reasonableness of the government's detention decision and to consult with our clients at DRO. Where there are potential litigation pitfalls or unusually sympathetic fact circumstances and where the BIA has the authority to fashion a remedy, you may want to consider remanding the case to the BIA. Attachments H and I provide broad guidance on these matters. Bring concerns to the attention of the Office of the United States Attorney or the Office of Immigration Litigation, depending upon which entity has responsibility over the litigation. See generally Attachment F (Memorandum from OPLA Appellate Counsel, U.S. Attorney Remand Recommendations (rev. May 10, 2005)); see also Attachment G (Memorandum from Thomas W. Hussey, Director, Office of Immigration Litigation, U.S. Department of Justice, Remand of Immigration Cases (Dec. 8, 2004)).

- **In absentia orders.** Reviewing courts have been very critical of in absentia orders that, for such things as appearing late for court, deprive aliens of a full hearing and the ability to pursue relief from removal. This is especially true where court is still in session and there does not seem to be any prejudice to either holding or rescheduling the hearing for later that day. These kinds of decisions, while they may be technically correct, undermine respect for the fairness of the removal process and cause courts to find reasons to set them aside. These decisions can create adverse precedent in the federal courts as well as EAJA liability. OPLA counsel should be mindful of this and, if possible, show a measured degree of flexibility, but

only if convinced that the alien or his or her counsel is not abusing the removal court process.

5) **Final Orders- Stays and Motions to Reopen/Reconsider**:

Attorney discretion doesn't cease after a final order. We may be consulted on whether a stay of removal should be granted. See Attachment B (Subchapter 20.7). In addition, circumstances may develop whether the proper and just course of action would be to move to reopen the proceeding for purposes of terminating the NTA.

Examples:

- **Ineffective Assistance**- An OPLA attorney is presented with a situation where an alien was deprived of an opportunity to pursue relief, due to incompetent counsel, where a grant of such relief could reasonably be anticipated. It would be appropriate, assuming compliance with Matter of Lozada, to join in or not oppose motions to reconsider to allow the relief applications to be filed.
- **Witnesses Needed, Recommend a Stay**- State law enforcement authorities need an alien as a witness in a major criminal case. The alien has a final order and will be removed from the United States before trial can take place. OPLA counsel may recommend that a stay of removal be granted and this alien be released on an order of supervision.

* * * * * * * * * *

Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers both in 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.

Official Use Disclaimer:

This memorandum is protected by the Attorney/Client and Attorney Work product privileges and is for Official Use Only. This memorandum is intended solely to provide legal advice to the Office of the Chief Counsels (OCC) and their staffs regarding the appropriate and lawful exercise of prosecutorial discretion, which will lead to the efficient management of resources. It is not intended to, does not, and may not be relied upon to create or confer any right(s) or benefit(s), substantive or procedural, enforceable at law by any individual or other party in

removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse. Finally this internal guidance does not have the force of law, or of a Department of Homeland Security Directive.

ATTACHMENT C

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process from planning investigations to enforcing final orders subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately.

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9 27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

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.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. 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.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution*." This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien if served with an NTA would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict

[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- Immigration status: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- Length of residence in the United States: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- Criminal history: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien's age at the time the crime was committed and whether or not he or she is a repeat offender.
- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- Immigration history: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.

- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.
- Likelihood of achieving enforcement goal by other means: In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.
- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.
- Effect of action on future admissibility: The effect an action such as removal may have on an alien can vary for example, a time-limited as opposed to an indefinite bar to future admissibility and these effects may be considered.
- Current or past cooperation with law enforcement authorities: Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.
- Honorable U.S. military service: Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).
- Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.
- Resources available to the INS: As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly "right" answer. Choosing a course of action in difficult

cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter

will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority such as this memorandum from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.

Tucker, Rachael (OAG)

From:	Tucker, Rachael (OAG)
Sent:	Friday, March 9, 2018 2:55 PM
To:	Shumate, Brett A. (CIV); Hamilton, Gene (OAG); Wetmore, David H. (ODAG); Percival, James (OASG); Bylund, Jeremy (OASG)
Subject:	ACLU files class-action lawsuit on ICE, DHS separating asylum-seeking families | TheHill

http://thehill.com/regulation/court-battles/377635-aclu-files-class-action-lawsuit-over-trump-admin-separating-asylum

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	.	CA No. 17-1907 (JDB)
Plaintiffs,	.	
v.	.	
DONALD TRUMP, et al.,	.	
Defendants.	.	
	.	
THE TRUSTEES OF PRINCETON UNIVERSITY, et al.,	.	CA No. 17-2325 (JDB)
Plaintiffs,	.	
v.	.	
UNITED STATES OF AMERICA, et al.,	.	Washington, D.C.
	.	Wednesday, March 14, 2018
Defendants.	.	10:08 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

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Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we have Civil Action 17-2325, Trustees of Princeton University, et al. versus United States of America, et al. And we also have Civil Action 17-1907, National Association for the Advancement of Colored People et al. versus Donald Trump et al. I would ask that all lead counsel please approach the lectern, identify yourself and those at your respective tables, starting with the plaintiff's side, please. And thank you.

MR. PERRELLI: Good morning, Your Honor. Tom Perrelli from Jenner & Block representing Princeton University, Microsoft Corporation, and Maria Perales Sanchez, one of the plaintiffs here. I'd like to introduce Ms. Perales Sanchez, who's sitting in the courtroom today. Also with me is Lindsay Harrison, Alex Trepp, Kendall Turner and Ben Eidelson from Jenner & Block. And then we have Joe Sellers and Julie Selesnick representing NAACP and the other plaintiffs.

THE COURT: Who will be presenting argument this morning?

MR. PERRELLI: So for the plaintiffs' side, I will be presenting argument primarily on the motion to dismiss set of issues. Ms. Harrison will be presenting argument on the substantive and procedural APA issues raised by our motion for summary judgment, or alternatively, preliminary injunction. And Mr. Sellers will focus on remedial issues, information sharing,

as well as any questions you might have about the standing of his clients.

THE COURT: Thank you, Mr. Perrelli.

MS. DAVIS: Good morning, Your Honor. Kathryn Davis from the Department of Justice on behalf of defendants. With me at counsel table today is Brinton Lucas, Stephen Pezzi, Brad Rosenberg, Brett Shumate, and John Tyler, all of the Department of Justice on behalf of defendants.

THE COURT: Good morning to all of you.

MS. DAVIS: Good morning. And today we will have two speakers, Your Honor. Mr. Lucas will be presenting on the justiciability issues, and I will be discussing the remainder of the issues between the parties' motions.

THE COURT: Now, there are different ways to organize this argument. I thought maybe the right way to do this, the most efficient way to do it, would be to hear first from the government on their motion to dismiss, then hear from plaintiffs to respond both to the motion to dismiss but also speak to their -- I'll just call it motion for partial summary judgment, then let the government reply and respond and then give plaintiffs a final word. Is there any problem with proceeding in that fashion?

MS. DAVIS: No, Your Honor. That's actually something that we discussed before the argument, and that's the exact arrangement that we came to as well.

THE COURT: All right. And that means that I will hear first from Mr. Lucas.

MR. LUCAS: Good morning, Your Honor. May it please the Court, Brinton Lucas for the United States. I would like to start today by discussing the central reason for why plaintiffs' challenge to the Acting Secretary's decision is not reviewable. Specifically, all that the Acting Secretary did here was end a nonenforcement policy, and that is a classic decision committed to agency discretion by law under the APA.

Now, plaintiffs offer several ways of trying to evade this problem, but none of them are persuasive. To start, plaintiffs try to draw a distinction between criminal enforcement policies and civil enforcement policy. So as I understand their position taken in their reply, plaintiffs think the following scenario would be unreviewable: If a chief prosecutor decided to end his predecessor's categorical nonenforcement policy of placing certain drug offenders into drug courts rather than in jail, and then that prosecutor decided to go back to a case-by-case analysis of treating those drug offenders, I think plaintiffs would agree that is not reviewable.

They think, however, that in this context, because it involves a civil enforcement decision, that is reviewable under the APA, but we think there are two problems with that.

First, *Chaney* itself, the Supreme Court's seminal case on this issue, expressly analogized civil enforcement actions to

criminal prosecutorial discretion. In fact, Justice Marshall, concurring in the judgment, objected to the majority's treatment and analogy of these two issues, but he did not prevail.

In addition, Your Honor, we think --

THE COURT: I understand this issue, but isn't the more fundamental issue the general enforcement policy versus the specific enforcement action?

MR. LUCAS: Your Honor, I'd like to respond to that in several points on why we don't think that distinction works either. First, we think that *Chaney* cannot be fairly characterized as a single-shot enforcement action. To start, that decision by the FDA involved a categorical decision not to exercise its jurisdiction over lethal injection drugs, which were just starting to be used at the time.

THE COURT: The D.C. Circuit hasn't seen *Chaney* as covering the field. It's spoken in subsequent cases to general enforcement policies and to the reviewability of general enforcement decisions. Hasn't it?

MR. LUCAS: Yes, Your Honor.

THE COURT: Cases like *Crowley* and *OSG*?

MR. LUCAS: Yes. Cases like *Crowley* and *OSG*. I'd like to address those. We think those cases need to be read in the light of *Chaney*, and that while *Crowley* and *OSG* do have language and reasoning suggesting why some general enforcement policies would not be reviewable, we don't think that applies to

all general enforcement policies. For one thing, just to go back to my criminal hypothetical, we don't think that *Crowley* or *OSG* would necessarily make those decisions reviewable. And I think plaintiffs are not even willing to go that far.

But returning to *Chaney*, we think *Crowley* and *OSG* need to be read in light of *Chaney* and harmonized with that decision. And we think that that case can't be squarely characterized as involving just a single-shot enforcement decision. Because in that --

THE COURT: Are you saying that the D.C. Circuit cases are wrong?

MR. LUCAS: No, Your Honor, not at all. We're just saying they have to be read more narrowly than as plaintiffs advance.

THE COURT: How would you like to read them?

MR. LUCAS: Certainly, Your Honor. We think that *Crowley* and *OSG* address a different issue and a particular problem. And so we think they essentially address the flip side of what the Supreme Court was talking about in *BLE*. And so *BLE* was discussing the context of and the problem just because an agency gives a reviewable answer or a reviewable reason for a nonreviewable policy or nonreviewable decision, that doesn't make that decision reviewable.

Now, so the hypo that the Supreme Court gave, of course, is say a prosecutor says I'm not going to prosecute this person

because I don't think I have a case under the law. Now, what *Crowley* and *OSG* addressed is essentially the flip side of *BLE*. They say an agency, if it has a reviewable interpretation of a statute, can't say oh, this interpretation is simply unreviewable by characterizing it as a nonenforcement policy.

So in *OSG*, what happened there was the agency had an interpretation of a substantive provision of the statute, and then the intervenors involved, they tried to characterize it as a nonenforcement policy. The agency didn't even make that argument. And the Court said no, we're going to look at the actual substantive interpretation of the statute.

But that, Your Honor, is not what we have going on here. Plaintiffs nowhere point to any provision in the INA that would substantively constrain the Secretary's decision to adopt or abandon DACA -- excuse me, to rescind or discontinue DACA. So we think that distinction is critical here, that nothing in *Crowley* or *OSG* or any of the other D.C. Circuit cases address the particular situation at issue here.

THE COURT: The situation we have here is basically a legal interpretation that the agency engaged in relying on the Attorney General? Is that correct?

MR. LUCAS: Your Honor, we of course think there are multiple reasons given for the --

THE COURT: What are the multiple reasons?

MR. LUCAS: Well, there are two reasons that we set

forth. One was the litigation risk, and the other is the interpretation of the INA.

THE COURT: But even the little litigation risk is dependent upon that legal interpretation, isn't it?

MR. LUCAS: Certainly, Your Honor. That -- it's of course cabined to that, an agency's -- you know, all sorts of litigation risk calculations.

THE COURT: So is it your position that if you have a situation where the agency is basically engaged in a legal interpretation in the context of a general enforcement decision it's made, that that's unreviewable by the courts?

MR. LUCAS: I would not state that so broadly, Your Honor.

THE COURT: Why is that not the situation we have here?

MR. LUCAS: Sure. Just to be clear, in this context -- so let me give you some examples that might help distinguish between these two cases.

THE COURT: Which two cases are you distinguishing between?

MR. LUCAS: Well, our case and the sort of hypothetical you've given with the *Crowley* cases. So in the context, let's say that if an agency interprets a substantive statute in a way that could be challenged by -- so sort of in the *OSG* situation where they're stating okay, we conclude that

this statute covers certain conduct and doesn't cover other conduct, and somebody has standing to challenge that, the agency can't say oh, well, I'm -- you know, this is an enforcement discretion, it's not reviewable. Here, by contrast --

THE COURT: So if the agency says there's no statutory authority, isn't that the same thing?

MR. LUCAS: Well, no, Your Honor, and here's why. Because plaintiffs have not pointed to any particular provision in the INA that cabins the Acting Secretary's discretion. The Secretary's discretion in her interpretation of the INA and to the extent she made legal conclusions, all of that is a matter of nonreviewable prosecutorial discretion. So she's looking at her own authority under the Act.

So this is the kind of situation where we're in *BLE* where a prosecutor is dealing with a nonreviewable decision, and he gives a legal reason for his nonreviewable decision, and that doesn't make that reviewable. And so that I think is the precise issue here. Just to be clear, Your Honor, nowhere do plaintiffs suggest that there's any provision in the INA that precludes the Secretary from discontinuing DACA. Their argument is that she needs to give more reasoning in her decision to do so.

THE COURT: That's what the APA is all about in many contexts, isn't it?

MR. LUCAS: Correct, Your Honor, but in this context

we think that this is an unreviewable decision. So if Your Honor does conclude that this is not a reviewable decision, then of course the fact that she -- that this is a reviewable decision, then of course the fact that she gave legal answers is relevant.

But in this context we think this is an unreviewable decision and thus it's analogous to the same situation where you have a prosecutor that says I don't think I can prosecute this particular conduct because I don't think it's covered by the statute. Nobody would think that, even though that analysis is purely legal and purely reviewable, that that sort of conduct could be reviewed -- or that decision could be reviewed.

THE COURT: But the example you just gave is not a general enforcement decision; it's a decision with respect to a particular enforcement.

MR. LUCAS: Your Honor, we think that same analogy would apply if it was in the case of a general prosecutorial policy. So let me sort of go back to my original hypothetical, and let's say we have the chief prosecutor who says I don't want any of these drug offenders put into jail. I want them to go to drug courts for this particular crime. I think they're low level offenders. And let's say he gives a general reason for doing so. Let's say he's concerned that doing this will violate the Equal Protection Clause. Or let's just say he doesn't give a reason for doing that. And his successor comes in and says

well, I'm concerned that by only going after certain -- or giving only certain drug offenders this treatment, I might be violating the Equal Protection Clause because I'm not treating similar defendants similarly.

Now, people may disagree about the Equal Protection Clause analysis, and it might be completely wrong as a matter of law, but that wouldn't necessarily mean his policy, his decision to discontinue that prosecutorial enforcement policy, is necessarily reviewable. We don't think at that point that the previous --

THE COURT: I'm having a little trouble where your limiting propositions are with respect to this kind of situation. Are you saying that any enforcement determination made by an agency, general or specific, is unreviewable under *Chaney*?

MR. LUCAS: No, Your Honor. *Chaney* is very clear, and so is this Court's and the D.C. Circuit's case law that if there are substantive constraints on the agency's enforcement discretion, obviously those can be reviewable. So in this context, let's say the INA had a provision --

THE COURT: If there are substantive constraints. What do you mean by substantive constraints?

MR. LUCAS: Let's say provisions in the statute that actually constrain the prosecutor's or agency's enforcement discretion. So if there were a provision in the INA stating you

must maintain deferred action programs once you adopt them, or you must maintain certain deferred action programs, then you might have a case where this would be reviewable.

But here, there's no provision in the INA -- and plaintiffs don't contend there is one -- that would say the Acting Secretary, having adopted a particular policy of deferred action, must continue that action indefinitely. So there's nothing in the INA that actually constrains her discretion. So in the context where the statute does impose constraints on an agency's discretion --

THE COURT: You're trying to turn this into a solely discretionary determination by the acting head of the agency. But in fact, it was primarily a legal assessment based on the Texas case and the Attorney General's one-page memorandum, not a discretionary decision. Perhaps discretionary as you move into your second rationale, the litigation risk, but certainly not discretionary in terms of that assessment of the law.

MR. LUCAS: Your Honor, but I think this is the sort of precise problem that the Court was dealing with in *BLE*.

THE COURT: You keep referring to *BLE*. You want to rely on *BLE*. *BLE* isn't really a case that speaks to the reviewability of enforcement decisions, is it?

MR. LUCAS: No, Your Honor. But it does draw an express analogy between the issue in that case, which was a refusal to reconsider an agency determination, and a

prosecutor's decision. So the critical point in *BLE* for our purposes is the hypothetical that the Court gives to explain its reasoning, which is that --

THE COURT: That's what you want me to rely on, the hypothetical in *BLE*, which is a case that doesn't deal with this situation?

MR. LUCAS: Well, Your Honor, I would also point you to *Crowley* itself, which takes the *BLE* point and explains why this is a controlling rule of law for the APA context.

THE COURT: But *Crowley* and *OSG* -- returning to that for a moment -- do together reflect a view in the D.C. Circuit that these general enforcement determinations, and particularly here, let's say, where it's based primarily, perhaps exclusively on this legal interpretation, that those are reviewable.

MR. LUCAS: Your Honor, I think in *Crowley* it makes it pretty clear that in the context, and it discusses *BLE* and says that if a prosecutor gives a purely legal analysis for a decision -- and that was the case in *BLE*. I mean, it wasn't a prosecutor's decision but it was an agency's decision that was otherwise unreviewable. And the agency's reason for why it denied review or denied reconsideration in that context was a purely legal situation. And of course it was reviewable, at least in the sense that courts were well equipped to consider that.

In fact, Justice Stevens in his concurrence in the

judgment, rejected the majority's jurisdictional analysis and went on to consider it on the merits and reviewed and applied the law in that particular context. But his view did not prevail.

And I think what *Crowley* does is it says yes, we're going to take this as a rule of law in addressing APA claims, including enforcement claims, and then it addresses the situation of general enforcement policies that happen to involve a substantive interpretation of a statute that actually would have an effect on a party where a party would otherwise have to challenge the -- excuse me -- standing to challenge that and could do so even if the agency tried to characterize that as a nonenforcement decision.

So we think, Your Honor, it's especially important to read *Crowley* and *OSG* and similar cases like that --

THE COURT: I'll do so.

MR. LUCAS: No, no. To read them not so broadly as plaintiff suggests, especially since we think that *Chaney* itself is hard to characterize as sort of a single-shot enforcement decision. I would even point you to the D.C. Circuit's analysis in *Chaney* that got reversed. And they pointed out in specific language that FDA refused to take action "to a general entire category of prohibited activity," and that courts are especially willing to review this analysis. And Justice Marshall in his concurrence in the judgment in *Chaney* also pointed out that this

policy of not going after lethal injection drugs affected around 200 inmates on death row at that point. So it was not sort of a single-shot individual nonprosecutorial discretion decision; it was in fact based on the FDA's view that it lacked jurisdiction.

THE COURT: And there were actually two rationales from the agency in *Chaney*, a legal one and a discretionary one. Right?

MR. LUCAS: Yes, Your Honor.

THE COURT: So does it matter whether, as happened in *Chaney*, the agency says that it would take the same action for discretionary reasons?

MR. LUCAS: No, Your Honor. I would point you to *Crowley's* --

THE COURT: That didn't happen here; right?

MR. LUCAS: Your Honor, I think the agency -- we would say that what the Acting Secretary did here was she gave multiple reasons for her analysis, and that even if she -- even setting aside her legal analysis, the litigation risk alone and the consideration of her enforcement policies --

THE COURT: Except to the extent it is totally dependent upon a legal analysis.

MR. LUCAS: Even accepting --

THE COURT: There's no policy reason given by the Acting Secretary here. This isn't a situation where as a matter of discretion there's a policy reason that has been applied for

enforcing or not enforcing or rescinding or not rescinding. There's no policy reason. It's just these two reasons of the legal interpretation coming from the Texas case and The attorney general's letter, and then the litigation risk caused primarily as a result of that legal assessment.

MR. LUCAS: Your Honor, I would -- I don't think we would necessarily agree to that. The Acting Secretary does invoke her authority to establish immigration policies. But even setting that aside, even assuming that those are the only two reasons --

THE COURT: She doesn't give any policy reason for it, does she, other than the two things we've just been discussing?

MR. LUCAS: We think you could fairly read a policy and concern that these sort of decisions should be left up to Congress within -- it's similar along the lines of legal analysis. But even setting that aside, Your Honor, even accepting your premise that this was a purely legal decision, we still think it would be covered by 701(a)(2). And part of that is *Crowley* itself addresses and says look, in *Chaney* the Supreme Court was faced with a situation where the agency gave two reasons, one was a jurisdictional legal one, one was prosecutorial discretion.

THE COURT: What's the best case you have that actually has decided that a legal interpretation in the context of a general enforcement policy is not reviewable?

MR. LUCAS: I would point you to *BLE*, Your Honor, both the hypothetical --

THE COURT: It didn't actually decide that; right? It wasn't dealing with that question. You point me to the hypothetical in *BLE*.

MR. LUCAS: I would also point you to the actual holding in *BLE*, which involved an agency refusal to reopen a proceeding, and the Court analogized that, said it was equally unreviewable as prosecutorial discretion decisions. We don't see any basis at least, Your Honor, in *BLE* to distinguish between a prosecutorial discretion decision and another otherwise unreviewable agency discretion determination.

And I think again, I would return you to *Crowley*, which said, look, in *Chaney*, they had these two rationales given; right? One was the jurisdictional one, one was a purely discretionary one. And they left the question open in *Chaney* whether you could -- what would happen if the agency only gave a purely legal analysis.

And then *Crowley* went on and said well, the Supreme Court answered that question in *BLE* precisely, and said that if an agency gives only a legal analysis and it's an unreviewable action, it's still unreviewable. An otherwise unreviewable action doesn't become reviewable just because a prosecutor or an agency or anyone else gives a reviewable reason in the sense that courts are eminently qualified to review it for that

particular action.

So that's why we think that if you read *BLE*, *Chaney*, and *Crowley*, they all point in favor of foreclosing review of the APA claims here.

THE COURT: You've been unsuccessful in three other courts with this argument. Right?

MR. LUCAS: Yes, Your Honor. But I'd also like to address plaintiff's sort of subsidiary point that, setting aside *Crowley*, they also argue that even if *Crowley*'s, what they characterize as rule, does not apply, this policy should be reviewable because it affects collateral benefits. And we don't think this distinction really works either.

I would point you again to the Supreme Court's decision in *Lincoln v. Vigil* where there were clearly reliance on benefits provided to disabled children over a course of seven years, and they were taken away. And the Supreme Court, the fact that that happened, that they clearly could have relied on those benefits did not affect the reviewability analysis. And I mean -- so I think in those contexts that the fact that benefits are either triggered or lost by a particular prosecutorial discretion policy shouldn't make a difference for purposes of 701(a)(2).

THE COURT: All right.

MR. LUCAS: Unless this Court has any further questions?

THE COURT: Let's move on.

MR. LUCAS: Thank you.

THE COURT: Thank you, Mr. Lucas. Mr. Perrelli?

MR. PERRELLI: May it please the Court. Thank you, Your Honor. I would like to start with *Crowley*, but first, as the Court is aware, there's a strong presumption in favor of reviewability here, and so whatever the scope of the "committed to agency discretion" by law exception is, we know it is very narrow and only applicable in rare instances. And we think that's why several courts already have rejected the arguments that the government is putting forth here.

I start with the idea that I think I read a very different *Crowley* case than the government has put forth here. In *Crowley*, the government looked at *Chaney* and treated *Chaney* as a single-shot case. Sorry, D.C. Circuit looked at *Chaney* and treated *Chaney* as a single-shot case. It looked at the exact language that the government quotes about not having a reviewable reason turns something that was otherwise unreviewable into a reviewable decision; looked at that precise language from *BLE*, and following that, drew this line between single-shot enforcement decisions and general broad enforcement policies.

So we think that viewing the recision of DACA and DACA itself as an exercise of enforcement discretion that *Chaney* and *OSG* and that line of cases control, and that's particularly true, as the Court's questions indicated, because the rationale

that the government has indicated here for its recision decision is a purely legal rationale. Whether one looks at it as a we are 100 percent sure that DACA is unlawful or maybe we're 80 percent sure, and you call that litigation risk, either way that is a legal judgment and we think that the United States --

THE COURT: So is your position that all general enforcement determinations are reviewable?

MR. PERRELLI: I think our position is that when you have a general enforcement policy, the presumption of reviewability, the strong presumption in favor of reviewability applies.

THE COURT: And what case leads you to that conclusion?

MR. PERRELLI: I think the strong presumption in favor of reviewability comes out of *Chaney*, and the presumption structure comes out of *Chaney* itself and *Citizens of Overton Park* before that. If you have such a general enforcement policy, the government can still come forward and say there is no law to apply here, that there is no -- judicial review is somehow impossible. But obviously they've ceded that ground in this case. They can't do that. Because the Attorney General has purported to make a legal assessment here. And I know we'll get into --

THE COURT: Do you dispute -- I know that you're relying on how *Chaney* was characterized by the D.C. Circuit, but

do you dispute the fact that it did involve a general enforcement policy?

MR. PERRELLI: I do dispute that. I don't think that's the way the D.C. Circuit read it and I don't think cases in the D.C. Circuit --

THE COURT: I asked for your view, not the D.C. Circuit's.

MR. PERRELLI: My view, I don't think that's the best way to read *Chaney*. And again, I don't think that's the D.C. Circuit's view either, nor do I think has it been the view of district courts in this circuit applying that view.

So I think there is a distinction. And the reasons are because of the policy rationales, among other things that are discussed in *Chaney*, really aren't applicable. *Chaney* talks about, well, a specific nonenforcement decision is not coercive. Here I think, we think the decision made here obviously is coercive. The recision of DACA has life-altering and drastic effects for the recipients involved. So we think that is quite different here.

We also think that again -- and this was what the D.C. Circuit talked about in *Crowley* -- that in the context of an individual enforcement decision, there may be interpretations of law or considerations bound up in a host of other things, allocation of resources that might be considered in an individual decision. In the context of a broad enforcement

policy you have a focused, clear action that a court can review.

So we think that's the best interpretation of *Chaney*. We think that's the controlling interpretation of *Chaney* in this Court. And we think that sort of dispenses with the government's arguments on their own terms.

THE COURT: Well, the government seems to put a great deal of reliance on *BLE*. Why is that not a fair point?

MR. PERRELLI: I think in *BLE*, as the Court indicated, obviously not a case about enforcement, and the hypo that they provide is again about an individual enforcement decision. But I go back to *Crowley*.

Crowley looked at exactly this question in drawing this distinction between single-shot enforcement and a broad enforcement policy. And so the D.C. Circuit had the benefit of all that, looked at the precise language that the government quotes, and that's how they read *BLE* and that's how we read *BLE*.

THE COURT: So do I need to go so far as to decide that general enforcement policies are reviewable, or is there a narrower ground that you succeed on?

MR. PERRELLI: I certainly think there are several grounds I think on which we can succeed. I think that ruling which I think comes out of *Crowley* I think is the correct ruling. And I will draw the distinction between civil and criminal in a minute, Your Honor, because I do think there are distinctions to be had there.

Obviously, to the extent that there's a narrower holding which is that, look, to the extent that this is a general enforcement policy premised on a legal judgment, that unquestionably should be reviewable as *Edison Electric*, *National Wildlife Federation* and a set of cases similar to *Crowley.*

And here we would say -- and again, we'll get into this when we get into the substantive APA claims -- that, Your Honor, discretion has to be exercised by one who knows that they have it. And if the Attorney General is incorrect -- you know, we heard a lot about the broad discretion that the United States has in the immigration context, and we've heard that in this case and other cases.

It appears to be the one thing that they say they don't have discretion to do, is this practical program that addresses the plight of individuals who they concede are their lowest enforcement priorities. So we think on that ground as well.

Lastly, Your Honor, on the reviewability question, I think we also think that -- and this is something that the government cites repeatedly in their brief, although always putting it on the Fifth Circuit, DACA is more than an enforcement program. And it's not just more than an enforcement program because it is a gateway to benefits which are life-altering and which we think is incredibly important here, but it's also quite different from the Sessions memorandum or other memoranda of that sort.

Under the DACA program, you had to come in, you had to pay

money, you had to provide the government with all kinds of information about yourself and your family. You had to provide them fingerprints. If the DEA had a civil enforcement memo that said, okay, if you want these otherwise unlawful controlled substances, come in, pay us some money, we'll come and inspect your facility and take a look at that, and then we won't enforce against you, that looks quite a bit different from a traditional prosecutorial discretion --

THE COURT: Why does that make it reviewable?

MR. PERRELLI: Because I think that the nature of that interaction is different from simply saying to prosecutors, here are the five factors you have to consider, or saying to -- or saying as a general matter, here are a few factors for you to consider in exercising your discretion.

Of course then, DACA is also the gateway to -- and again, this is something that the Fifth Circuit very much focused on, more than an enforcement program. It is the gateway opening eligibility for Social Security numbers, for work authorization, for a host of other things that are critically important benefits for DACA recipients.

So we think this doesn't look at all like *Heckler*. We think, like I said, even if one viewed it in that way, *Crowley* would dispose of the government's arguments, but we think there are these other steps that again take this out of that paradigm and we think are quite different.

Counsel for government talked a little bit about criminal versus civil. We do think there is a distinction. The executive's power, particularly under Article II, is at its zenith in the context of criminal prosecution. Congress cannot tell the executive who they have to prosecute. And I think that's D.C. Circuit in *Aiken County*, and I think there's a long history of cases before that. But it is unexceptional in the regulatory context, and including in immigration, for Congress to set forth either enforcement priorities or to define --

THE COURT: What case would you rely on that draws that distinction between civil and criminal in the reviewability context?

MR. PERRELLI: I don't think there is a case that I'm aware of where the court has said gee, do we apply *Crowley* to criminal or not. I do think that when I look at *Heckler*, they looked at it, and the D.C. Circuit cases have followed, they treat the criminal prosecution context as an analogy, not as directly identical or similar. But again, I think all of the cases that talk about enforcement discretion are cases where there's a question about well what discretion did Congress give to regulatory authority in terms of setting enforcement policy. So all of those cases have that --

THE COURT: You used the term at its zenith earlier. Why in the immigration setting isn't that discretion over enforcement at its zenith for the executive branch?

MR. PERRELLI: Certainly it hasn't been treated that way in the courts. Even in highly discretionary decisions related to discretionary benefits, the Congress defines those with great specificity and great clarity in many cases, or gives the government broad discretion which it says it doesn't have in this context.

I would point the Court to the Supreme Court decision in *Judulang*, which was a 9-0 decision and a case about whether or not -- or the policy to be applied to give highly discretionary benefits, relief from deportation for resident aliens. And there the Supreme Court said look, that's reviewable under the APA. You know, even though this is highly discretionary, even though nobody has a right to this particular relief, the policy is so -- sufficiently irrational and sufficiently poorly explained that it fails.

And nine justices of the Supreme Court said, you know, we cannot -- you know, it's inconsistent with the INA, and it appears to be -- to leave these people with no more than a coin flip by individual immigration officials in the field.

So we think that I think is consistent with I think the larger body of law that treats those kind of enforcement decisions, whether they're discretionary or not, as reviewable and have to be consistent with the APA.

Your Honor, if you have no other questions, we're happy to rest on the other issues that the government did not raise.

THE COURT: All right.

MR. PERRELLI: Thank you.

THE COURT: Good morning.

MS. HARRISON: Good morning, Your Honor. Lindsay Harrison on behalf of plaintiffs. The recision of DACA violates the APA in at least three ways, each of which provides an independent ground for vacating the rule: First, recision is a substantive rule that was advanced without notice and comment. Second, the government's explanation for recision wholly fails the heightened explanatory burden to rescind an existing rule. And third, what explanation the government has provided is arbitrary and capricious.

The latter two claims received most of the focus in the Eastern District of New York and Northern District of California, so I would actually like to start today with our procedural APA claim, which is independent of the government's justiciability arguments.

Our procedural APA claim boils down to two basic questions. First, is the recision of DACA a substantive rule; and second, is this claim at all affected if DACA itself was a substantive rule. The answer to the first question is yes. The answer to the second is no. And that is enough to send this back to the agency to follow the APA's procedural mandates.

THE COURT: Basically, notice and comment.

MS. HARRISON: Exactly, Your Honor. First, the

recision of DACA is a substantive rule --

THE COURT: You've been unsuccessful with that argument. Just to turn the tables a little bit, you've been unsuccessful with that argument --

MS. HARRISON: Absolutely, that's true. That's not the basis for --

THE COURT: I mean for you, your side of the --

MS. HARRISON: Yes. The plaintiffs in Judge Alsup and in Judge Garaufis's courts were not successful in this claim but I think this claim should be the basis on which Your Honor rules, and I think clearly the recision of DACA is a substantive rule and I think perhaps it's because the D.C. Circuit precedent is so much clearer than the Ninth Circuit or Second Circuit precedent --

THE COURT: So isn't there a little bit of a troubling point that DACA itself was issued and implemented without notice and comment?

MS. HARRISON: That is true, but I don't think that affects our claim.

THE COURT: So if there's something that was issued without notice and comment, the agency has to go through notice and comment to rescind it?

MS. HARRISON: That's correct, Your Honor, and that's what --

THE COURT: What case stands for that proposition?

MS. HARRISON: So *Consumer Energy Council* is one case that stands for that proposition. In footnote 79 of that opinion, the D.C. Circuit -- well, just some background. So that was a case in which FERC issued a rule related to pricing of natural gas. And the Act had afforded either house of Congress essentially a one-house veto.

THE COURT: I'll have to look at this closely, but just the fact that you're relying on footnote 79 in a FERC opinion for this authority --

MS. HARRISON: A little bit --

THE COURT: -- leaves me a little doubtful.

MS. HARRISON: I know. No, no, but -- so there's more than just *Consumer Energy Council*. That footnote has actually been cited in a number of other D.C. Circuit cases. What the Court said in that footnote is that if you allow an exception to notice and comment for a rule that's been defectively promulgated -- so for example because there was no notice and comment to begin with -- it would permit an agency to circumvent the requirements of Section 553 merely by confessing that the regulations were defective in some respect, and asserting that modification or repeal without notice and comment was necessary to fix that defect.

And what the D.C. Circuit said is: "Such a holding would ignore the fact that the question whether the regulations are indeed defective is one worthy of notice and comment to begin

with." So that's *Consumer Energy Council*.

And then *American Wild Horse Preservation Campaign* is another case that stands for the same proposition, where the Forest Service tried to justify a change in the maps governing wild horse territory based on the agency's failure to follow the APA when the map was changed previously. And the D.C. Circuit said no, that a failure to follow the APA would not render the change to the territory void from inception.

And that's what the government is essentially arguing, is that if there was no notice and comment when DACA was implemented, and that it was a substantive rule to begin with, that would render it void *ab initio*. They don't cite a case for that proposition, and it's just not correct.

And this *American Wild Horse Preservation Campaign* says so. What the D.C. Circuit said is, whatever the Forest Service's past transgressions in putting the map into place, we, quote "cannot condone the correction of one error by the commitment of another."

And Your Honor even cited these cases, or this proposition, in the *Douglas Timber* case, in which the Secretary of Interior, without notice and comment, withdrew a record of decision that was adopting plan revisions for certain BLM districts. When the timber companies sued, the agency said it withdrew it because the original ROD had been approved in error. And what Your Honor said is that the possibility that a rule might be unlawful

is not in the same ballpark as a clear Supreme Court decision saying that or legislation saying that and that it wasn't enough. Essentially, two wrongs don't make a right.

THE COURT: Let me move you to another of your three arguments. In the Supreme Court cases, *Encino Motors*, *State Farm*, etc., those cases for the most part deal with the requirement that an agency provide an adequate explanation for a change in policy. Are there cases you can point me to that require an adequate explanation in the same context for a change in the agency's view of the law?

MS. HARRISON: Yes, Your Honor. The *International Union* case, which is the United Mine Workers International Union case cited in our reply brief, is that case. So in that case, the agency withdrew a proposed air quality rule because of intervening Eleventh Circuit precedent that said basically that you have to do phased rulemaking. So the agency thought that that Eleventh Circuit intervening precedent applied and would render invalid the proposed rule that they had advanced, so they withdrew it, and said it's based on this Eleventh Circuit precedent. And the D.C. Circuit said that's not an adequate explanation. You can't just cite this Eleventh Circuit case and withdraw the rule. You need to say why --

So the Eleventh Circuit precedent, there was no explanation about why the Eleventh Circuit precedent applied to this proposed rule and invalidated it. And the D.C. Circuit said you

need to give an explanation. You can't just say there's this other case and we've reached this conclusion. You've got to show not just where you got the path and how you got there. And that's this case.

So here the agency says there's this DAPA litigation, and based on the DAPA litigation, we recommend the recision of DACA. But there's a whole host of things that aren't explained in the decision.

So, among them, number one, there's no articulation of the legal theory on which DACA is illegal. And we're left to guess, is it because there was no notice and comment? Is it because there was something substantively unlawful about DACA? And if so, what was that? Because the government argues that deferred action is lawful when it's applied to individuals, when it's applied to groups. There's no line being drawn that tells anyone evaluating the agency's policy why it was illegal.

Second, there's a failure to explain why the government was so certain that DACA would be enjoined. It's completely unclear why they think a preliminary injunction would have been issued against a policy that had been in place for more than five years and that was relied upon by more than 800,000 people, their employers, their families, educational institutions, and everyone else in the country.

Third --

THE COURT: This is leading into the litigation risk

articulation.

MS. HARRISON: That's correct, Your Honor. And we think there's not an adequate explanation of either the legal basis or the litigation risk theory. And related to that --

THE COURT: Do you still contend that they can't be raising the litigation risk argument here?

MS. HARRISON: I think our contention is not that an agency can't defend a policy based on litigation risk, but rather that there was not a sufficiently articulated litigation risk basis to rescind this policy.

THE COURT: Well, "sufficiently articulated," do you mean not an adequate explanation or do you mean not raised and therefore waived?

MS. HARRISON: Well, we do argue that it was not -- essentially not adequately raised to be affirmed on that basis under *Chenery*. That if the agency didn't provide an adequate explanation and that has to be provided post hoc by the attorneys in defending the recision, that that is itself a post hoc rationalization, and under *Chenery* can't be the basis on which it's affirmed. We also argue that it's not adequately articulated under *Encino Motorcars* and the related precedent.

THE COURT: All right.

MS. HARRISON: So the next reason why the explanation is inadequate is there's a total failure to weigh the facts and circumstances that were engendered by DACA. This is the

language from *Encino Motorcars* and from the *Fox* case. That you can't just ignore the reality that you're rescinding a policy that's been in place, that's been relied upon by hundreds of thousands, millions even of individuals, without discussing those interests.

And so if it is a litigation risk assessment that was the basis, that -- litigation risk has to be balanced against something, and the agency didn't balance it against anything. There's no consideration of that. In fact, the agency tells the story that they were concerned there would be an immediate injunction nationwide. But if you look at the actual Sessions letter and at the Acting Attorney General's recision memo, the concern about that is for the agency. The language is that it would be disruptive for the agency. There's no concern given to how that might affect individuals.

Next, there's a failure to consider any reasonable alternatives to recision. So among those might include ways to mitigate whatever legal flaws the Attorney General believed existed. So if it was a failure to go through notice and comment, reasonable alternative might be to promulgate DACA as a proposed rule and have notice and comment.

Likewise, if the legal flaw was a failure to allow for adequate consideration of individual applications, there are lots of ways it could have been modified to do that. One is that you could have had applications reviewed at service

locations -- at service offices, field offices rather than the service center, and that was one of the reasons discussed with respect to DAPA why --

THE COURT: So you don't think it would have been enough if, instead of the recision memo that was issued, a recision memo contained two or three additional paragraphs that said: And we agree with the Attorney General's assessment and believe that the OLC memo was wrong for the following reasons, and then had explained those reasons in two paragraphs. That wouldn't have been good enough here?

MS. HARRISON: First of all, it still would not have gone through notice and comment and so there would be the procedural --

THE COURT: Setting aside the notice and comment.

MS. HARRISON: Right. But yes, that's -- so if it was a legal judgment and there was more rationale given, the Court would review that judgment *de novo* under *Prill* and that line of cases, *Teva Pharmaceuticals*, and we think it would be reversible on substantive APA grounds.

THE COURT: But that's not on the failure of a reasonable explanation ground.

MS. HARRISON: That's right, although --

THE COURT: It's an assessment of the law.

MS. HARRISON: Right. Although still, under *State Farm*, the agency would be required to analyze all important

aspects of the problem and evaluate whether there were any reasonable alternatives to recision. And so even if there was an explanation of why DACA as applied had been considered unlawful and concluded to be unlawful, if there were alternatives to recision available that might have mitigated that unlawfulness -- and this of course, it's hard to say because we don't know the reason that the agency found it was unlawful -- but for almost every theory about why it might have been unlawful, there's a reasonable alternative to recision.

So even a more fully articulated legal theory of why DACA might be illegal wouldn't be sustainable under the APA without a consideration of whether there was some lesser alternative to recision that might have accounted for all of the various reliance interests of individuals who had taken advantage of the program over the five-plus years it had been in place.

And then the last thing that is completely unexplained in the recision memo is why the government chose to wind the program down in the manner that it did. We're not saying that deadlines are never arbitrary, but there was no explanation given as to why six months, as to why they would accept applications for people whose status expired then but not now, why there wasn't consideration given to perhaps letting students finish their degrees when they had enrolled in school in reliance on the existence of this program. Allowing employees to finish working on important projects or -- you know, there

were all sorts of ways that it could have been theoretically wound down, and there was no explanation as to why this one was the manner chosen. So we think under *Encino Motorcars* and under *State Farm*, the government has failed in its explanatory burden.

Now, as for the government's contention today that --

THE COURT: What's the standard of review that I'm applying to the rationales that have been articulated here, the illegality rationale and the litigation risk rationale?

MS. HARRISON: So the illegality rationale is reviewed *de novo* under *Prill*, and we think that the litigation risk rationale is also reviewed *de novo* today because there is nothing about this litigation risk assessment apart from the legal judgment that DACA was unlawful.

THE COURT: Doesn't that sort of put me in the business of telling agencies what they should or shouldn't litigate?

MS. HARRISON: No, Your Honor. I think it might be a different answer if the agency had provided something other than just a legal judgment as the basis for the litigation risk assessment, but the two really have merged because the only thing that makes up the litigation risk assessment here is the legal judgment. And if an agency could just say essentially, instead of saying we think this is illegal, say we think there's a risk -- a very high risk, nearly 100 percent that we're going to lose a challenge because it's illegal, it would render --

THE COURT: Because one case has led us to that conclusion?

MS. HARRISON: That's right. But what that would do -- I mean, that's *International Union*. But what that would do is it would render *Prill* a dead letter, and *Prill* says that courts should evaluate *de novo* and should ask themselves whether the legal assessments of the agency are correct or incorrect. So if the agency could just transform every incorrect legal judgment into a litigation risk assessment, *Prill* would be a dead letter, and we think that's not what the D.C. Circuit would want and not what the D.C. Circuit has intended.

If I could turn back actually to my procedural APA claim, I just want to discuss the reasons why we think the recision of DACA is substantive. And I want to point the Court to the *Pickus* case by the D.C. Circuit because I think that's extraordinarily analogous.

In that case, the Bureau of Prisons published guidelines specifying the factors to be considered when paroling federal employees [sic]. So the agency argued there, again, this is discretionary, these are parole guidelines, and argued that they didn't have to be implemented with notice and comment. And the D.C. Circuit disagreed and said although they were guidelines, they were calculated to have a substantial effect on parole decisions, they narrowed the agency's field of vision, and although there was a theoretical ability to depart from the

guidelines in any individual case, they controlled and limited how the agency would exercise its discretion.

And so what the D.C. Circuit asked in *Pickus* was if the regulation is likely to produce a different outcome than some other guidelines would, that that is substantive and it has to go through notice and comment.

And that's what the recision of DACA does. It speaks in mandatory language. You will not grant deferred action applications to DACA beneficiaries when they seek to renew, you will not grant any new ones --

THE COURT: So if the agency promulgates something that says here are our enforcement policies, our first priority is such-and-such, our second priority is such-and-such, a lower priority is this other thing, that has to be done through notice and comment?

MS. HARRISON: Well, I think what the D.C. Circuit would say is first you look at the language of the guidelines and the priorities, and if it speaks in mandatory language, using words like "will," that suggests the rigor of a rule and not the pliancy of a policy. And therefore, yes, it does have to go through notice and comment, but you also look at is it outcome determinative. And that's what the Court asked in *Pickus*. And I think in this case undoubtedly it's outcome determinative because there is no alternative way in which these 800,000 people are going to be able to get deferred action.

Now, the government says well, we have this residual authority to grant deferred action in individual cases, but first, the government admits in its brief that that sort of deferred action is offered on a, quote, "more limited basis." And so at a minimum, the government has conceded that it's more limited, and that means that the outcomes will be different in this kind of ad hoc residual deferred action as opposed to the program that's been eliminated, which guided discretion and which ensured that individuals who met the criteria would at least be entitled to a presumption that they were to receive deferred action unless there was some sort of special circumstances present.

And if you just contrast the world before DACA existed with the world of DACA, you know, what deferred action was used for before outside of a program for people from a specific country or people seeking U visas or V visas was basically medical emergencies only. This was not something available to 800,000 people, it was not something sought by 800,000 people, and it would not have been granted.

And also, even if the agency retains some sort of residual authority to grant deferred action, that ignores the extremely significant programmatic elements of the DACA program, including the prohibition on sharing information by individuals who gave their information to the government in exchange for the opportunity --

THE COURT: Mr. Sellers is going to address that; right?

MS. HARRISON: That's correct, Your Honor.

THE COURT: I think I've heard enough on the notice and comment.

MS. HARRISON: Okay. So let me then turn to the substantive unreasonableness of the agency's decision. So I'll take litigation risk first. Litigation risk, assuming it was the agency's rationale, was not articulated in a way that could be sustained by the Court. So there's at least six important aspects of litigation risk that weren't taken into account. I'll just tick through them and then I can address any that Your Honor would like to hear more argument on.

One, there was no consideration given to the idea that DACA had been in place for more than five years. Two, there was no consideration or discussion of the substantive differences between DAPA and DACA. Three, there was no explanation for why the agency assumed that a ninth vote in the Supreme Court would be against DACA. The 4-4 decision rendered in *U.S. v. Texas* was nonprecedential, so you would expect at least some explanation for why this case would turn out differently.

Four, there was no balancing at all of the risk of an injunction against the consequences of recision. And if this isn't a legal judgment and instead it is a risk assessment, you have to balance the risk of one against the consequences. Five,

there was no consideration given to the litigation risk associated with recision. And as Your Honor's recognized, we're not the only case being litigated on this issue. So it didn't exactly eliminate the litigation, nor litigation risk. And sixth, as I've stated earlier, there was no consideration given to alternatives that might have mitigated that litigation risk. So each of those should have been in part -- in the agency's decision. None of them were. And that renders --

THE COURT: Are those all part of the legal assessment that lies at the core of the litigation risk, or are they something beyond?

MS. HARRISON: So I think they are relevant to both the legal assessment and also to the litigation risk. I would say maybe if one of them is not relevant to the legal judgment, it would be the consequences of recision, because if there's a conclusion that it's unlawful, then maybe you don't need to go through what the consequences would be because you're sort of assuming how the case would turn out.

But if the agency's assessment is what they say it was, which is we're balancing, you know, we're sort of assessing the likelihood of success, then you would have to balance that against the costs of recision, and that just wasn't done.

Instead what was done is there was a recitation of the procedural history of the *Texas* case, and then there was an assertion in a sentence, maybe two, within one small paragraph

of a one-page letter, that DACA would be held unlawful. And under *International Union* and also under *Prill* we think it can't stand.

I'll turn now to the legality of DACA and the substantive unreasonableness of the agency's conclusion that DACA was illegal. So the agency does have discretion, as the agency has asserted in the context of reviewability.

THE COURT: Illegal meaning without statutory authority?

MS. HARRISON: That's correct, Your Honor, assuming that was the theory. And it's a little hard to discern because the agency contends it does have statutory authority to grant deferred action to individuals, and it does have statutory authority to grant deferred action to groups of individuals, so it's a little unclear what the Attorney General thought there wasn't authority to do.

But assuming that it had been adequately explained, we think it can't be sustained under *Prill* upon *de novo* review. And that's because the INA provides the AG -- I'm sorry, provides the agency with discretion to establish regulations and instructions to carry out her authority, and also establish national immigration enforcement priorities and policies. And since 1960 the executive has established more than 20 policies for according deferred action or similar types of relief to large groups of undocumented persons living in the country based

on the recognition that Congress has not ever given enough resources to the agency to deport all undocumented persons that are here, so the agency is supposed to be prioritizing.

And Congress has said you should prioritize criminal aliens and you should prioritize people detained at the border. What that leaves is this whole category of individuals, like childhood arrivals, who are particularly inculpable. And so what DACA did was essentially recognize, these people are going to be here, let's give them an opportunity to go to school, and to work, and to be productive members of our society. And that is something that the executive has always had authority to do.

THE COURT: Is this an argument that, rather than being an argument that they didn't explain things, is this an argument that they couldn't reach this conclusion as a matter of policy?

MS. HARRISON: As a matter of law, Your Honor. It's an argument --

THE COURT: Law or policy.

MS. HARRISON: Well, right. It's an argument that as a matter of law they are incorrect that DACA was unlawful. DACA was lawful. And I know that counsel today has said that this could easily -- just as easily have been voiced as a policy conclusion that it should be left to Congress, but that's not what the agency said. The agency said this was, quote, unconstitutional and that there was no statutory authority. And

that's a legal judgment, not a policy one.

If it had been a policy judgment, you know, we would be arguing that there wasn't sufficient consideration given to the countervailing policy interests associated with keeping DACA, which were of course the very interests voiced by the government in the *U.S. v. Texas* litigation with respect to DAPA.

THE COURT: Do I have to reach this issue of substantive legality, as you put it?

MS. HARRISON: No, you don't, Your Honor. You could rule first on the basis of our procedural APA claim and send it back for notice and comment.

THE COURT: Even if I decide that it's not subject to notice and comment, do I have to reach it?

MS. HARRISON: No, Your Honor. You can rule solely on the basis that there was an inadequately articulated rationale, that the agency didn't consider all important aspects of the problem, under *State Farm*, and failed to consider the reliance interests of individuals under *Encino Motorcars* and send it back to the agency to provide a reasoned explanation for the decision under those decisions, without reaching the question of whether DACA itself was legal or illegal.

I mean, it might come back, and then you'd have to reach it then, but I don't think you have to reach it today. And if Your Honor has no further questions.

THE COURT: All right. And I guess in the way I've

set this up, we turn to Mr. Sellers now to get that out on the table so that it can be responded to by the government in one swell foop.

MR. SELLERS: Good morning, Your Honor. Thank you. Joseph Sellers.

THE COURT: Good morning.

MR. SELLERS: The record is very clear with respect to the information sharing provision of DACA, that in 2012, even in the application for DACA, that the government assured applicants that their information would be protected from disclosure to any of the enforcement agencies absent evidence of some national security risk. And in 2016 Secretary Johnson reaffirmed that position exactly the unequivocal way it was set out in 2012. But in 2017 in connection with the recision notice, the government took a different position and said that it would not proactively provide that information to the enforcement agencies.

THE COURT: What am I dealing with here? Motion for summary judgment on that, or a motion for preliminary injunction?

MR. SELLERS: Well, I think we're seeking final judgment on this. And let me explain why.

THE COURT: In reviewing some of the briefing, I thought you were seeking a preliminary injunction.

MR. SELLERS: Fair enough. Let me explain why, and --

we're seeking injunctive relief, there's no question about it. But it's not clear to us that there is any further action, any further factual development that needs to be taken absent hearing from the government as to what its position it.

But its position so far has been something other than the unequivocal assurance that this information would not be provided to the enforcement authorities. And to compound the problem --

THE COURT: The reason it matters to me is because if it's a preliminary injunction inquiry, then harm matters. And I do have some questions with respect to what the immediate irreparable harm would be.

MR. SELLERS: In order to provide you with both options, let me address that so that it's -- as I said, I think we --

THE COURT: Given the fact that there are existing preliminary injunctions in place.

MR. SELLERS: I understand. So fair enough. There are existing preliminary injunctions that, in other circuits, were they not changed or modified or overturned, would provide --

THE COURT: You say in other circuits, but they're nationwide injunctions.

MR. SELLERS: I understand that, but they don't enjoin this Court from issuing its own ruling.

THE COURT: Well, I hope they don't enjoin this Court.

(Laughter.)

That's not what injunctions normally do.

MR. SELLERS: I understand, and as a result I think this Court is fully in a position to render its own decision pursuant to the precedent in this circuit.

THE COURT: But the question with respect to harms and a preliminary injunction is whether I need to render a decision.

MR. SELLERS: I understand. And -- well, I would submit that at any time those injunctions may be modified, they may be dissolved.

THE COURT: That doesn't usually cut it for the immediacy of the threat of irreparable harm.

MR. SELLERS: Well, the record speaks for itself. I submit to you that the government has taken the position that it can change its position at any time with respect to information sharing. I recognize that the Court in California and the Court in Maryland at least have both directed maintenance of the status quo as to this position. The decision in California is up on review in the Ninth Circuit. I understand the decision in Maryland is maybe subject to further review. It was just issued I think two weeks ago. And so we may be back here soon. And if that's the way the Court wishes to proceed, we will do so.

THE COURT: Well, so set aside the preliminary injunction for a second, and tell me why it is you think this

case procedurally is in the posture that I should rule on the information sharing dispute, and then why you should succeed on it.

MR. SELLERS: All right. So I think we should succeed because the government provided an unequivocal policy that assured applicants, to their detriment, that they would provide confidential information that -- in order to apply for the DACA program, and it appears to have since reneged on that promise, having induced the applicants to act to their detriment in providing this information.

THE COURT: And your legal basis for proceeding is due process?

MR. SELLERS: Due process, yes. And we believe the *Cox* decision, the *Raley* decision, among others from the Supreme Court, both set forth the basic principle that the government may not induce persons to rely on a promise to their detriment and then change the promise and prosecute or take action adverse to them afterwards as a result of that.

So we think this is a due process violation, and we think -- and the government has given no assurances that it will maintain this position. And unlike the arguments that you've heard so far about whether there needs to be some further action returned to the agency to issue any recision policy that it wishes to do so properly, there is no do-over here, because the government is in possession of this information. Unless it's

going to somehow destroy the information it's collected, it possesses the information that it reserves the right to use to assist in the deportation of these people. There is no way of going back with respect to this one.

And so, therefore, we think that the Court -- we ask the Court to enjoin the government both with respect to not using the information in a way inconsistent with the way it was originally promised, and not to modify that position without notice in any respect.

THE COURT: All right. Now let's shift to remedy were your side to succeed on the APA summary judgment claims. I assume you're the one to address that as well?

MR. SELLERS: Well, I'm addressing the scope of the injunctive relief, if that's what you're asking.

THE COURT: Let's talk about it in slightly different terms. If I decide, if I were to decide, as I've been urged to, that there's some APA-related flaw, either notice and comment requirement, or a lack of a sufficient explanation, to use that broad term, isn't what normally would happen in this kind of a case that it would be remanded to the agency? Is that right?

MR. SELLERS: I think it could be remanded to the agency to follow the proper procedure.

THE COURT: So remanded to the agency, and if they have a better explanation, they could come up with it. If they need to do notice and comment, they could do it. The parallel

question then with that would be in the meantime should there be vacatur, because that's normally the APA-related assessment that needs to be undertaken: is there a need to vacate along with the remand.

It's not usually termed and thought of in an APA case as nationwide injunction; it's thought of more in terms of, okay, what's the proper administrative law relief? Remand and either vacate or don't vacate. What would you be arguing for, vacation or --

MR. SELLERS: We are seeking a vacatur.

THE COURT: And why?

MR. SELLERS: Our position is they have offered no independent policy reason to support their position.

THE COURT: But if I decided they hadn't sufficiently explained, I would be remanding for them to take a crack at explaining.

MR. SELLERS: Well, certainly, that's an alternative, but I think the point is that they've offered no independent policy reason to justify this, and having offered no such reason, the action they've taken is outside the scope of the authority they have under the APA, and --

THE COURT: So I'm basically deciding that even though I'm remanding it, I don't think there's much of a chance they can come up with a reasonable explanation.

MR. SELLERS: Well, I don't think you'd have to go

that far. I think the point is that I don't think the judgment we're seeking requires a finding that there is no scenario in which they could issue a recision. What we're saying is on this record they have utterly failed to do so.

THE COURT: The two-pronged assessment really involves what's the possibility that they can come up with a reasoned explanation. That's one part of the assessment. The other part of the assessment is what's the chaos that would be created either by vacating or not vacating.

MR. SELLERS: Well, so the maintaining the status quo, which we maintain a vacatur would achieve because it would return the status quo to where it was in early September.

THE COURT: Right now, today, the status quo is influenced by existing preliminary injunctions, at least with respect to existing DACA applications, not new applications. If I vacated, I would then be taking into that category of the new applications as well.

MR. SELLERS: Well, new applications and also the ability to apply for advanced parole. Those are both very significant deficiencies in the injunctions that have been issued to date. I'm not faulting either of the courts, but they do not restore the rights fully to the position they were before. And as some of the evidence we supplied in the record here indicates, some of the individuals who provided sworn statements describe the profound ways in which the present

injunctive relief has limited -- has really altered the ability for them to pursue their educational opportunities and other things. And so we think that the Court -- the proper --

THE COURT: Vacatur would somehow relieve them of that uncertainty? Why would it do so any more than the existing preliminary injunctions?

MR. SELLERS: Well, vacatur, first of all, would restore us to the status quo. I think we all would agree that would be the effect of vacatur.

THE COURT: The status quo meaning before the recision memo?

MR. SELLERS: Sorry. Forgive me. Yes, before September of 2017, where they had the full panoply of rights that were available under DACA. At that point, if the government wishes to issue pursuant to an appropriate rule-making proceeding compliant with the APA that reflects its consideration of the varied interests and the impact of a recision on the lives and the careers and the life of the people who are registrants in DACA, it can do so and solicit notice and comment. That process will ensure that any rule that ensues has -- and may be subject to further judicial review, but will have taken into account the effects of this, any recision on the varied circumstances that it would have on the DACA recipients. And that is -- that's the reason why it's important to restore this to the status quo --

THE COURT: Is there some reason under the law that you think I need to grapple with this question of nationwide injunction as opposed to just, if your side succeeds -- and this is all hypothetical --

MR. SELLERS: I understand.

THE COURT: -- if your side succeeds. That I would need to grapple with this question of nationwide injunction as opposed to just looking at what is traditionally APA-related relief? And it is beyond question, I think, remand and either vacating or not vacating, and why isn't that the assessment I would undertake?

MR. SELLERS: So first of all, as I understand it, under the APA, vacatur vacates the rule, which in this case would be the recision, and restores the status quo ante to before the decision was announced. So it would restore DACA in its full range of opportunities and rights that it provided.

THE COURT: I know what it does. My question is, is there some reason that looking at it through that prism is not adequate and that I have to look at it more in terms of a nationwide injunction?

MR. SELLERS: I think if the Court were prepared to vacate as we've discussed it, I don't know that the Court has to issue an injunction as well. If by vacatur --

THE COURT: If I don't vacate, you think I do have to issue an injunction? Doesn't make a lot of sense, but go ahead.

MR. SELLERS: Sorry. I think if you don't vacate, we're asking for an injunction to ensure that the recision doesn't go forward, that the information sharing doesn't change, those kinds of things. The vacatur would in its most simple form I think achieve the purpose of restoring the status quo ante in all respects.

THE COURT: All right. Anything else, Mr. Sellers?

MR. SELLERS: I think otherwise we'll rest on our papers.

THE COURT: All right. Thank you. Ms. Davis? Or if you all have to share the responsibility here, please feel free to do so.

MS. DAVIS: My understanding of the order I think has been a little confused at this point. So I think if Mr. Lucas could make some rebuttal points to the justiciability.

THE COURT: We have all their arguments on the table. You now have a chance to reply with respect to the points that Mr. Lucas made originally. And by "you" I mean your side. And to oppose with respect to the merits points and relief points that they've raised. And you and Mr. Lucas can share it as you see fit.

MS. DAVIS: That sounds good. So Mr. Lucas will make a few rebuttal points, and then I'll make my presentation.

THE COURT: All right.

MR. LUCAS: Thank you, Your Honor. A few quick

points. As my understanding is that plaintiffs here do not solely argue that *Crowley* alone disposes of this issue. They seem to suggest in both their reply and today that perhaps there's some general nonenforcement policies or general enforcement policy changes that would be unreviewable under 701(a)(2).

Instead, they offer, from what I can tell, two distinctions of why this case should be different. One is that this program involved applicants coming forward and talking to the government and disclosing their status in exchange for deferred action. But we don't think that distinction is material. I point you to page 26 of the administrative record which discusses a number of other similar programs that DOJ has in the criminal prosecutorial discretion context, where violators are encouraged to come forward in exchange for leniency.

THE COURT: And what do you think their second point is?

MR. LUCAS: And their second point, Your Honor, I think, and what they essentially hang their hat on, is that there's a distinction between criminal and civil enforcement.

THE COURT: But it seems to me there's also the narrower reading of *Crowley* that where an enforcement decision is at issue but it's based on a purely legal interpretation.

MR. LUCAS: Your Honor, again, we think that reading both *Chaney* and *BLE* together forecloses that, except in the

context we would say of where there's an interpretation of a substantive provision of the statute. So let's say the Secretary here had interpreted a criminal provision of the INA and set forth a policy saying, well, this particular crime I think constitutes a crime of moral turpitude, but these other crimes do not, and I'm setting this forward in a prosecutorial discretion document. Assuming you would have a plaintiff that would have standing to challenge that underlying legal interpretation, sure, that would be reviewable.

THE COURT: But the Secretary did make a legal determination, albeit relying on the Attorney General, who thinks he relied on the *Texas* decision. Legal determination was that there's no statutory authority. A purely legal determination, isn't it?

MR. LUCAS: Right, Your Honor, but --

THE COURT: You're saying that's insulated from review.

MR. LUCAS: Yes, Your Honor, because it's in the same context of in this situation there's no statutory constraints on the Secretary's authority.

THE COURT: You want to turn it to the other side, saying they haven't pointed out any statutory restraints, as opposed to the fact that the agency said there was no statutory authority but didn't explain why, gave no explanation as to why. Correct?

MR. LUCAS: Your Honor, if you walk through all the *Texas* court's reasoning and then said --

THE COURT: What was the *Texas* court's reasoning with respect to no statutory authority?

MR. LUCAS: Certainly, Your Honor. The *Texas* court walked through and said that the INA had contained many different provisions and that it set forth --

THE COURT: Well, you say it walked through the reasoning. I don't see where the recision memo or the Attorney General's letter actually walks through the reasoning. And the only decision that the *Texas* court reached was that notice and comment was required. Right?

MR. LUCAS: The District Court, Your Honor, the Fifth Circuit reached both, and I believe that --

THE COURT: Both what?

MR. LUCAS: Both the substantive and procedural APA problems in its decision. It addressed both notice and comment, and then it talked about why DAPA and expanded DACA fell outside the authority of the government under the provisions of the INA.

But just to take you back, the key distinction here is that there's no provision in the INA that actually cabins the Secretary's authority in this respect. So there's nothing here to review. So the fact that she gave an answer --

THE COURT: You mean nothing to apply in the review. No law --

MR. LUCAS: There's no law that constrains her authority to rescind DACA, and plaintiffs don't point to anything in the INA. All they say is that it should have gone through either notice and comment, or that she should have given a more fulsome explanation. But they don't say that the INA actually constrains her authority with respect to rescinding the DACA program. And that point I think is --

THE COURT: I mean, the thing that bothers me a little bit -- well, I'll save this for Ms. Davis. Go ahead. I don't want to have nothing to talk to her about.

(Laughter.)

MR. LUCAS: I want to make sure she has a lot of time to address your concerns. But we think that is the critical distinction here, and that this is simply akin to a prosecutorial decision to discontinue or change nonenforcement policy and return to prosecutions on a case-by-case basis.

And even if that was based on a purely legal analysis, whether that was -- let's say *Chaney* didn't give any sort of enforcement discretion reasoning and just said we don't think we have jurisdiction to go after lethal injection drugs, or in the context of the hypothetical where the prosecutor is worried about going after certain offenders but not others, he's at risk of violating the equal protection clause, we don't think those reasons, even if courts are eminently qualified to review them, turn a nonreviewable decision into a reviewable one. Thank you.

THE COURT: All right. Thank you, Mr. Lucas.

All right. Finally, your chance, Ms. Davis.

MS. DAVIS: Yes. Saving the best for last, as I like to think of it.

All right. Good morning, Your Honor. I'm going to address first the APA claims in this case. Now, substantively plaintiffs argue that the recision violated the APA because the reasons that the Acting Secretary provided for it, namely the imminent litigation risk that was posed in the *Texas* proceedings, and her concerns about the lawfulness of DACA were arbitrary and capricious. And they throw an array of attacks at the decision itself, but at bottom these arguments boil down to the fact that they simply disagree with the judgment that the Acting Secretary exercised. And in their judgment, they --

THE COURT: I think they boil down -- I mean, perhaps my major concern there is that there isn't much to boil down, that the reasoning given by the Secretary, which relies to some extent on the Attorney General, there isn't much there.

MS. DAVIS: Well, Your Honor, if you look at the recision memo itself, it provides two reasons for the recision of DACA. The first was the imminent litigation risk in *Texas*, and the second was the concerns about lawfulness. The memo itself spends the better part of two pages describing in detail the history of the *Texas* litigation, the threat that was received by the plaintiffs in that case to amend their complaint

to challenge DACA.

THE COURT: But most of it is just a procedural recitation. This is a substantive discussion of the legal principles.

MS. DAVIS: Sure. But going through the factors that she considered in coming to the conclusion that it was better for the agency for this policy to wind it down rather than to subject it to potential -- a potential nationwide injunction in the *Texas* court was a rational decision. So here she discussed, as the administrative record demonstrates, the threat. The rulings in the Fifth Circuit with respect to DACA, or DAPA, which is a materially indistinguishable deferred action policy, as well as expanded DACA.

THE COURT: Point me to a sentence that you think is particularly important with respect to explaining the legal rationale.

MS. DAVIS: The legal rationale or the litigation risk rationale?

THE COURT: Legal rationale.

MS. DAVIS: Well, with respect to her concerns about the unlawfulness of the program, that was supported by the Fifth Circuit's decision in *Texas* as well as the Attorney General's opinion --

THE COURT: So point me to something that you want me to rely on and look at that you think is a good explanation of

the unlawfulness.

MS. DAVIS: Well, I think she pointed to the Fifth Circuit decision because that decision goes through the defects that were found with respect to DAPA, and DAPA is a materially indistinguishable deferred action policy. So while she didn't specify, you know, which parts of that reasoning applied, when you look at those decisions themselves, all of the reasoning equally applies to problems with the DACA policy as well because they are indistinguishable -- or materially indistinguishable policies. And the Fifth Circuit decision also included a striking down expanded DACA, which there are really no legally principled distinctions between expanded DACA and DACA.

So in going through this history of the *Texas* rulings and in considering the threat from the *Texas* plaintiffs, in noting the fact that the agency had made a decision to rescind DAPA and expanded DAPA based on what they had perceived to be an unlikelihood of success in the *Texas* proceeding, and in relying on the Attorney General's assessment that potential imminent litigation would likely lead to the same result for DACA, she came to this litigation risk rationale.

THE COURT: Let me make sure I ask you the same question, Ms. Davis, with respect to the Attorney General's letter. Do you want to point me to any particular place in that that you think is a good, reasoned discussion of the unlawfulness or the legal issue?

MS. DAVIS: Well, the Attorney General in his letter provided advice about what he perceived to be the problems with DACA, and those are the fact that it was implemented without proper statutory authority --

THE COURT: And is that explained anywhere, what that means?

MS. DAVIS: That is in the second paragraph. It doesn't go into more detail than what is actually in the letter itself, but I think he identifies the concerns that he had about the lawfulness of DACA, and he certainly identified that there was a potential imminent litigation risk that would likely result in the same outcome as it did for DAPA.

THE COURT: But the concern that I have, again, that I was about to ask Mr. Lucas about, is that the two documents, the Attorney General's letter and then the recision memo, don't contain much analysis of the legal issue. The Attorney General simply says without proper statutory authority, without ever referring to any statutory provision. It's just a conclusion.

And the reliance on the *Texas* case, I think we have to be careful about because the *Texas* case fundamentally is a notice and comment case. It doesn't deal with unconstitutionality, and it can't be stretched to that point. So when the Attorney General says that DACA was an unconstitutional exercise of authority by the executive branch, he nowhere explains that.

The only thing that I have in the record with respect to

that assessment is a 33-page memorandum by the Office of Legal Counsel, the entity charged with that responsibility in the executive branch, reaching the opposite conclusion. There's no discussion of that memo, why it's not correct, why the statutory authorities really lead to an opposite conclusion than the Office of Legal Counsel reached. It's not there.

Shouldn't that give a court concern when I'm assessing whether there's a reasonable explanation for the legal conclusion that was reached?

MS. DAVIS: No, Your Honor. I think the administrative record as a whole creates a basis for the Acting Secretary's conclusion that she had concerns about the lawfulness of DACA. And that includes the Attorney General's opinion, which it is what it is. He explained his concerns about the constitutionality of it, he explained that it suffered from the same defects as DAPA did, and the outcome that was likely to occur --

THE COURT: But there's no assessment of the fact that DAPA and DACA are in two different situations. DAPA, when examined by the Texas courts, was not in place yet. DACA has been in place for over five years.

MS. DAVIS: Correct. But that would not impact the substantive issues that the Fifth Circuit identified with respect to DAPA.

Now, also in the administrative record is the Fifth

Circuit's decision which didn't just address primarily a notice and comment issue. It addressed both a procedural and substantive APA violations with respect to DAPA and expanded DACA. And this isn't a situation where the parties, as Ms. Harrison suggested, or where the Acting Secretary simply said we are rescinding this policy, see Fifth Circuit's decision in the *Texas* case.

In the *International Union* case that they cite, the court was unaware of how or why that particular case that was cited by the agency sort of mandated or compelled the result that the agency believed it did, because that decision, while it made it harder for them to try and go through the regulation creation process, wasn't exactly fatal.

And in this case what we have is a Fifth Circuit decision about an analogous deferred action policy, and about the expansion of that same policy, in which the Fifth Circuit itself explained the similarities between DAPA and DACA, and in fact called DACA an apt comparator. It relied on specific findings about DACA itself in coming to the conclusion that DAPA, which was supposed to be implemented in the same process and the same manner that DACA was, made that finding to hold that DAPA was procedurally invalid.

So this is simply not a case where the Court is left to wonder why did the Acting Secretary discuss this Fifth Circuit case, why is it relevant, and what impact does it have --

THE COURT: Even with the discussion that you think is sufficiently fulsome and that I think may not be, even granting that, doesn't a reasoned explanation obligation under the APA, placed on the agency, mean that there should be some assessment of a detailed assessment of the legal issues by the executive branch through a 33-page memorandum by the Office of Legal Counsel? Isn't that something that a court should expect would be addressed as part of a reasoned explanation?

MS. DAVIS: Well, what the APA standard requires is that the agency provide rational connection between the reasons for its decision and the decision itself.

THE COURT: So your answer is no, that shouldn't --

MS. DAVIS: Well, I think -- obviously, we think that the Acting Secretary's decision is sufficient, and she provided a reasonable explanation. She acknowledged that they were repealing a policy, she provided good reasons for it, namely, the litigation risk and her concerns about the lawfulness. She did not ignore prior government positions like the OLC opinion. In fact, the OLC opinion is part of the administrative record. And she didn't ignore prior positions in litigation, which are themselves summarized in the Fifth Circuit case.

The point is those positions were positions that were made in defense of DAPA, which is analogous to the policy at issue here, and they were unsuccessful. So this isn't a case where we have an agency who's just ignoring what was said before and is

proceeding without explaining why they're doing what they're doing and what prompted the change. That information is all in the administrative record, and that meets the APA standard of review.

THE COURT: I'm curious as to the standard of review here and what deference you think the Court owes to the agency with respect to its interpretation of the law, the correctness of its decision.

MS. DAVIS: Sure. I think that the proper review here is whether the agency considered the relevant factors and whether the decision was a clear error of judgment. So basically the same --

THE COURT: Where does that standard of review come from, whether the error was a clear error of judgment?

MS. DAVIS: That comes from the *State Farm* case. And that's true even when the agency reverses policy, and that's true in this particular case with respect to the agency's concerns about lawfulness.

Now, whether or not plaintiff disagrees with the conclusion that DACA is lawful, unlawful, is irrelevant to the question before the Court. That's not the question. The question isn't whether this Court agrees or whether plaintiff agrees with the lawfulness of DACA.

THE COURT: I guess my question that I'm not sufficiently articulating for you is -- first of all, is the

view that the Department has reached with respect to the legality of DACA an interpretation of the relevant statutory authorities?

MS. DAVIS: I think it represents her concerns about the lawfulness based on the advice that was provided --

THE COURT: I don't think that really answers my question, though. My question is, is it an interpretation of the relevant statutory authorities in the INA?

MS. DAVIS: It doesn't include an explicit --

THE COURT: I know it's not there, but does it constitute an interpretation? I'm trying to search out whether I owe some deference to the agency in determining whether DACA is within its statutory authority.

MS. DAVIS: Sure. I think in either case, whether we look at the concerns that she gave or whether we consider it as an interpretation of their statutory authority deference is appropriate here because the question really is whether or not her interpretation, her conclusion was within the permissible range of interpretations. I mean, again, the question is not was DACA legal or not, it's was her conclusion rational and was it based on facts that are supported by the administrative record.

THE COURT: And do I owe her some *Chevron* deference in reaching that conclusion, in assessing that? Because it's the statute that the agency is charged with implementing and

applying.

MS. DAVIS: Correct.

THE COURT: Is there some *Chevron* deference that's appropriate here?

MS. DAVIS: I think in this particular context, nothing in the INA requires that the agency provide DACA, and there's nothing in the INA that precludes the agency from rescinding deferred action.

THE COURT: Okay. Let's assume that she reached that conclusion rather than you just articulating it. Do I owe her some deference?

MS. DAVIS: I would say because that is clear and there's nothing ambiguous --

THE COURT: And is it *Chevron* deference?

MS. DAVIS: What's that?

THE COURT: And is it *Chevron* deference? Or is it something else?

MS. DAVIS: I don't even think we would have to get to a step 2 *Chevron* analysis because there's nothing in the statute that requires DACA nor prohibits the agency from rescinding it. And nobody is arguing that in this case. Not even plaintiffs are saying that this is required or that she doesn't have the authority to rescind a policy.

THE COURT: There is something in one of the cases, I think it's in a footnote in the latest New York decision, about

the level of deference. And it triggered some thinking on my part as to whether we would be dealing with *Chevron* deference here at all, given the fact that we have a memorandum, the recision memorandum, that didn't -- isn't the result of notice and comment.

It's more in the nature of an enforcement guideline or interpretation. And the courts then look more to *Skidmore* deference, which is a much lower form of deference than *Chevron* deference, and it's only deference that depends on the persuasive value and the persuasiveness of the agency decision. And then again, we wind up in a situation that, as we've discussed already, that at least on some levels, there isn't that much in the agency decision in terms of explaining why there's no statutory authority. And you juxtapose that with a fairly lengthy discussion in the OLC memo as to why there is statutory authority.

MS. DAVIS: Correct. And as the Acting Secretary noted in the recision memo in the history of the Fifth Circuit decision, the arguments that were made in that OLC memo were litigated in defense of DAPA, and the courts found those to be unpersuasive, and four justices of the Supreme Court agreed with that decision in a split affirmance. So I think she's not --

THE COURT: The Supreme Court did what?

MS. DAVIS: There are four justices of the Supreme Court --

THE COURT: Four justices agreed, yes. There's no precedential value, by the way, from that decision.

MS. DAVIS: Correct.

THE COURT: And to the extent that the Acting Secretary says, "Taking into consideration the Supreme Court's rulings," it's not precedent to be taken into consideration.

MS. DAVIS: It's not precedential but it means that that Fifth Circuit decision stands. It was affirmed.

THE COURT: That's certainly true.

MS. DAVIS: And four justices of the Supreme Court agreed that it should be affirmed in a split decision.

THE COURT: That's certainly true.

MS. DAVIS: Now getting back to what exactly is the question before the Court. Recently in the District of Maryland in a case called *Casa de Maryland v. DHS*, and the opinion is available at 2018 WL 1156769.

THE COURT: I've read the decision.

MS. DAVIS: Then you know that Judge Titus in that case granted summary judgment in favor of defendants basically on that same -- applying that same scrutiny, which is whether or not the court believes DACA is in fact unlawful isn't the question. If the Acting Secretary reasonably believed it was unlawful, and that was supported in the administrative record, then he found that decision to be completely rational. And that's the same lens that we would ask this Court to look at the

decision through.

The recision memo explains that she had concerns about the lawfulness in light of the *Texas* litigation, in light of the Attorney General's letter.

THE COURT: But to the extent that this is a decision based on a legal assessment, would you disagree that that's a *de novo* review by the Court?

MS. DAVIS: I don't think that the Court has to determine whether or not the Attorney General, in providing advice, or the Acting Secretary in coming to a decision in this case, was right or wrong. That's not the question at issue. And this isn't a case where there's been a clear legal error, as plaintiffs would allege. And we can contrast the two cases -- or the case that they cite, *Teva Pharmaceuticals*, with this case here.

In *Teva* the FDA interpreted a statutory provision in a certain way solely because they thought the D.C. Circuit in prior opinions required that interpretation. And the D.C. Circuit said, no, our decision didn't require that interpretation, and in fact, it required the opposite. It required you to come up with an interpretation in the first instance.

So the legal error was that FDA attributed a holding to a case that did not exist. And this isn't the same kind of situation. The Court in *Teva* didn't say, here was your

interpretation and we disagree with it. And the same is true here. We're not dealing with a legal error; we're dealing with a judgment that was made based on facts supported in the record, what happened in the Fifth Circuit litigation, and the advice of the Attorney General. And based on those facts, it simply cannot be that her conclusion was a clear error of judgment.

THE COURT: To the extent that there's reliance on the Attorney General's letter, the Attorney General's letter says that DACA policy "has the same legal and constitutional defects that the courts recognized as to DAPA." Which is a reference to the Texas cases. But there was no recognition of constitutional defects.

MS. DAVIS: There was not.

THE COURT: They didn't reach the constitutional issues.

MS. DAVIS: No, they did not reach the --

THE COURT: So the Attorney General is not correct in saying that constitutional defects were recognized with respect to DAPA, is he?

MS. DAVIS: I think it was an error to assert that they had reached a constitutional issue in the Fifth Circuit. But the decision-maker in this case is the Acting Secretary, not the Attorney General, and when you look at her memo, there's no question that she understood correctly the Fifth Circuit holdings.

THE COURT: Although she relied on the Attorney General's letter.

MS. DAVIS: She did. But she also understood the Fifth Circuit's decision, which she described purely in statutory terms. But aside from the decision that -- or the basis for her decision that had to do with her concerns about the lawfulness, there is an independent reason that she provided for the recision, and that was the litigation risk that was posed in the *Texas* case.

THE COURT: I understand that an agency has to be able to make such assessments. But here that assessment is indistinguishable from the legal assessment. It's totally reliant on the legal assessment.

MS. DAVIS: I disagree. Litigation risk assessments are not necessarily legal determinations. An attorney who's going into a case and is advising their client on what they should do in that case looks to the law that's going to be binding in that particular case. You may not agree with what the law is in that particular district or in that particular circuit. It doesn't matter whether you agree with it or not; it's binding on the parties.

Here there is overlap in that the agency's decision is also supported by those cases, so there's not necessarily a disagreement, but one is not dependent on the other. They're two independent determinations.

THE COURT: So you think the litigation risk assessment is totally independent of the assessment of the lawfulness.

MS. DAVIS: Yes. The litigation risk was looking at the threat that was being posed in an ongoing case in the Southern District of Texas, and what decisions were going to be binding on both the parties and the court.

THE COURT: And a large part of the --

MS. DAVIS: And DACA had been amended into the complaint.

THE COURT: You done?

MS. DAVIS: Yes.

THE COURT: A large part of the litigation risk assessment was dependent upon this belief that a nationwide injunction would be entered with respect to DACA. Right?

MS. DAVIS: Yes.

THE COURT: Why is that a rational belief, that a court, faced with a program that had been underway for several years, that had serious impact on many hundreds of thousands of people, would be immediately and completely enjoined by a federal judge? Why is that a reasonable assessment? I understand what happened with DAPA, but DAPA was in an entirely different circumstance than DACA. DACA's an ongoing program with respect to hundreds of thousands of people that had real impacts. DAPA hadn't been put into effect yet.

MS. DAVIS: Correct. In the Southern District of Texas, the parties and the court would have both been bound by the Fifth Circuit's decision, and I think it's clear that the Fifth Circuit's reasoning would equally apply to DACA as well. So at the very least, the writing was on the wall for DACA if plaintiffs had made good on their threat in Texas. Now, the judge --

THE COURT: You say it's clear that the Fifth Circuit's reasoning would apply. I -- we'll leave that open.

MS. DAVIS: Okay. I'm happy to answer any questions on that, but to go back, the judge in the Texas litigation had entered a preliminary injunction on a nationwide basis against DAPA. So I think that it would be likely and a potential outcome that he would do the same thing in the -- in a case where DACA were before him as well.

THE COURT: Why? Why is that likely, given the impact and effect that it would have? Why wouldn't a court, at least as much as the Secretary, be looking for some orderly wind-down and some reasonable way of dealing with the circumstances presented?

MS. DAVIS: Well, even if the Court had determined that it would wind down the policy or impose an injunction that winded down the policy, that doesn't make the Acting Secretary's decision any less rational. There are many times in cases where parties decide that if they know what the likely outcome is

going to be, and one way or the other, whether the injunction was permanent or the injunction was preliminary, the writing was certainly on the wall. And parties in litigation oftentimes take voluntary actions so they have the ability to control the process, so that they can wind down a policy on their terms, under the timetable that they choose, rather than being subjected to court-imposed standards over which they do not have a lot of control. That's a completely reasonable rational decision to make in litigation and one that is made all the time.

THE COURT: Let me ask two questions that are sort of -- I did some of this with your opponents -- that are based on an assumption, not indicating how I'm going to rule, but based on the assumption that I were to grant the plaintiffs' partial summary judgment motion, decide for them on the APA issues, what do I do then with your motion to dismiss the constitutional claims?

MS. DAVIS: Oh, I think that you should grant our motion to dismiss the constitutional claims. But if you granted summary judgment in their favor, it would largely I think take care of the issues because you would be remanding the decision to the agency.

THE COURT: Well, that's what I'm getting at. If I were to do that on the APA claims and remand, wouldn't there be at least the possibility, I would think a realistic possibility,

of some further articulation of explanation from the Secretary? And wouldn't that potentially impact the constitutional claims?

What I'm indicating and asking you about, is whether, again assuming that I were to rule in their favor on the APA claims and remand, doesn't that mean in that circumstance that I should be hesitant to rule in your favor on the constitutional claims because -- or against you on the constitutional claims, because there could be some further explanation that would be relevant to that constitutional assessment?

MS. DAVIS: I agree. And if the decision were remanded, then I think that would in a way moot the constitutional claims because we would be coming back to the Court potentially with --

THE COURT: Whatever the right terminology is.

MS. DAVIS: Sure.

THE COURT: So the other question I have, again on the same hypothetical basis, is if I were to rule in favor of the plaintiffs on their motion for summary judgment on the APA claims, what should I do? What's the remedy? What's the relief in your view? Is it an APA-type relief where I should remand? And if so, and if remand is appropriate, what about vacatur?

MS. DAVIS: I think this is an APA case like any other APA case. And the proper remedy, if the Court finds an inadequate explanation or some other procedural defect, is that it should remand to the agency for further proceedings. I do

not believe that in this case the Court should vacate the ruling.

Basically what we have here is the recision of a policy. So vacatur of a recision would in effect be a mandatory injunction that the agency should go back to implementing the DACA policy.

THE COURT: Let's not call it a mandatory injunction. I don't think the courts normally call that a mandatory injunction in APA cases. APA cases are a dime a dozen in this court and in this circuit. And I don't think that the decision whether to remand and then the decision whether to vacate is usually termed in mandatory injunction terminology.

MS. DAVIS: It's not, but in this particular case what we're dealing with is the recision of a policy. So if the recision policy is remanded, that would essentially mean that the agency would have to continue operating the policy that it had just rescinded, and in that sense, is an injunction to continue operating the DACA policy. And that just can't be. This isn't like a normal case where it's a positive policy, some positive policy has been announced, and if the Court vacates --

THE COURT: I don't see why it's any different than the mine run of rules, regulations, orders, et cetera, that come for APA-based review in the courts and the decision is always, you know -- if the plaintiffs win, is always just, okay, does it get remanded? Yes. And then is the challenged policy, rule,

regulation, whatever it may be, subject to being vacated?

MS. DAVIS: Correct. And under the two-prong standard that the Court discussed earlier, the government's position would be that it should not be vacated.

THE COURT: And why is that?

MS. DAVIS: Because, if there is something that the Court has identified as defective in the agency's decision, I believe that it would be something that could be corrected on remand that wouldn't warrant the Court vacating the recision.

THE COURT: That's the first part of the test. The second part of the test is basically what the chaos or burdens would be from vacating or not vacating.

MS. DAVIS: In this particular context, the chaos would be significant. It would essentially be --

THE COURT: Why? You've already got preliminary injunctions out there.

MS. DAVIS: That's true. Well, I mean, that's another reason why vacatur isn't necessary in this case. There's two other --

THE COURT: But it also is a reason why there wouldn't be chaos, because there's already preliminary injunctions.

MS. DAVIS: Well, the preliminary injunctions were limited. They didn't enjoin the recision policy in total and just returned to the state of play when DACA was --

THE COURT: Because right now, new applications are

not being accepted and reviewed by the agency. Correct?

MS. DAVIS: Correct.

THE COURT: And if I vacated, you think the agency would be under an obligation to then consider new applications?

MS. DAVIS: If you vacated the policy --

THE COURT: The recision.

MS. DAVIS: -- the recision policy in its entirety, then essentially the Court would be ordering the agency to return to the policy that was in place before, and that --

THE COURT: So your interpretation would be that vacatur would require the agency to then accept new applications.

MS. DAVIS: Exactly. And I think that would be overbroad because in this case there are no plaintiffs or parties that are represented by the plaintiffs in this case who are new applicants -- or new requesters who have never received DACA before, so this Court would actually be going a step further in granting relief to parties that are not even before the Court.

THE COURT: So what if I decided to -- I think this plays into what you just said and perhaps makes my question nonsense, but I'll ask it anyway. And that is, if I decided to vacate -- in other words, still on this hypothetical ruling that is in the plaintiffs' favor on the APA claims with remand and then I decided to vacate, should there be a limitation to the

breadth of that vacatur? Vacate only as to the plaintiffs in this case? Or is something like that appropriate?

MS. DAVIS: Yes. We think that whatever relief that this Court grants, that that needs to be tailored to the particular parties in this case and the particular injuries that have been pled.

THE COURT: But the problem with that -- and again, I'm not venturing in this conversation into the general concept of nationwide injunction -- but I think the D.C. Circuit has said -- it's rejected the agency's suggestion that named plaintiffs alone should be protected, and that when a reviewing court determines that regulations in that instance are unlawful, the result is that the rules are vacated, not that their application just to the specific individual petitioners is proscribed. And that's the *Harmon v. Thornburgh* case.

So it seems to me that in that context there's a little bit of problem that you have with D.C. Circuit law with suggesting that a limited vacatur only as to the parties in this case would be appropriate.

MS. DAVIS: Well, I mean, depending on the relief that's granted, whether it's vacatur or injunctive relief, and especially so in the case of injunctive relief, and preliminary injunctive relief especially, there are important constitutional and equitable principles that are at play that require parties when they come to court to prove standing for each relief that

is requested; for the remedy that's provided to be no more than is needed to correct the injury that has been alleged; and especially in injunctive relief, that the injunction is no more burdensome than necessary to correct the harm.

And I think that there are important limitations that have been noted in the other preliminary injunctions, and while they, I believe, are overbroad to begin with, there were important limitations. And one of them was that no -- the agency didn't have to process new requests from DACA recipients who had never requested DACA before.

THE COURT: I have two final questions. I've kept you up there a long time, and I want to give the plaintiffs a chance for just a couple of minutes to respond. Do you -- not you personally, but does your side take the position in this litigation at this time that DACA was unconstitutional?

MS. DAVIS: I believe that the Attorney General's letter -- and the Attorney General speaks for the Department of Justice -- noted the constitutional defects with respect to DACA.

THE COURT: It said that it was unconstitutional? What's the basis for that conclusion?

MS. DAVIS: I believe the basis that is inferred from the Attorney General's letter is that there is an issue with the separation of powers, that the executive branch is prescribed by the Constitution to enforce the laws, and that the Congress is,

you know, in charge of making the laws. And when Congress has repeatedly refused to provide in the form of legislation a type of relief to a particular group of individuals, that the executive branch cannot then go and essentially legislate a solution to that problem.

THE COURT: Do I owe any deference to the Attorney General in that assessment of constitutionality?

MS. DAVIS: I believe in the context of this case, again, the lens is whether or not the Acting Secretary's decision was rational.

THE COURT: Do I owe any deference to the Acting Secretary with respect to that decision? I don't think she reached a decision that DACA was unconstitutional. Or do you think she did?

MS. DAVIS: I think she relied on the advice that was provided by the Attorney General and that included concerns about --

THE COURT: All right. So let's assume that she did reach that conclusion. Do I owe deference to that? To a conclusion that a prior act by the agency was unconstitutional? I owe deference to the agency on that?

MS. DAVIS: I think in this case the question is not whether or not this Court believes that DACA was in fact lawful. It's whether or not the agency's decision was rational based on the factual record and the administrative record.

THE COURT: So in a sentence or two, can you tell me what is the argument that DACA was implemented without statutory authority? That is stated in the Attorney General's memorandum. But of course we've all seen that Section 202(5) of Title VI does authorize the agency, the Department of Homeland Security, to establish national immigration enforcement policies and priorities.

So is DACA somehow outside of that statutory authority? What's the basis for the argument that DACA was implemented without statutory authority?

MS. DAVIS: It's the reasoning that would be articulated in the Fifth Circuit's decision with respect to DAPA, which was an analogous deferred action program that was granted to a large group of individuals that allowed for incremental deferred action to be granted in DAPA on a three-year basis.

THE COURT: But there there's a statutory provision that's actually in conflict.

MS. DAVIS: Correct.

THE COURT: Here there's not.

MS. DAVIS: There's not, but I think that fact makes DACA on shakier ground than firmer ground.

THE COURT: Really? I don't think that's normally the assessment either in a separation of powers context or otherwise. If Congress has spoken and there's something

inconsistent with what the executive branch is doing, that makes the executive branch's action more questionable, not less questionable.

MS. DAVIS: Well, what the Fifth Circuit found was, under the broad delegation of authority to the Secretary of the Department of Homeland Security, that that broad delegation cannot be characterized as including the ability to make decisions on deferred action that had vast social and political and economic outcomes. And that was exactly what happened in DAPA because, you know, it applied to a large group of individuals and provided work authorization. And the same reasoning applies equally to DACA.

Now, there, with DAPA, there was a pathway for individuals to gain a lawful presence here in the United States, and there's not one for DACA. But courts have said where there are explicit remedies that are set forth in a statute, for certain individuals, that the court should be wary of reading in other remedies that are not there.

When Congress was determining who should by statute get discretionary relief, it did not include those individuals who would be eligible for DACA. In fact, it has, on multiple occasions, considered whether or not there should be a statutory pathway for those individuals, and it has decided not to legislate for them.

THE COURT: I think it's an overstatement to say that

Congress has decided anything on that question. But thank you, Ms. Davis.

MS. DAVIS: Your Honor, do you have any questions about the notice and comment?

THE COURT: No, I don't think so. I think that that's been covered in your briefing, and I don't think I need to hear anything further.

MS. DAVIS: May I speak very briefly on the information sharing policy claims and the request for injunctive relief?

THE COURT: You may take one minute.

MS. DAVIS: Okay, one minute. I can do them in one minute because it's very simple. The information sharing policy has not changed. Mr. Sellers came up here and he described to you why he thinks it has changed because there was a slight modification in some language in an FAQ that came out with the recision that restated the information sharing policy.

To the extent there was any confusion, that language certainly was not intended to make a change and in fact has not. To the extent there was any confusion, the Department of Homeland Security has issued publicly on its website subsequent FAQs that make very clear that the information sharing policy has not changed, it remains the same as it was in June of 2012 when DACA was rolled out, and therefore, there simply is no basis for this due process claim.

Second, there was no --

THE COURT: Is everything that I need that you've referred to already in the record?

MS. DAVIS: That I just referred to?

THE COURT: Yes.

MS. DAVIS: Yes. We've cited the FAQ that recently came out that confirmed that there has been no change. That is in our briefing. And I believe the FAQs that they rely on have been incorporated into their complaint.

And as another matter, there's never been a promise by the agency that information would not be shared in any circumstance or that the policy would never change. The entire information policy -- and it's the same in every single document that they've incorporated into their complaint and referred to in their preliminary injunction motion -- it has always included exceptions for the use and sharing of information and explicitly stated that it could be modified, superseded or terminated at any time.

So for the plaintiffs really to ignore those parts of the policy and only focus on the ones that are very helpful to them in their view is simply cherry-picking.

And to the extent that they think any injunctive relief is necessary on the information sharing claim, I would say that they have not shown any imminent harm with respect to the information sharing policy.

THE COURT: If it's not a preliminary injunction but rather a ruling on the -- final ruling on the merits, I'm not sure there's a harm analysis that's necessary. Do you think it's appropriate for me to rule as a final matter on that question?

MS. DAVIS: We believe the Court can dismiss that claim now. They have not met the pleading standard and they have not stated a claim for a due process violation --

THE COURT: Can I rule in their favor on summary judgment now? I know you don't want me to. But it's a procedural question.

MS. DAVIS: In our view, there's no genuine dispute about a material fact. The policy has not changed, and that's simple. And there's never been a promise that it would not be changed in the future. So in that respect, yes, I think you could enter final judgment on that claim, and we would ask that you enter it in favor of the government.

THE COURT: All right.

MS. DAVIS: And just to note, there is a -- the government has recently represented in the District of Maryland case where there is an outstanding permanent injunction with respect to the information sharing policy. We've at least represented in the context of trying to amend that injunction that the information policy would not be changed and that we would comply with that policy.

THE COURT: Well, if you made that representation, then you should make that representation by filing something here. I don't like to rule on just what counsel says from the lectern.

MS. DAVIS: Sure.

THE COURT: So if you think there's something that is relevant to my assessment of that issue, you should submit something.

MS. DAVIS: Okay.

THE COURT: Not a brief.

MS. DAVIS: No need for more paper in this case, Your Honor. But just to make the Court aware, that representation has been made with respect to another injunction. Again, merits against further injunctive relief here or the necessity of any relief at all.

So, Your Honor, I would just ask that the Court dismiss plaintiffs' complaint, or in the alternative grant summary judgment in favor of defendants in this case and to deny plaintiffs' cross-motion.

THE COURT: Thank you. So very briefly, whatever points you wish to make.

MR. PERRELLI: Certainly, Your Honor. Very briefly. We do think this is a legal judgment. Litigation risk, I know there's been a lot of discussion about that post hoc, but as I think the Court indicated, to the extent that it's a decision

based on a legal assessment, and that was the sole basis for it, it sort of merges into the legal judgment.

Whatever that legal judgment was -- and I think, you know, only now are we starting to hear a new sort of separation of powers rationale -- it's insufficiently explained, and we think the Court can rule based on that lack of explanation.

We also think, to the extent it is a conclusion based on the INA that the Secretary did not have discretion to have DACA or a program like DACA, we think it was wrong. And we would note Judge Alsup's decision on page 32 where he struggles with this question of the government has told me all these things are legal and they have massive discretion, why is this program a problem? We don't think that's ever been explained by the government in this case or in any case.

THE COURT: So why isn't Judge Titus right that all we need here is sort of a reasonable explanation? I hesitate to say close enough for government work, but if the government comes forward with a reasonable explanation, it doesn't have to be right. It's just that it's good enough under an arbitrary and capricious assessment.

MR. PERRELLI: I think that legal questions are reviewed *de novo*. And I think here again I go back to the *Prill* line of cases, which is the government is saying here that it's -- asserting here that it's exercising its discretion. But it can only exercise discretion if it knows that it has it. And

if the Secretary is relying on something from the Attorney General that says something is unlawful, and it's not, then there I think *Prill* and that line of cases come into play. As we said, I don't think we even get there because it's just not sufficiently explained.

All the arguments about the Fifth Circuit, we don't know, is it a notice and comment problem that the Fifth Circuit talked about? The substantive DAPA analysis in the Fifth Circuit deals, as the Court said, with a host of statutory provisions, intricate provisions related to family members and their immigration status. Nothing, as the Court indicated, deals with inculpable children who were brought to this country.

Last thing I wanted to mention was just on the remedial issues, the Court asked about it, essentially applying *Allied Signal*, the two-part test, in *Allied Signal* here. On the disruption point, I don't think the government can really argue that there is disruption from vacatur here in this sense. They have not sought stays of the other injunctions in this case, they have said to the Supreme Court they wanted to get there quickly because they thought it was just better to sort of leave DACA in place while these cases -- they wanted to rocket them to the Supreme Court, but leave it in place while the cases were being litigated.

THE COURT: What about with respect to new applications and their belief that they would be under an

obligation to accept the process and rule on new applications?

MR. PERRELLI: And, Your Honor, we believe if there is vacatur here, there would be an obligation to accept new applications. We recognize that is different from the injunctions currently in place. There are -- recision was done on a particular day and as of the next day, if you were writing your application, you were unable to apply, you were harmed. And we think that vacatur is appropriate here of the recision, and that also the result should be that they should be required to take new applications because they do not have a policy in place other than the DACA policy which should -- after the court's ruling.

THE COURT: All right. Thank you, Mr. Perrelli.

MR. PERRELLI: Thank you, Your Honor.

THE COURT: Thank you all. I appreciate the briefing and the argument. The case is submitted and I will get on with it as quickly as I can. Thank you all.

(Proceedings adjourned at 12:09 p.m.)

* * * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

BRYAN A. WAYNE

Whitaker, Matthew (OAG)

From:	Whitaker, Matthew (OAG)
Sent:	Thursday, March 22, 2018 2:26 PM
To:	Hamilton, Gene (OAG)
Subject:	Fwd: Immigration Periodic Policy Digest
Attachments:	2018.03.22 Immigration Periodic Policy Digest.docx; ATT00001.htm

Begin forwarded message:

From: "Lichter, Jennifer (OLP)" <jlichter@jmd.usdoj.gov>
Date: March 22, 2018 at 10:57:21 AM EDT
To: "Lichter, Jennifer (OLP)" <jlichter@jmd.usdoj.gov>
Subject: Immigration Periodic Policy Digest

IMMIGRATION PERIODIC POLICY DIGEST – MARCH 22, 2018

Data and Research

- What's at Stake: Immigrant Impacts in 287(g) Jurisdictions, by Nicole Prchal Svajlenka (Center for American Progress). This report attempts to argue that joint enforcement agreements that cities and counties enter into with ICE under INA Section 287(g) are economically harmful to the jurisdictions that agree to them. (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b)(5) [redacted]
  - (b) (5) [redacted]

(b) (5)

- (b) (5)

What They're Saying

- LA Times Op-Ed: The demographic most likely to benefit from tougher immigration enforcement is young black men, who often compete with immigrant laborers for jobs.

- Washington Post: Editorial claims that immigration officials are forcibly separating children from their parents with increasing frequency.
    - This editorial followed a feature piece in the Post (A-1 above the fold) profiling a Salvadoran mother and children separated for 12 weeks after crossing the border illegally.
    - The Post reports that DHS states it does not have a policy of separating mothers and children but does so in certain circumstances to protect the children in potential smuggling or trafficking activities.

Congress

- The omnibus appropriations bill released on Wednesday night includes, per the Washington Post, $1.6 billion in funding for barriers along the U.S.-Mexico border—with a number of restrictions attached. The spending package also includes more funding for CBP and ICE, again with significant restrictions including a limit on the number of illegal aliens ICE may have in detention at the end of the fiscal year.

- On March 19, the Senate confirmed U.S. Customs and Border Protection Acting Commissioner Kevin McAleenan to be Commissioner of CBP in a 77-19 vote.

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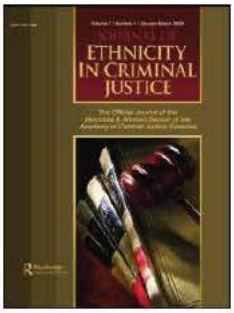

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Urban crime rates and the changing face of immigration: Evidence across four decades

Robert Adelman, Lesley Williams Reid, Gail Markle, Saskia Weiss & Charles Jaret

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Urban crime rates and the changing face of immigration: Evidence across four decades

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ABSTRACT

Research has shown little support for the enduring proposition that increases in immigration are associated with increases in crime. Although classical criminological and neoclassical economic theories would predict immigration to increase crime, most empirical research shows quite the opposite. We investigate the immigration-crime relationship among metropolitan areas over a 40 year period from 1970 to 2010. Our goal is to describe the ongoing and changing association between immigration and a broad range of violent and property crimes. Our results indicate that immigration is consistently linked to decreases in violent (e.g., murder) and property (e.g., burglary) crime throughout the time period.

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Introduction

> When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.
>
> —Donald Trump, June 16, 2015

From the beginning of the 20th century to today in the 21st, immigrants' alleged propensity for crime has been a common theme in the political discourse surrounding state and federal immigration law (Carter & Steinberg, 2006; Higgins, Gabbidon, & Martin, 2009; Moehling & Piehl, 2009; Sampson, 2008). This theme, as expressed in Donald Trump's statement above, however, stands in sharp contrast to the findings of existing research on the topic. Immigration–crime research over the past 20 years has widely corroborated the conclusions of a number of early twentieth century presidential commissions (Wickersham, 1931)

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that found no support for the immigration–crime connection. Although there are always individual exceptions to aggregate patterns and trends, immigrants commit fewer crimes, on average, than native-born Americans (Bersani, 2014; Butcher & Piehl, 1998; Feldmeyer, 2009; Hagan & Palloni, 1998; Morenoff & Astor, 2006; Olson, Laurikkala, Huff-Corzine, & Corzine, 2009).

Immigration does not occur at a stable and consistent pace. Rates of immigration in the United States have fluctuated dramatically over time and across geographic spaces (Portes & Rumbaut, 2014). For example, in each decade from 1880 to 1930, well over five million immigrants entered the United States, and the foreign-born comprised over 12% of the total population. But from 1930 to 1960, due to restrictive immigration laws, the Great Depression, and World War II, immigration dropped to an average of 1.3 million per decade and the foreign-born declined from 12% to 5% of the total population (Portes & Rumbaut, 2014). Currently, the percentage of the total U.S. population that is foreign-born is 13% and the immigrant population itself is 47% Latino, 26% Asian, 18% white, and 8% black (Cohn, 2015). However, annually since 2009, the percentage of Asian immigrants (36%) has surpassed that of Latino immigrants (31%), leading researchers to project that by 2065 the U.S. immigrant population will be 38% Asian and 31% Latino with the proportion of whites and blacks unchanged (Taylor et al., 2013). Moreover, immigrants are settling in a wider range of states than in the past, with many going to parts of the United States that previously did not have large immigrant communities (e.g., Georgia, Nevada), and many immigrants now directly settle in suburban areas such as Prince William County, VA, and Montgomery County, MD (Baird, Adelman, Reid, & Jaret, 2008; Wilson & Singer, 2011). Since immigrants are less likely to be criminal offenders than the native-born, it is possible that immigration, as an aggregate-level phenomenon, can affect the overall rate of crime in different places and at different times. In this study, we explore these possible geo-temporal effects of immigration on crime at the macro-level.

There are a variety of macro-level explanations about the relationship between immigration and crime. Some scholars contend that immigration indirectly increases aggregate levels of crime by reducing the economic opportunities of native-born Americans (Beck, 1996; Borjas, 1987; Catanzarite, 2003; Johannson & Shulman, 2003; Shihadeh & Barranco, 2010; Stewart & Hyclak, 1986; Waldinger, 1996, 1997). Immigrants might, for example, displace native-born workers from jobs, forcing the latter to participate in illegal labor markets (Grogger, 1998). In this scenario, immigrants themselves do not commit crimes but instead change the opportunity structure of non-immigrant workers, which drives them to offend. Other scholars contend that immigrants improve local labor markets by creating jobs and revitalizing inner-city neighborhoods in ways that improve conditions for both immigrants and native-born workers (Adelman & Jaret, 1999; Grant & Parcel, 1990; Light & Gold, 2000; Lyons, Vélez, & Sontoro, 2013; Stansfield, 2013). As a consequence, immigration reduces aggregate levels of crime as increasing labor market opportunities improve native-born Americans' ability to earn an income in

legal labor markets (Feldmeyer & Steffensmeier, 2009; Lee & Martinez, 2009; Lee, Martinez, & Rosenfeld, 2001; Reid, Weiss, Adelman, & Jaret, 2005).

Aside from these possible economic-based links between immigration and crime rates, researchers have debated whether immigration creates changes in urban social organization that affects the crime rate. Work examining pre-1900 immigration and crime has focused on impoverished Irish Catholics in American cities. Researchers describe criminally violent Irish street gangs in New York and Philadelphia, mention increased crime rates in the Irish immigrant neighborhood of South Boston, and contend that Irish immigration contributed to higher homicide rates between 1850 and 1875 (Asbury, 1927; Fallows, 1979; Monkkonen, 1989). Wirth (1938) contended that as cities increased in size, density, and heterogeneity (much of it due to immigration) a weakening of traditional and informal means of social control occurred and an anomic, competitive, even exploitative way of life arose in which crime was more frequent. Other classic Chicago School urban sociologists found high rates of juvenile delinquency and criminal behavior in poor immigrant neighborhoods. They contended this was produced by poverty, lack of opportunities, and social disorganization manifested in so-called broken families, neighborhood instability, and lack of common community standards or morals (Burgess & Bogue, 1964). This view of disorganized, crime-ridden immigrant neighborhoods was challenged and amended by subsequent research showing them to be highly organized and relatively safe places (Suttles, 1968; Sanchez-Jankowski, 2008). More recently, the debate on immigrants and crime was reopened with Putnam's (2007) assertion that increases in metropolitan areas' social diversity (e.g., more and a wider variety of immigrants) causes a decline in social solidarity, social capital, and interpersonal trust, which leads to higher crime.

We evaluate the relationship between the size of the foreign-born population in U.S. metropolitan areas and crime rates in those areas between 1970 and 2010. Examining these longitudinal data allows us to assess whether the relationship between immigration and crime has changed over time and geographic space in the context of changes in the broader U.S. economy and changes in the size and origination of immigrant flows. As the relationships between other socioeconomic factors and crime are historically and geographically contingent, so too may be the relationship between immigration and crime.

Studying the immigration–crime relationship

Some of the most influential and enduring theories within sociology and criminology developed when the founders of the Chicago School observed the social consequences of rapid immigration during the first half of the twentieth century (Park & Burgess, 1924; Shaw & McKay, 1942; Shaw, Zorbaugh, McKay, & Cottrell, 1929). Even during this period of rapid immigration and pervasive anti-immigrant sentiment, data did not indicate a positive relationship between immigration and crime (Hart, 1896; Hourwich, 1912). During the 1930s, researchers' concern about

immigrants as a cause of crime waned, largely due to the precipitous drop in immigration resulting from the restrictive immigration laws passed the previous decade. This concern reappeared after Congress passed the Hart-Celler Immigration Reform Act of 1965. Commonly referred to as the Hart-Celler Act, the Immigration and Nationality Act of 1965, amended previous U.S. immigration policy by abolishing the national origins quota system, in place since 1921, and replacing it with a preference system focusing on relatives of U.S. citizens and permanent residents, professional and highly skilled workers or unskilled workers in needed occupations, and those seeking refuge from violence, persecution, or national calamities (Bureau of Security and Consular Affairs, 1968; Immigration and Nationality Act of 1965; Keely, 1971). By abolishing the quota system and prioritizing family reunification, the common perception was that this law would increase immigration from Latin American countries (Rumbaut, 1994). Although the direct effects of the Hart-Celler Act have been overstated (Massey, 1996; Rumbaut, 1994), overall increases in immigration, not only from nations similar to the United States but also from Asian and Latin American countries, have greatly increased the diversity of U.S. immigrants (Zhou, 2001) and rekindled public concern about its consequences.

Likewise, recent immigration has renewed researchers' interest in the potential connection between immigration and crime. Over the past 15 years, research has attempted to answer two general questions. The first, posed at the individual, or micro level, asks whether immigrants have a higher propensity to commit crime than the native-born. The second question, posed at the aggregate, or macro level, asks whether immigrants affect the crime rate by any means, either directly or indirectly.

The immigration–crime relationship among individuals

Sociological theories predicting immigrants to be more criminal are frequently based on the assumption that new arrivals are poor (Clark, 1998; DeJong & Madamba, 2001). Basing their arguments on the characteristics of immigrants in the early twentieth century, researchers often followed Merton's (1938) premise, suggesting that immigrants enter the United States poor and experience discrimination in labor markets and blocked pathways to social and economic mobility (Lee et al., 2001; Waldinger, 1997). They consequently use crime in order to improve their economic standing. Moreover, blocked economic opportunities may engender frustration that could lead to violence (Agnew, 1992; Blau & Blau, 1982; Tonry, 1997). Furthermore, systematic discrimination and barriers to social and economic mobility could also lead to the formation of criminal immigrant subcultures that develop into gangs, especially among the children of immigrants (Bankston, 1998; Short, 1997).

These arguments are clearly countered, however, by empirical results showing that immigrants offend less than the native-born U.S. population (Bersani, 2014;

Harris, 1999; Sampson, Morenoff, & Rudenbush, 2005; Sampson, 2008). Extant empirical evidence finds that immigrants are less criminal than the native-born population, although there are exceptions for specific immigrant groups. Investigating the relationship between immigration and different types of crime in San Diego and El Paso, Hagan and Palloni (1999) found that immigrants and the native-born have similar rates of arrest for drug, property, and violent crimes. Martinez and Lee (2000) observed that in Miami rates of criminal offending among Haitian, Jamaican, and Mariel Cuban immigrants were less than those of the native-born. Examining homicide among Mariel Cubans, non-Mariel Latinos, whites, Afro-Caribbeans (Haitians and Jamaicans), and native-born blacks, Martinez, Nielsen, and Lee (2003) showed virtually no effect of immigrant-status. The only exception was that Afro-Caribbeans were more likely than native-born blacks to commit drug-related homicides. Olson et al. (2009) found that native-born citizens had the highest rate of arrest for homicide, attempted homicide, robbery, and aggravated assault compared to foreign-born citizens, naturalized citizens, and noncitizens in Orange County, FL (Orlando), but noncitizens had the highest rate of arrest for sexual assault. Nielsen and Martinez (2011) examined arrests for robbery and aggravated assault among specific immigrant groups in Miami and noted that immigrants from Cuba, Haiti, Honduras, Nicaragua, Dominican Republic, and other countries were less likely to be arrested for robbery than for aggravated assault compared to the native born.

Although immigrants have offending levels lower than those of the native-born, this does not necessarily hold true for their children. Research indicates the likelihood of committing violence increases with successive generations of immigrants (Bersani, 2014; Morenoff & Astor, 2006; Sampson et al., 2005). In Chicago, the odds of committing violence for children of immigrants were 1.33 times that of immigrants themselves, and the odds of violence for grandchildren of immigrants were twice that of immigrants themselves (Sampson et al., 2005). However, it is important to note that, in spite of these generational increases in offending, children and grandchildren of immigrants approach, but do not exceed, the level of offending of the native-born population. Moreover, evidence suggests that the children of more recent immigrants are less delinquent than children whose parents immigrated in the middle part of the twentieth century (Dinovitzer, Hagan, & Levi, 2009).

If immigrant offending is lower than that of the native-born, then all else being equal, having a large immigrant population in a city or metropolitan area should have the effect of lowering that area's crime rate (since the immigrant population adds disproportionately more to the denominator than to the numerator in computing the community's crime rate) and percentage immigrant (i.e., percentage foreign born) in the population should be negatively correlated with that area's crime rate. However, as we discuss in the next section, some researchers suggest that "all else is not equal" and therefore the percentage of immigrants in a community might indirectly be associated with a rise in aggregate crime rates.

The immigration–crime relationship at the macro level

A number of studies have found that immigrants challenge the wage and job opportunities of the native-born, especially African Americans (e.g., Aydemir & Borjas, 2007; Borjas, 2003). Rosenfeld and Tienda (1999) contend that blacks and some immigrants (e.g., foreign-born Latino) compete in the secondary labor market where jobs require less human capital, and offer low wages and harsh working conditions (see also Catanzarite, 2003; Johannsson & Shulman, 2003). Consequently, many non-white immigrants and blacks compete for the same jobs within a metropolitan area (see also Browne, Tigges, & Press, 2001; Moss & Tilly, 2001; Ong & Valenzuela, 1996; Rosenfeld & Tienda, 1999).

Beck (1996) is particularly concerned because immigrants have lower expectations in terms of wages, and he argues that blacks are moved down the job queue by the existence of immigrants in labor markets. Further, Borjas (2003) argued that when examining matched pairs of immigrant and native-born workers based on education, experience, and skill levels, immigrants challenge native-born wages and job security. And ethnographic research suggests that many employers prefer hiring immigrant workers over African Americans (Beck, 1996; Waldinger, 1996, 1997; Wilson, 1987). They perceive the former as reliable while stereotyping native-born blacks as lazy and unreliable (Neckerman & Kirschenman, 1991). Even if immigrants are not themselves involved in crime, their influx into local labor markets could displace native-born workers who must shift their employment to a legitimate/illegitimate work mix in order to survive (Freeman, 1996).

In contradiction to this argument, Zhou (2001) contended that "[t]he image of the poor, uneducated, and unskilled 'huddled masses,' used to depict the turn-of-the-century European immigrants, does not apply to today's newcomers" (p. 206). Since the passage of the Hart Celler Act, immigrants in the United States have become increasingly diverse with regard to their countries of origin, their racial, ethnic, and religious backgrounds, and their levels of education. Although some groups of immigrants enter the United States with, on average, very low levels of education (e.g., Mexicans), others arrive with college degrees from their home country with which they are able to successfully compete for highly-skilled jobs (Zhou, 2001). Consequently, arguments about displacement may overestimate the danger immigrants pose to the occupational opportunities of U.S. low-skilled workers.

Additionally, recent immigrants may not compete directly with native-born workers because they are often employed in ethnically-owned niche businesses (Zhou, 1992). If this is the case, then they do not compete with native-born workers and do not reduce the labor market opportunities of the native-born. Moreover, immigrant businesses may provide native-owned businesses with work. Even if an ethnically-owned business fills a niche and does not directly compete in the native-born economy, services and materials they require (e.g., transportation, raw materials, and warehousing) likely still improve labor market opportunities for native-

born workers (Kotkin, 2000). Furthermore, as consumers of goods and services, immigrants may increase the customer-base for native-owned businesses (Kotkin, 2000).

In fact, a body of research suggests that immigrant settlement in inner-city areas, many of which still suffer from the population declines and economic disinvestment of the 1970s (Bluestone & Harrison, 1982), has revitalized some of these places (Alba, Denton, Shu-yin, & Logan, 1995; Winnick, 1990). Consequently, it is possible that immigration reduces aggregate levels of crime by actually increasing the labor market opportunities of native-born workers *and* revitalizing urban neighborhoods (Graif & Sampson, 2009; Lee & Martinez, 2009; Lee et al., 2001; Lyons et al., 2013; Reid et al., 2005; Stansfield, 2013). Lyons et al. (2013) argued that immigrants' potential for neighborhood revitalization lies not only in their positive effect on local economies, but in their tendencies toward two-parent families and strong community relationships that enhance social organization.

Thus, according to the literature, as immigrants move into metropolitan areas and their neighborhoods there may be displacement or revitalization, depending on economic circumstances in each time period. In order to study these outcomes, scholars often examine relationships between immigration and crime in a single city or among two or three cities with high populations of immigrants. In Austin, TX, for example, a metropolitan area which has experienced an increase of 580% in its immigrant population for the period 1980–2000, researchers indicated no relationship between immigration and homicide (Akins, Rumbaut, & Stansfield, 2009) or burglary, larceny, and motor vehicle theft (Stansfield, Akins, Rumbaut, & Hammer, 2013). Researchers showed no relationship between immigration and homicide (Stowell, 2007; Stowell & Martinez, 2007) in Houston, San Antonio (Martinez & Stowell, 2012; Martinez, Stowell, & Cancino, 2008), and Alexandria, VA (Stowell, 2007). Martinez et al. (2008) found a negative relationship between immigration and homicide in San Diego. Analyzing black and Latino homicides in El Paso, Miami, and San Diego, Lee's (2003) results suggested that the effect of immigration on homicide was negative, except for a positive effect on black homicides in San Diego.

In Chicago, examining the relationship between recent immigrants and homicide Vélez (2009) pointed to elevated levels of homicide in advantaged areas but lower levels of homicide in disadvantaged areas, leading her to conclude that recent immigrants revitalize disadvantaged neighborhoods. Also in Chicago, Kubrin and Ishizawa (2012) observed that neighborhoods with high concentrations of immigrants which were spatially embedded within larger immigrant communities had lower rates of homicide and robbery compared to other immigrant neighborhoods, but in Los Angeles these embedded immigrant neighborhoods had higher rates of homicide and robbery, although MacDonald, Hipp, and Gill (2013) found that an increase in recent immigrants was associated with decreased levels of violent and total crime, especially in areas of concentrated poverty in Los Angeles. Studying

New York City, Davies and Fagan (2012) determined there was an association between immigration and reduced rates of violent crime, drug crime, and property crime. In Miami, researchers identified a negative relationship between immigration and homicide (Martinez & Stowell, 2012; Stowell & Martinez, 2007). Comparing racial and ethnic groups in Miami, Nielsen and Martinez (2009) showed a negative relationship between immigration and Latino and black homicide, while Stowell and Martinez (2009) showed how the negative relationship between immigration and homicide was stronger for Latino immigrants than for other immigrant groups.

Studies using samples of cities or metropolitan areas yield similar results. Martinez and Lee's (2000) analysis of 111 cities revealed a negative or null effect on most types of Latino homicides, but a positive effect for felony homicides which occur during the commission of another crime. Ousey and Kubrin (2009) found that, in their sample of 159 cities, immigration was tied to decreases in violent crime, and attributed this relationship to the revitalization of traditional family structure brought on by immigration. Shihadeh and Barranco (2010) attributed a positive relationship between Latino immigration and black crime in 117 cities to higher levels of black unemployment resulting from increased levels of Latino participation in low-skill labor markets. Reid et al. (2005) found a negative relationship between immigration and homicide over a sample of 150 metropolitan areas, and no relationship between immigration and robbery or burglary. In general, the authors also noted no relationship between immigration and theft with one exception: As the relative size of the Asian foreign-born population increased, levels of theft decreased. Schnapp (2015) examined 146 cities weighted by population size and identified no relationship between immigration and homicide. And Stanfield's (2013) analysis of 131 cities indicated no relationship between immigration and violent crime and a negative relationship between immigration and property crime.

Scholars also examine the relationship between immigration and crime at the census tract, or neighborhood level. Feldmeyer and Steffensmeier (2009) examined 328 census places in California and found that immigration had no effect on total homicide offending and a small negative effect on black and white homicide offending. Harris, Gruenewald, and Painter-Davis (2015) showed that Latino immigration was associated with increased black-on-black and black-on-white homicide, and black-on-black, black-on-white, and black-on-Latino robbery in a sample of 363 census places. In a sample of 8931 census tracts nested within 87 large cities, Lyons et al. (2013) found inverse relationships between immigration and homicide and robbery, especially in areas in which immigrants had access to political opportunities. Martinez, Stowell, and Lee (2010) found that the growth of the foreign-born population was associated with a decline in lethal violence in San Diego neighborhoods during the period 1980–2000. And Chavez and Griffiths (2009) examined homicide rates in Chicago neighborhoods from 1980 to 1995 and revealed a negative relationship between immigration and crime.

Studying individuals nested within neighborhoods also shows consistent results. In their study of Chicago adolescents, Morenoff and Astor (2006) find that first generation immigrant youth are less involved in violent crime than their native-born counterparts independent of the immigrant composition of the neighborhoods in which they live. However, second generation immigrant youth exhibit less violence if they live in neighborhoods with larger immigrant concentrations. Nationwide, using Add Health data, Desmond and Kubrin (2009) find that neighborhood immigrant concentration lessens levels of youth violence overall, but that the effect is strongest for Asian youth, both foreign- and native-born. Similar research suggests that immigrant concentration at the neighborhood-level is a protective factor for overall juvenile recidivism (Wolff, Baglivio, Intravia, & Piquero, 2015).

Several recent studies have compared traditional immigrant destination cities to non-traditional, or new, destination cities. Shihadeh and Winters' (2010) analysis of rates of Latino immigration and homicide victimization in 755 U.S. counties indicated significantly higher rates of Latino homicide in new immigrant destinations than in traditional destinations. Similarly, Barranco (2013) showed increased Latino homicide victimization in new destinations. Comparing traditional and new destinations in California, New York, and Texas, Harris and Feldmeyer (2013) found a negative relationship between Latino immigration and Latino violence, and no relationship between Latino immigration and white and black violence in traditional destinations, and higher levels of Latino and Black violence in new destinations. Comparing neighborhoods, Ramey (2013) illustrated how violence was much higher in integrated neighborhoods in new destinations compared to traditional destinations.

Contrasting crime across eras with higher rates of immigration to those with lower rates of immigration may also shed light on the question of whether immigration affects crime through indirect means. Longitudinal analysis on immigration and crime is, however, limited. Butcher and Piehl (1998) analyzed the impact changes in immigrant flows had on crime for a small sample of metropolitan areas for the period 1980 through 1990. Their results indicated changes in levels of immigration had no effect on changes in crime measured either year-to-year or across the decade. Stowell, Messne, McGeever, and Raffalovich (2009) examined crime rates from 1994 to 2004 across 103 metropolitan areas and concluded that increases in immigration contributed to declines, not increases, in violent crimes. Ousey and Kubrin (2009) examined violent crime rates for 159 metropolitan areas for the years 1980, 1990, and 2000, and found a negative relationship between immigration and crime which they attributed to lower rates of divorce and single-parent families in the immigrant population. Wadsworth (2010) investigated the relationship between immigration, homicide, and robbery in a sample of American cities between 1990 and 2000 and showed that increasing immigration contributed considerably to decreases in property and violent crime during this decade. More recently, Ousey and Kubrin (2014) investigated subtypes of homicide in large cities

during 1980–2010, and concluded that changes in immigration were not associated with argument, felony, or gang-related homicides, but were negatively associated with drug-related homicides. They also contend that city context was important; the negative relationship between immigration and homicide was greater in cities with larger pre-existing immigrant bases.

Extending immigration–crime research

Our study adds to these bodies of research by carefully considering the geographically and temporally contingent nature of the immigration–crime relationship at the macro level. Our study contributes to the current literature in at least two important ways. First, we investigate the possibility that the immigration–crime relationship is temporally and spatially contingent by examining it across metropolitan areas and over a period during which patterns of immigration in the United States varied greatly. Since most contemporary immigration–crime research has been conducted with data from 1990 or later, when the U.S. economy has been relatively prosperous until very recent years, current results might be missing the potential impact of large economic changes. Moreover, the post-1990s were years of high immigration, prohibiting comparisons with earlier eras of lower immigration. Together, these trends make it necessary to reach further back into the history of the United States to investigate the immigration–crime relationship. Therefore, we investigate the relationship between immigration and crime at four points in time over a 40 year period between 1970 and 2010. Second, we consider a much broader range of criminal offenses. Prior research has focused almost entirely on violent crime, specifically homicide, because it is more accurately measured and more troubling to the population (Mosher, Miethe, & Hart 2010); however, since homicide is statistically rare, we study a broader range of violent crime as well as property crime. In summary, our goal is to describe the ongoing and changing association between immigration and a broad range of violent and property crimes.

Data and methods

For this study, we drew a stratified sample of 200 Metropolitan Statistical Areas (MSAs) as defined in the 2010 census. We stratified the sample based on region and population size, and thus the sample is representative of the regional distribution of U.S. metropolitan areas. In our sample, all metropolitan areas with a population of one million or more are included, and we chose smaller ones (population 75,000 to one million) with an equal probability of selection method. We matched MSAs over time, merging or separating county-level data as necessary and where possible to account for changes in MSA geographies over time. Without missing data our sample would consist of 1,000 observations (200 for each year under observation). However, due to missing values on both independent and dependent variables, the number of observations for specific years changes.

Variables

Violent and property crimes

The dependent variables for this study represent rates (per 100,000 people) of murder and non-negligent manslaughter, aggravated assault, robbery, burglary, and larceny that were known to police at five points in time (1970, 1980, 1990, 2000, and 2010). We obtained the data from the uniform crime reporting (UCR) program of the FBI (U.S. Department of Justice, 2002, 2012), although missing data also made it necessary to construct some crime rates for specific MSAs using county-level FBI data (U.S. Department of Justice, 2002, 2012) and files from a UCR data utility created by Maltz and Weiss (2006). In those cases where the latter data had to be used to construct MSA-level crime rates, we added the reported number of offenses for the individual counties composing the MSA (based on FIPS codes) updated through 2010 and transformed them into rates using the reported population of the counties. In addition to rates for individual crimes, we also developed indices for both violent and property crime. The first index sums the rates of murder and non-negligent manslaughter, aggravated assault, and robbery, while the second index sums the rates of burglary and larceny. The two indices will be referred to as the violent crime index and the property crime index, respectively. UCR data follow the hierarchy rule, which means that, in multiple-offense incidents, only the most serious offense is recorded. While National Incident Based Reporting System (NIBRS) data corrects for this shortcoming, only about one-third of agencies participate in NIBRS today and NIBRS data are not publically available prior to 2011. The impact of the hierarchy rule on underestimating UCR crime rates is modest, however. Comparisons of UCR and NIBRS data report that the difference in crime estimatestends to be small, with NIBRS violent crime rates being about 1% higher than the UCR and NIBRS property crime rates being 2–3% higher than the UCR (Rantala, 2000; U.S. Department of Justice, 2015).

Immigration

The percentage of the MSA population that was born abroad, our main variable of interest, was obtained from the decennial censuses of 1970, 1980, 1990, 2000, and 2010. For this and other variables, 1990–2010 data come directly from the Census summary files for the respective years. Data for 1970 and 1980 come from Census of Population and Housing, 1970: Extract Data (Adams, 1970) and Census of Population and Housing, 1980: Extract Data (Adams, 1980). Since we are interested in how the immigration–crime relationship has changed over the past 40 years, we use 1970 as the reference year. 1970 serves as a useful baseline start date because it is five years after the passage of the Hart–Celler Act and represents a time when unemployment, immigration, and crime were relatively low.

Economic variables

The effect of immigration on crime may be contingent on the economic situation of a given metropolitan area. In order to test this, we include a number of variables

that operationalize the labor market structures and economic well-being of residents in our sample of MSAs. We include a variable that represents the level of unemployment in MSAs in 1970, 1980, 1990, 2000, and 2010. This variable is operationalized as the percentage of the civilian population aged 16 and over that was unemployed at the time of the census data collection in the respective year. Temporally disaggregated descriptive statistics (for space reasons not provided in this article) show that, compared to 1970 (mean = 4.36, std. dev. = 1.4), unemployment in our sample was more prevalent and demonstrated a greater range in 1980 (mean = 6.38, std. dev. = 1.99) and 1990 (mean = 11.07, std. dev. = 3.19), before showing improvement in 2000 (mean = 5.63, std. dev. = 1.73) but then increases sharply in 2010 (mean = 10.65, std. dev. = 2.54). Our sample is, therefore, adequate in determining potential effects of this variable on the immigration–crime relationship as it represents both increases and decreases in unemployment throughout the past four decades, as well as large regional differences in unemployment across the country.

Manufacturing jobs, such as those of metal workers, woodworkers, fabricators, or assemblers, are usually considered relatively good jobs for less-educated workers. They pay comparatively well, provide chances for advancement and training, and tend to be relatively stable. However, since the late 1960s and early 1970s such jobs have increasingly given way to low-skill service sector jobs, jobs that pay little, are unstable, and provide little chance for advancement (Doeringer & Piore, 1971; Gordon, 1972; Osterman, 1975). This has led to fundamental changes in the structure of labor markets in U.S. metropolitan areas, with low-skill jobs becoming far more prevalent and manufacturing declining rapidly. Since immigrants may reduce native-born Americans' chances of employment it is important that our analyses contain a measure of the relative sizes of the low-skill service and manufacturing sectors. The two variables measuring labor market structure were obtained from the census of the respective years and represent the percentage of the civilian workforce that is employed in these jobs. Specific occupational categories were combined to create a low-skill service sector employment variable based on prior research on segmented labor markets and categorization schemes within this research (Boston, 1990). Similar categorizations have been used previously within criminology (Crutchfield, 1989; Haynie, Weiss, & Piquero, 2008; Weiss & Reid, 2005).

Finally, we account for the economic distress experienced by residents of the MSAs by creating an economic deprivation index. The scale we created incorporates standardized values of the following variables: The natural log of the median family income, the percentage of families living below poverty, the percentage of African American residents, and the percentage of all households in an MSA that is headed by a female householder with no husband present (Reid et al., 2005).

Control variable

It is a well-established finding that criminal offending is more prevalent among youth and young adults, and is related to the age structure more generally (Moffitt,

1993; Sampson & Laub, 1993; Sampson & Laub, 2001; Farrell, Laycock, & Tilley, 2015). In order to control for the age structure of the population within our MSAs, we include a variable representing the percentage of the population that is below the age of 25.

Analytic strategy

To begin, we examine the effect of percentage foreign-born on the dependent variables; we also compare the coefficients using 1970 data to those of subsequent years. We employ fixed effects models in this analysis because, compared to random effects models, the technique makes fewer assumptions about the independence of time-varying independent variables (Gibbons & Kubrin, 2009).

We also rely on fixed effects models in order to counteract potential autocorrelation. Although there is a relatively long time (10 years) between our data points, autocorrelation remains a threat to the accuracy of our results. Ordinary least squares regression and other types of analyses require that errors between cases be uncorrelated. This is not the case in time series data, where errors are often correlated between time points and within cases. There are a number of ways in which time series data can be analyzed while still minimizing the influence of autocorrelation. However, most of these strategies (e.g., lagging data) would reduce the already small number of time points in our data making them difficult to apply to our analyses. Fixed effects models include dummy variables for each case (i.e., MSA). This essentially holds constant any unmeasured MSA characteristics that change little over time, such as regional or cultural effects (Jacobs & Tope, 2008). Using fixed effects models we minimize the effects of autocorrelation because the analysis controls for known and unknown factors that do not show change over the observed time period (Fitzgerald, 2005; Kail, Quadagno, & Dixon, 2009). Likewise, fixed effects analyses control for unobserved factors that take the same value for all of the cases (i.e., MSAs). Although our analyses contain both demographic and economic variables that should control for many temporal effects, there are likely macro-level changes our variables do not capture (e.g., a sudden economic shock like the 1973 oil embargo). The use of fixed effects models allows us to control for such changes in this study (Allison, 2009).

Our approach in the following analyses is to investigate the effect of the foreign-born population on rates of violent and property crime indices as well as rates of specific crimes. We suspect that the relationship between immigration and crime is not static; rather, it changes over decades as demographic and economic characteristics of U.S. metropolitan areas change.

Results

Trends in immigration, violent crime, and property crime between 1970 and 2010

Figures 1 and 2 show mean rates of violent and property crime per 100,000 residents for our sample of MSAs. In Fig. 1, violent crime rates increased after 1970,

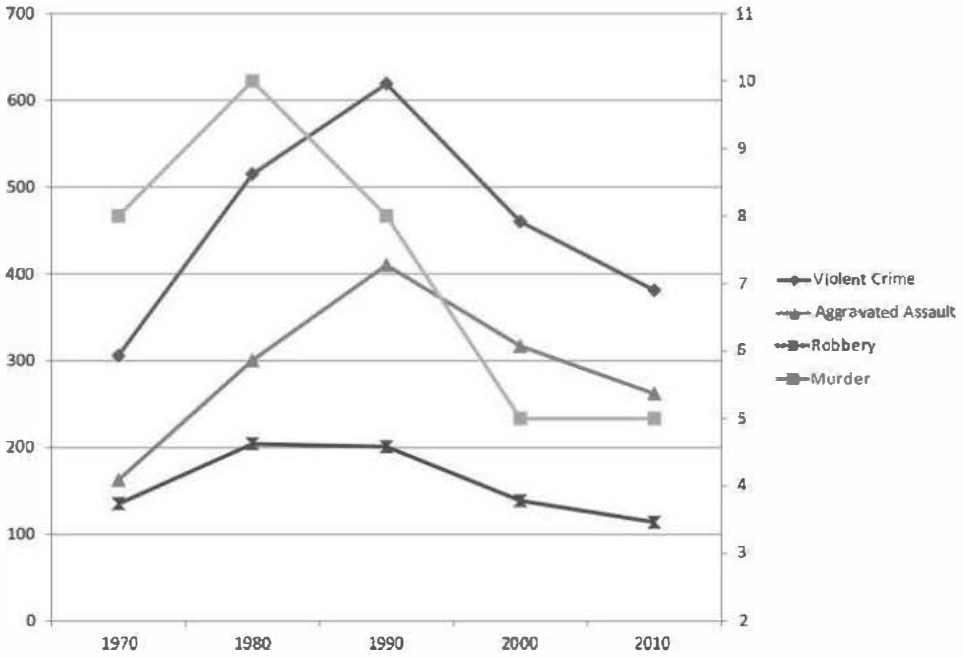

Figure 1. Average rates of the violent crime index, murder, aggravated assault, and robbery across U.S. metropolitan areas, 1970-2010. For scaling reasons the right axis represents the rate of murder while the left axis represents rates of violent crime, aggravated assault, and robbery.

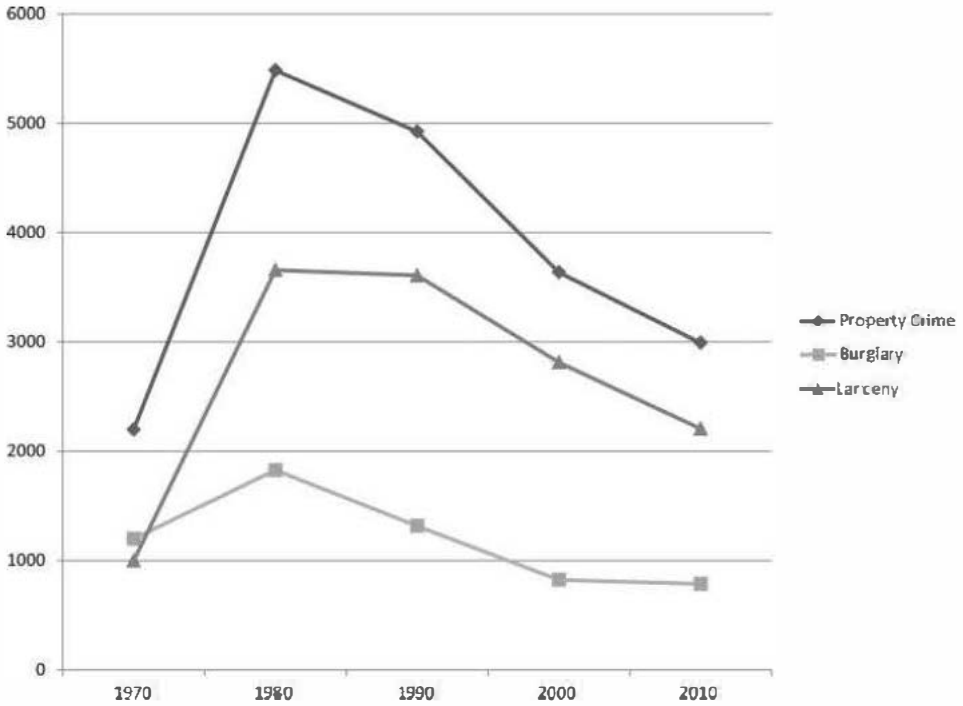

Figure 2. Average rates of the property crime index, burglary, and larceny across U.S. metropolitan areas, 1970-2010.

peaked around 1990, and then continued to decrease through 2010. Compared to 1970, the violent crime index rate for 1980 showed an increase of 213 crimes per 100,000 persons in the population. In 1990, the rate of violent crime was, on average, 316 incidences above the rate of 1970 before falling to a rate of 157 above the 1970 levels in 2000 and 74 in 2010.

The results for the violent crime index mask some differences observable when we disaggregate it into individual crime categories. Within the 1970–2010 period under study, and with 1970 serving as the reference point, murder appears to have peaked around 1980, with a rate that was, on average, about 2 offenses higher than in 1970. By 1990, murder rates in U.S. metropolitan areas had decreased again and were no longer different from those in 1970. By 2000 and 2010, rates of murder in U.S. metropolitan areas had further decreased to levels that were significantly lower than they were in 1970 (around 5 murders per 100,000).

Robbery follows a similar trend. It appears to have peaked around 1980 (around 69 robberies per 100,000 more than in 1970) and then began to drop. With reference to the 1980 data, the rate of robbery in 1990 had decreased by 3 robberies per 100,000 people. However, even in this year robbery remained 66 crimes per 100,000 people higher than it had been in 1970. By 2000, the rates of robbery had dropped to about the same rate of robbery as in 1970, and in 2010, rates of robbery had decreased again to about 114 robberies per 100,000 people, the lowest level in the robbery data.

The trend for assault is somewhat different from both robbery and murder and is likely the reason for the overall temporal trend in the violence index. Rather than peaking in 1980, as was the case with murder and robbery, rates of aggravated assault increased throughout the 1980s, peaked around 1990, with a rate of aggravated assault that was 247 crimes per 100,000 people higher than in 1970, and declined after that. In 2000, the rate was 154 aggravated assaults higher than in 1970, and even through 2010 the rate was 99 assaults higher. Thus, while murder and robbery occurred most around 1980 and then declined to below 1970 levels in 2010, aggravated assault peaked ten years later in 1990 and, while it declined somewhat, remained high even by the year 2010 in these metropolitan areas.

Property crime also peaked in 1980 (see Fig. 2), and then began to decline. However, as with the case for the violent crime index, the property crime index also masks differences for the two different types of property crime we investigate. Compared to 1970, larcenies increased and peaked around 1980 (3,656 larcenies per 100,000). They then decreased throughout the 1990s and 2000s, when the larceny rate of 2,205 larcenies per 100,000 people for 2010 remained higher than 1970 but was lower than in the three decades before.

The pattern for burglaries is very different. The rates for this crime peaked around 1980 and then began to fall precipitously so that by 1990 the rate was similar to the 1970 rate (about 1,200 versus 1,300 per 100,000 people). By 2000, the rate of burglary had declined to a new low that was 376 burglaries per 100,000 people lower than in 1970, and by 2010 it had dropped even

Table 1. Average crime rates for the 25 MSAs with the largest foreign-born population and the smallest foreign-born population.

		2010	2000	1990	1980	1970
Violent crime	Large % foreign born	451.0	557.4	868.3	699.4	360.6
	Small % foreign born	391.5	454.3	551.2	479.0	318.8
Homicide	Large % foreign born	5.2	4.8	10.3	12.0	7.4
	Small% foreign born	6.2	7.3	9.8	10.1	11.3
Aggravated assault	Large % foreign born	291.3	378.0	506.3	363.8	159.6
	Small% foreign born	270.7	308.8	387.0	299.2	196.3
Robbery	Large % foreign born	154.6	174.6	351.7	323.6	193.6
	Small% foreign born	114.5	138.3	154.3	169.7	111.3
Property crime	Large % foreign born	2659.0	3117.8	5139.5	5902.3	2461.8
	Small % foreign born	3370.9	4071.4	4797.5	5176.4	2117.0
Burglary	Large % foreign born	656.6	699.0	1489.8	2121.6	1385.9
	Small% foreign born	963.9	1006.3	1380.2	1725.3	1176.7
Larceny	Large % foreign born	2002.4	2418.9	3649.8	3780.7	1075.9
	Small% foreign born	2407.0	3065.1	3417.3	3451.1	940.3
% foreign born	Large % foreign born	27.3	26.9	21.1	14.1	9.9
	Small% foreign born	2.6	1.9	1.2	1.6	1.0

further to 413 burglaries lower, on average, per 100,000 people (at a rate of 786 burglaries per 100,000 people).

Table 1 displays the average crime rates for the 25 MSAs with the largest percentage of foreign-born residents and the 25 MSAs with the smallest percentage of foreign-born residents for each decade between 1970 and 2010. This table shows a linear trend across both sets of MSAs over time. Those MSAs with large foreign-born populations had an average percentage foreign-born of 9.9% in 1970 that grew to 27.3% by 2010. MSAs with small foreign-born populations experienced a similar pattern of growth, beginning with an average percent foreign-born of 1.0% in 1970 and increasing to 2.6% in 2010. These results support the general trend of increasing immigration in the United States as a whole discussed earlier.

Violent crime rates overall began to decline after 1990 in both MSAs with high percentages of foreign-born residents and low percentages of foreign-born residents, following steady increases since 1970. This is consistent with broader trends in violent crime (Parker, 2006). The violent crime rate is driven primarily by trends in aggravated assault and robbery; looking specifically at homicide reveals some deviations from this overall trend. Homicide rates in MSAs with small foreign-born populations declined across the entire 1970–2010 time period. However, in MSAs with large foreign-born populations, homicide rates peaked in 1980 and then declined through 2010. This decline in homicide rates in MSAs with large foreign-born populations was greater than in MSAs with small foreign-born populations. The result is that, as of 2010, homicide rates are highest in MSAs with small foreign-born populations. By contrast, rates of aggravated assaults and robbery are lowest in those MSAs.

Property crime rates in MSAs with large and small foreign-born populations parallel national trends in property crime (Parker, 2006). Overall property crime rates, as well as rates of burglary and larceny specifically, increased between 1970 and 1980. After 1980, property crime rates began to decline, with the rate of

decline increasing after 1990. Moreover, the rate of decline over this time period was more rapid in those MSAs with large foreign-born populations than in those MSAs with small foreign-born populations. Although all property crime rates were higher in MSAs with large foreign-born populations in 1970, by 2010 this pattern had reversed, and MSAs with large foreign-born populations had lower property crime rates than MSAs with small foreign-born populations.

Foreign-born group size as a predictor of violent and property crime

Most important for the purpose of our research are the postulated relationships between the size of the foreign-born population in U.S. metropolitan areas and rates of crime. In Table 2, we examine a series of models predicting murder, aggravated assault, and robbery in addition to a summary index of the three variables, the violent crime index. In three of the four models, the coefficient for percentage foreign-born is significant and negative indicating that, as the relative size of the foreign-born population increases, rates of violent crime, murder, and robbery decrease. More specifically, every 1% increase in the foreign-born population decreases the overall violent crime rate by 4.9 crimes. For murder, the decrease is .11 crimes (a small but significant effect especially given the relatively low numbers of murders per 100,000 people) and for robbery, 4.3 crimes per 100,000 population. Percentage foreign-born is not significantly associated with aggravated assault, but we think it is important to note that the direction of the effect is negative.

As a consequence of these results, our findings mirror the larger literature showing either a negative effect of immigration on crime or no significant effect. Following 40 years of increases in immigration in American metropolitan areas, we find no evidence of displacement related to measures of violent crime.

Table 2. Fixed effects regression results for rates of violent crime, murder, aggravated assault, and robbery on foreign born population.

	Violent crime		Murder		Aggravated assault		Robbery	
Foreign born(%)	4.90*	(2.34)	0.11**	(0.04)	0.66	(1.71)	4.27***	(1.00)
Unemployment rate (%)	2.89	(3.63)	0.05	(0.07)	0.24	(2.64)	2.76	(1.70)
Manufacturing (%)	0.48	(1.56)	0.08***	(0.03)	0.52	(1.12)	0.03	(0.72)
Low service sector (%)	0.42	(2.04)	0.01	(0.04)	0.79	(1.48)	0.32	(0.96)
Deprivation	2.04	(4.04)	0.01	(0.07)	3.15	(2.94)	1.05	(1.90)
Young population (%)	3.72	(4.03)	0.10	(0.07)	2.08	(2.91)	1.37	(1.89)
Year 1980†	218.86***±	(20.29)	1.98***±	(0.38)	140.02***±	(14.70)	74.54***±	(9.48)
Year 1990†	357.40***±	(34.62)	1.22±	(0.63)	276.12***±	(25.04)	79.95***±	(16.14)
Year2000†	215.50***	(31.63)	2.77***±	(0.60)	172.36***±	(22.88)	43.94***	(14.75)
Year2010†	54.08	(78.51)	1.04±	(3.68)	76.57***	(56.69)	15.86	(36.55)
N_{obs}	855		857		864		866	
N_{groups}	200		200		200		200	
$R^2_{overall}$	0.081		0.134		0.144		0.001	

*$p \leq 0.05$ **$p \leq 0.01$ ***$p \leq 0.001$ (two tailed).
†Coefficients for years represent the average differences in crime compared to 1970 while independent variables are controlled. ±Multiplicative term between percentage foreign born and dichotomous designator for that year is statistically significant.
Standard errors are in parentheses.

Table 3. Fixed effects regression results for rates of property crime, burglary, and larceny on foreign born population.

	Property cirme		Burglary		Larceny	
Foreign born (%)	98.96***	(11.44)	44.62***	(4.13)	54.28***	(8.65)
Unemployment rate (%)	43.16*	(17.67)	19.37**	(6.38)	23.64	(13.37)
Manufacturing (%)	6.61	(7.54)	1.24	(2.72)	7.68	(5.70)
Low service sector (%)	11.54	(9.96)	3.01	(3.60)	8.54	(7.53)
Deprivation	12.59	(19.74)	6.83	(7.13)	5.62	(14.94)
Young population (%)	13.08	(19.53)	1.33	(7.05)	11.92	(14.78)
Year 1980†	3,332.46***	(98.59)	646.34***±	(35.61)	2,685.62***	(74.60)
Year 1990†	2,765.56***	(167.94)	127.92*	(60.63)	2,639.82***	(127.08)
Year2000†	2,083.14***	(153.37)	165.78	(55.39)	2,247.57***	(116.06)
Year 2010†	1,063.32**	(380.36)	270.43*	(137.25)	1,327.10***	(287.82)
N_{obs}	865		866		865	
N_{groups}	200		200		200	
R^2overall	0.395		0.277		0.499	

*$p \leq 0.05$ **$p \leq 0.01$ ***$p \leq 0.001$ (two tailed).
†Coefficients for years represent the average differences in crime compared to 1970 while independent variables are controlled. ±Multiplicative term between percentage foreign born and dichotomous designator for that year is statistically significant.
Standard errors in parentheses.

An even stronger examination of the relationship between immigration and crime is to study the effect of immigration on property crime because people often commit crimes to acquire economic goods. Our results for property crime in Table 3 show that the size of the foreign-born population is significantly and negatively related to the property crime index, rates of burglary, and rates of larceny. Every 1% increase in the foreign-born population decreases overall property crime by about 99 offenses; it decreases the rate of burglary by 45 crimes and the rate of larceny by around 54 crimes per 100,000 people. This finding is consistent with results of previous research that shows immigrants bring economic improvement by revitalizing formerly deteriorated areas (Reid et al., 2005).

It appears, then, that for the latter part of the 20th century and early part of the 21st, the presence of immigrants consistently helped to decrease violent and property crime in U.S. metropolitan areas. Few other coefficients were significant in the models presented in Tables 2 and 3. The negative effect of manufacturing for murder rates in Table 2 and the positive effect of unemployment on the property crime index and burglary in Table 3 are in directions predicted by the literature. Most of the indicators for year are significant, which means that in these years crime rates are actually higher or lower (depending on the sign) than they were in 1970, controlling for the independent variables included in the models.

As expected, the explanatory power of our models varies by the crimes under observation. Our economic and demographic variables account for more variation in property crimes than violent offense rates. We explain 40% of the variation in property crime in our data compared to 8% of the variation in violent crime. This is not surprising, since violent crimes are usually based on affect, or emotional processes such as anger. By contrast, property crimes are instrumental in nature and closely tied to economic conditions in both geographic areas and time periods.

Discussion and conclusion

Despite continuing nativist arguments alleging a causal relationship between immigration and crime, individual-level research based on arrest and offense data of the foreign-born shows that they are overall less likely to offend than native-born Americans. Some argue, however, that regardless of immigrants' relatively low involvement in crime at the individual level, immigration might nevertheless be tied to increases in crime through structural and macro-level mechanisms. In this study, we investigated arguments that suggest immigration displaces native-born residents to such an extent that crime would increase or that immigration in a metropolitan area could help revitalize that area. Thus, we examine how the relationship between immigration and crime varies across four decades during which the United States underwent considerable economic and demographic change, working from the premise that understanding the aggregate-level relationship between immigration and crime requires a longitudinal investigation that includes times of economic stress, as well as times of relative economic well-being.

Our results indicate that, for property crimes, immigration has a consistently negative effect. For violent crimes, immigration has no effect on assault and a negative effect on robbery and murder. This is strong and stable evidence that, at the macro-level, immigration does not cause crime to increase in U.S. metropolitan areas, and may even help reduce it. The interpretation of our results gives us pause when considering the current cultural ethos in the United States. The variety of legislation at the state level aimed at immigrants, legal or not, is underscored by popular sentiments about how current immigration is detrimental to the U.S. economically and socially. But at least when it comes to crime—and in fact, on many other counts addressed in the literature—there is no evidence at a metropolitan level of these severe impacts. Our results are clear and overarching that immigration does *not* lead to increases in crime in American metropolitan areas.

What does lead to increases, or decreases, in crime over time in the United States? One weakness of our article is that we could not include the breadth of variables that have been proposed as possible answers to this question in recent years beyond immigration. We partially capture some, like changes in the size of the youth population that affect the initiation of adolescent offending (Farrell, Laycock, & Tilley 2015) and shifts in the composition of urban labor markets due to industrial restructuring (Parker, 2008). However, our use of nationally representative longitudinal data at the level of metropolitan areas makes the inclusion of other proposed explanatory factors impossible. Explanatory factors proposed in recent research cover a wide range of phenomena that include such things as changes in gang activity and the militaristic policing of gangs, especially in minority neighborhoods (Costanza & Helms, 2012); increases in cell phone use generating more effective crime prevention through guardianship and increased efficiency in reporting crimes (Orrick & Piquero, 2015); and declines in the uses of cash for financial transactions, including welfare benefits (Wright et al., 2014). It

is likely that many factors drove the persistent decline in crime after the early 1990s. Immigration is just one of these.

Clearly, the relationship between immigration and crime is complex and future research needs to work toward a better understanding of that complexity, including the role of other factors in shaping trends over time. However, the relationship between immigration and our crime measures is robust and consistently negative throughout the four data points we compared to 1970. Since the Hart-Celler Act went into effect only a few years before 1970, this year represents a time period when relatively few new immigrants had entered the country. And, in spite of the varying social conditions in 1970, 1980, 1990, 2000, and 2010, the immigration–property crime relationship remains consistently negative throughout the entire period. Metropolises with higher percentages of foreign-born populations had consistently lower rates of murder, robbery, burglary, and larceny. Thus, our research leads us to conclude that revitalization is most likely the dominant mechanism linking immigration to crime in U.S. metropolitan areas over the past four decades, further solidifying scholarly support for the idea that immigrants, on the whole, have positive impacts on American social and economic life.

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AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of California

2018 MAR 27 A 11: 15

DEPARTMENT OF STATE

Farangis Emami et al.

Plaintiff(s)

v.

Kirstjen Nielsen,
Secretary of Homeland Security, et al.

Defendant(s)

Civil Action No. 3:18-cv-01587

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* SEE ATTACHMENT

SERVICE ACCEPTED IN
OFFICIAL CAPACITY ONLY
EXECUTIVE DIRECTOR
OFFICE OF THE LEGAL ADVISER
03/27/18

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Luis Alberto Cortes Romero
Immigrant Advocacy & Litigation Center, PLLC
19309 68th Avenue South
Suite R102
Kent, WA 98032

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 03/23/2018

Susan Y. Soong

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 3:18-cv-01587

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* .

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)*

_____ on *(date)* ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date:

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

ATTACHMENT TO SUMMONS

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Soheil Vazehrad; Atefehossadat Motavaliabyazani; Behnam Babalou; Hoda Mehrabi Mohammad Abadi; Mahdi Afshar Arjmand; Ehsan Heidaryan; Najmeh Maharlouei; Nastaran Hajiheydari; Afrooz Kharazmi; Afshan Alamshah Zadeh; Bamshad Azizi; Roghayeh Azizikoutenaei; Hojjatollah Azizikoutenaei; Clyde Jean Tedrick II; Mitra Farnoodian-Tedrick; Farajollah Farnoudian; Farangis Emami; Tannaz Toloubeydokhti; Fathollah Tolou Beydokhti; Behnaz Malekghaeini; Maral Charkhtab Tabrizi; Zahra Rouzbehani; Bahram Charkhtab Tabrizi; Maryam Mozafari; Nahid Golestanian; Mohammad Mehdi Mozaffary

Plaintiffs,

Civil Case No.

COMPLAINT FOR WRIT OF MANDAMUS AND INJUNCTIVE AND DECLARATORY RELIEF

CLASS ACTION

ADMINISTRATIVE PROCEDURE ACT CASE

-against-

DONALD J. TRUMP, as President of the United States of America; JEFFERSON BEAUREGARD SESSIONS III, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; REX W. TILLERSON, in his official capacity as Secretary of State; U.S. DEPARTMENT OF STATE; DAN COATS, in his official capacity as Director of National Intelligence; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Defendants.

INTRODUCTION

1. Mania Pour Aghdasi is a U.S. citizen residing in California. In September 2016, Ms. Aghdasi's brother passed away after battling brain cancer in the house in which her father lived in Iran. Ms. Aghdasi is her father's last remaining family member. She assisted her father, a 78-year-old Iranian national, in applying for a visitor's visa so they could be together in their grief. During the long 14 months that followed, Ms. Aghdasi repeatedly contacted the U.S. Embassy, her congressional representatives, the State Department, the White House—anyone who would listen—to get her father's visa approved as his health deteriorated. Ms. Aghdasi's father died on December 24, 2017, waiting for his visa to be issued. Two weeks later, his visa application was denied pursuant to the Presidential Proclamation that established the latest travel ban. At no point did anyone consider Ms. Aghdasi's father for a waiver from the travel ban. Nonetheless his visa was denied. Ms. Aghdasi's story is emblematic of the destruction and tragedy that has been wrought by the Proclamation's reckless implementation, but her experience is sadly not uncommon.

2. Plaintiffs and proposed class members are American citizens, U.S. lawful permanent residents, and foreign nationals who have approved visa petitions, or who have assisted family members with filing for U.S. visas, and who seek entry to the United States to be reunited with their American families or fulfill significant U.S. business relations.

3. In 2017, President Donald J. Trump attempted to institute three travel bans via executive order and presidential proclamation. Each ban applied mostly to Muslim-majority countries. The first two versions were struck down by federal district and appellate courts. The constitutionality of the third travel ban is currently being litigated at the U.S. Supreme Court. On December 4, 2017, the Court issued a decision allowing the third travel ban to be implemented while the case was heard on its merits.

4. On December 8, 2017, Defendants began implementing the third version of the travel ban in a way that violates the Administrative Procedure Act ("APA"), the Immigration and Nationality Act ("INA"), and Plaintiffs' right to due process under the Fifth Amendment to the U.S. Constitution. The Presidential Proclamation ("Proclamation") that established this ban specifically states that "case-by-case waivers" may be granted by consular officers under a non-exclusive list of circumstances for visa applicants from the banned countries. Nonetheless, in direct contravention of the terms of the Proclamation, Defendants have refused to consider such waivers and have instead issued blanket denials of visas, regardless of personal circumstances and without giving applicants the opportunity to argue their cases, thereby violating the APA, the INA, and Plaintiffs' right to Fifth Amendment due process.

5. These claims are backed up by numbers published by Defendants themselves: State Department has revealed that, as of March 6, 2018, only about a hundred waivers had been granted to visa applicants from the banned countries, a rejection rate of more than 98%.

6. Defendants' unlawful and discriminatory actions have shattered Plaintiffs' lives and their prospects for being reunited with their loved ones as well as the lives and reunification prospects of the scores of similarly situated families and individuals they seek to represent through this action. They seek this Court's intervention to cease visa denials due to the Proclamation. Such intervention is needed to prevent ongoing and future harm to such applicants and to protect the integrity of the U.S. visa process.

7. At issue in this suit is Section 3 of the Proclamation, which allows for case-by-case waivers from the Proclamation for visa applicants from the countries banned by the Proclamation.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

8. Jurisdiction is proper under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (Mandamus and Venue Act of 1962), 5 U.S.C. § 702 (APA), and 28 U.S.C. § 220 (Declaratory Judgment Act). The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702. This Court may grant declaratory and injunctive relief pursuant to 5 U.S.C. § 702, 28 U.S.C. § 1651, and 28 U.S.C. § 2201–2202. A claim for attorney's fees will be brought pursuant to 5 U.S.C. § 504 and 28 U.S.C. § 2412(d).

9. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(e) because Defendants are officers or employees of the United States acting in their official capacities and agencies of the United States, many Plaintiffs reside in this judicial district, and no real property is involved in this action. Plaintiffs have exhausted all administrative remedies.

10. Intradistrict assignment is proper in the San Francisco Division because a substantial part of the events or omissions that give rise to the claim occurred in San Francisco and Napa Counties. Civil L. R. 3-2(c), (d).

PARTIES

11. Plaintiff Soheil Vazehrad is a U.S. citizen, residing in Napa, California.

12. Plaintiff Atefehossadat Motavaliabyazani is an Iranian national residing in Iran.

13. Ms. Motavaliabyazani has a pending nonimmigrant visa based on Mr. Vazehrad's approved K1 fiancée visa petition.

14. Plaintiff Mr. Behnam Babalou is an Iranian national residing in Iran who invested $500,000.00 in CMB Infrastructure Investment Group XIV, L.P., located in San Bernardino, California.

15. Plaintiff Mr. Behnam Babalou has an approved immigrant visa petition based on his investments and significant business ties in CMB Infrastructure Investment Group XIV, L.P.

16. Plaintiff Hoda Mehrabi Mohammad Abadi is an Iranian national residing in Iran who and has an approved immigrant visa petition based on her $500,000.00 investment in Kimpton Hotels & Restaurants in Milwaukee, Wisconsin.

17. Plaintiff Dr. Mahdi Afshar Arjmand is an Iranian national, currently residing in Iran, who has an approved immigrant visa petition based on his extensive record of achievements as an alien with extraordinary ability.

18. Plaintiff Dr. Ehsan Heidaryan is an Iranian national, currently residing in Brazil, who has an approved immigrant visa petition based on his extensive record of achievements as an alien with extraordinary ability.

19. Plaintiff Najmeh Maharlouei is an Iranian national currently residing in Shiraz, Iran, who has an approved immigrant visa petition based on her extensive record of achievements and the fact that her work is in the U.S. national interest.

20. Plaintiff Nastaran Hajiheydari is an Iranian national, currently residing in Iran, who has an approved immigrant visa petition based on her extensive record of achievements and the fact that her work is in the U.S. national interest.

21. Plaintiff Afrooz Kharazmi is a U.S. citizen residing in Loveland, Ohio.

22. Plaintiff Afshan Alamshah Zadeh is an Iranian national residing in Iran.

23. Ms. Alamshah Zadeh has a pending immigrant visa based on Ms. Kharazmi's approved family-based immigrant visa petition for her.

24. Plaintiff Bamshad Azizi is a U.S. lawful permanent resident residing in San Jose, California.

25. Plaintiffs Roghayeh Azizikoutenaei and Hojjatollah Azizikoutenaei are Iranian nationals residing in Iran.

26. Mr. Bamshad Azizi assisted his parents, Ms. Azizikoutenaei and Mr. Azizikoutenaei, with filing for tourist visas to visit him in San Jose, California.

27. Plaintiff Clyde Jean Tedrick II is an American citizen residing in Rockville, Maryland.

28. Plaintiff Mitra Farnoodian-Tedrick is a U.S. lawful permanent resident residing in Rockville, Maryland.

29. Plaintiffs Farajollah Farnoudian and Farangis Emami are Iranian nationals currently residing in Iran.

30. Mr. Tedrick and Ms. Farnoodian-Tedrick assisted Mr. Farnoudian and Ms. Emami with applying for tourist visas.

31. Plaintiff Tannaz Toloubeydokhti is a U.S. citizen who resides in San Diego, California.

32. Plaintiffs Fathollah Tolou Beydokhti and Behnaz Malekghaeini are Iranian nationals residing in Iran.

33. Mr. Beydokhti and Ms. Malekghaeini have pending immigrant visas based on Ms. Toloubeydokhti's approved family-based immigrant visa petitions.

34. Plaintiff Maral Charkhtab Tabrizi is a U.S. lawful permanent resident living in Tempe, Arizona, who is married to a U.S. citizen and has just given birth to her first child.

35. Plaintiffs Zahra Rouzbehani and Bahram Charkhtab Tabrizi are Iranian nationals residing in Iran.

36. Ms. Tabrizi assisted her parents, Ms. Rouzbehani and Mr. Charkhtab Tabrizi, with filing for tourist visas.

37. Plaintiff Maryam Mozafari is an U.S. lawful permanent resident residing in San Francisco, California.

38. Plaintiffs Nahid Golestanian and Mohammad Mehdi Mozaffary are Iranian nationals residing in Iran.

39. Ms. Mozafari assisted her parents, Mrs. Golestanian and Mr. Mozaffary with filing for tourist visas.

40. Defendant Donald J. Trump is the President of the United States and is sued in his official capacity. President Trump issued the Proclamation challenged in this suit.

41. Defendant Jefferson Beauregard Sessions III is the U.S. Attorney General and is sued in his official capacity. Attorney General Sessions is responsible for overseeing the activities of the Department of Justice ("DOJ") with respect to the implementation and enforcement of the Proclamation.

42. Defendant DOJ is a cabinet-level department of the U.S. federal government. The Proclamation assigns DOJ a variety of responsibilities regarding its implementation and enforcement.

43. Defendant Kirstjen Nielsen is the Secretary of Homeland Security and is sued in her official capacity. Secretary Nielsen is responsible for administration of the INA by the U.S. Department of Homeland Security ("DHS") and for overseeing enforcement and implementation of the Proclamation by all DHS staff.

44. Defendant DHS is a cabinet-level department of the U.S. federal government. Its components include U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE"). USCIS's responsibilities include adjudicating requests for immigration benefits for individuals located within the United States. CBP's responsibilities include inspecting and admitting immigrants and nonimmigrants arriving with U.S. visas at international points of entry, including airports and land borders. ICE's responsibilities include enforcing federal immigration law within the interior of the United States. The Proclamation assigns DHS a variety of responsibilities regarding its enforcement.

45. Defendant Rex W. Tillerson is the Secretary of State and is sued in his official capacity. Secretary Tillerson is responsible for overseeing enforcement and implementation of the Proclamation by all U.S. Department of State ("State Department") staff.

46. Defendant State Department is a cabinet-level department of the U.S. federal government responsible for the issuance of immigrant and nonimmigrant visas abroad. The Presidential Proclamation assigns the State Department a variety of responsibilities regarding its implementation and enforcement.

47. Defendant Dan Coats is the Director of National Intelligence and is sued in his official capacity. Director Coats is responsible for overseeing enforcement and implementation of the Proclamation by all Office of the Director of National Intelligence ("ODNI") staff.

48. Defendant ODNI is an independent agency of the U.S. federal government which has specific responsibilities and obligations with respect to implementation of the Proclamation.

FACTUAL ALLEGATIONS

I. Background

49. On September 24, 2017, President Trump signed the third version of the travel ban, Presidential Proclamation 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." Presidential Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017). (Exhibit A) The Proclamation provides for discretionary case-by-case waivers from a now-indefinite travel ban on nationals of the six Muslim-majority countries.

50. Affected states and individuals immediately brought suit against the Proclamation in federal district court in Hawaii and Maryland, seeking to block implementation of the travel ban. On October 17, 2017, the Hawaii court granted a nationwide temporary restraining order and, the following day, the Maryland court issued a nationwide preliminary injunction.

51. The government appealed these decisions to the Ninth and Fourth Circuit Courts of Appeal. It also requested the U.S. Supreme Court to issue a stay of the Hawaii and Maryland courts' decisions blocking the Proclamation's implementation pending disposition of its appeals of those decisions in the circuit courts. The U.S. Supreme Court granted that request on

Monday, December 4, 2017, thereby allowing the Proclamation's travel ban to take full effect. Oral arguments in the circuit courts proceeded.

52. On Friday, December 22, 2017, the Ninth Circuit affirmed the Hawaii court's preliminary injunction order but stayed its decision pending review by the U.S. Supreme Court. On February 14, 2018, the Fourth Circuit affirmed the Maryland court's preliminary injunction order, but also stayed its decision pending review by the U.S. Supreme Court.

53. In the midst of the legal challenges to the Proclamation, the State Department began implementing the travel ban. Since the U.S. Supreme Court allowed full implementation of the latest iteration of the ban, officials at consulates and embassies in the banned countries have engaged in a pattern of indiscriminately denying immigrant and non-immigrant visas to applicants from the banned countries.

54. Indeed, in a response to an inquiry by two U.S. senators, the State Department has revealed that, as of January 8, 2018, only two waivers were granted to applicants of the banned countries out of a total of 6,555 applicants who were eligible to be considered for waivers. Letter from Mary K. Waters, U.S. Department of State, to Chris Van Hollen, U.S. Senator (Feb. 22, 2018), http://fingfx.thomsonreuters.com/gfx/reuterscom/1/60/60/letter.pdf (Exhibit B) As of March 6, 2018, the State Department had apparently issued 100 more waivers, meaning that consular officers have rejected more than 98% of visa applicants. Yaganeh Torbati & Mica Rosenberg, *Exclusive: Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban*, Reuters (Mar. 6, 2018), https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW. (Exhibit C)

55. The two most recent versions of the travel ban specifically provided for "case-by-case waivers" to be granted by consular officers under a non-exclusive list of circumstances for visa applicants from the banned countries. Nonetheless, in direct contravention of the terms of the Proclamation, Defendants have refused to consider such waivers and have instead issued blanket denials of visas, regardless of personal circumstances and without giving applicants the opportunity to argue their cases. Thus, irrespective of an applicant's personal circumstances or bona fide relationship to the United States, the government has found a way to circumvent both the courts and its own instruction and fully implement the Muslim travel ban.

56. A mere three days after the U.S. Supreme Court's lifting of the stays preventing implementation of the travel ban, the State Department, without taking time to develop standards or protocols, recklessly and irresponsibly executed a ban that greatly harmed, and continues to harm, more than 150 million visa applicants worldwide. Visa applicants contacted embassies and consulates abroad to ask for clarity but were given the runaround. Attorneys contacted the State Department for clarification but received inadequate and inconsistent responses. The problem continues. As of the date of filing of this complaint, the State Department also lacks protocols for considering waiver applications for individuals whose cases were pending administrative processing[1] at the time the ban went into effect and for visa applicants whose visas were approved prior to implementation of the ban.

[1] Administrative processing is a period after a visa interview during which applicants undergo additional screening outside of "normal" visa processing. Maggio & Kattar & The Pennsylvania State University Law School's Center for Immigrants' Rights, Administrative Processing FAQ, *1, https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Administrative-Processing-FAQ.pdf (accessed Jan. 21, 2018). "Before issuing a visa, consular officers review different databases to determine if information exists that may impact individual eligibility for a

57. The process remains so opaque that, in addition to the formal request for information from U.S. senators, civil rights organizations have filed a FOIA request seeking documents from the State Department related to the travel ban waiver process. (Exhibit D) As of the date of filing, Defendants have not yet complied with the request.

II. Relevant Law

58. Section 3 of the Proclamation contains a subsection entitled "Waivers," which states:

> Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner's designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection [laying out waiver standards].

82 Fed. Reg. at 45167.

59. The Proclamation explains that a waiver may be granted if, in a consular officer's or CBP's discretion, a foreign national has demonstrated that (1) a denial of entry "would cause the foreign national undue hardship"; (2) his or her "entry would not pose a threat to the national security or public safety of the United States"; and (3) his or her "entry would be in the national interest." 82 Fed. Reg. at 45168.

60. The Proclamation then specifies that while "case-by-case waivers may not be granted categorically," they "may be appropriate, subject to the limitations, conditions, and requirements set forth" in subsection (c), "in individual circumstances ...." *Id.* It proceeds to give a number of examples of such circumstances under which issuance of a waiver may be appropriate, including:

> (A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date ... of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;
>
> (B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date ... of this proclamation for work, study, or other lawful activity;
>
> (C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;
>
> (D) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;
>
> (E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case ....

82 Fed. Reg. at 45169.

61. The Proclamation also instructs that, "[t]he Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants." 82 Fed. Reg. at 45168. It further directs the Secretaries to:

> [A]ddress the standards, policies and procedures for:
>
> (A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;
>
> (B) determining whether the entry of a foreign national would be in the national interest;

> (C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;
>
> (D) assessing whether the United States has access, at the time of the waiver determination, to sufficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and
>
> (E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

Id.

62. Defendants have not yet developed such guidance and have instead proceeded full speed to implement the ban, rejecting more than 98% of visa applicants.

III. Plaintiffs have been denied due consideration for a waiver of the Proclamation

63. Plaintiff Soheil Vazehrad is a U.S. citizen who is employed as a registered dental hygienist and resides in Napa, California. He filed an application with USCIS for a fiancée visa for his soon-to-be wife, Ms. Atefehossadat Motavaliabyazani, in April 2016. Ms. Motavaliabyazani is an Iranian national who currently resides in Iran. USCIS approved Mr. Vazehrad's petition on May 11, 2016. Ms. Motavaliabyazani attended her interview at the U.S. Embassy in Yerevan, Armenia, on October 20, 2016, and was told that her case would go through routine administrative processing. On January 4, 2018, she received an email stating the following:

> Dear Applicant:
>
> This is to inform you that a consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality

> Act, pursuant to Presidential Proclamation 9645. Today's decision cannot be appealed....
>
> Taking into account the provisions of the Proclamation, a waiver will not be granted in your case.

(Exhibit E)

64. Thus, Ms. Motavaliabyazani's visa was refused pursuant to the Proclamation and she was ineligible for a waiver of the Proclamation, despite the facts that her fiancé, Mr. Vazehrad, is a U.S. citizen, that her interview took place almost a year *before* the Proclamation was signed, and that, once the Proclamation came into effect, she was never given the opportunity to request a waiver of the Proclamation.

65. Mr. Benham Babalou is an Iranian national who invested five hundred thousand dollars ($500,000.00 USD) in the United States as part of his petition for an employment-based fifth preference (EB-5) investment visa[2] in 2011. USCIS adjudicated his case and sent him an approval notice four years later, on December 15, 2015. Mr. Babalou then attended his immigrant visa interview at the U.S. Embassy in Yerevan, Armenia, on May 24, 2016, after which his case was placed in administrative processing. On December 22, 2017, six years after his initial investment, he received a visa denial via an email identical to that sent to Ms. Motavaliabyazani.

66. Thus, Mr. Babalou's visa was refused pursuant to the Proclamation and he was ineligible for a waiver of the Proclamation, despite the facts that the Proclamation would not

[2] The EB-5 investment visa is designed to give permanent resident status to entrepreneurs (and their spouses and unmarried children under 21) who (1) "[m]ake the necessary investment in a commercial enterprise in the United States" (either $500,000 or $1 million); and (2) "[p]lan to create or preserve 10 permanent full-time jobs for qualified U.S. workers." USCIS, EB-5 Immigrant Investor Program, https://www.uscis.gov/eb-5 (accessed Jan. 21, 2018).

come into existence until almost a year and a half *after* Mr. Babalou's interview at the Embassy and, further, that once the Proclamation came into effect, he was never given the opportunity to request a waiver of the Proclamation. His attorneys continue to request a waiver of the Proclamation to no avail.

67. Ms. Hoda Mehrabi Mohammad Abadi is an Iranian national who invested five hundred thousand dollars ($500,000.00) in the United States as part of her petition she filed on August 5, 2014, for an employment-based fifth preference (EB-5) investment visa. USCIS adjudicated her case and sent her an approval notice nearly two years later, on June 9, 2016. Ms. Mehrabi Mohammad Abadi attended her immigrant visa interview at the U.S. Embassy in Yerevan, Armenia, on February 23, 2017, after which her case was placed in administrative processing. On December 14, 2017, her attorney received the same email that Mr. Babalou received stating that her visa was refused pursuant to the Proclamation and she was ineligible for a waiver.

68. Her attorney tried to request the Embassy to consider Ms. Mehrabi Mohammad Abadi's case for a waiver from the Proclamation, but the Embassy responded again on December 17, 2017, with the following:

> Dear inquirer,
>
> Unfortunately, your case is not eligible for a waiver under Presidential Proclamation 9645. This refusal under Section 212(f) of the Immigration and Nationality Act applies only to the current visa application. Please be advised that Presidential Proclamation 9645 currently restricts issuance of most visas to nationals of Iran and seven other countries.

(Exhibit F)

69. This despite the facts that the Proclamation would not come into existence until long after her visa interview and, further, that once it came into effect, she was never given the

opportunity to request a waiver of the Proclamation, nor was she informed of her right to be considered for a waiver.

70. Dr. Mahdi Afshar Arjmand is an Iranian national who filed for an EB-1A (alien with extraordinary ability) immigrant visa on December 27, 2016, and received an approval notice on January 9, 2017. He attended his immigrant visa interview with his family on July 25, 2017 at the U.S. Embassy in Yerevan, Armenia. The officer informed them that their case looked good, but just needed to go through administrative processing. On January 12, 2018, the Embassy emailed Dr. Afshar Arjmand the same denial letter that Mr. Babalou and Ms. Mehrabi Mohammad Abadi received. The consulate never mentioned anything about a waiver process. Dr. Afshar Arjmand had a job offer from the University of California, San Diego, to work as a researcher and professor. The Embassy refused to consider Dr. Afshar Arjmand for a waiver even though the university had sent multiple emails to the Embassy requesting it to issue Dr. Afshar Arjmand's visa so he could start his position there.

71. Dr. Ehsan Heidaryan, a world-renowned professor of chemical engineering and Iranian national, filed a petition for an employment-based first preference visa for aliens with extraordinary ability (EB-1A)[3] with USCIS on February 7, 2017. Based on his impressive record of achievements in his field, USCIS approved Dr. Heidaryan's petition on March 3, 2017. He attended his immigrant visa interview at the U.S. Consulate General in Rio de Janeiro, Brazil, on December 23, 2017. Thereafter, the Consulate emailed Dr. Heidaryan to inform him

[3] To qualify for an EB-1A visa an applicant "must be able to demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim." USCIS, Employment-Based Immigration: First Preference EB-1, https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1 (accessed Jan. 21, 2018).

that since he is an Iranian national, his immigrant visa must be refused because of the Proclamation. Specifically, the consulate wrote:

> Dear Sir,
>
> Unfortunately your immigrant visa is refused under Presidential Proclamation 9645 and now considered closed. Do not need to fill out the questionnaire we sent by email.

(Exhibit G)

Not only did the Consulate never mention anything about a waiver process or how Dr. Heidaryan could prove his eligibility, but it affirmatively stopped him from even completing his visa application.

72. Ms. Najmeh Maharlouei is an Iranian national currently residing in Shiraz, Iran, where she is employed as a health researcher and Associate Professor of Community Medicine at Shiraz University of Medical Sciences. She filed an application with USCIS for an immigrant visa under the category of employment-based second preference (EB-2) with a National Interest Waiver[4] on June 20, 2015. Her case was approved on March 4, 2016, and Ms. Maharlouei attended her immigrant visa interview at the U.S. Embassy in Yerevan, Armenia, on October 6, 2016. She was told at that interview that there were no problems with her case, but that she would have to undergo routine administrative processing. Ms. Maharlouei received a notice

[4] An applicant can acquire permanent residency under the EB-2 category if she is a foreign national who has an advanced degree and exceptional ability in the sciences, art, or business. USCIS, Employment-Based Immigration: Second Preference EB-2, https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2 (accessed Jan. 21, 2018). This category usually requires that the applicant's employer get a labor certification from the U.S. Department of Labor, but an applicant can receive a National Interest Waiver of that requirement if she shows that her work is in the U.S. national interest.

denying her visa application pursuant to the Proclamation on December 22, 2017. She at no point had the opportunity to request a waiver of the Proclamation despite the fact that the very reason her immigrant visa petition was approved by USCIS was a determination that her work is in the U.S. national interest. The Proclamation would not come into existence until more than a year after Ms. Maharlouei's interview.

73. Plaintiff Nastaran Hajiheydari is an Iranian national currently residing in Iran where she works in the field of Information Technology Business as an Associate Professor at the University of Tehran. She filed an application with USCIS for an immigrant visa under the category of employment-based second preference (EB-2) with a National Interest Waiver on October 14, 2016. Her case was approved less than 40 days later in November 2016, and Ms. Hajiheydari and her family attended their immigrant visa interviews at the U.S. Embassy in Yerevan, Armenia, on October 26, 2017. Their cases were placed in routine administrative processing. Ms. Hajiheydari received an email notice denying her family's visa applications pursuant to the Proclamation on January 16, 2018. She at no point had the opportunity to request a waiver of the Proclamation despite the fact that the very reason her immigrant visa petition was approved by USCIS was a determination that her work is in the U.S. national interest.

74. Plaintiff Afrooz Kharazmi, a U.S. citizen residing in Loveland, Ohio, filed an immigrant visa petition with USCIS on June 1, 2004, for her sister, Plaintiff Afshan Alamshah Zadeh, an Iranian national currently residing in Iran. Ms. Alamshah Zadeh waited in line for 12 years for

her priority date[5] to become current. USCIS approved her petition in October 2016. The U.S. Embassy in Abu Dhabi, UAE, scheduled Ms. Alamshah Zadeh's immigrant visa interview for January 7, 2018. She attended the interview and was informed that her immigrant visa was denied pursuant to the Proclamation. Ms. Alamshah Zadeh did not have the opportunity to apply for a waiver, thus the consular officer did not consider the fact that she has two U.S. citizen parents and a U.S. citizen sister with whom she seeks to be reunited, or the fact that she patiently waited in line for 12 years for her visa number to become current.

75. Plaintiff Bamshad Azizi is a U.S. lawful permanent resident residing in San Jose, California, and co-founder of a cybersecurity startup in the United States. His parents, Roghayeh Azizikoutenaei and Hojjatollah Azizikoutenaei applied for tourist visas to come visit him and his sister. They attended their interview at the U.S. Consulate General in Dubai, UAE, on September 12, 2017, 12 days before the signing of the Proclamation, and were told that their visas would be ready in two weeks. In disbelief at their luck, Mr. and Mrs. Azizikoutenaei asked if their visas would really be ready in only two weeks, and the interviewing officer smiled and confirmed. On October 3, 2017, they received an email from the Embassy requesting that they send their passports so that their visas could be stamped. They did so and, to their dismay, their passports were returned eleven days later with no visas and with a letter stating that their applications had been placed in administrative processing. After following up multiple times with the Embassy and receiving only automated responses, Mr. and Mrs. Azizikoutenaei

[5] An applicant's priority date is the date upon which her application was filed. An applicant's priority date must become "current" before she can apply for an adjustment of status to that of permanent resident. Spouses, parents, and minor children of U.S. citizens do not have to wait for visas to become available, so their priority dates are irrelevant, but all other categories of immigrants have to wait in line, in some cases for decades, for their priority dates to become current.

received rejections on January 10, 2018. Mrs. Azizikoutenaei was diagnosed with cancer about a year ago and had to undergo two surgeries and a series of intense chemotherapy sessions. Mr. Azizikoutenaei also had surgery recently. They are both still quite weak and the family just wants to be reunited. They were unable to tell officers about their circumstances as they did not have the opportunity to request a waiver from the Proclamation at any point.

76. Plaintiff Clyde Jean Tedrick II is an American citizen residing in Rockville, Maryland, with Plaintiff Mitra Farnoodian-Tedrick, U.S. lawful permanent resident. They assisted Ms. Farnoodian-Tedrick's parents, Farajollah Farnoudian and Farangis Emami, with applying for tourist visas to attend their wedding on May 27, 2018. Mr. Farnoudian and Ms. Emami had visited the U.S. before and had fully complied with the terms of their tourist visas. They attended their visa interview on October 17, 2017, at the U.S. Consulate General in Dubai, UAE. Mr. Farnoudian's visa application was placed in administrative processing, but Ms. Emami's visa application was approved. Mr. Farnoudian received an email on January 8, 2018, informing him that his visa had been denied pursuant to the Proclamation. Ms. Emami was never notified that her already-approved visa had been denied pursuant to the Proclamation, but only found out after checking the status of her case online. At no point did anyone in the family have an opportunity to request a waiver. Due to the lack of opportunity to request a waiver, Mr. Tedrick and Ms. Farnoodian-Tedrick were forced to cancel their wedding.

77. Plaintiff Tannaz Toloubeydokhti is a U.S. citizen who resides in San Diego, California. She is employed as an obstetric-gynecologist and has dedicated her career to improving the lives of American mothers and babies. She is herself in her last trimester of pregnancy and, knowing how difficult labor and caring for a newborn can be, she seeks family support for help both in delivery of the baby and with childcare afterwards. Ms. Toloubeydokhti petitioned for

immigrant visas for her parents, Fathollah Tolou Beydokhti and Behnaz Malekghaeini, Iranian nationals, on September 1, 2016. Their cases were approved, and her parents attended their immigrant visa interviews on December 21, 2017, at the U.S. Embassy in Yerevan, Armenia. Mr. Beydokhti and Ms. Malekghaeini, went prepared to their interviews, ready to request waivers of the Proclamation with supporting documents in hand. But when they presented their documents, the officer refused to review them, told them that they did not qualify for a waiver, and their visas were denied.

78. Plaintiff Maral Charkhtab Tabrizi is a U.S. lawful permanent resident residing in Arizona who is married to a U.S. citizen and is pregnant with her first child. Her parents, Plaintiffs Zahra Rouzbehani and Bahram Charkhtab Tabrizi, who have traveled to the United States many times before, applied for tourist visas to witness the birth of their first grandchild. They attended their interviews at the U.S. Consulate General in Dubai, UAE, on October 19, 2017. Ms. Rouzbehani was approved right away, but Mr. Charkhtab Tabrizi's case was sent for administrative processing. Ms. Rouzbehani decided to not send the passport for visa stamping immediately, but to wait for her husband's administrative processing to be completed first so that they could travel together to the United States. Immediately after the Supreme Court allowed the Proclamation to go into effect, Ms. Rouzbehani sent her passport for visa stamping. Near the end of December 2017, the passport was returned without a visa and their visas were refused pursuant to the Proclamation. They were not given the opportunity to apply for a waiver.

79. Had they been given that opportunity, Ms. Charkhtab Tabrizi's parents would have told the adjudicating officer that they wanted to be there to support their daughter for a number of reasons. The first is financial. Ms. Charkhtab Tabrizi's household finances depend heavily on her salary and, because she is a contractor for Google and has been there for less than 12 months

and is therefore not eligible for maternity leave or for time off under the Family Medical Leave Act, she had planned to return to work as soon as possible. Without her parents, Ms. Charkhtab Tabrizi will be unable to go back to work as quickly as she had hoped and will be unable to afford daycare after an unpaid leave during which time she and her husband will be depleting their savings. The second reason is medical. Ms. Charkhtab Tabrizi has a connective tissue disorder which has caused her severe pain during her pregnancy and makes her daily activities very difficult. She had hoped that her parents could be there to support her during her recovery so she could go back to work quickly; this is important because her contract may end before she has fully recovered and she may lose all of her benefits and her opportunity to extend her contract. The denial of Ms. Rouzbehani's and Mr. Charkhtab Tabrizi's visas is causing Ms. Charkhtab Tabrizi severe financial hardship and may even cost her her job.

80. Plaintiff Maryam Mozafari is a U.S. permanent resident currently residing in San Francisco, California. She is pregnant and wanted her parents, Ms. Nahid Golestanian and Mr. Mohammad Mehdi Mozaffary, to come visit her and provide her the support she needs during this stressful time. They had both visited the United States in 2014, and had left the country well in advance of the expiration of their visas, and were thus confident they would be granted tourist visas again. On December 28, 2016, they applied for tourist visas at the U.S. Consulate General in Dubai, UAE. Ms. Golestanian's visa was granted immediately. Mr. Mozaffary was asked for his mandatory military service documents. He did not have them with him, as the documents were not mentioned in the list of required documents for the visa application, and he was asked to reapply and bring the documents with him to the next interview.

81. Because of the timing of the first two travel bans, Mr. Mozaffary had to delay his interview, and was not able to get back in to the Consulate until July 30, 2017. He was told by

the consular officer that his documents appeared to be in order, but that he would be sending Mr. Mozaffary additional forms to fill out. Mr. Mozaffary received the forms in August and returned them to the Consulate soon thereafter. For the next several months, Ms. Mozafari and Mr. Mozaffary sent several emails to the Consulate to inquire about the status of the cases, but either received no reply at all or a system-generated standard response. On January 11, 2018, Mr. Mozaffary's visa was denied pursuant to the Proclamation. He did not have an opportunity to request a waiver. Mr. Mozaffary suffers from a heart condition which requires that he be accompanied at all times. During this time, Ms. Golestanian came to the United States to visit Ms. Mozafari. She wants to stay with Ms. Mozafari to support her during her pregnancy, but she feels torn between her daughter and her ailing husband. She has been put in an impossible position.

82. Despite the fact that the Proclamation contains examples of specific circumstances under which issuance of a waiver to an applicant would be appropriate, Defendants have abrogated their duty to consider Plaintiffs' individual circumstances—all of which fall cleanly under one or more of these examples—and have instead engaged in categorical refusals to consider waiver applications and, thus, categorical denials of visas to the individuals affected by the travel ban.

IV. President Trump's ongoing promise to implement "a total and complete shutdown of Muslims entering the United States"

83. Prior to his election, President Trump campaigned on the promise that he would ban Muslims from entering the United States. On December 7, 2015, then-candidate Trump issued a press release calling for "a total and complete shutdown of Muslims entering the United States."

Donald J. Trump Campaign, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015). (Exhibit H)

84. When asked on the following day what the customs process would look like for a Muslim non-citizen attempting to enter the United States, candidate Trump stated, "[T]hey would say, 'are you Muslim?'" Nick Gass, *Trump not bothered by comparisons to Hitler*, POLITICO (Dec. 8, 2015), https://www.politico.com/trump-muslims-shutdown-hitler-comparison. Candidate Trump then confirmed that, if they answered in the affirmative, they would not be allowed into the country. *Id.*

85. On June 13, 2016, candidate Trump reiterated his promise to ban all Muslims entering this country until the United States is "in a position to properly and perfectly screen those people coming into our country." Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, TIME (Jun. 13, 2016), http://time.com/4367120/orlando-shooting-donald-trump-transcript/.

86. In a foreign policy speech delivered on August 15, 2016, candidate Trump noted that the United States could not "adequate[ly] screen[]" immigrants because it admits "about 100,000 permanent immigrants from the Middle East every year." *Donald Trump Foreign Policy Speech in Youngstown*, C-SPAN (Aug. 15, 2016), https://www.c-span.org/video/?413977-1/donald-trump-delivers-foreign-policy-address (quoted remarks at 50:46). Candidate Trump proposed creating an ideological screening test for immigration applicants, which would "screen out any who have hostile attitudes towards our country or its principles – or who believe that Sharia law should supplant American law." He referred to this proposal as "extreme, extreme vetting." *Id.*

87. On June 5, 2017, after litigation against the first travel ban led to its replacement by a revised ban, President Trump issued a series of tweets criticizing the revision and calling for a return to the first travel ban. He stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C." (Exhibit I) President Trump also tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is a TRAVEL BAN!" (Exhibit J)

88. Defendants have pointed to the existence of a waivers provision in the Proclamation as proof of its constitutionality. But the president's statements, both before and during his time in office, combined with the blanket denials of waivers and visas to applicants from the banned Muslim-majority countries lay bare Defendants' intent to institute a complete ban on Muslims entering the United States.

V. President Trump's promise to end family reunification, a.k.a. chain migration

89. On January 4, 2018, President Trump tweeted, "...We must BUILD THE WALL, stop illegal immigration, end chain migration & cancel the visa lottery." (Exhibit K)

90. On January 16, 2018, President Trump tweeted, "[W]e need to keep America safe, including moving away from a random chain migration and lottery system, to one that is merit-based." (Exhibit L)

91. On January 25, 2018, the White House issued a fact sheet entitled, "White House Framework on Immigration Reform & Border Security," where it stated one of the administration's goal is to "[p]romote nuclear family migration by limiting family sponsorship to spouses and minor children only (for both Citizens and LPRs), ending extended-family chain migration." (Exhibit M)

92. Defendants have changed the terms of the travel ban that they themselves wrote by categorically limiting the number of visa applicants who can request consideration for a waiver of the travel ban. Defendants are therefore bypassing Congress and the INA and working to effectively end family reunification in the banned countries.

VI. Existing guidance from the State Department is inadequate to guide either consular officers or visa applicants with respect to the Proclamation's waiver process

93. The guidance provided by the Proclamation itself is minimal, and the Proclamation directs the Secretary of State and the Secretary of Homeland Security to develop specific guidance for consular officers and visa applicants on how the waivers provision will be implemented. 82 Fed. Reg. at 45168; *see Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) ("The Government ... has offered no explanation for how these [discretionary waiver] provisions would function in practice: how would the "national interest" be determined, who would make that determination, and when?").

94. After the Supreme Court's lifting of the stays on the Proclamation, the State Department issued guidance regarding its immediate implementation on its website. Dep't of State, *New Court Order on Presidential Proclamation* (Dec. 4, 2017), https://travel.state.gov/content/travel/en/News/visas-news/new_court_orders_on_presidential_proclamation.html. (Exhibit N) The guidance indicates that consular officers will review eligibility for a waiver at the time of an applicant's interview. *Id.*

95. But the State Department's guidance does not offer definitions of key terms from the Proclamation's waivers provision like "undue hardship" or "significant contacts" or any explanation for how applicants can show that their entry into the United States would be in the national interest.

96. This lack of clarity leaves applicants guessing as to what the standards of eligibility are for waivers—whether their hardships are undue, whether their contacts are significant—and presumably also leaves consular officers guessing as to which applicants are eligible.

97. The State Department's guidance does provide a definition of "close family member," and indicates that the definition for purposes of the Proclamation is the same as the definition for "immediate relative" that can be found elsewhere in immigration law. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

98. But according to an email received by counsel from the U.S. Consulate General in Vancouver, Canada, visa applicants who seek to be reunited with a parent in the U.S. are ineligible for consideration of a waiver if they are over 21 years old, the opposite of the definition under the rest of immigration law. The email exchange reads in relevant part as follows:

> COUNSEL: [I]t appears as though my client, [REDACTED], has been denied the opportunity to request a waiver of the presidential proclamation.
>
> According to the presidential proclamation itself and guidance on the State Department's website, foreign nationals who seek to enter the US to be reunited with a close family member (e.g. spouse, child, or parent) are eligible for requesting a waiver.
>
> My client is the daughter of a United States citizen. Could you kindly explain why your office has denied my client the opportunity to request a waiver of the presidential proclamation?

> CONSULATE: A consular officer may issue a visa based on a listed waiver category to nationals of countries identified in the Presidential Proclamation on a case-by-case basis.
>
> It has been determined that your client, [REDACTED], does not meet the definition of close family as she is over 21 years of age.
>
> This decision cannot be appealed.

(Exhibit O)

99. Defendants have thus limited the meaning of "close family member" to suit their intended goal of broadly denying waivers to applicants from banned countries.

100. The guidance also does not explain how consular officers should consider the eligibility for a waiver of applicants, like several Plaintiffs, who were interviewed *prior* to implementation of the Proclamation but were in administrative processing during the periods when the Proclamation was being implemented.

101. Nor does the guidance explain how applicants stuck in administrative processing should handle the situation. Applicants are thus at a loss for what to do—they do not know whether they are supposed to contact the embassy or whether the embassy will contact them; whether they should wait until administrative processing is completed or request a waiver while their cases are still pending administrative processing. Applicants fear that, if they contact the embassy, attention will be brought to their cases, which will result in an immediate denial due to the Proclamation. This fear is not unfounded: counsel have personal knowledge of cases in which this occurred.

102. Visa applicants have stated that when they attend interviews at embassies and consulates abroad, the officers inform them that waivers are processed in Washington, D.C. This undercuts the State Department's guidance which states that visa applicants' eligibility for waivers will be

determined by the consular officer at the time of the interview and further muddies the water. Applicants do not even know *who* is adjudicating their requests for waivers, much less what the standards are to qualify for one.

103. In a letter to two U.S. senators published on March 6, 2018, the State Department issued more guidance on the waiver process. (Exhibit B) This guidance contradicts both the Proclamation and the State Department's previous guidance on the process.

104. For example, the letter states that "the applicant's travel may be considered in the national interest if the applicant demonstrates to the consular officer's satisfaction that a U.S. person or entity would suffer hardship if the applicant could not travel until after visa restrictions ... are lifted." *Id.* Neither the Proclamation nor the guidance from the State Department's website ever make any mention of visa applicants being required to show that U.S. citizens or entities would suffer hardship if the applicant were not granted a visa, which belies the State Department's contention that "[t]he Department's worldwide guidance to consular officers regarding waivers is drawn directly from the Proclamation." *Id.*

105. It is thus clear that Defendants are making things up as they go along, saying one thing on government websites, another thing to visa applicants and attorneys, and yet another thing when a U.S. senator is doing the inquiring.

VII. Denial letters issued by consular officers reveal Defendants' policy and practice of refusing to give applicants due consideration for waivers

106. Defendants provided the consulates and embassies abroad with a template letter to give to visa applicants when they have been denied a visa pursuant to the Proclamation. The letter has two options for a consular officer to select: (1) "Taking into account the provisions of the

Proclamation," a waiver will not be granted in your case"; or (2) "The consular officer is reviewing your eligibility for a waiver under the Proclamation." (Exhibit P)

107. This begs the question: why are consular officers not considering *all* applicants for a waiver? And on what basis does an officer decide in the first instance whether an applicant should be considered for a waiver at all?

108. These form letters betray Defendants' policy and practice of judging applicants' eligibility for waivers based not on their personal circumstances or on a consideration of the guidance provided by the Proclamation, but instead on applicants' nationality and country of origin.

109. These form letters also contradict the guidance found on the State Department website. *See* Dep't of State, *New Court Order on Presidential Proclamation* (Dec. 4, 2017), https://travel.state.gov/content/travel/en/News/visasnews/new_court_orders_on_presidential_proclamation.html. That guidance tells officers that if they are faced with a visa applicant who is subject to the Proclamation, they will determine whether the applicant "may be eligible for a waiver under the Proclamation and therefore issued a visa." The guidance goes on to state explicitly that, "[a] consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation . . . and, if so, whether the applicant qualifies for an exception or a waiver." *Id.*

110. The fact that the form letters reveal that officers are not considering all applicants for waivers, and that the letters are inconsistent with the guidance given by State Department which explicitly tells officers to consider all applicants, shows that Defendants are making decisions based on inappropriate considerations of country of origin and nationality and not on valid and good faith considerations of applicants' personal circumstances.

VIII. Plaintiffs and proposed class members have suffered and continue to suffer irreparable harm because of the flawed waiver process

111. Defendants' reckless and irresponsible implementation of the Proclamation, and their policy and practice of refusing to consider in good faith the facts of individual cases, has caused significant and irreparable harm to Plaintiffs and proposed class members.

112. Mr. Vazehrad has suffered a loss of consortium as he has been deprived and continues to be deprived of the opportunity to be with his fiancée, Ms. Motavaliabyazani. Both Plaintiffs are suffering ongoing severe emotional and mental distress as a result of their prolonged separation. Because the Proclamation made the travel ban of indeterminate length, the separation may well be permanent. The couple have also paid thousands of dollars in attorney's fees, filing fees, travel costs, and medical fees, which they will never recoup.

113. Mr. Babalou is at risk of losing a $500,000 investment in the United States. From his home in Iran, he is unable to fulfill the duties assigned to him as part of running a business, unable to oversee the U.S. citizens he has employed, and therefore unable to effectively grow his business and continue contributing to the U.S. economy. In addition to the large investment he made into a U.S. business, Mr. Babalou has incurred substantial incidental costs over the last seven years, including $50,000 paid to a regional center for assistance with overseeing his investment and thousands of dollars more in attorney's fees, filing fees, travel costs, and medical fees. These are costs that Mr. Babalou can never recoup.

114. Ms. Mehrabi Mohammad Abadi is also at risk of losing a $500,000 investment in the United States. From her home in Iran, she is unable to fulfill the duties assigned to her as part of running a business, unable to oversee the U.S. citizens she has employed, and therefore unable

to effectively grow her business and continue contributing to the U.S. economy. In addition to her large investment, Ms. Mehrabi Mohammad Abadi incurred substantial incidental costs, including $50,000 paid to a regional center for assistance with overseeing her investment and thousands of dollars more in attorney's fees, filing fees, travel costs, and medical fees. These are costs that Ms. Mehrabi Mohammad Abadi will never recover.

115. Dr. Afshar Arjmand risks losing a once-in-a-lifetime research and teaching opportunity at the University of California, San Diego, one of the world's leading public research universities. This despite the fact that Dr. Afshar Arjmand was deemed by USCIS to be "extraordinary"—and it would thus clearly be in the U.S. national interest to allow him to enter—and despite the university's persistence and assistance in the matter borne of its desire to secure Dr. Afshar Arjmand and his prodigious talent and expertise for its faculty. In addition to missing out on this incredible opportunity, he has also paid thousands of dollars in attorney's fees, filing fees, travel costs, and medical fees, which he will be unable to recoup.

116. Dr. Heidaryan risks losing the opportunity to use his hard-won skills and experience, deemed "extraordinary" by USCIS, to conduct research and teach in his area of expertise—chemical engineering—in America's top tier universities. Relatedly, Dr. Heidaryan risks losing the opportunity to take advantage of the substantial resources American universities have to more effectively further his research and, thus, the opportunity to contribute his expertise to the United States. He has also paid thousands of dollars in attorney's fees, filing fees, travel costs, and medical fees, which he cannot recover.

117. Ms. Maharlouei also risks losing the opportunity to conduct research in the United States in her field of medical sciences, despite the fact that USCIS already deemed her research to be in the U.S. national interest. Ms. Maharlouei risks losing the opportunity to take advantage of

American universities' substantial resources to more effectively further her research and, thus, the opportunity to contribute her substantial expertise to the United States. She has also paid thousands of dollars in attorney's fees, filing fees, travel costs, and medical fees, which she will be unable to recoup.

118. Ms. Hajiheydari risks losing the opportunity to conduct research in the United States, despite the fact that USCIS already determined that her work is in the U.S. national interest. Ms. Hajiheydari risks losing the opportunity to take advantage of American universities' substantial resources to more effectively further her research and, thus, the opportunity to contribute her expertise to the United States. She has also paid thousands of dollars in attorney's fees, filing fees, travel costs, and medical fees, for herself and three family members, all of which she will be unable to recoup.

119. Plaintiff Afrooz Kharazmi and Plaintiff Afshan Alamshah Zadeh waited in line for more than 12 years for Ms. Alamshah Zadeh's priority date to become current, enduring years of hardship, separation, and sacrifice. Ms. Alamshah Zadeh's entire family are American citizens residing in the United States, and she is therefore at risk of permanently losing the ability to visit any member of her family and being left permanently alone in Iran. The sisters have also paid thousands of dollars in attorney's fees, filing fees, travel costs, and medical fees, which they cannot recover.

120. Plaintiff Bamshad Azizi and his parents, Roghayeh and Hojjatollah Azizikoutenaei, have suffered and are suffering significant emotional distress at their ongoing separation. Mrs. Azizikoutenaei has been suffering from cancer for the last year and Mr. and Ms. Azizikoutenaei both recently underwent surgeries. All the family wants is to be together, but, because the travel ban is of an indeterminate length, and Mr. and Mrs. Azizikoutenaei are quite weak after their

illnesses and surgeries, they are unsure that they will ever get to be reunited. This prospect is also causing Mr. Azizi and his parents ongoing and significant emotional distress. The family have paid thousands of dollars in attorney's fees, filing fees, and travel costs, which they will be unable to recoup.

121. Plaintiff Clyde Jean Tedrick II and Plaintiff Mitra Farnoodian-Tedrick cancelled their wedding and lost $3,976.76 because of Defendants' denial of Plaintiff Farajollah Farnoudian and Plaintiff Farangis Emami's case. They have all suffered considerable stress in connection with the wedding and have lost, perhaps permanently, an experience that everyone should get to enjoy: celebrating a wedding with one's parents. They have also paid thousands of dollars in attorney's fees, filing fees, and travel costs, which they cannot recoup.

122. Plaintiff Tannaz Toloubeydokhti has suffered significant emotional distress as she has been deprived of the opportunity to have her parents, Mr. Fathollah Tolou Beydokhti and Ms. Behnaz Malekghaeini present during her pregnancy. They are also at risk of missing the birth of Ms. Toloubeydokhti's child. These experiences are ones none of them can ever get back and this loss is irreparable. Ms. Toloubeydokhti is also at risk of enduring a significant financial burden, as she had hoped that her parents would assist her with childcare for her newborn. She may have to seek hired help, an expensive prospect. Ms. Toloubeydokhti and her parents have also paid thousands of dollars in attorney's fees, filing fees, and travel costs, which they will be unable to recoup.

123. Plaintiff Maral Charkhtab Tabrizi has suffered significant emotional distress as she was deprived of the opportunity to have her parents, Plaintiffs Zahra Rouzbehani and Bahram Charkhtab Tabrizi, present during her pregnancy. She also suffered increased physical pain and suffering, as she has a connective tissue disorder with associated pain that would have been

lessened with the assistance of her parents. Additionally, Ms. Rouzbehani and Mr. Charkhtab Tabrizi missed the birth of their first grandchild. This is an experience none of them can never get back and their loss is therefore irreparable. Ms. Charkhtab Tabrizi is also at risk of enduring a significant financial burden, as she had hoped that her parents would assist her with childcare for her newborn. Because Ms. Charkhtab Tabrizi cannot take paid time off, without her parents' assistance, she will have to increase the amount of time she takes off, thereby losing far more money than she would have had her parents been present. Her unpaid leave, potentially extended due to Ms. Rouzbehani and Mr. Charkhtab Tabrizi's absence, may also result in the cancellation of her job contract and the loss of her medical benefits, harms that would be irreparable. Ms. Charkhtab Tabrizi and her parents have also paid thousands of dollars in attorney's fees, filing fees, and travel costs, which they will be unable to recoup.

124. Applicants are told in their denial letters they can apply for visas again. But Defendants have no protocols in place and, despite having more than five months to do so, have issued no guidance to officers or applicants. Thus, applicants will have to pay application fees, buy plane tickets, make hotel reservations, and pay, again, all of the costs associated with applying for a visa and traveling to a U.S. embassy to attend yet another interview with no hope of achieving a different result.

125. As a result, Plaintiffs' rights continue to be violated and they continue to be separated from their families, jobs, research, and investments on the basis of the unlawful and unconstitutional waiver process.

CLASS ALLEGATIONS

126. Individual Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2), on behalf of themselves and all other persons similarly situated. A class action is proper because the class is so numerous that joinder of all members is impractical, this action involves questions of law and fact common to the class, Plaintiffs' claims are typical of the claims of the class, Plaintiffs will fairly and adequately protect the interests of the class, and Defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

127. In addition to the named plaintiffs, there are many other similarly situated individuals who have been denied waivers and visas pursuant to the Proclamation. Each of these similarly situated individuals is entitled to bring a complaint for declaratory and injunctive relief to prohibit Defendants' policy, pattern, and practice of denying waivers and visas to applicants from banned countries without a good faith consideration of their applications.

128. The proposed class is defined as follows:

> All petitioners and beneficiaries of immigrant or nonimmigrant visa petitions that were refused or will be refused pursuant to the Proclamation without the opportunity to request a waiver of the Proclamation or that were refused or will be refused despite clearly falling under the examples provided by the Proclamation for circumstances under which a waiver may be appropriate. All individuals who were or will be considered for a waiver of the Proclamation and refused a waiver due to Defendants' narrow and incorrect definition of a "close family member."

129. The proposed class meets the requirements of Rule 23(a)(1) because it is so numerous that joinder of all members is impracticable. The number of individuals who have been wrongly denied waivers is not known with precision by Plaintiffs but is easily ascertainable by Defendants. On any given day, thousands of visa applications are adjudicated at embassies and

consulates abroad. As such, more individuals will become class members in the future, as Defendants continue to deny applicants a good faith opportunity to request a waiver of the Proclamation. The members of the class are ascertainable and identifiable by Defendants.

130. The proposed class meets the commonality requirements of Rule 23(a)(2) because all proposed class members have been or will be subject to Defendants' common policy, pattern, and practice of refusing to consider applicants for waivers of the Proclamation. Plaintiffs and the proposed class share the same legal claims, which include, but are not limited to: whether Defendants' refusal to consider applicants for waivers in good faith and failure to develop standards or guidance for consular officers and visa applicants to follow violate the APA, the INA, and the Due Process Clause of the Fifth Amendment.

131. Similarly, the proposed class meets the typicality requirements of Rule 23(a)(3) because the claims of the representative Plaintiffs are typical of the claims of the class as a whole. Plaintiffs, as with the class they seek to represent, are all individuals who have been or will be denied the chance to request a waiver of the Proclamation and who have been or will be stymied in their attempts to apply by a dearth of guidance from Defendants.

132. The adequacy requirements of Rule 23(a)(4) are also met. Plaintiffs know of no conflict between their interests and those of the proposed class. Plaintiff seek the same relief as other members of the class, namely that the Court (a) order Defendants to immediately cease their unlawful policy and/or practice of refusing to receive or consider requests for waivers of the Proclamation; (b) retract visa denials due to the arbitrary and capricious nature of Defendants' decision to implement the ban without appropriate guidance in place; (c) provide clear guidance that defines key words and sets clear standards for consular officers and applicants to use; and (d) abide by the terms of the Proclamation and consider case-by-case waivers in good faith. In

defending their own rights, the individual Plaintiffs will defend the rights of all class members fairly and adequately. Plaintiffs are represented by counsel with deep knowledge of immigration law and extensive experience litigating class actions and complex cases. Counsel have the requisite level of expertise to adequately prosecute this case on behalf of Plaintiffs and the proposed class.

133. The proposed class satisfies Rule 23(b)(2) because Defendants have acted on grounds generally applicable to the class in refusing to fairly adjudicate waiver requests. Thus, final injunctive and declaratory relief is appropriate with respect to the class as a whole.

CAUSES OF ACTION

COUNT ONE
(Violation of Administrative Procedure Act)

134. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

135. The APA prohibits federal agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is conducted "without observance of procedure required by law." 5 U.S.C. § 706(2).

136. The INA prohibits discrimination in the issuance of immigrant visas based on nationality, place of birth, or place of residence. 8 U.S.C. § 1152(a)(1)(A). The INA's implementing regulations specify the procedures for issuance or denial of a visa. 22 C.F.R. 42.81; 22 CFR 41.121; 22 C.F.R. § 40.6. Under these regulations, a denial must be based on legal grounds and made in conformance with the INA.

137. In denying waivers and visas to Plaintiffs and proposed class members based on their country of origin or nationality, Defendants have acted arbitrarily, capriciously, and not in accordance with the INA.

138. Defendants' actions have resulted in the indefinite—and possibly permanent—separation of U.S. citizens and U.S. lawful permanent residents from their family members in contravention of Congress' purpose in enacting the INA: promoting family reunification. This conduct is not in accordance with the INA.

139. Defendants have discriminated against Plaintiffs and proposed class members based on the proscribed grounds in implementing the Proclamation's waivers provisions. In this respect, they have failed to use the discretion granted them by law. They are therefore in violation of the APA.

140. Defendants have a non-discretionary duty under the Proclamation to develop standards to guide visa applicants in compiling their applications for waivers and for consular officers to reference in adjudicating waiver and visa applications. *See* 82 Fed. Reg. at 45168. Defendants have failed to promulgate such guidance and have nonetheless proceeded in denying waivers and visas. Defendants have also failed to follow existing procedures prescribed by the INA and implementing regulations and the Foreign Affairs Manual in issuing these denials. In failing to develop or follow any procedures, instead basing their decisions on applicants' country of origin or nationality, Defendants have conducted themselves arbitrarily and capriciously and in contravention of the Proclamation, the INA, and the U.S. Constitution, and they have thus violated the APA.

141. Defendants' violations of these laws have harmed and continue to harm Plaintiffs and proposed class members by indefinitely denying them access to their families and to economic and research opportunities.

COUNT TWO
(Violation of Due Process Clause of the Fifth Amendment)

142. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

143. The Due Process Clause of the Fifth Amendment of the U.S. Constitution protects all individuals from the government denying equal protection of the law.

144. The blanket denials of visas to applicants from banned countries without the opportunity to argue for a waiver from the Proclamation, together with statements made by Defendants concerning their intent and the application of the travel ban, makes clear that Defendants are targeting individuals for discriminatory treatment based on their country of origin or nationality, without any lawful justification.

145. Defendants' implementation of the waivers provision has a disparate impact on applicants from certain countries and of certain nationalities.

146. Defendants' discriminatory implementation of the waivers provisions serves no compelling government interest and is not narrowly tailored.

147. Defendants' conduct violates the Fifth Amendment's guarantee of equal protection.

148. The Due Process Clause of the Fifth Amendment also prohibits the federal government from depriving individuals of their fundamental rights without due process of law, i.e., substantive due process.

149. Plaintiffs' fundamental rights include their right to the "integrity of the family unit." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

150. The implementation of the waiver provision of the Proclamation directly and substantially infringes on Plaintiffs' fundamental rights.

151. The Due Process Clause forbids Defendants from infringing on Plaintiffs' fundamental rights unless the infringement is narrowly tailored to serve a compelling governmental interest.

152. As applied, the Proclamation's waivers provision fails this test. It is not narrowly tailored to protect national security interests—it operates to block nearly all persons from banned countries from entry into the United States, regardless of their relationship to violence or terrorism. It is both under- and over-inclusive.

153. The Due Process Clause of the Fifth Amendment guarantees procedural due process rights, e.g., the right to fair and impartial processes, even to foreign nationals. Those due process rights are implicated by the deprivation of a fundamental liberty interest, e.g., family integrity, and they may also arise from statute. *See Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004) ("The due process afforded aliens stems from those statutory rights granted by Congress and the principle that 'minimum due process rights attach to statutory rights.'") (quoting *Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003). The INA and its implementing regulations mandate various procedures for the processing of visas, procedures which Defendants have failed to follow.

154. In refusing to consider Plaintiffs' applications in good faith, Defendants have violated Plaintiffs' Fifth Amendment right to equal protection under the law and to substantive and procedural due process.

155. Defendants' violations of these laws have harmed and continue to harm Plaintiffs and proposed class members by indefinitely denying them access to their families and economic and research opportunities.

COUNT THREE
(Writ of Mandamus)

156. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

157. Defendants owe Plaintiffs and class members a duty to adjudicate in good faith their requests for waivers of the Proclamation. The adjudication of waivers and development of guidance on such adjudication are clear, non-discretionary duties imposed upon Defendants by the INA and implementing regulations and by section 3 of the Proclamation.

158. Defendants are unlawfully ignoring Plaintiffs' requests for waivers of the Proclamation and have failed to carry out the adjudicative and administrative functions delegated to them by law with regard to Plaintiffs' cases.

159. Defendants' refusal to consider applicants' eligibility for waivers on a case-by-case basis or develop meaningful guidance is, as a matter of law, arbitrary, capricious, and not in accordance with the law and is thus violative of the APA.

160. Defendants' policy and practice of denying visa applications and waivers to people of a certain country of origin or nationality violates Plaintiffs' right against discrimination under the INA and implementing regulations.

161. Defendants' discriminatory behavior in issuing blanket denials to visa applicants from banned countries without consideration of their personal circumstances violates Plaintiffs' Fifth

Amendment rights to equal protection under the law and substantive and procedural due process.

162. Because there are no other adequate remedies available to Plaintiffs, mandamus is appropriate. *See* 5 U.S.C. § 704.

163. Defendants' violation of the law in denying Plaintiffs the opportunity to present waiver applications as a matter of course, and thereby refusing to consider waivers on a case-by-case basis, is substantially unjustified. Plaintiffs are, therefore, entitled to reasonable attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. A temporary restraining order and/or preliminary and permanent injunction enjoining Defendants from denying visa applications due to the Proclamation;
2. An order requiring Defendants to immediately retract all visa denials due to the Proclamation and notify applicants that they may apply for a waiver of the Proclamation without submitting a new visa application, paying associated fees, and attending another interview;
3. An order requiring Defendants to fulfill their duties by providing clear and consistent guidelines for the waiver process, including definitions of key terms, standards for applicants to meet, and examples of documents needed to meet those standards;
4. An order requiring Defendants to abide by the terms of the Proclamation and consider applicants' waiver applications on a case-by-case basis without discriminating based on applicants' country of origin or nationality;

5. An order declaring Defendants' refusal to consider waiver applications in good faith as violative of the APA, the INA, and the Due Process Clause of the Fifth Amendment;

6. An order awarding Plaintiffs costs of suit and reasonable attorney's fees under the Equal Access to Justice Act and any other applicable law;

7. Such other and further relief as this Court deems equitable, just, and proper.

DATED: March 13, 2018

Kent, Washington

Respectfully Submitted,

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The Hon. James Donato
U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Farangis Emami, et al.

Plaintiffs,

-against-

KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security, et al.

Defendants.

Civil Case No. 3:18-cv-01587-JD

DECLARATION OF LUIS CORTES ROMERO IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS AND INJUNCTIVE AND DECLARATORY RELIEF

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**Pro hac vice forthcoming*

Attorneys for Plaintiffs

I, Luis Cortes Romero, declare as follows:

1. I am an attorney admitted to practice law before this Court. I am an attorney at Immigrant Advocacy & Litigation Center, PLLC and I am one of the attorneys responsible for the representation of Plaintiffs in the above-captioned action. I submit this declaration in support of Plaintiffs' Complaint for Writ of Mandamus and Injunctive and Declaratory Relief. The following facts are within my personal knowledge and, if called and sworn as a witness, I would testify competently to these facts.

2. Attached hereto as Exhibit A is a true and correct copy of Presidential Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." Presidential Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017).

3. Attached hereto as Exhibit B is a true and correct copy of a letter from Mary K. Waters, Assistant Secretary of Legislative Affairs at U.S. Department of State, to U.S. Senator Chris Van Hollen, dated February 22, 2018. A copy of the letter can be found here: http:///fingfx.thomsonreuters.com/gfx/reuterscom/1/60/60/letter.pdf

4. Attached hereto as Exhibit C is a true and correct copy of an article by Yaganeh Torbati & Mica Rosenberg, entitled, "Exclusive: Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban," dated March 6, 2018. A copy of the article can be found at: https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW.

5. Attached hereto as Exhibit D is a true and correct copy of a Freedom of Information Act request filed on January 23, 2018, by Muslim Advocates and Center for Constitutional Rights.

6. Attached hereto as Exhibit E is a true and correct copy of an email sent on January 4, 2018, by the U.S. Embassy in Yerevan, Armenia, to Ateffehossadat Motavaliabyazani.

7. Attached hereto as Exhibit F is a true and correct copy of an email sent on December 17, 2017, by the U.S. Embassy in Yerevan, Armenia, to Hoda Mehrabi Mohammad Abadi.

8. Attached hereto as Exhibit G is a true and correct copy of an email sent on December 27, 2018, by the U.S. Consulate General in Rio de Janeiro, Brazil, to Dr. Ehsan Heidaryan.

9. Attached hereto as Exhibit H is a true and correct copy of a press release statement issued by President Donald J. Trump on December 7, 2015, entitled, "Donald J. Trump Statement on Preventing Muslim Immigration."

10. Attached hereto as Exhibit I is a true and correct copy of a tweet posted to Twitter by Donald J. Trump on June 5, 2017. The original tweet can be found here: https://twitter.com/realDonaldTrump/status/871675245043888128

11. Attached hereto as Exhibit J is a true and correct copy of a tweet posted to Twitter by Donald J. Trump on June 5, 2017. The original tweet can be found here: https://twitter.com/realDonaldTrump/status/871674214356484096

12. Attached hereto as Exhibit K is a true and correct copy of a tweet posted to Twitter by Donald J. Trump on January 4, 2018. The original tweet can be found here: https://twitter.com/realDonaldTrump/status/949066181381632001

13. Attached hereto as Exhibit L is a true and correct copy of a tweet posted to Twitter by Donald J. Trump on January 16, 2018. The original tweet can be found here: https://twitter.com/realDonaldTrump/status/953406553083777029

14. Attached hereto as Exhibit M is a true and correct copy of a fact sheet issued by the White House on January 25, 2018, entitled, "White House Framework on Immigration

Reform & Border Security."

15. Attached hereto as Exhibit N is a true and correct copy of a Q&A posted on the U.S. Department of State's website on December 4, 2017, entitled, "New Court Order on Presidential Proclamation." A copy can be found at: https://travel.state.gov/content/travel/en/News/visas-news/new_court_orders_on_presidential_proclamation.html

16. Attached hereto as Exhibit O is a true and correct copy of an email Attorney Shabnam Lotfi received from the U.S. Consulate General in Vancouver, Canada, on January 9, 2018.

17. Attached hereto as Exhibit P is a true and correct copy of a denial letter for a visa application sent by the U.S. Embassy in Yerevan, Armenia.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct, and that I executed this Declaration on March 23, 2018, in Seattle, Washington.

/s/ *Luis Cortes Romero*
Luis Cortes Romero

EXHIBIT A

Presidential Documents

Proclamation 9645 of September 24, 2017

Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats

By the President of the United States of America

A Proclamation

In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history. As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.

Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.

As President, I must act to protect the security and interests of the United States and its people. I am committed to our ongoing efforts to engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks. Some of the countries with remaining inadequacies face significant challenges. Others have made strides to improve their protocols and procedures, and I commend them for these efforts. But until they satisfactorily address the identified inadequacies, I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations, as set forth more fully below, on entry into the United States of nationals of the countries identified in section 2 of this proclamation.

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the

interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. They enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and they aid our efforts to prevent such individuals from entering the United States.

(b) Information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States. Governments manage the identity and travel documents of their nationals and residents. They also control the circumstances under which they provide information about their nationals to other governments, including information about known or suspected terrorists and criminal-history information. It is, therefore, the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems.

(c) Section 2(a) of Executive Order 13780 directed a "worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." That review culminated in a report submitted to the President by the Secretary of Homeland Security on July 9, 2017. In that review, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, developed a baseline for the kinds of information required from foreign governments to support the United States Government's ability to confirm the identity of individuals seeking entry into the United States as immigrants and nonimmigrants, as well as individuals applying for any other benefit under the immigration laws, and to assess whether they are a security or public-safety threat. That baseline incorporates three categories of criteria:

(i) *Identity-management information.* The United States expects foreign governments to provide the information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be. The identity-management information category focuses on the integrity of documents required for travel to the United States. The criteria assessed in this category include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports.

(ii) *National security and public-safety information.* The United States expects foreign governments to provide information about whether persons who seek entry to this country pose national security or public-safety risks. The criteria assessed in this category include whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States.

(iii) *National security and public-safety risk assessment.* The national security and public-safety risk assessment category focuses on national security risk indicators. The criteria assessed in this category include whether the country is a known or potential terrorist safe haven, whether it is

a participant in the Visa Waiver Program established under section 217 of the INA, 8 U.S.C. 1187, that meets all of its requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States.

(d) The Department of Homeland Security, in coordination with the Department of State, collected data on the performance of all foreign governments and assessed each country against the baseline described in subsection (c) of this section. The assessment focused, in particular, on identity management, security and public-safety threats, and national security risks. Through this assessment, the agencies measured each country's performance with respect to issuing reliable travel documents and implementing adequate identity-management and information-sharing protocols and procedures, and evaluated terrorism-related and public-safety risks associated with foreign nationals seeking entry into the United States from each country.

(e) The Department of Homeland Security evaluated each country against the baseline described in subsection (c) of this section. The Secretary of Homeland Security identified 16 countries as being "inadequate" based on an analysis of their identity-management protocols, information-sharing practices, and risk factors. Thirty-one additional countries were classified "at risk" of becoming "inadequate" based on those criteria.

(f) As required by section 2(d) of Executive Order 13780, the Department of State conducted a 50-day engagement period to encourage all foreign governments, not just the 47 identified as either "inadequate" or "at risk," to improve their performance with respect to the baseline described in subsection (c) of this section. Those engagements yielded significant improvements in many countries. Twenty-nine countries, for example, provided travel document exemplars for use by Department of Homeland Security officials to combat fraud. Eleven countries agreed to share information on known or suspected terrorists.

(g) The Secretary of Homeland Security assesses that the following countries continue to have "inadequate" identity-management protocols, information-sharing practices, and risk factors, with respect to the baseline described in subsection (c) of this section, such that entry restrictions and limitations are recommended: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. The Secretary of Homeland Security also assesses that Iraq did not meet the baseline, but that entry restrictions and limitations under a Presidential proclamation are not warranted. The Secretary of Homeland Security recommends, however, that nationals of Iraq who seek to enter the United States be subject to additional scrutiny to determine if they pose risks to the national security or public safety of the United States. In reaching these conclusions, the Secretary of Homeland Security considered the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS).

(h) Section 2(e) of Executive Order 13780 directed the Secretary of Homeland Security to "submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means." On September 15, 2017, the Secretary of Homeland Security submitted a report to me recommending entry restrictions and limitations on certain nationals of 7 countries determined to be "inadequate" in providing such information and in light of other factors discussed in the report. According to the report, the recommended restrictions would help address the threats that the countries' identity-management protocols, information-sharing inadequacies, and other risk factors pose to the security and welfare of the United

States. The restrictions also encourage the countries to work with the United States to address those inadequacies and risks so that the restrictions and limitations imposed by this proclamation may be relaxed or removed as soon as possible.

(i) In evaluating the recommendations of the Secretary of Homeland Security and in determining what restrictions to impose for each country, I consulted with appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General. I considered several factors, including each country's capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors, such as whether it has a significant terrorist presence within its territory. I also considered foreign policy, national security, and counterterrorism goals. I reviewed these factors and assessed these goals, with a particular focus on crafting those country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur. The restrictions and limitations imposed by this proclamation are, in my judgment, necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States. These restrictions and limitations are also needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments; and to advance foreign policy, national security, and counterterrorism objectives.

(ii) After reviewing the Secretary of Homeland Security's report of September 15, 2017, and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be "inadequate" with respect to the baseline described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. These restrictions distinguish between the entry of immigrants and nonimmigrants. Persons admitted on immigrant visas become lawful permanent residents of the United States. Such persons may present national security or public-safety concerns that may be distinct from those admitted as nonimmigrants. The United States affords lawful permanent residents more enduring rights than it does to nonimmigrants. Lawful permanent residents are more difficult to remove than nonimmigrants even after national security concerns arise, which heightens the costs and dangers of errors associated with admitting such individuals. And although immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national security of the United States. For all but one of those 7 countries, therefore, I am restricting the entry of all immigrants.

(iii) I am adopting a more tailored approach with respect to nonimmigrants, in accordance with the recommendations of the Secretary of Homeland Security. For some countries found to be "inadequate" with respect to the baseline described in subsection (c) of this section, I am restricting the entry of all nonimmigrants. For countries with certain mitigating factors, such as a willingness to cooperate or play a substantial role in combatting terrorism, I am restricting the entry only of certain categories of nonimmigrants, which will mitigate the security threats presented by their entry into the United States. In those cases in which future cooperation seems reasonably likely, and accounting for foreign policy, national security, and counterterrorism objectives, I have tailored the restrictions to encourage such improvements.

(i) Section 2(e) of Executive Order 13780 also provided that the "Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which

any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States." The Secretary of Homeland Security determined that Somalia generally satisfies the information-sharing requirements of the baseline described in subsection (c) of this section, but its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory, present special circumstances that warrant restrictions and limitations on the entry of its nationals into the United States. Somalia's identity-management deficiencies and the significant terrorist presence within its territory make it a source of particular risks to the national security and public safety of the United States. Based on the considerations mentioned above, and as described further in section 2(h) of this proclamation, I have determined that entry restrictions, limitations, and other measures designed to ensure proper screening and vetting for nationals of Somalia are necessary for the security and welfare of the United States.

(j) Section 2 of this proclamation describes some of the inadequacies that led me to impose restrictions on the specified countries. Describing all of those reasons publicly, however, would cause serious damage to the national security of the United States, and many such descriptions are classified.

Sec. 2. *Suspension of Entry for Nationals of Countries of Identified Concern.* The entry into the United States of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers, as described in sections 3 and 6 of this proclamation:

(a) *Chad.*

(i) The government of Chad is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Chad has shown a clear willingness to improve in these areas. Nonetheless, Chad does not adequately share public-safety and terrorism-related information and fails to satisfy at least one key risk criterion. Additionally, several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb. At this time, additional information sharing to identify those foreign nationals applying for visas or seeking entry into the United States who represent national security and public-safety threats is necessary given the significant terrorism-related risk from this country.

(ii) The entry into the United States of nationals of Chad, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(b) *Iran.*

(i) Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals subject to final orders of removal from the United States. The Department of State has also designated Iran as a state sponsor of terrorism.

(ii) The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.

(c) *Libya.*

(i) The government of Libya is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding on that cooperation, including in the areas of immigration and border management. Libya, nonetheless, faces significant challenges in sharing several types of information, including public-safety

and terrorism-related information necessary for the protection of the national security and public safety of the United States. Libya also has significant inadequacies in its identity-management protocols. Further, Libya fails to satisfy at least one key risk criterion and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. The substantial terrorist presence within Libya's territory amplifies the risks posed by the entry into the United States of its nationals.

(ii) The entry into the United States of nationals of Libya, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(d) *North Korea.*

(i) North Korea does not cooperate with the United States Government in any respect and fails to satisfy all information-sharing requirements.

(ii) The entry into the United States of nationals of North Korea as immigrants and nonimmigrants is hereby suspended.

(e) *Syria.*

(i) Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism. Syria has significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Syria as immigrants and nonimmigrants is hereby suspended.

(f) *Venezuela.*

(i) Venezuela has adopted many of the baseline standards identified by the Secretary of Homeland Security and in section 1 of this proclamation, but its government is uncooperative in verifying whether its citizens pose national security or public-safety threats. Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. There are, however, alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela. As a result, the restrictions imposed by this proclamation focus on government officials of Venezuela who are responsible for the identified inadequacies.

(ii) Notwithstanding section 3(b)(v) of this proclamation, the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures—including the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations—and their immediate family members, as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended. Further, nationals of Venezuela who are visa holders should be subject to appropriate additional measures to ensure traveler information remains current.

(g) *Yemen.*

(i) The government of Yemen is an important and valuable counterterrorism partner, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Yemen, nonetheless, faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory. The government of Yemen fails to satisfy critical identity-management requirements, does not share public-safety and terrorism-related information adequately, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(h) *Somalia.*

(i) The Secretary of Homeland Security's report of September 15, 2017, determined that Somalia satisfies the information-sharing requirements of the baseline described in section 1(c) of this proclamation. But several other considerations support imposing entry restrictions and limitations on Somalia. Somalia has significant identity-management deficiencies. For example, while Somalia issues an electronic passport, the United States and many other countries do not recognize it. A persistent terrorist threat also emanates from Somalia's territory. The United States Government has identified Somalia as a terrorist safe haven. Somalia stands apart from other countries in the degree to which its government lacks command and control of its territory, which greatly limits the effectiveness of its national capabilities in a variety of respects. Terrorists use under-governed areas in northern, central, and southern Somalia as safe havens from which to plan, facilitate, and conduct their operations. Somalia also remains a destination for individuals attempting to join terrorist groups that threaten the national security of the United States. The State Department's 2016 Country Reports on Terrorism observed that Somalia has not sufficiently degraded the ability of terrorist groups to plan and mount attacks from its territory. Further, despite having made significant progress toward formally federating its member states, and its willingness to fight terrorism, Somalia continues to struggle to provide the governance needed to limit terrorists' freedom of movement, access to resources, and capacity to operate. The government of Somalia's lack of territorial control also compromises Somalia's ability, already limited because of poor record-keeping, to share information about its nationals who pose criminal or terrorist risks. As a result of these and other factors, Somalia presents special concerns that distinguish it from other countries.

(ii) The entry into the United States of nationals of Somalia as immigrants is hereby suspended. Additionally, visa adjudications for nationals of Somalia and decisions regarding their entry as nonimmigrants should be subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States.

Sec. 3. *Scope and Implementation of Suspensions and Limitations.* (a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspensions of and limitations on entry pursuant to section 2 of this proclamation shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the applicable effective date under section 7 of this proclamation;

(ii) do not have a valid visa on the applicable effective date under section 7 of this proclamation; and

(iii) do not qualify for a visa or other valid travel document under section 6(d) of this proclamation.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;

(iii) any foreign national who has a document other than a visa—such as a transportation letter, an appropriate boarding foil, or an advance parole document—valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;

(iv) any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner's designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection. The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.

(i) A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:

(A) denying entry would cause the foreign national undue hardship;

(B) entry would not pose a threat to the national security or public safety of the United States; and

(C) entry would be in the national interest.

(ii) The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for:

(A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;

(B) determining whether the entry of a foreign national would be in the national interest;

(C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;

(D) assessing whether the United States has access, at the time of the waiver determination, to sufficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and

(E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

(iii) Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa adjudication process will be effective both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.

(iv) Case-by-case waivers may not be granted categorically, but may be appropriate, subject to the limitations, conditions, and requirements set forth under subsection (i) of this subsection and the guidance issued under subsection (ii) of this subsection, in individual circumstances such as the following:

(A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;

(E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(F) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and the foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government–sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

Sec. 4. *Adjustments to and Removal of Suspensions and Limitations.* (a) The Secretary of Homeland Security shall, in consultation with the Secretary of State, devise a process to assess whether any suspensions and limitations imposed by section 2 of this proclamation should be continued, terminated, modified, or supplemented. The process shall account for whether countries have improved their identity-management and information-sharing protocols and procedures based on the criteria set forth in section 1 of this proclamation and the Secretary of Homeland Security's report of September 15, 2017. Within 180 days of the date of this proclamation, and every 180 days thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies, shall submit a report with recommendations to the President, through appropriate Assistants to the President, regarding the following:

(i) the interests of the United States, if any, that continue to require the suspension of, or limitations on, the entry on certain classes of nationals of countries identified in section 2 of this proclamation and whether the restrictions and limitations imposed by section 2 of this proclamation should be continued, modified, terminated, or supplemented; and

(ii) the interests of the United States, if any, that require the suspension of, or limitations on, the entry of certain classes of nationals of countries not identified in this proclamation.

(b) The Secretary of State, in consultation with the Secretary of Homeland Security, the Secretary of Defense, the Attorney General, the Director of National Intelligence, and the head of any other executive department or agency (agency) that the Secretary of State deems appropriate, shall engage the countries listed in section 2 of this proclamation, and any other countries that have information-sharing, identity-management, or risk-factor deficiencies as practicable, appropriate, and consistent with the foreign policy, national security, and public-safety objectives of the United States.

(c) Notwithstanding the process described above, and consistent with the process described in section 2(f) of Executive Order 13780, if the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, and the Director of National Intelligence, determines, at any time, that a country meets the standards of the baseline described in section 1(c) of this proclamation, that a country has an adequate plan to provide such information, or that one or more of the restrictions or limitations imposed on the entry of a country's nationals are no longer necessary for the security or welfare of the United States, the Secretary of Homeland Security may recommend to the President the removal or modification of any or all such restrictions and limitations. The Secretary of Homeland Security, the Secretary of State, or the Attorney General may also, as provided for in Executive Order 13780, submit to the President the names of additional countries for which any of them recommends any lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

Sec. 5. *Reports on Screening and Vetting Procedures.* (a) The Secretary of Homeland Security, in coordination with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies shall submit periodic reports to the President, through appropriate Assistants to the President, that:

(i) describe the steps the United States Government has taken to improve vetting for nationals of all foreign countries, including through improved collection of biometric and biographic data;

(ii) describe the scope and magnitude of fraud, errors, false information, and unverifiable claims, as determined by the Secretary of Homeland Security on the basis of a validation study, made in applications for immigration benefits under the immigration laws; and

(iii) evaluate the procedures related to screening and vetting established by the Department of State's Bureau of Consular Affairs in order to enhance the safety and security of the United States and to ensure sufficient review of applications for immigration benefits.

(b) The initial report required under subsection (a) of this section shall be submitted within 180 days of the date of this proclamation; the second report shall be submitted within 270 days of the first report; and reports shall be submitted annually thereafter.

(c) The agency heads identified in subsection (a) of this section shall coordinate any policy developments associated with the reports described in subsection (a) of this section through the appropriate Assistants to the President.

Sec. 6. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of this proclamation.

(b) In implementing this proclamation, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including those that provide an opportunity for individuals to enter the United States on the basis of a credible claim of fear of persecution or torture.

(c) No immigrant or nonimmigrant visa issued before the applicable effective date under section 7 of this proclamation shall be revoked pursuant to this proclamation.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 of January 27, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms and conditions of the visa marked revoked or marked canceled. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This proclamation shall not apply to an individual who has been granted asylum by the United States, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 7. *Effective Dates.* Executive Order 13780 ordered a temporary pause on the entry of foreign nationals from certain foreign countries. In two cases, however, Federal courts have enjoined those restrictions. The Supreme Court has stayed those injunctions as to foreign nationals who lack a credible claim of a bona fide relationship with a person or entity in the United States, pending its review of the decisions of the lower courts.

(a) The restrictions and limitations established in section 2 of this proclamation are effective at 3:30 p.m. eastern daylight time on September 24, 2017, for foreign nationals who:

(i) were subject to entry restrictions under section 2 of Executive Order 13780, or would have been subject to the restrictions but for section 3 of that Executive Order, and

(ii) lack a credible claim of a bona fide relationship with a person or entity in the United States.

(b) The restrictions and limitations established in section 2 of this proclamation are effective at 12:01 a.m. eastern daylight time on October 18, 2017, for all other persons subject to this proclamation, including nationals of:

(i) Iran, Libya, Syria, Yemen, and Somalia who have a credible claim of a bona fide relationship with a person or entity in the United States; and

(ii) Chad, North Korea, and Venezuela.

Sec. 8. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, foreign policy, and counterterrorism interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its other provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 9. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(iii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of September, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-second.

[FR Doc. 2017-20899
Filed 9-26-17; 11:15 am]
Billing code 3295-F7-P

EXHIBIT B

United States Department of State
Washington, D.C. 20520
Feb. 22, 2018

The Honorable
Chris Van Hollen
United States Senate
Washington, DC 20510

Dear Senator Van Hollen:

Thank you for your letter of January 31 regarding Presidential Proclamation 9645 on *Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public Safety Threats* (the Proclamation), which suspended the entry into the United States of certain nationals of eight designated countries, Chad, Iran, Libya, Syria, Yemen, North Korea, Venezuela and Somalia. In particular you request information regarding the processing of waivers for nationals of these countries following the Supreme Court's December 4, 2017 stay of injunctions entered by lower courts which enjoined the implementation of the Proclamation. We are responding questions posed in your letter that relate to the Department of State. The Department of Homeland Security will write to you relating to issues under its authority.

Section 1(b) of the Proclamation stresses that it is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats and that screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. Further, the Proclamation notes that information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States. It determines that the governments of Chad, Iran, Libya, Syria, Yemen, North Korea, Venezuela and Somalia had inadequate identity-management protocols, information-sharing practices, and risk factors, such that entry restrictions and limitations are required.

Section 3(b) of the Proclamation specifically excepts certain nationals of the designated countries from the Proclamation's entry restrictions, and section 3(c) provides for a case-by-case waivers of the entry restrictions. The entry restrictions of the Proclamation may be waived if a consular officer determines that the applicant meets each of the following three criteria: (1) denying entry would cause the foreign national undue hardship; (2) entry would not pose a threat to the national security or public safety of the United States; and (3) entry would be in the national interest.

As part of the visa application process, all aliens are required to submit an online visa application form. The application form requests a variety of information about the alien's history and background, including his family relationships, work experience, and criminal record. See, e.g., 8 U.S.C. § 1202(b). The visa application process includes an in-person interview and results in a decision by a consular officer, 8 U.S.C. §§ 1201(a)(1), 1202(h), 1204; 22 C.F.R. §§ 41.102, 42.62.

When adjudicating the visa application of an applicant subject to the Proclamation, the consular officer must first determine whether the applicant is eligible for a visa under the provisions of the

Immigration and Nationality Act (INA). The applications of both immigrant and nonimmigrant visa applicants from the designated countries are processed in the same manner as all other applicants for U.S. visas. This processing includes screening of their fingerprints and biometric information though the Department's Consular Lookout and Support System (CLASS) database; and screening through IDENT (which contains DHS fingerprint records), NGI (the FBI Next Generation Identification database), and the Department's Facial Recognition database, which contains watchlist photos of known and suspected terrorists obtained from the FBI's Terrorist Screening Center (TSC) as well as the entire gallery of prior visa applicant photos. If an applicant from one of the designated countries is determined to be otherwise eligible for a visa under the INA, the interviewing officer must then determine whether the applicant falls into one of the exceptions to the Proclamation. Only if the otherwise eligible applicant does not fall within an exception, will the consular officer consider the applicant for a waiver. Each applicant who meets the conditions set forth in section 3(c) of the Proclamation must be considered for a waiver. There is no waiver form to be completed by the applicant.

Consular officers may grant waivers on a case-by-case basis when the applicant demonstrates to the officer's satisfaction that he or she meets the three criteria discussed above. First, to satisfy the undue hardship criterion, the applicant must demonstrate to the consular officer's satisfaction that an unusual situation exists that compels immediate travel by the applicant and that delaying visa issuance and the associated travel plans would defeat the purpose of travel. Second, the applicant's travel may be considered in the national interest if the applicant demonstrates to the consular officer's satisfaction that a U.S. person or entity would suffer hardship if the applicant could not travel until after visa restrictions imposed with respect to nationals of that country are lifted.

Finally, to establish that the applicant does not constitute a threat to national security or public safety, the consular officer considers the information-sharing and identity-management protocols and practices of the government of the applicant's country of nationality as they relate to the applicant. If the consular officer determines, after consultation with the Visa Office, that an applicant does not pose a threat to national security or public safety and the other two requirements have been met, a visa may be issued with the concurrence of a consular manager.

Section 3(c)(iv) of the Proclamation provides examples of the circumstances in which a waiver might be appropriate. The Department's worldwide guidance to consular officers regarding waivers is drawn directly from the Proclamation. Further, consular officers may consult with the Visa Office if a consular officer believes a case may warrant a waiver but the applicant's circumstances do not align with one of the examples in the Proclamation.

Your letter also requests statistical information about the number of applicants from the designated countries who have applied for visas and those who have received waivers. Unfortunately, some of the information you seek is not readily available in the form you have requested. Nonetheless, we can provide the information attached.

We hope this information is responsive to your concerns. Please do not hesitate to contact us further should you require additional information.

Sincerely,

Mary K. Waters
Assistant Secretary
Legislative Affairs

Enclosure: As stated

SENSITIVE BUT UNCLASSIFIED

VISA APPLICATIONS RECEIVED AND PROCESSED FROM NATIONALS SUBJECT TO PRESIDENTIAL PROCLAMATION 9645
(From December 8, 2017 to January 8, 2018)

This non-public information is being provided to address your request as fully as possible. Not for public release without prior consultation with the Department of State.

Applications for nonimmigrant and immigrant visas:	8,406
Applicants refused for reasons unrelated to the Proclamation:	1,723
Applicants qualifying for an exception:	128
Applicants who failed to meet the criteria for a waiver	6,282
Applications refused under the Proclamation with waiver consideration:	271

Waivers approved (as of February 15): 2

SENSITIVE BUT UNCLASSIFIED

EXHIBIT C

Exclusive: Visa waivers rarely granted under Trump's latest U.S. travel ban: data

www.reuters.com
3 mins read

WASHINGTON/NEW YORK (Reuters) - In the first weeks after President Donald Trump's latest travel ban was implemented on Dec. 8, around 100 waivers were granted to thousands of applicants for U.S. visas from the eight countries subject to its restrictions, according to State Department data provided to Reuters.

Between Dec, 8 and Jan. 8, more than 8,400 people applied for U.S. visas from Chad, Iran, Libya, North Korea, Syria, Somalia, Yemen and Venezuela, the countries listed in the ban.

Of those, 128 applicants qualified for visas because they fell into categories exempted from the ban, according to a letter from the State Department sent last month to U.S. Senator Chris Van Hollen, a Democrat. Exemptions to the ban are made for lawful permanent residents of the United States and certain other categories of applicants.

The ban contains a provision that those who do not qualify for exceptions can be considered for waivers in special circumstances, such as a need for urgent medical care or to accommodate adoptions. Waivers can also be granted to those previously granted visas who

want to return to employment or studies in the United States. Significant business obligations or close U.S. family ties can also be taken into consideration for a waiver.

As of Feb. 15 only two of the initial month's applicants had been approved for the waivers, according to the letter, which was seen by Reuters. Since then, more than 100 additional waivers have been granted, the State Department told Reuters on Tuesday. It was not clear how many of those additional waivers went to applicants from the initial month.

The White House did not immediately respond to a request for comment about the issue. A State Department official said the policy is being implemented as called for in the president's proclamation.

(For the text of the State Department letter to Van Hollen, see: tmsnrt.rs/2Hcpgs)

Van Hollen, along with Republican Senator Jeff Flake requested information about visas from the State Department in late January, saying in a letter to the agency and the Department of Homeland Security that they had "received reports of the near uniform denial of waivers for visas."

"The Trump administration claims that the waiver system can be used by people who pose no threat to our country.... But these facts show that system is a farce designed to hide President Trump's true purpose," Van Hollen said in a statement to Reuters on Tuesday. "Appellate courts have found that this is a de facto Muslim ban in violation of our Constitution and our immigration laws, and this high refusal rate bears that out."

FILE PHOTO: International travelers (reflected in a closed door) arrive on the day that U.S. President Donald Trump's limited travel ban, approved by the U.S. Supreme Court, goes into effect, at Logan

Airport in Boston, Massachusetts, U.S., June 29, 2017. REUTERS/Brian Snyder/File Photo

Six of the eight countries included in the ban are majority Muslim. The Trump administration has said the travel ban is needed to protect U.S. residents from terrorism.

Courts struck down the first two versions of the Republican president's travel ban, and the current one is narrower in scope than its predecessors. The Supreme Court will consider its legality this spring, and a decision is expected in June.

Many visa applications from the eight countries were denied even before the travel ban. And since it took effect, more than 1,700 of the 8,400 visa applications were denied for reasons other than the travel ban, according to the State Department's data.

Exact comparisons with previous years are not possible, because data is not available for all types of visa applications. But for the 2016 federal fiscal year, State Department data shows that applicants from the eight countries were refused tourist and business visas, called B visas, at rates of between 15 percent and 64 percent, depending on the country. North Koreans had the lowest rate of denials, while Somalis had the highest. In the first month after the travel ban took effect, more than 95 percent of U.S. visa applications from the countries were denied.

Attorneys representing applicants abroad who were turned down for visas say consular officials have not clearly explained why their clients did not qualify for waivers.

"There is a feeling of extreme frustration. People are operating basically in the blind," said Diala Shamas, an attorney at the Center for Constitutional Rights, a New York-based nonprofit group that assists Yemeni applicants waiting for visas at the U.S. embassy in Djibouti. "An outsider might think that the impact of the proclamation would be mitigated by the waivers, but in reality that is not at all the case."

Trump's proclamation of a travel ban outlined three broad requirements for a visa waiver. Applicants must face undue hardship if denied a visa, the travel must be in the U.S. interest and the applicant must not pose a security risk.

For an applicant to be cleared of being a security threat, consular officers are told to consider "the information-sharing and identity-management protocols of the applicant's country of nationality as they relate to the applicant," according to the letter.

That last consideration could prove complicated for most applicants, given that the reason a country winds up on the banned list is that it does not meet U.S. standards for information sharing and identity management.

(Refiling to make it "data" instead of "letter" in headline)

Reporting by Yeganeh Torbati in Washington and Mica Rosenberg in New York; additional reporting by Grant Smith; editing by Sue Horton, Lisa Shumaker and Jonathan Oatis

Our Standards:The Thomson Reuters Trust Principles.

EXHIBIT D

muslim advocates
PROMOTING FREEDOM & JUSTICE FOR ALL

center for constitutional rights

January 23, 2018

VIA CERTIFIED MAIL AND EMAIL

Dr. James V.M.L. Holzer
Deputy Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
Washington, DC 20032

Kellie Robinson, Public Liaison
U.S. Department of State
A/GIS/IPS/PP
SA-2, Suite 8100
Washington, DC 20522-0208

Sabrina Burroughs
U.S. Customs and Border Protection
FOIA Officer/ Public Liaison
1300 Pennsylvania Avenue, NW, Room 3.3D
Washington, DC 20229

U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010

Re: Freedom of Information Act Request Regarding the Waiver Process Provided for in Presidential Proclamation 9645

To Whom It May Concern:

Muslim Advocates and the Center for Constitutional Rights ("Requestors") submit this letter as a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.* for documents, communications, and all other materials related to the implementation of the waiver provisions of President Donald Trump's September 24, 2017 Proclamation 9645, titled

"Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." We ask that this request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) and that we be granted a fee waiver. We also request that you refer the requests contained in this letter to any other component agency of the U.S. Department of Homeland Security ("DHS") or the U.S. Department of State as appropriate.

I. Background

On January 27, 2017, President Trump issued Executive Order 13,769, titled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("First Executive Order").[1] The First Executive Order temporarily banned entry of individuals from seven predominantly Muslim countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[2] It also suspended the entire United States Refugee Admissions Program, and indefinitely barred entry of Syrian refugees.[3]

Following legal challenges to the First Executive Order, President Trump issued a new executive order on March 6, 2017 ("Second Executive Order").[4] The Second Executive Order presented a few key differences. First, it removed Iraq from the list of targeted countries but subjected Iraqis to specific enhanced-vetting requirements.[5] Second, it permitted the grant of case-by-case waivers for individuals whose entry the Executive Order would have otherwise suspended.[6]

After decisions from the Fourth and Ninth Circuits enjoined the Second Executive Order[7], a "worldwide review" was undertaken to assess what "additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat."[8] This "worldwide review" resulted in Presidential Proclamation 9645 ("the Proclamation") on September 24, 2017. The Proclamation barred nationals of eight countries from entry into the U.S.: Chad, Iran, Libya, North Korea,

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[1] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
[2] Id. §§ 3(c), 5(a), (c).
[3] Id. §§ 3(c), 5(a), (c).
[4] Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).
[5] Id. § 4.
[6] Id. § 3(c).
[7] *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), and *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).
[8] Pres. Proclamation 9645, 82 FR 45161 (Sept. 24, 2017).

Syria, Venezuela[9], and Yemen.[10] There is near-perfect overlap between the countries whose nationals are banned before and after the "worldwide review."

Importantly, a waiver provision, like that provided in the Second Executive Order, was also included in the Proclamation, allowing case-by-case waivers in certain circumstances.[11] These include whether the denial of entry "would cause undue hardship" or when "entry would not pose a threat to national security" or when his or her entry "would be in the national interest."[12] The Proclamation states, "The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants."[13] Although the Proclamation provides some examples of circumstances in which waivers might be granted, the general public still does not have any detailed information about how a person may apply for a waiver, how determinations regarding eligibility for a waiver are made and by whom; and whether there is any recourse for persons denied a waiver. Since a waiver grant is currently the sole means by which a national of the banned countries may enter the United States, the records requested herein would provide information that is critically important to the public.

Clarity on the waiver process is also of significant urgency. Beginning on December 17, 2017, our organizations have received reports that the U.S. Consulate in Djibouti has issued a significant but unknown number of form letters denying visas to Yemenis awaiting processing of family-based visas. These visa denial letters appear to follow a standardized form and inform applicants that a "consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, and pursuant to Presidential Proclamation 9645." Additionally, several of these documents inform petitioners that "their case will not be considered for a waiver." Our organizations have also received reports of similar denial letters from other U.S. consulates during the same week—including in Armenia, Dubai, Abu Dhabi, Saudi Arabia and Jordan. An example of such a letter from the U.S. Consulate in Djibouti is attached as Exhibit 1.

II. Request for Records

For the purposes of this Request, "Record" means a record in the broadest sense possible, and includes, without limitation, everything tangible, electronic, or digital containing a datum,

[9] As opposed to the other countries, the Proclamation only bars the entry into the United States of certain Venezuelan government officials "involved in screening and vetting procedures" and their immediate family members on non-immigrant business and/or tourist visas. *Id.* § 2(f)(ii).
[10] Pres. Proclamation 9645 § 1(g).
[11] *Id.* § 3(c).
[12] *Id.*
[13] *Id.*

number, photograph, picture, word, or any other information, including, but not limited to, communications between phones or other electronic devices, e-mails, digital or physical images, video, audio recordings, voicemail messages, social media posts, instructions, directives, guidance documents, formal and informal presentations, training documents, bulletins, notices, alerts, updates, advisories, reports, legal and policy memoranda, contracts, agreements, minutes or notes of meetings and phone calls, and memoranda of understanding.

The Requestors seek release of the following:

1) Records created on or after September 24, 2017, that concern guidance, interpretation, implementation, or enforcement of the Proclamation's waiver provision by DHS, Customs & Border Patrol ("CBP"), the Department of State, or any component agency of the federal government, including, but not limited to:

   a) Practices, policies, guidance, and procedures implemented on or after September 24, 2017, relating to criteria for assessing individual waiver requests;

   b) Policies, practices, guidance, and procedures implemented on or after September 24, 2017, regarding how officers should determine that an individual's waiver request be granted;

   c) Internal guidance or correspondence instructing consular or other officers on how to assess whether denial of an individual's entry "would cause undue hardship"; or when "his or her entry would not pose a threat to national security"; or when his or her entry "would be in the national interest";

   d) The processes for accepting and adjudicating waiver requests;

   e) The person or office to whom waiver requests should be addressed;

   f) The number of waiver requests the Department of State, CBP, DHS, or any other component agency of DHS has received under the Proclamation;

   g) The number of waiver requests granted by the Department of State, CBP, DHS, or any other component agency of DHS under the Proclamation and the reasoning for the grants;

   h) The number of waiver requests denied by the Department of State, CBP, DHS, or any other component agency of DHS, under the Proclamation and the reasoning for the

denials;

i) Any guidance provided to CBP, DHS, or Department of State field personnel regarding the Proclamation's waiver provisions;

j) Any memoranda setting guidance for the Department of State, CBP, DHS, or any other component agency of the DHS on enforcement of the Proclamation's waiver provisions in light of the Supreme Court's December 4, 2017 stay of the lower court injunctions; and

k) Any memoranda providing guidance for the Department of State, CBP, DHS, or any other component agency of the DHS on enforcement of the Proclamation's waiver provisions in light of federal court decisions granting preliminary injunctions against its implementation.

l) Any guidance or communications regarding the prioritization of the issuance of denial letters among applicants from the countries named in the Presidential Proclamation, or in the Second Executive Order.

2) Records concerning guidance, interpretation, enforcement, or implementation of the waiver provisions of the Proclamation created any time after December 4, when certain U.S. Consulates began issuing an unknown number of denials of visas. These include, but are not limited to:

i) The number of letters issued on December 4 through present by the U.S. Consulate in Djibouti denying eligibility for a waiver; and

ii) The number of letters issued on December 4 through present by the U.S. Consulate in Djibouti reviewing eligibility for a waiver.

iii) The number of letters issued granting waiver

iv) Communications between the Department of State, CBP, DHS or any other component agency of DHS with the consulates of Djibouti, (X and Y consulates) regarding the language of the form letters, including the language indicating the availability of a waiver provision; and

v) Any written guidance, including but not limited to memoranda, establishing how to assess whether individuals who had received a visa approval notice prior to the Presidential Proclamation and whose visas were only awaiting printing are to be considered separately for eligibility for the waiver program.

The Department of State, DHS, CBP, and all other relevant components of DHS are obliged to search all such field offices that are reasonably expected to produce relevant information. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (agency not required to search all of its field offices because request did not ask for a search beyond the agency's central files); *see also Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013).

Due to the expedited nature of the relevant events and interpretations, we request that searches of all electronic information include the personal email accounts and work phones of all employees and former employees who may have sent or received emails or text messages regarding the subject matter of this Request.

To the extent that our Request encompasses records responsive or potentially responsive to the Request that have been destroyed, our Request should be interpreted to include, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

Format of Production

With respect to the form of production, see 5 U.S.C. § 552(a)(3)(B). Please search for responsive records regardless of format, medium, or physical characteristics, and including electronic records. Please provide the requested documents in the following format:

- Saved on a CD, CD-ROM or DVD;
- In PDF or TIF format wherever possible;
- Electronically searchable text wherever possible;
- Each paper record in a separately saved file;
- "Parent-child" relationships maintained, meaning that the requester must be able to identify the attachments with emails;
- Any data records in native format (i.e. Excel spreadsheets in Excel);
- Emails should include BCC and any other hidden fields;
- With any other metadata preserved.

III. The Requestors

The Center for Constitutional Rights ("CCR") is a non-profit, public interest legal organization located in New York City. CCR engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR's diverse dockets include litigation and advocacy around immigration detention, post-9/11 immigration enforcement policies, policing, and racial and ethnic profiling. CCR is a member of immigrant rights networks nationally and provides legal support to immigrant rights movements. One of

CCR's primary activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current immigration law issues, and other similar materials for public dissemination. CCR operates a website, http://ccrjustice.org, which addresses the issues on which the Center works. The CCR regularly files Freedom of Information Act cases, and makes the information produced by government agencies publically available through its website and further shares the information released under FOIA through reports, production guides and other written materials. In addition, CCR regularly issues press releases, has a social media reach of over 85,000 followers, and issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. CCR staff members often serve as sources for journalist and media outlets, including on immigrant rights.

Muslim Advocates ("MA") is a non-profit, public interest legal advocacy organization dedicated to promoting freedom and equality for Americans of all faiths. MA has offices in Oakland, California and Washington, DC. MA engages in litigation, legal advocacy, and educational outreach, and regularly produces reports, white papers, and other materials to educate the public on civil rights matters. MA has a wide-ranging docket that has included extensive litigation and advocacy on the Executive Orders banning travel to the United States for certain nationals of Muslim-majority countries, and has been a leading voice in requests for clarification and further information about the waiver process. MA regularly files FOIA requests and published information obtained pursuant to such requests in a digestible, public-facing form. We regularly receive requests about obtaining case-by-case waivers under the Proclamation and therefore has a particular interest in promoting greater transparency on the subject of this request.

IV. Application for Waiver of Fees

The Requestors seek a waiver of document search, review, and duplication fees on the grounds that disclosure is in the public interest because it is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). If the waiver request is not granted, Requestors request that fees be limited to reasonable standard charges for document duplication because Requestors qualify as representatives of the news media and the records sought are not for commercial use. Id. § 552(4)(A)(ii)(II).

A. Disclosure Is in the Public Interest

As an initial matter, the public interest in this case is evident: at this time, the waiver process is the only way for an individual seeking entry into the United States to avoid the absolute prohibition on travel and on refugee-processing contained in the Proclamation. To date, no information has been released on (1) the manner in which this waiver process is to proceed; (2) the person or office to whom such waivers should be directed; (3) the documents that should

accompany such requests; or (4) the clear and specific criteria by which officials are to evaluate whether a person meets the broad criteria outlined in the Proclamation itself.

Moreover, the implementation of the second Executive Order and the Presidential Proclamation have generally been the subject of widespread and ongoing media attention[14]. The records sought will significantly contribute to the public understanding of how the waiver process is being used and of how waivers are being adjudicated.

Thus, a fee waiver would fulfill Congress's legislative intent in granting fee waivers to noncommercial requestors. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (internal quotation marks omitted)).

B. Requestors Are Representatives of the News Media

Even if a waiver is not granted, fees should be "limited to reasonable standard charges for document duplication" because each of Muslim Advocates and the Center for Constitutional Rights is a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(4)(A)(ii)(II). Other organizations similar to Requestors in mission, function, and educational activities have been found by courts to be representatives of the news media. *See Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (a non-profit educational organization qualified under the news media category); *Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (a nonprofit research organization qualified under the news media category).

Finally, Requestors do not seek to use the information requested for commercial use, 22 C.F.R. § 171.16(a)(2), and do not have a commercial interest that would be furthered by the disclosure. Instead, their primary interest in the disclosure of information is to educate the public and advocate for the rights of Americans to be free from racial and religious profiling. § 171.16(a)(2)(i)-(ii).

V. Application for Expedited Processing

[14] *See e.g.*, Liz Robbins, *'Your Visa Is Approved,' They were Told. And Then It Wasn't.*, N. Y. TIMES (Jan. 17, 2018), https://nyti.ms/2FNJmOm; Sam Levin, *Tears, despair and shattered hopes: the families torn apart by Trump's travel ban*, THE GUARDIAN (Jan. 8, 2018, 5:00M), https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month; Esther Yu Hsi Lee, *Trump's Muslim ban has put this Stage 3 cancer patient in an impossible situation*, THINKPROGRESS (Jan. 12, 2018), https://thinkprogress.org/iranian-cyberknife-cancer-treatment-4576199d430e/.

The Requestors request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).[14] There is a "compelling need" for these records as defined in the statute because: (1) the request concerns "[t]he loss of substantial due process rights," 6 C.F.R. § 5.5(e)(1)(iii); 5 U.S.C. § 552(a)(6)(E)(ii); and (2) the request concerns "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 6 C.F.R. § 5.5(e)(1)(iv); 5 U.S.C. § 552(a)(6)(E)(ii).

The Proclamation's implementation has received widespread media interest, in particular with regards to the confusion surrounding the waiver process.[15] The requested records seek to inform the public about an urgent issue implicating thousands of individuals' due-process rights—namely, the interpretation, implementation, and enforcement of the Proclamation's waiver provision, which at this time is the sole manner by which affected individuals from the eight countries are able to gain entry into the United States.

Reports of the Proclamation's implementation have raised serious due-process concerns, giving rise "to questions about the government's integrity" and an "urgency to inform the public." 28 C.F.R. § 16.5(d)(1)(iv). The waiver process instituted by the Proclamation has been shadowed in confusion and has not eliminated the constitutional and statutory questions raised by the First and Second Executive Orders. Thus, attorneys, other service providers, and the public urgently need these important public documents.

Given the foregoing, the Requestors have satisfied the requirements for expedited processing of this Request. Pursuant to applicable statutes and regulations, the Requestors expect a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552 (a)(6)(E)(ii); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the Requestors ask that you justify all denials by reference to specific FOIA exemptions. The Requestors expect the release of all segregable portions of otherwise exempt material. The Requestors reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Additionally, in order to avoid delays in receiving records, Requestors request that records be produced seriatim as they become available. Thank you for your prompt attention to this matter.

---

[15] *See, e.g.*, Sam Levin, *Tears, despair and shattered hopes: the families torn apart by Trump's travel ban*, THE GUARDIAN, Jan. 8, 2018, *available* at https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month; Betsy Woodruff, *The Kafkaesque Hell of Being an Iranian Dissident Trying to Come to America*, THE DAILY BEAST, Jan. 3, 2018, *available at* https://www.thedailybeast.com/the-kafkaesque-hell-of-being-an-iranian-dissident-trying-to-come-to-america.

Please furnish the applicable records to:

Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, DC 20035
sirine@muslimadvocates.org

If you have any questions regarding the processing of this request, please contact Sirine Shebaya at (202) 897-1894 or Diala Shamas at (212) 614-6426.

We affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. See 5 U.S.C. § 552(a)(6)(E)(vi).

Very truly yours,

Sirine Shebaya
NimraAzmi
MUSLIM ADVOCATES
P.O. Box 66408
Washington, DC 20035
sirine@muslimadvocates.org

Diala Shamas
Noor Zafar
Center for Constitutional Rights
Broadway, 7th Fl.
NewYork,NY
dshamas@ccrjustice.org

EXHIBIT E

Gmail

Shabnam Lotfi <shabnam@lotfilegal.com>

Fwd: YRV2016[redacted]

[redacted] Mon, Feb 5, 2018 at 5:46 PM

To: shabnam@lotfilegal.com

Soheil Vazehrad, RDH,
[redacted]

Begin forwarded message:

From: atefe motevally [redacted]
Date: January 5, 2018 at 10:06:59 PM PST
To: Soheil Vazehrad [redacted]
Subject: Fw: YRV2016[redacted]
Reply-To: atefe motevally [redacted]

On Thursday, January 4, 2018 10:47 AM, "Yerevan, Iran IV" <IranIVYerevan@state.gov> wrote:

Consular Section of the
Embassy of the United States of America
Yerevan, Armenia

Dear Applicant:

This is to inform you that a consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, pursuant to Presidential Proclamation 9645. Today's decision cannot be appealed.

■ Taking into account the provisions of the Proclamation, a waiver will not be granted in your case.

□ The consular officer is reviewing your eligibility for a waiver. To approve your waiver, the consular officer must determine that denying your entry would cause undue hardship, that

[redacted] 1/3

your entry would not pose a threat to the national security or public safety of the United States, and that your entry would be in the national interest of the United States. This can be a lengthy process, and until the consular officer can make an individualized determination on these three factors, your application will remain refused under Section 212(f). You will be contacted with a final determination on your application as soon as practicable.

Regards,

Immigrant Visa Unit

متقاضی گرامی،

به اطلاع می رسانیم افسر کنسولگری تعیین کردند که شما طبق بند 212(ف) قانون مهاجرت و تابعیت آمریکا مطابق بیانیه رییس جمهور، فاقد شرایط لازم برای اخذ ویزا هستید. تصمیم امروز غیر قابل تجدید نظر است.

■ با در نظر گرفتن مقررات این بیانیه، درپرونده شما این محدودیت چشم پوشی نخواهد شد.
□ افسر کنسولگری صلاحیت شما جهت چشم پوشی از این بیانیه را بررسی می کند. برای تأیید این چشم پوشی، افسر کنسولگری باید تعیین کند که رد ورود شما منجربه سختیهای ناخوشایند خواهد شد و ورود شما تهدیدی برای امنیت ملی یا عمومی آمریکا نخواهد بود و به نفع منافع ملی ایالات متحده آمریکا خواهد بود. این روند ممکن است طولانی باشد و تا هنگامی که افسر کنسولگری بتواند در مورد این سه عامل تصمیمی برای پرونده شما بگیرد، درخواست ویزای شما طبق بند 212(ف) رد شده باقی خواهد ماند. ما در اسرع وقت با شما درباره تصمیم نهایی پرونده تان تماس خواهیم گرفت.

با تشکر،
بخش ویزای مهاجرتی

[redacted] 2/3

Privacy/PII
This email is UNCLASSIFIED.

image002.jpg
4K

EXHIBIT F

From: Yerevan, Iran IV [mailto:IranIVYerevan@state.gov]
Sent: Sunday, December 17, 2017 9:21 PM
To: Anthony Ravani <[redacted]>
Subject: RE: YRV2016[redacted]

Dear inquirer,

Unfortunately, your case is not eligible for a waiver under Presidential Proclamation 9645. This refusal under Section 212(f) of the Immigration and Nationality Act applies only to the current visa application. Please be advised that Presidential Proclamation 9645 currently restricts issuance of most visas to nationals of Iran and seven other countries.

Consular Section | Immigrant Visa Unit
U.S. Embassy Yerevan | 1 American Ave, Yerevan 0082, Armenia

This email is UNCLASSIFIED.

From: Anthony Ravani [mailto:[redacted]]
Sent: Friday, December 15, 2017 10:38 PM
To: Yerevan, Iran IV
Subject: RE: YRV2016[redacted]

Dear officer,

Based on the following FAM procedure can you please fully explain why you determined the applicant is not eligible for a waiver.

9 FAM 504.11-3 (U) REFUSAL PROCEDURES

(U) If you determine that the applicant is not eligible for a visa, the following procedures should be followed.

9 FAM 504.11-3(A)(1) (U) Inform the Alien Orally and in Writing

b. (U) INA 212(b) requires officers to provide timely written notice that the alien is inadmissible. The written notification should provide the alien (and the attorney of record) with:

(1) (U) The provision(s) of law on which the refusal is based;

(2) (U) The factual basis for the refusal (unless such information is classified) please also see "Exceptions to Notice Requirements" below;

Sincerely,

Anthony B. Ravani,

Principal Attorney at Law

Immigration & Business Law

Anywhere in USA

Phone: [redacted]

[redacted]

[redacted]

FAX: [redacted]

Lotus Law Group, PLLC

800 Fifth Ave., Suite 400 300 Spectrum Center Dr., Suite 400

Seattle, WA. 98104 AND Irvine, CA. 92618

www.Lotus-Lawgroup.com

Please be advised that in all my work I follow the USA laws and all appropriate Regulations and Policies relevant to your inquiry.

From: Yerevan, Iran IV [mailto:IranIVYerevan@state.gov]
Sent: Thursday, December 14, 2017 11:48 PM
To: Anthony Ravani [redacted]
Subject: YRV2016[redacted]

Consular Section of the

Embassy of the United States of America

Yerevan, Armenia

Dear Applicant:

This is to inform you that a consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, pursuant to Presidential Proclamation 9645. Today's decision cannot be appealed.

Please see the letter attached.

■ Taking into account the provisions of the Proclamation, a waiver will not be granted in your case.

☐ The consular officer is reviewing your eligibility for a waiver. To approve your waiver, the consular officer must determine that denying your entry would cause undue hardship, that your entry would not pose a threat to the national security or public safety of the United States, and that your entry would be in the national interest of the United States. This can be a lengthy process, and until the consular officer can make an individualized determination on these three factors, your application will remain refused under Section 212(f). You will be contacted with a final determination on your application as soon as practicable.

Regards,

Immigrant Visa Unit

متقاضی گرامی،

به اطلاع می رسانیم افسر کنسولگری تعیین کردند که شما طبق بند 212(ف) قانون مهاجرت و تابعیت آمریکا مطابق بیانیه رییس جمهور، فاقد شرایط لازم برای اخذ ویزا هستید. تصمیم امروز غیر قابل تجدید نظر است.

■ با در نظر گرفتن مقررات این بیانیه، در پرونده شما این محدودیت چشم پوشی نخواهد شد.

□ افسر کنسولگری صلاحیت شما جهت چشم پوشی از این بیانیه را بررسی می کند. برای تائید این چشم پوشی، افسر کنسولگری باید تعیین کند که رد ورود شما متجر به سختی های ناخوشایند خواهد شد و ورود شما تهدیدی برای امنیت ملی یا عمومی آمریکا نخواهد بود و به نفع منافع ملی ایالات متحده آمریکا خواهد بود. این روند ممکن است طولانی باشد و تا هنگامی که افسر کنسولگری بتواند در مورد این سه عامل تصمیمی برای پرونده شما بگیرد، درخواست ویزای شما طبق بند 212(ف) رد شده باقی خواهد ماند. ما در اسرع وقت با شما درباره تصمیم نهایی پرونده تان تماس خواهیم گرفت.

با تشکر،

بخش ویزای مهاجرتی

Privacy/PII

This email is UNCLASSIFIED.

2 attachments:

[redacted].png
18K

[redacted].pdf
1714K

EXHIBIT G

mail.com

RE: Fwd: RDJ2017[redacted]- HEIDARYAN, EHSAN

From: [illegible]
To: [illegible] <[redacted]
Cc: "[redacted] <[redacted]
Date: Dec 27, 2017 [illegible]

Dear Sir,

[illegible] Presidential Proclamation [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Official

UNCLASSIFIED

From: [illegible]
Sent: Wednesday, December 27, 2017 10:16 AM
To: [illegible]
Cc: [redacted]
Subject: RE: Fwd: RDJ2017[redacted] HEIDARYAN, EHSAN

Dear Sir,

[illegible]

[illegible]

[illegible]

[illegible]

Official

UNCLASSIFIED

From: [illegible] [redacted]
Sent: Tuesday, December [illegible], 2017 [illegible]
To: [illegible]
Cc: [redacted]
Subject: RE: Fwd: [illegible][redacted] HEIDARYAN, EHSAN

Dear Sir/Madam,

Many thanks for your message!

1. [illegible]

2. [illegible]

3. [illegible]

Kind regards,
Ehsan Heidaryan
RDJ2017[redacted]

[redacted]

[redacted]

Dear Immigrant Visa Applicant,

Please find the attached document requiring review and completion by the principal applicant. Please complete the form in English. Once you have completed the form, print it and send to us by drop box or mail..

Be advised that incomplete or unclear responses will delay the processing of your case.

Attachments.

Best regards.

Immigrant Visa Unit

United States Consulate General

Rio de Janeiro - RJ - Brazil

br

[redacted]

EXHIBIT H

DONALD J. TRUMP

XLV President of the United States: 2017-present

Statement by Donald J. Trump Statement on Preventing Muslim Immigration

December 7, 2015

(New York, NY) December 7th, 2015, – Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled, "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life. If I win the election for President, we are going to Make America Great Again." - *Donald J. Trump*

Citation: Donald J. Trump: "Statement by Donald J. Trump Statement on Preventing Muslim Immigration," December 7, 2015. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*.
http://www.presidency.ucsb.edu/ws/?pid=113841.

EXHIBIT I

Donald J. Trump
@realDonaldTrump

Follow

The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.

3:29 AM - 5 Jun 2017

14,910 Retweets **69,311** Likes

11K **15K** **69K**

EXHIBIT J

Donald J. Trump
@realDonaldTrump

Follow

People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!

3:25 AM - 5 Jun 2017

21,040 Retweets **86,662** Likes

16K 21K 87K

EXHIBIT K

Donald J. Trump
@realDonaldTrump

Follow

Thank you to the great Republican Senators who showed up to our mtg on immigration reform. We must BUILD THE WALL, stop illegal immigration, end chain migration & cancel the visa lottery. The current system is unsafe & unfair to the great people of our country - time for change!

3:53 PM - 4 Jan 2018

29,898 Retweets **136,536** Likes

24K 30K 137K

EXHIBIT L

Donald J. Trump
@realDonaldTrump

Follow

....we need to keep America safe, including moving away from a random chain migration and lottery system, to one that is merit-based.

3:20 PM - 16 Jan 2018

18,883 Retweets **81,226** Likes

16K **19K** **81K**

EXHIBIT M

White House Framework on Immigration Reform & Border Security

www.whitehouse.gov
1 min read

BORDER SECURITY: Securing the Southern and Northern border of the United States takes a combination of physical infrastructure, technology, personnel, resources, authorities, and the ability to close legal loopholes that are exploited by smugglers, traffickers, cartels, criminals and terrorists.

- The Department of Homeland Security must have the tools to deter illegal immigration; the ability to remove individuals who illegally enter the United States; and the vital authorities necessary to protect national security.
- These measures below are the minimum tools necessary to mitigate the rapidly growing surge of illegal immigration.
    - $25 billion trust fund for the border wall system, ports of entry/exit, and northern border improvements and enhancements.
    - Close crippling personnel deficiencies by appropriating additional funds to hire new DHS personnel, ICE attorneys, immigration judges, prosecutors and other law enforcement professionals.

- Hiring and pay reforms to ensure the recruitment and retention of critically-needed personnel.
- Deter illegal entry by ending dangerous statutorily-imposed catch-and-release and by closing legal loopholes that have eroded our ability to secure the immigration system and protect public safety.
- Ensure the detention and removal of criminal aliens, gang members, violent offenders, and aggravated felons.
- Ensure the prompt removal of illegal border-crossers regardless of country of origin.
- Deter visa overstays with efficient removal.
- Ensure synthetic drugs (fentanyl) are prevented from entering the country.
- Institute immigration court reforms to improve efficiency and prevent fraud and abuse.

DACA LEGALIZATION: Provide legal status for DACA recipients and other DACA-eligible illegal immigrants, adjusting the time-frame to encompass a total population of approximately 1.8 million individuals.

- 10-12 year path to citizenship, with requirements for work, education and good moral character.
- Clear eligibility requirements to mitigate fraud.
- Status is subject to revocation for criminal conduct or public safety and national security concerns, public charge, fraud, etc.

PROTECT THE NUCLEAR FAMILY: Protect the nuclear family by emphasizing close familial relationships.

- Promote nuclear family migration by limiting family sponsorships to spouses and minor children only (for both Citizens and LPRs), ending extended-family chain migration.

- **Apply these changes prospectively, not retroactively, by processing the "backlog."**

ELIMINATE LOTTERY AND REPURPOSE VISAS: The Visa Lottery selects individuals at random to come to the United States without consideration of skills, merit or public safety.

- **This program is riddled with fraud and abuse and does not serve the national interest.**
- **Eliminate lottery and reallocate the visas to reduce the family-based "backlog" and high-skilled employment "backlog."**

EXHIBIT N

December 4, 2017 - New Court Order on Presidential Proclamation

On December 4, 2017, the U.S. Supreme Court granted the government's motions for emergency stays of preliminary injunctions issued by U.S. District Courts in the Districts of Hawaii and Maryland. The preliminary injunctions had prohibited the government from fully enforcing or implementing the entry restrictions of Presidential Proclamation 9645 (P.P.) titled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats" to nationals of six countries: Chad, Iran, Libya, Syria, Yemen, and Somalia. Per the Supreme Court's orders, those restrictions will be implemented fully, in accordance with the Presidential Proclamation, around the world, beginning December 8 at open of business, local time.

The District Court injunctions did not affect implementation of entry restrictions against nationals from North Korea and Venezuela. Those individuals remain subject to the restrictions and limitations listed in the Presidential Proclamation, which went into effect at 12:01 a.m. eastern time on Wednesday, October 18, 2017, with respect to nationals of those countries.

Additional Background: The President issued Presidential Proclamation 9645 on September 24, 2017. Per Section 2 of Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry Into The United States), a global review was conducted to determine what additional information is needed from each foreign country to assess whether foreign nationals who seek to enter the United States pose a security or safety threat. As part of that review, the Department of Homeland Security (DHS) developed a comprehensive set of criteria to evaluate the information-sharing practices, policies, and capabilities of foreign governments on a worldwide basis. At the end of that review, which included a 50-day period of engagement with foreign governments aimed at improving their information sharing practices, there were seven countries whose information sharing practices were determined to be "inadequate" and for which the President deemed it necessary to impose certain restrictions on the entry of nonimmigrants and immigrants who are nationals of these countries. The President also deemed it necessary to impose restrictions on one country due to the "special concerns" it presented. These restrictions are considered important to addressing the threat these existing

information-sharing deficiencies, among other things, present to the security and welfare of the United States and pressuring host governments to remedy these deficiencies.

Nationals of the eight countries are subject to various travel restrictions contained in the Proclamation, as outlined in the following table, subject to exceptions and waivers set forth in the Proclamation.

Country	Nonimmigrant Visas	Immigrant and Diversity Visas
Chad	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
Iran	No nonimmigrant visas except F, M, and J visas	No immigrant or diversity visas
Libya	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
North Korea	No nonimmigrant visas	No immigrant or diversity visas
Somalia		No immigrant or diversity visas
Syria	No nonimmigrant visas	No immigrant or diversity visas
Venezuela	No B-1, B-2 or B-1/B-2 visas of any kind for officials of the following government agencies Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal; the Bolivarian Intelligence Service; and the People's Power Ministry of Foreign Affairs, and their immediate family members.	
Yemen	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas

We will not cancel previously scheduled visa application appointments. In accordance with the Presidential Proclamation, for nationals of the eight designated countries, a consular officer will make a determination whether an applicant otherwise eligible for a visa is exempt from the Proclamation or, if not, may be eligible for a waiver under the Proclamation and therefore issued a visa.

No visas will be revoked pursuant to the Proclamation. Individuals subject to the Proclamation who possess a valid visa or valid travel document generally will be permitted to travel to the United States, irrespective of when the visa was issued.

We will keep those traveling to the United States and our partners in the travel industry informed as we implement the order in a professional, organized, and timely way.

FAQs on the Presidential Proclamation - Department of Homeland Security

The President's Proclamation on Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats

Frequently Asked Questions

What are the exceptions in the Proclamation?

The following exceptions apply to nationals from all eight countries and will not be subject to any travel restrictions listed in the Proclamation:

a) Any national who was in the United States on the applicable effective date described in Section 7 of the Proclamation for that national, regardless of immigration status;

b) Any national who had a valid visa on the applicable effective date in Section 7 of the Proclamation for that national;

c) Any national who qualifies for a visa or other valid travel document under section 6(d) of the Proclamation;

d) Any lawful permanent resident (LPR) of the United States;

e) Any national who is admitted to or paroled into the United States on or after the applicable effective date in Section 7 of the Proclamation for that national;

f) Any applicant who has a document other than a visa, valid on the applicable effective date in Section 7 of the Proclamation for that applicant or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as advance parole;

g) Any dual national of a country designated under the Proclamation when traveling on a passport issued by a non-designated country;

h) Any applicant traveling on a diplomatic (A-1 or A-2) or diplomatic-type visa (of any classification), NATO-1 -6 visas, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; except certain Venezuelan government officials and their family members traveling on a diplomatic-type B-1, B-2, or B1/B2 visas

i) Any applicant who has been granted asylum; admitted to the United States as a refugee; or has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

Exceptions and waivers listed in the Proclamation are applicable for qualified applicants. In all visa adjudications, consular officers may seek additional information, as warranted, to determine whether an exception or a waiver is available.

If a principal visa applicant qualifies for an exception or a waiver under the Proclamation, does a derivative also get the benefit of the exception or waiver?

Each applicant, who is otherwise eligible, can only benefit from an exception or a waiver if he or she individually meets the conditions of the exception or waiver.

Does the Proclamation apply to dual nationals?

This Proclamation does not restrict the travel of dual nationals, so long as they are traveling on the passport of a non-designated country.

Our embassies and consulates around the world will process visa applications and issue nonimmigrant and immigrant visas to otherwise eligible visa applicants who apply with a passport from a non-designated country, even if they hold dual nationality from one of the eight restricted countries.

Does this apply to U.S. Lawful Permanent Residents?

No. As stated in the Proclamation, lawful permanent residents of the United States are not affected by the Proclamation

Are there special rules for permanent residents of Canada?

Waivers may not be granted categorically to any group of nationals of the eight countries who are subject to visa restrictions pursuant to the Proclamation, but waivers may be appropriate in individual circumstances, on a case-by-case basis. The Proclamation lists several circumstances in which case-by-case waivers may be appropriate. That list includes foreign nationals who are Canadian permanent residents who apply for visas at a U.S. consular section in Canada. Canadian permanent residents should bring proof of their status to a consular officer.

A consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation during each phase of the implementation and, if so, whether the applicant qualifies for an exception or a waiver.

Will you process waivers for those affected by the Proclamation? How do I qualify for a waiver to be issued a visa?

As specified in the Proclamation, consular officers may issue a visa based on a listed waiver category to nationals of countries identified in the PP on a case-by-case basis, when they determine: that issuance is in the national interest, the applicant poses no national security or public safety threat to the United States, and denial of the visa would cause undue hardship. There is no separate application for a waiver. An individual who seeks to travel to the United States should apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for a waiver.

What is a "close family member" for the purposes of determining if someone is eligible for a waiver?

Section 201(b) of the INA provides a definition of immediate relative, which is used to interpret the term "close family member" as used in the waiver category. This limits the relationship to spouses, children under the age of 21, and parents. While the INA definition includes only children, spouses, and parents of a U.S. citizen, in the context of the Presidential Proclamation it also includes these relationships

with LPRs and aliens lawfully admitted on a valid nonimmigrant visa in addition to U.S. citizens.

Can those needing urgent medical care in the United States still qualify for a visa?

Applicants who are otherwise qualified and seeking urgent medical care in the United States may be eligible for an exception or a waiver. Any individual who seeks to travel to the United States should apply for a visa and disclose during the visa interview any information that might qualify the individual for an exception or waiver. A consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation, and if so, whether the case qualifies for an exception or a waiver.

The Proclamation provides several examples of categories of cases that may be appropriate for consideration for a waiver, on a case-by-case basis, when in the national interest, when entry would not threaten national security or public safety, and denial would cause undue hardship. Among the examples provided, a foreign national who seeks to enter the United States for urgent medical care may be considered for a waiver.

I'm a student or short-term employee that was temporarily outside of the United States when the Proclamation went into effect. Can I return to school/work?

If you have a valid, unexpired visa and are outside the United States, you can return to school or work per the exception noted in the Proclamation.

If you do not have a valid, unexpired visa and do not qualify for an exception you will need to qualify for the visa and a waiver. An individual who wishes to apply for a nonimmigrant visa should apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for a waiver per the Proclamation. A consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation and, if so, whether the case qualifies for a waiver.

I received my immigrant visa but I haven't yet entered the United States. Can I still travel there using my immigrant visa?

The Proclamation provides specifically that no visas issued before the effective date of the Proclamation will be revoked pursuant to the Proclamation, and it does not apply to nationals

of affected countries who have valid visas on the date it becomes effective.

I recently had my immigrant visa interview at a U.S. embassy or consulate overseas, but my case is still being considered. What will happen now?

If your visa application was refused under Section 221(g) pending updated supporting documents or administrative processing, you should proceed to submit your documentation. After receiving any required missing documentation or completion of any administrative processing, the U.S. embassy or consulate where you were interviewed will contact you with more information.

I am currently working on my case with NVC. Can I continue?

Yes. You should continue to pay fees, complete your Form DS-260 immigrant visa applications, and submit your financial and civil supporting documents to NVC. NVC will continue reviewing cases and scheduling visa interviews overseas. During the interview, a consular officer will carefully review the case to determine whether the applicant is affected by the Proclamation and, if so, whether the case qualifies for an exception or may qualify for a waiver.

What immigrant visa classes are subject to the Proclamation?

All immigrant visa classifications for nationals of Chad, Iran, Libya, North Korea, Syria, Yemen, and Somalia are subject to the Proclamation and restricted. All immigrant visa classifications for nationals of Venezuela are unrestricted. An individual who wishes to apply for an immigrant visa should apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for an exception or waiver per the Proclamation. A consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation and, if so, whether the case qualifies for an exception or a waiver.

I sponsored my family member for an immigrant visa, and his interview appointment is after the effective date of the Proclamation. Will he still be able to receive a visa?

All immigrant visa classifications for nationals of Chad, Iran, Libya, North Korea, Syria, Yemen, and Somalia are subject to the Presidential Proclamation and suspended. An individual who wishes to apply for an immigrant visa should apply for a

visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for an exception or waiver per the Proclamation. A consular officer will carefully review each case to determine whether the applicant is affected by the Proclamation and, if so, whether the applicant qualifies for an exception or a waiver.

I am applying for a K (fiancé) visa. My approved I-129 petition is only valid for four months. Can you expedite my case?

The National Visa Center already expedites all Form I-129F petitions to embassies and consulates overseas. Upon receipt of the petition and case file, the embassy or consulate will contact you with instructions on scheduling your interview appointment.

I received my Diversity Visa but I haven't yet entered the United States. Can I still travel there using my Diversity Visa?

The Proclamation provides specifically that no visas issued before the effective date of the Proclamation will be revoked pursuant to the Proclamation, and it does not apply to nationals of affected countries who have valid visas on the date it becomes effective.

I recently had my Diversity Visa interview at a U.S. embassy or consulate overseas, but my case is still being considered. What will happen now?

If your visa application was refused under Section 221(g) pending updated supporting documents or administrative processing, please provide the requested information. The U.S. embassy or consulate where you were interviewed will contact you with more information.

Will my case move to the back of the line for an appointment?

No. KCC schedules appointments by Lottery Rank Number. When KCC is able to schedule your visa interview, you will receive an appointment before cases with higher Lottery Rank Numbers.

I am currently working on my case with KCC. Can I continue?

Yes. You should continue to complete your Form DS-260 immigrant visa application. KCC will continue reviewing

cases and can qualify your case for an appointment. You will be notified about the scheduling of a visa interview.

What if my spouse or child is a national of one of the countries listed, but I am not?

KCC will continue to schedule new DV interview appointments for nationals of the affected countries. A national of any of those countries applying as a principal or derivative DV applicant should disclose during the visa interview any information that might qualify the individual for a waiver/exception. Note that DV 2018 visas, including derivative visas, can only be issued during the program year, which ends September 30, 2018, and only if visa numbers remain available. There is no guarantee a visa will be available in the future for your derivative spouse or child.

What if I am a dual national or permanent resident of Canada?

This Proclamation does not restrict the travel of dual nationals, so long as they are traveling on the passport of a non-designated country. You may apply for a DV using the passport of a non-designated country even if you selected the nationality of a designated country when you entered the lottery. Also, permanent residents of Canada applying for DVs in Montreal may be eligible for a waiver per the Proclamation, but will be considered on a case-by-case basis. If you believe one of these exceptions, or a waiver included in the Proclamation, applies to you and your otherwise current DV case has not been scheduled for interview, contact the U.S. embassy or consulate where your interview will take place/KCC at KCCDV@state.gov.

Does this Proclamation affect follow-to-join asylees?

The Proclamation does not affect V92 applicants, follow-to-join asylees.

EXHIBIT O

Gmail

Shabnam Lotfi <shabnam@lotfilegal.com>

Request for Clarity: [redacted] Case Number [redacted]

Vancouver, NIV Unit <vancouverniv@state.gov> Tue, Jan 9, 2018 at 2:42 PM
To: Shabnam Lotfi <shabnam@lotfilegal.com>

Dear Shabnam Lotfi,

A consular officer may issue a visa based on a listed waiver category to nationals of countries identified in the Presidential Proclamation on a case-by-case basis.

It has been determined that your client, [redacted], does not meet the definition of close family as she is over 21 years of age.

This decision cannot be appealed.

Non-Immigrant Visa Unit

U.S. Consulate General Vancouver

From: Shabnam Lotfi [mailto:shabnam@lotfilegal.com]
Sent: Wednesday, January 03, 2018 12:41 PM
To: Vancouver, NIV Unit
Cc: [redacted]
Subject: Request for Clarity: [redacted] Case Number [redacted]

Dear Consular Officer,
Per your communication (see attached), it appears as though my client, [redacted], has been denied the opportunity to request a waiver of the presidential proclamation.

According to the presidential proclamation itself and guidance on the State Department's website, foreign nationals who seek to enter the US to be reunited with a close family member (e.g. spouse, child, or parent) are eligible for requesting a waiver.

My client is the daughter of a United States citizen. Could you kindly explain why your office has denied my client the opportunity to request a waiver of the presidential proclamation?

Respectfully,

[redacted] 1/2

Attorney Shabnam Lotfi

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Madison, WI 53703

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Official

UNCLASSIFIED

[redacted] 2/2

EXHIBIT P

Consular Section of the
Embassy of the United States of America
Yerevan, Armenia

Dear Applicant:

This is to inform you that a consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, pursuant to Presidential Proclamation 9645. Today's decision cannot be appealed.

✓ Taking into account the provisions of the Proclamation, a waiver will not be granted in your case.

☐ The consular officer is reviewing your eligibility for a waiver under the Proclamation. To approve a waiver, the consular officer must determine that denying your entry would cause undue hardship, that your entry would not pose a threat to the national security or public safety of the United States, and that your entry would be in the national interest of the United States. This can be a lengthy process, and until the consular officer can make an individualized determination on these three factors, your visa application will remain refused under Section 212(f). You will be contacted with a final determination on your visa application as soon as practicable.

Regards,
Nonimmigrant Visa Unit

متقاضی گرامی،

به اطلاع می رسانیم افسر کنسولگری تعیین کردند که شما طبق بند 212(ف) قانون مهاجرت و تابعیت آمریکا مطابق بیانیه رییس جمهور، فاقد شرایط لازم برای اخذ ویزا هستید. تصمیم امروز غیر قابل تجدید نظر است.

✓ با در نظر گرفتن مقررات این بیانیه، درپرونده شما این محدودیت چشم پوشی نخواهد شد.

☐ افسر کنسولگری صلاحیت شما جهت چشم پوشی از این بیانیه را بررسی می کند. برای تأیید این چشم پوشی، افسر کنسولگری باید تعیین کند که رد ورود شما منجر به سختی های ناخوشایند خواهد شد و ورود شما تهدیدی برای امنیت ملی یا عمومی آمریکا نخواهد بود و به نفع منافع ملی ایالات متحده آمریکا خواهد بود. این روند ممکن است طولانی باشد و تا هنگامی که افسر کنسولگری بتواند در مورد این سه عامل تصمیمی برای پرونده شما بگیرد، درخواست ویزای شما طبق بند 212(ف) رد شده باقی خواهد ماند. ما در اسرع وقت با شما درباره تصمیم نهایی پرونده تان تماس خواهیم گرفت.

با تشکر
بخش ویزای غیر مهاجرتی

DENNIS J. HERRERA, State Bar #139669
City Attorney
JESSE C. SMITH, State Bar #122517
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Attorneys for Plaintiff
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, vs. JEFFERSON B. SESSIONS III, Attorney General of the United States, ALAN R. HANSON, Acting Assist. Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE, DOES 1-100, Defendants.	Case No. 3:17-CV-04642-WHO **PLAINTIFF CITY AND COUNTY OF SAN FRANCISCO'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS** Date Filed: August 11, 2017 Trial Date: December 10, 2018

PROPOUNDING PARTY: PLAINTIFF CITY AND COUNTY OF SAN FRANCISCO

RESPONDING PARTY: JEFFERSON B. SESSIONS III, Attorney General of the United States, ALAN R. HANSON, Acting Assist. Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE

SET NO. ONE

Please note that you are required to respond to this Demand for Inspection and Production of Documents within 30 days from the date of service of this Demand. If you fail to respond within that time period you will be deemed to have waived all objections, including any and all claims of privilege, if any, in respect to documents responsive to this Demand.

Pursuant to Federal Rule of Civil Procedure 34, Plaintiff City and County of San Francisco hereby demands that defendants produce the originals of the documents specified herein for inspection and copying within 30 days of the date of service of this demand to the Office of the City Attorney, 1390 Fox Plaza, 6th Floor, San Francisco, California 94102 or, alternatively, defendants may copy the documents, at the City's expense (color copies for photographs) and deliver them to the same address and on the same date.

INSTRUCTIONS

In responding to these requests, YOU are required by law to produce all DOCUMENTS reasonably available to YOU or subject to YOUR custody or control, including without limitation DOCUMENTS in the possession of YOUR attorneys, accountants, advisors, or other PERSONS directly or indirectly employed by or associated with YOU or YOUR counsel, and anyone else otherwise subject to YOUR control.

In responding to these requests, YOU must make a diligent search of YOUR own DOCUMENTS and of all other papers and materials in YOUR possession or available to YOU or YOUR representatives.

If these requests or any one of them cannot be answered in full, answer them to the extent possible, specify the reasons for YOUR inability to answer the remainder, and state all of the information and knowledge YOU have regarding the unanswered portion.

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All DOCUMENTS produced in response to these requests must be produced as they are kept in the usual course of business or organized and labeled to correspond with the request to which they are responsive.

If privilege or work product protection is claimed as a ground for withholding from production one or more DOCUMENTS, in whole or in part, the response hereto shall IDENTIFY the date of the DOCUMENT, its author, its subject matter, its length, its attachments (if any), its present custodian, and all recipients thereof, whether or not indicated on the DOCUMENT, and shall describe the factual basis for the claim of privilege or work product protection in sufficient detail so as to permit the Court to adjudicate the validity of the claim.

In the event that a DOCUMENT called for by these requests has been destroyed, the response hereto shall IDENTIFY (to the extent it is known): (a) the preparer of the DOCUMENT; (b) its addressor (if different); (c) its addressee; (d) each recipient thereof; (e) each PERSON to whom it was distributed or shown; (f) the date it was created or prepared; (g) the date it was transmitted (if different); (h) the date it was received; (i) a description of its contents and subject matter; (j) the date of its destruction; (k) the manner of its destruction; (l) the name, title and address of the PERSON authorizing its destruction; (m) the reason(s) for its destruction; (n) the name, title and address of the PERSON who destroyed the DOCUMENT; and (o) a description of the efforts YOU have taken to locate a copy of the DOCUMENT.

Unless otherwise specified, the time period for this request is from October 1, 2016 to the present.

DEFINITIONS

The following definitions shall apply to the terms used in every request in this entire set and to this section of definitions:

1. The term "**ALL**" shall mean any and ALL.

2. The term "**AND**" shall be understood to mean "**OR**" AND vice versa whenever such construction results in a broader request for information.

3. The term "**ANY**" shall mean ANY AND ALL.

4. The terms "**COMMUNICATION**" AND "**COMMUNICATIONS**" shall mean AND refer to ANY kind of written, oral, visual, audible, OR electronic transfer of information, thoughts, OR ideas, OR ANY request for the transfer of such information, including, but not limited to, making, sending, OR receiving information from electronic mail messages, text messages, internet postings, social network postings, internet chat conversations, Twitter transmissions, facsimiles, inquiries, letters, mail, marketing promotions, memoranda, packages, pages, presentations, press releases, proposals, public statements, sales pitches, solicitations, speaking, speeches, telephone calls, telephone messages, testimony, voice-mail messages, AND writings.

5. The term "**DOCUMENT**" AND "**DOCUMENTS**" means writing and includes the original or a copy of handwriting, typewriting, printing, Photostatting, photographing, electronic mail, recording of information in electronic form and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

6. The term "**IDENTIFY**" when referring to a natural person, entity or corporation shall require the following information about the person: (a) full name; (b) every alias by which the person was known at ANY time; (c) current OR last known home AND business address; (d) current OR last known job title OR description; (e) each employer of the person during the period of time covered by the answer referring to such person; (f) phone number; AND (g) each job title OR description of the person during the period of time covered by the answer referring to such person.

7. The terms "**IDENTIFY**" AND "**IDENTIFYING**" when referring to a document shall include the following information: (a) the author OR originator of the DOCUMENT; (b) every person to whom the DOCUMENT was sent OR transferred; (c) the date on which the DOCUMENT was created; (d) each date on which it was sent OR transferred; (e) the type of DOCUMENT (*e.g.*, letter, memorandum, chart, etc.); (f) a detailed description of the matter, nature, substance, AND content of the DOCUMENT; AND (g) the present location AND present custodian of the DOCUMENT, OR the date on which the DOCUMENT was lost, discarded, destroyed, altered, OR relinquished from your possession, custody, OR control.

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8. The term "**OR**" shall be understood to mean "AND" AND vice versa whenever such construction results in a broader request for information.

9. The terms "**PERSON**" AND "**PERSONS**" shall mean AND refer to natural PERSONS, corporations, firms, joint owners, associations, partnerships, joint ventures, trusts, estates, governmental agencies, AND ALL other forms of business, governmental, judicial, personal OR legal entities AND ALL other PERSONS acting OR purporting to act on your behalf.

10. The term "**SAN FRANCISCO**" shall mean the City and County of San Francisco, the Plaintiff in this action.

11. The terms "**YOU**" AND "**YOUR**" shall mean AND refer to Defendants and all PERSONS acting on their behalf such as agents, employees, attorneys, and investigators.

12. "**SAN FRANCISCO CHAPTER 12H**" means San Francisco Administrative Code Chapter 12H, which is attached as Exhibit 1 to these discovery requests.

13. "**SAN FRANCISCO CHAPTER 12I**" means San Francisco Administrative Code Chapter 12I, which is attached as Exhibit 2 to these discovery requests.

14. "**BYRNE JAG PROGRAM**" means the Edward Byrne Memorial Justice Assistance Grant Program, as authorized by 34 U.S.C. §§ 10151-10158.

15. "**SECTION 1373**" means 8 U.S.C. § 1373.

16. The "**ACCESS REQUIREMENT"** shall refer to the grant condition set forth at Paragraph 55 of the FY 2017 Byrne JAG award issued to the County of Greenville, South Carolina, providing that:

> With respect to the "program or activity" that is funded (in whole or in part) by this award, as of the date the recipient accepts this award, and throughout the remainder of the period of performance for the award
>
> A. A State statute, or a State rule, -regulation, -policy, or-practice, must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given to access any State (or State-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States.

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17. The "**NOTICE REQUIREMENT**" shall refer to the grant condition set forth at Paragraph 55 of the FY 2017 Byrne JAG award issued to the County of Greenville, South Carolina, providing that:

> With respect to the "program or activity" that is funded (in whole or in part) by this award, as of the date the recipient accepts this award, and throughout the remainder of the period of performance for the award . . .
>
> B. A State statute, or a State rule, -regulation, -policy, or practice, must be in place that is designed to ensure that, when a State (or State-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and as early as practicable (see para. 4.B of this condition) provide the requested notice to DHS.

18. The "**SECTION 1373 REQUIREMENT**" shall refer to the grant condition set forth at Paragraph 53 of the FY 2017 Byrne JAG award issued to the County of Greenville, South Carolina, providing that, *inter alia*:

> With respect to the "program or activity" funded in whole or in part under this award (including any such "program or activity" of any subrecipient at any tier), throughout the period of performance for the award, no State or local government entity, -agency, or official may prohibit or in any way restrict (1) any government entity or official from sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. 1373(a); or (2) a government entity or agency from sending, requesting or receiving, maintaining, or exchanging information regarding immigration status as described in 8 U.S.C. 1373(b). For purposes of this award, any prohibit (or restriction) that violates this condition is an "information-communication restriction."

19. The "**IMMIGRATION ENFORCEMENT REQUIREMENTS**" shall refer to the Notice Requirement, the Access Requirement, and the Section 1373 Requirement collectively.

20. The "**SECTION 1373 CERTIFICATION**" shall refer to the certification set forth at page 38 of the Edward Byrne Memorial Justice Assistance Grant Program, FY 2017 Local Solicitation, which is attached as Exhibit B to the Complaint.

21. The "**NOVEMBER 15 LETTER**" shall refer to the letter from Alan Hanson to then-Mayor of San Francisco Edwin Lee, dated November 15, 2017.

22. The "**JANUARY 24 LETTER**" shall refer to the letter from Jon Adler, Director of the Bureau of Justice Assistance, Office of Justice Programs, to San Francisco Mayor Mark Farrell, dated January 24, 2018.

23. "ICE" shall mean U.S. Immigration and Customs Enforcement and includes, but is not limited to, any predecessor or successor agencies, and any divisions, departments, affiliates, agents, attorneys, representatives, employees, and/or other persons acting on its behalf.

24. "Department of Justice" shall mean the U.S. Department of Justice and includes, but is not limited to, any predecessor or successor agencies, and any divisions, departments, affiliates, agents, attorneys, representatives, employees, and/or other persons acting on its behalf.

REQUESTS FOR PRODUCTION

REQUEST NO. 1.:

All DOCUMENTS reflecting the Defendants' position that they have the authority to identify Section 1373 as an applicable law for purposes of eligibility for Byrne JAG awards.

REQUEST NO. 2.:

All DOCUMENTS that were submitted to the Office of Inspector General when the Department of Justice asked it to investigate potential violations of Section 1373 in response to the request from Congressman Culberson.

REQUEST NO. 3.:

All DOCUMENTS reflecting Defendants' position that they have the authority to add "special conditions" for the award of Byrne JAG funds pursuant to 34 U.S.C. § 10102.

REQUEST NO. 4.:

All COMMUNICATIONS and other DOCUMENTS that form the basis for the Defendants' decision to impose the IMMIGRATION ENFORCEMENT REQUIREMENTS on applicants for the FY 2017 BYRNE JAG PROGRAM.

REQUEST NO. 5.:

All COMMUNICATIONS and other DOCUMENTS that Defendants relied upon, or which form the basis for, the Department of Justice's indication in the NOVEMBER 15 LETTER that the Department of Justice "is concerned" that SAN FRANCISCO CHAPTERS 12H AND 12I "may violate section 1373."

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REQUEST NO. 6.:

All COMMUNICATIONS and other DOCUMENTS that Defendants relied upon, or which form the basis for, Defendants' indication in the JANUARY 24 LETTER that "the Department remains concerned that [SAN FRANCISCO's] laws, policies, or practices may violate section 1373 or, at a minimum, that they may be interpreted or applied in a manner inconsistent with section 1373."

REQUEST NO. 7.:

All COMMUNICATIONS and other DOCUMENTS that discuss, IDENTIFY, or evaluate whether SAN FRANCISCO does or does not comply with Section 1373.

REQUEST NO. 8.:

All COMMUNICATIONS and other DOCUMENTS that form the basis for or discuss any determinations (regardless of whether the determination was "preliminary" or "final") made by Defendants that one or more of a state or locality's policies comply or fail to comply with Section 1373.

REQUEST NO. 9.:

All COMMUNICATIONS and other DOCUMENTS related to the Defendants' interpretation of Section 1373.

REQUEST NO. 10.:

All COMMUNICATIONS and other DOCUMENTS related to any information Defendants have given to Byrne JAG grant recipients regarding Section 1373.

REQUEST NO. 11.:

All COMMUNICATIONS and other DOCUMENTS that describe or are related to Defendants' position regarding what jurisdictions must do to comply with the ACCESS REQUIREMENT.

REQUEST NO. 12.:

All COMMUNICATIONS and other DOCUMENTS that describe or are related to Defendants' position regarding what jurisdictions must do to comply with the NOTICE REQUIREMENT.

//

REQUEST NO. 13.:

All COMMUNICATIONS and other DOCUMENTS that support Defendants' determination that the IMMIGRATION ENFORCEMENT REQUIREMENTS each are related to the congressional purpose underlying the BYRNE JAG PROGRAM, as is required by the Spending Clause.

REQUEST NO. 14.:

All COMMUNICATIONS and other DOCUMENTS that discuss, IDENTIFY, or evaluate whether SAN FRANCISCO interferes with the federal government's administration of federal immigration laws.

REQUEST NO. 15.:

All COMMUNICATIONS and other DOCUMENTS that discuss, IDENTIFY, or evaluate whether SAN FRANCISCO does or does not comply with the NOTICE REQUIREMENT.

REQUEST NO. 16.:

All COMMUNICATIONS and other DOCUMENTS that discuss, IDENTIFY, or evaluate whether SAN FRANCISCO does or does not comply with the ACCESS REQUIREMENT.

REQUEST NO. 17.:

All COMMUNICATIONS and other DOCUMENTS that support the Attorney General's position that sanctuary city policies undermine public safety. *See* Dkt. No. 61 ¶ 6.

REQUEST NO. 18.:

All COMMUNICATIONS and other DOCUMENTS that Defendants relied upon, or which form the basis for, the Department of Justice's assertion in the JANUARY 24 LETTER that it has the authority to "seek return of your FY 2016 grant funds, require additional conditions for receipt of any FY 2017 Byrne JAG funding for which you have applied, and/or deem you ineligible for FY 2017 Byrne JAG funds."

REQUEST NO. 19.:

All COMMUNICATIONS and other DOCUMENTS that relate to what constitutes "policies, or practices" that "may violate section 1373," as those terms are used in the JANUARY 24 LETTER.

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REQUEST NO. 20.:

All COMMUNICATIONS and other DOCUMENTS that support Defendants' assertion that "information regarding . . . immigration status" under Section 1373 includes all "information that allows ICE to do its job." *State of California ex rel. Becerra v. Sessions*, Case No. 3:17-CV-4701-WHO, Hr'g. Tr. at 30:5-10 (Dec. 13, 2017).

REQUEST NO. 21.:

All COMMUNICATIONS and other DOCUMENTS related to the administrative process Defendants have represented is occurring with respect to SAN FRANCISCO's compliance with Section 1373. *See, e.g.,* Dkt. No. 66 at 12-13 & n. 6; Dkt. No. 72 at 2-4.

REQUEST NO. 22.:

All COMMUNICATIONS and other DOCUMENTS that are referenced in Defendants' Initial Disclosures and Interrogatory responses.

Dated: March 28, 2018

DENNIS J. HERRERA
City Attorney
JESSE C. SMITH
RONALD P. FLYNN
YVONNE R. MERÉ
CHRISTINE VAN AKEN
TARA M. STEELEY
MOLLIE M. LEE
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AILEEN M. McGRATH

Deputy City Attorneys

By: */s/ Aileen M. McGrath*
DENNIS J. HERRERA
City Attorney

Attorneys for Plaintiff
CITY AND COUNTY OF SAN FRANCISCO

EXHIBIT 1

Print

San Francisco Administrative Code

CHAPTER 12H: IMMIGRATION STATUS

SEC. 12H.1. CITY AND COUNTY OF REFUGE.

It is hereby affirmed that the City and County of San Francisco is a City and County of Refuge.

(Added by Ord. 375 89, App. 10/24/89)

SEC. 12H.2. USE OF CITY FUNDS PROHIBITED.

No department, agency, commission, officer, or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or any other such personal information as defined in Chapter 121 in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation, or court decision. The prohibition set forth in this Chapter 12H shall include, but shall not be limited to:

(a) Assisting or cooperating, in one's official capacity, with any investigation, detention, or arrest procedures, public or clandestine, conducted by the Federal agency charged with enforcement of the Federal immigration law and relating to alleged violations of the civil provisions of the Federal immigration law, except as permitted under Administrative Code Section 121.3.

(b) Assisting or cooperating, in one's official capacity, with any investigation, surveillance, or gathering of information conducted by foreign governments, except for cooperation related to an alleged violation of City and County, State, or Federal criminal laws.

(c) Requesting information about, or disseminating information, in one's official capacity, regarding the release status of any individual or any other such personal information as defined in Chapter 121, except as permitted under Administrative Code Section 121.3, or conditioning the provision of services or benefits by the City and County of San Francisco upon immigration status, except as required by Federal or State statute or regulation, City and County public assistance criteria, or court decision.

(d) Including on any application, questionnaire, or interview form used in relation to benefits, services, or opportunities provided by the City and County of San Francisco any question regarding immigration status other than those required by Federal or State statute, regulation, or court decision. Any such questions existing or being used by the City and County at the time this Chapter is adopted shall be deleted within sixty days of the adoption of this Chapter.

(Added by Ord. 375 89, App. 10/24/89; amended by Ord. 228 09, File No. 091032, App. 10 28 2009; Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

SEC. 12H.2-1. [REPEALED.]

(Added by Ord. 282 92, App. 9/4/92; amended by Ord. 238 93, App. 8/4/93; Ord. 228 09, File No. 091032, App. 10 28 2009; repealed by Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

SEC. 12H.3. CLERK OF BOARD TO TRANSMIT COPIES OF THIS CHAPTER; INFORMING CITY EMPLOYEES.

The Clerk of the Board of Supervisors shall send copies of this Chapter, including any future amendments thereto that may be made, to every department, agency and commission of the City and County of San Francisco, to California's United States Senators, and to the California Congressional delegation, the Commissioner of the Federal agency charged with enforcement of the Federal immigration law, the United States Attorney General, and the Secretary of State and the President of the United States. Each appointing officer of the City and County of San Francisco shall inform all employees under her or his jurisdiction of the prohibitions in this ordinance, the duty of all of her or his employees to comply with the prohibitions in this ordinance, and that employees who fail to comply with the prohibitions of the ordinance shall be subject to appropriate disciplinary action. Each City and County employee shall be given a written directive with instructions for implementing the provisions of this Chapter.

(Added by Ord. 375 89, App. 10/24/89; Ord. 228 09, File No. 091032, App. 10 28 2009)

SEC. 12H.4. ENFORCEMENT.

The Human Rights Commission shall review the compliance of the City and County departments, agencies, commissions and employees with the mandates of this ordinance in particular instances in which there is question of noncompliance or when a complaint alleging noncompliance has been lodged.

(Added by Ord. 375 89, App. 10/24/89)

SEC. 12H.5. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL WELFARE.

In undertaking the adoption and enforcement of this Chapter, the City is assuming an undertaking only to promote the general welfare. This Chapter is not intended to create any new rights for breach of which the City is liable in money damages to any person who claims that such breach proximately caused injury. This section shall not be construed to limit or proscribe any other existing rights or remedies possessed by such person.

(Added by Ord. 375 89, App. 10/24/89)

SEC. 12H.6. SEVERABILITY.

If any part of this ordinance, or the application thereof, is held to be invalid, the remainder of this ordinance shall not be affected thereby, and this ordinance shall otherwise continue in full force and effect. To this end, the provisions of this ordinance, and each of them, are severable.

(Added by Ord. 375 89, App. 10/24/89)

EXHIBIT 2

Print

San Francisco Administrative Code

CHAPTER 12I: CIVIL IMMIGRATION DETAINERS

SEC. 12I.1. FINDINGS.

The City and County of San Francisco (the "City") is home to persons of diverse racial, ethnic, and national backgrounds, including a large immigrant population. The City respects, upholds, and values equal protection and equal treatment for all of our residents, regardless of immigration status. Fostering a relationship of trust, respect, and open communication between City employees and City residents is essential to the City's core mission of ensuring public health, safety, and welfare, and serving the needs of everyone in the community, including immigrants. The purpose of this Chapter 12I, as well as of Administrative Code Chapter 12H, is to foster respect and trust between law enforcement and residents, to protect limited local resources, to encourage cooperation between residents and City officials, including especially law enforcement and public health officers and employees, and to ensure community security, and due process for all.

The United States Immigration and Customs Enforcement ("ICE") is responsible for enforcing the civil immigration laws. ICE's programs, including Secure Communities and its replacement, the Priority Enforcement Program ("PEP"), seek to enlist local law enforcement's voluntary cooperation and assistance in its enforcement efforts. In its description of PEP, ICE explains that all requests under PEP are for voluntary action and that any request is not an authorization to detain persons at the expense of the federal government. The federal government should not shift the financial burden of federal civil immigration enforcement, including personnel time and costs relating to notification and detention, onto local law enforcement by requesting that local law enforcement agencies continue detaining persons based on non-mandatory civil immigration detainers or cooperating and assisting with requests to notify ICE that a person will be released from local custody. It is not a wise and effective use of valuable City resources at a time when vital services are being cut.

ICE's Secure Communities program (also known as "S-Comm") shifted the burden of federal civil immigration enforcement onto local law enforcement. S-Comm came into operation after the state sent fingerprints that state and local law enforcement agencies had transmitted to the California Department of Justice ("Cal DOJ") to positively identify the arrestees and to check their criminal history. The FBI would forward the fingerprints to the Department of Homeland Security ("DHS") to be checked against immigration and other databases. To give itself time to take a detainee into immigration custody, ICE would send an Immigration Detainer Notice of Action (DHS Form I-247) to the local law enforcement official requesting that the local law enforcement official hold the individual for up to 48 hours after that individual would otherwise be released ("civil immigration detainers"). Civil Immigration detainers may be issued without evidentiary support or probable cause by border patrol agents, aircraft pilots, special agents, deportation officers, immigration inspectors, and immigration adjudication officers.

Given that civil immigration detainers are issued by immigration officers without judicial oversight, and the regulation authorizing civil immigration detainers provides no minimum standard of proof for their issuance, there are serious questions as to their constitutionality. Unlike criminal warrants, which must be supported by probable cause and issued by a neutral magistrate, there are no such requirements for the issuance of a civil immigration detainer. Several federal courts have ruled that because civil immigration detainers and other ICE "Notice of Action" documents are issued without probable cause of criminal conduct, they do not meet the Fourth Amendment requirements for state or local law enforcement officials to arrest and hold an individual in custody. (*Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST *17 (D.Or. April 11, 2014) (finding that detention pursuant to an immigration detainer is a seizure that must comport with the Fourth Amendment). *See alsoMorales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I 2014); *Villars v. Kubiatowski*, No. 12-cv-4586 *10-12 (N.D. Ill. filed May 5, 2014).)

On December 4, 2012, the Attorney General of California, Kamala Harris, clarified the responsibilities of local law enforcement agencies under S-Comm. The Attorney General clarified that S-Comm did not require state or local law enforcement officials to determine an individual's immigration status or to enforce federal immigration laws. The Attorney General also clarified that civil immigration detainers are voluntary requests to local law enforcement agencies that do not mandate compliance. California local law enforcement agencies may determine on their own whether to comply with non-mandatory civil immigration detainers. In a June 25, 2014, bulletin, the Attorney General warned that a federal court outside of California had held a county liable for damages where it voluntarily complied with an ICE request to detain an individual, and the individual was otherwise eligible for release and that local law enforcement agencies may also be held liable for such conduct. Over 350 jurisdictions, including Washington, D.C., Cook County, Illinois, and many of California's 58 counties, have already acknowledged the discretionary nature of civil immigration detainers and are declining to hold people in their jails for the additional 48 hours as requested by ICE. Local law enforcement agencies' responsibilities, duties, and powers are regulated by state law. However, complying with non-mandatory civil immigration detainers frequently raises due process concerns.

According to Section 287.7 of Title 8 of the Code of Federal Regulations, the City is not reimbursed by the federal government for the costs associated with civil immigration detainers alone. The full cost of responding to a civil immigration detainer can include, but is not limited to, extended detention time, the administrative costs of tracking and responding to detainers, and the legal liability for erroneously holding an individual who is not subject to a civil immigration detainer. Compliance with civil immigration detainers and involvement in civil immigration enforcement diverts limited local resources from programs that are beneficial to the City.

The City seeks to protect public safety, which is founded on trust and cooperation of community residents and local law enforcement. However, civil immigration detainers and notifications regarding release undermine community trust of law enforcement by instilling fear in immigrant communities of coming forward to report crimes and cooperate with local law enforcement agencies. A 2013 study by the University of Illinois, entitled "Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement," found that at least 40% of Latinos surveyed are less likely to provide information to police because they fear exposing themselves, family, or friends to a risk of deportation. Indeed, civil immigration detainers have resulted in the transfer of victims of crime, including domestic violence victims, to ICE.

The City has enacted numerous laws and policies to strengthen communities and to build trust between communities and local law enforcement. Local cooperation and assistance with civil immigration enforcement undermines community policing strategies.

In 2014, DHS ended the Secure Communities program and replaced it with PEP. PEP and S-Comm share many similarities. Just as with S-Comm, PEP uses state and federal databases to check an individual's fingerprints against immigration and other databases. PEP employs a number of tactics to facilitate transfers of individuals from local jails to immigration custody.

First, PEP uses a new form (known as DHS Form I-247N), which requests notification from local jails about an individual's release date prior to his or her release from local custody. As with civil immigration detainers, these notification requests are issued by immigration officers without judicial oversight, thus raising questions

about local law enforcement's liability for constitutional violations if any person is overdetained when immigration agents are unable to be present at the time of the person's release from local custody.

Second, under PEP, ICE will continue to issue civil immigration detainer requests where local law enforcement officials are willing to respond to the requests, and in instances of "special circumstances," a term that has yet to be defined by DHS. Despite federal courts finding civil immigration detainers do not meet Fourth Amendment requirements, local jurisdictions are often unable to confirm whether or not a detention request is supported by probable cause or has been reviewed by a neutral magistrate.

The increase in information-sharing between local law enforcement and immigration officials raises serious concerns about privacy rights. Across the country, including in the California Central Valley, there has been an increase of ICE agents stationed in jails, who often have unrestricted access to jail databases, booking logs, and other documents that contain personal information of all jail inmates.

The City has an interest in ensuring that confidential information collected in the course of carrying out its municipal functions, including but not limited to public health programs and criminal investigations, is not used for unintended purposes that could hamper collection of information vital to those functions. To carry out public health programs, the City must be able to reliably collect confidential information from all residents. To solve crimes and protect the public, local law enforcement depends on the cooperation of all City residents. Information gathering and cooperation may be jeopardized if release of personal information results in a person being taken into immigration custody.

In late 2015, Pedro Figueroa, an immigrant father of an 8-year-old U.S. citizen, sought the San Francisco Police Department's help in locating his stolen vehicle. When Mr. Figueroa went to the police station to retrieve his car, which police had located, he was detained for some time by police officers before being released, and an ICE agent was waiting to take him into immigration custody immediately as he left the police station. It was later reported that both the Police Department and the San Francisco Sheriff's Department had contact with ICE officials while Mr. Figueroa was at the police station. He spent over two months in an immigration detention facility and remains in deportation proceedings. Mr. Figueroa's case has raised major concerns about local law enforcement's relationship with immigration authorities, and has weakened the immigrant community's confidence in policing practices. Community cooperation with local law enforcement is critical to investigating and prosecuting crimes. Without the cooperation of crime victims like Mr. Figueroa and witnesses, local law enforcement's ability to investigate and prosecute crime, particularly in communities with large immigrant populations, will be seriously compromised.

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013; amended by Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

(Former Sec. 121.1 added by Ord. 391 90, App. 12/6/90; amended by Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 121.2. DEFINITIONS.

"Administrative warrant" means a document issued by the federal agency charged with the enforcement of the Federal immigration law that is used as a non-criminal, civil warrant for immigration purposes.

"Eligible for release from custody" means that the individual may be released from custody because one of the following conditions has occurred:

(a) All criminal charges against the individual have been dropped or dismissed.

(b) The individual has been acquitted of all criminal charges filed against him or her.

(c) The individual has served all the time required for his or her sentence.

(d) The individual has posted a bond, or has been released on his or her own recognizance.

(e) The individual has been referred to pre-trial diversion services.

(f) The individual is otherwise eligible for release under state or local law.

"Civil immigration detainer" means a non-mandatory request issued by an authorized federal immigration officer under Section 287.7 of Title 8 of the Code of Federal Regulations, to a local law enforcement official to maintain custody of an individual for a period not to exceed 48 hours and advise the authorized federal immigration officer prior to the release of that individual.

"Convicted" means the state of having been proved guilty in a judicial proceeding, unless the convictions have been expunged or vacated pursuant to applicable law. The date that an individual is Convicted starts from the date of release.

"Firearm" means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion as defined in Penal Code Section 16520.

"Law enforcement official" means any City Department or officer or employee of a City Department, authorized to enforce criminal statutes, regulations, or local ordinances; operate jails or maintain custody of individuals in jails; and operate juvenile detention facilities or maintain custody of individuals in juvenile detention facilities.

"Notification request" means a non-mandatory request issued by an authorized federal immigration officer to a local law enforcement official asking for notification to the authorized immigration officer of an individual's release from local custody prior to the release of an individual from local custody. Notification requests may also include informal requests for release information by the Federal agency charged with enforcement of the Federal immigration law.

"Personal information" means any confidential, identifying information about an individual, including, but not limited to, home or work contact information, and family or emergency contact information.

"Serious Felony" means all serious felonies listed under Penal Code Section 1192.7(c) that also are defined as violent felonies under Penal Code Section 667.5(c); rape as defined in Penal Code Sections 261, and 262; exploding a destructive device with intent to injure as defined in Penal Code Section 18740; assault on a person with caustic chemicals or flammable substances as defined in Penal Code Section 244; shooting from a vehicle at a person outside the vehicle or with great bodily injury as defined in Penal Code Sections 26100(c) and (d).

"Violent Felony" means any crime listed in Penal Code Section 667.5(c); human trafficking as defined in Penal Code Section 236.1; felony assault with a deadly weapon as defined in Penal Code Section 245; any crime involving use of a firearm, assault weapon, machine gun, or .50 BMG rifle, while committing or attempting to commit a felony that is charged as a sentencing enhancement as listed in Penal Code Sections 12022.4 and 12022.5.

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013; amended by Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

(Former Sec. 121.2 added by Ord. 391 90, App. 12/6/90; amended by Ord. 278 96, App. 7/3/96; Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 121.3. RESTRICTIONS ON LAW ENFORCEMENT OFFICIALS.

(a) Except as provided in subsection (b), a law enforcement official shall not detain an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody.

(b) Law enforcement officials may continue to detain an individual in response to a civil immigration detainer for up to 48 hours after that individual becomes eligible for release if the continued detention is consistent with state and federal law, and the individual meets both of the following criteria:

(1) The individual has been Convicted of a Violent Felony in the seven years immediately prior to the date of the civil immigration detainer; and

(2) A magistrate has determined that there is probable cause to believe the individual is guilty of a Violent Felony and has ordered the individual to answer to the same pursuant to Penal Code Section 872.

In determining whether to continue to detain an individual based solely on a civil immigration detainer as permitted in this subsection (b), law enforcement officials shall consider evidence of the individual's rehabilitation and evaluate whether the individual poses a public safety risk. Evidence of rehabilitation or other mitigating factors to consider includes, but is not limited to: the individual's ties to the community, whether the individual has been a victim of any crime, the individual's contribution to the community, and the individual's participation in social service or rehabilitation programs.

This subsection (b) shall expire by operation of law on October 1, 2016, or upon a resolution passed by the Board of Supervisors that finds for purposes of this Chapter, the federal government has enacted comprehensive immigration reform that diminishes the need for this subsection (b), whichever comes first.

(c) Except as provided in subsection (d), a law enforcement official shall not respond to a federal immigration officer's notification request.

(d) Law Enforcement officials may respond to a federal immigration officer's notification request if the individual meets both of the following criteria:

(1) The individual either:

(A) has been Convicted of a Violent Felony in the seven years immediately prior to the date of the notification request; or

(B) has been Convicted of a Serious Felony in the five years immediately prior to the date of the notification request; or

(C) has been Convicted of three felonies identified in Penal Code sections 1192.7(c) or 667.5(c), or Government Code sections 7282.5(a)(2) or 7282.5(a)(3), other than domestic violence, arising out of three separate incidents in the five years immediately prior to the date of the notification request; and

(2) A magistrate has determined that there is probable cause to believe the individual is guilty of a felony identified in Penal Code sections 1192.7(c) or 667.5(c), or Government Code sections 7282.5(a)(2) or 7282.5(a)(3), other than domestic violence, and has ordered the individual to answer to the same pursuant to Penal Code Section 872.

In determining whether to respond to a notification request as permitted by this subsection (d), law enforcement officials shall consider evidence of the individual's rehabilitation and evaluate whether the individual poses a public safety risk. Evidence of rehabilitation or other mitigating factors to consider includes, but is not limited to, the individual's ties to the community, whether the individual has been a victim of any crime, the individual's contribution to the community, and the individual's participation in social service or rehabilitation programs.

(e) Law enforcement officials shall not arrest or detain an individual, or provide any individual's personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws.

(f) Law enforcement officials shall make good faith efforts to seek federal reimbursement for all costs incurred in continuing to detain an individual, after that individual becomes eligible for release, in response each civil immigration detainer.

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013; amended by Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

(Former Sec. 121.3 added by Ord. 391 90, App. 12/6/90; amended by Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 121.4. PURPOSE OF THIS CHAPTER.

The intent of this Chapter 121 is to address requests for non-mandatory civil immigration detainers, voluntary notification of release of individuals, transmission of personal information, and civil immigration documents based solely on alleged violations of the civil provisions of immigration laws. Nothing in this Chapter shall be construed to apply to matters other than those relating to federal civil immigration detainers, notification of release of individuals, transmission of personal information, or civil immigration documents, based solely on alleged violations of the civil provisions of immigration laws. In all other respects, local law enforcement agencies may continue to collaborate with federal authorities to protect public safety. This collaboration includes, but is not limited to, participation in joint criminal investigations that are permitted under local policy or applicable city or state law.

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013; amended by Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

(Former Sec. 121.4 added by Ord. 391 90, App. 12/6/90; amended by Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 121.5. SEMIANNUAL REPORT.

By no later than July 1, 2014, the Sheriff and Juvenile Probation Officer shall each provide to the Board of Supervisors and the Mayor a written report stating the number of detentions that were solely based on civil immigration detainers during the first six months following the effective date of this Chapter, and detailing the rationale behind each of those civil immigration detainers. Thereafter, the Sheriff and Juvenile Probation Officer shall each submit a written report to the Board of Supervisors and the Mayor, by January 1st and July 1st of each year, addressing the following issues for the time period covered by the report:

(a) a description of all communications received from the Federal agency charged with enforcement of the Federal immigration law, including but not limited to the number of civil immigration detainers, notification requests, or other types of communications.

(b) a description of any communications the Department made to the Federal agency charged with enforcement of the Federal immigration law, including but not limited to any Department's responses to inquires as described in subsection 121.5 and the Department's determination of the applicability of subsections 121.3(b), 121.3(d) and 121.3(e).

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013; amended by Ord. 96 16, File No. 160022, App. 6/17/2016, Eff. 7/17/2016)

(Former Sec. 121.5 added by Ord. 391 90, App. 12/6/90; amended by Ord. 304 92, App. 9/29/92; Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 121.6. SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or word of this Chapter 121 or it[1] application, is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter 121. The Board of Supervisors hereby declares that it would have passed this Chapter 121 and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter 121 would be subsequently declared invalid or unconstitutional.

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013)

(Former Sec. 121.6 added by Ord. 391 90, App. 12/6/90; amended by Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

CODIFICATION NOTE

1. So in Ord. 204 13.

SEC. 121.7. UNDERTAKING FOR THE GENERAL WELFARE.

In enacting and implementing this Chapter 12I the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

(Added by Ord. 204 13, File No. 130764, App. 10/8/2013, Eff. 11/7/2013)

(Former Sec. 12I.7 added by Ord. 391 90, App. 12/6/90; amended by Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 12I.8.

(Added by Ord. 391 90, App. 12/6/90; amended by Ord. 409 97, App. 10/31/97; Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 12I.10.

(Added by Ord. 391 90, App. 12/6/90; amended by Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

SEC. 12I.11.

(Added by Ord. 391 90, App. 12/6/90; amended by Ord. 38 01, File No. 010010, App. 3/16/2001; repealed by Ord. 171 03, File No. 030422, App. 7/3/2003)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, vs. JEFFERSON B. SESSIONS III, Attorney General of the United States, ALAN R. HANSON, Acting Assist. Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE, DOES 1-100, Defendants.	Case No. 3:17-CV-04642-WHO **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Date Action Filed: August 11, 2017 Trial Date: December 10, 2018

INTRODUCTION

1. The City and County of San Francisco brings this action to challenge the Attorney General of the United States' attempt to use a longstanding federal grant program the Edward Byrne Memorial Justice Assistance Grant ("Byrne JAG") Program as a cudgel to force San Francisco to abandon its sanctuary city policies. The Attorney General and other members of the Trump Administration have threatened to withhold congressionally appropriated federal funds unless San Francisco and other jurisdictions across the country accede to the Administration's immigration-related policy demands. In doing so, the Defendants have grossly misinterpreted federal law and have seized for themselves power that belongs only to Congress. Defendants' behavior is unlawful and unconstitutional, and must be prohibited.

2. Like many cities, San Francisco has a vibrant immigrant community, many members of which are undocumented. San Francisco has long endeavored to foster cooperation and trust between its immigrant community and city employees and agencies by lawfully limiting when city employees and agencies may assist with the enforcement of federal immigration laws. San Francisco's laws ("Sanctuary City Laws") and policies generally prohibit city employees from using city funds or resources to assist in enforcing federal immigration law, unless required by federal or state law. They specifically prohibit local law enforcement officers from cooperating with Immigration and Customs Enforcement ("ICE") voluntary detainer requests, limit when local law enforcement officers may give the federal government advance notice of a person's release from jail, and do not allow ICE representatives conducting civil immigration enforcement free access to inmates in jail. But at the same time, San Francisco law expressly states that "[i]n all other respects, local law enforcement agencies may continue to collaborate with federal authorities to protect public safety."

3. San Francisco enacted its Sanctuary City Laws based on evidence showing that San Francisco is a safer, healthier, and stronger city when its officials do not enforce federal immigration laws. San Francisco is safer when all people, including undocumented immigrants, feel comfortable reporting crimes to authorities. San Francisco is healthier when all residents, including undocumented immigrants, access public health programs. San Francisco is economically and socially stronger when all children, including undocumented immigrants, attend school. And San Francisco

communities are strengthened when members of the public, including undocumented immigrants, can use public transit, visit libraries, or take their children to the playground without fear. For these reasons, among others, San Francisco has made the considered judgment not to comply with voluntary detainer requests, not to allow federal civil immigration authorities access to jails, and not to provide federal officials with information about the date and time of a person's release from local custody.

4. But San Francisco, and other jurisdictions, have found themselves targeted by Attorney General Sessions and other members of President Donald Trump's Administration, who make no secret of their intent to undo these considered policy choices, even in the absence of congressional action. The Attorney General has repeatedly condemned "sanctuary cities" that "refus[e] to detain known felons under federal detainer requests" or otherwise refuse to use local resources to carry out demands from federal immigration authorities.[1] Similarly, the acting Director of ICE told Congress in June that the federal government expects local governments "[to] allow us access to the jails."[2] Likewise, President Trump has criticized "[s]anctuary cities, like San Francisco, [that] block their jails from turning over criminal aliens to Federal authorities for deportation."[3]

5. Since taking office, the President, directly and through his Administration, has tried various coercive tactics to require local jurisdictions to abandon their sanctuary city policies. The President issued Executive Order 13,768, targeting sanctuary cities and commanding federal agencies to withhold federal funding from these cities unless they changed their policies to begin enforcing federal immigration law. Exec. Order No. 13,768, 82 Fed. Reg. 8799 at 8799 (Jan. 25, 2017) ("Executive Order"). The order was permanently enjoined by this Court for violating numerous constitutional provisions. *City and County of San Francisco v. Donald J. Trump*, --- F. Supp. 3d ---,

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[1] Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions ("March 27 Sessions remarks").

[2] H. Approps, Subcommittee on Homeland Security Hearing on the ICE and CBP F.Y. 2018 Budget (June 13, 2017), 2017 WLNR 18737622 (testimony of Acting ICE Director Thomas Homan).

[3] Press Release, The White House, Office of the Press Secretary, Statement on Sanctuary Cities Ruling (Apr. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/04/25/statement-sanctuary-cities-ruling.

No. 3:17-cv-00485-WHO, 2017 WL 5569835, at *11-*16 (N.D. Cal. Nov. 20, 2017) ("*San Francisco v. Trump*").

6. The Attorney General has also tried to create a stigma surrounding sanctuary jurisdictions by falsely claiming that sanctuary city policies undermine public safety and by calling "a sanctuary city a trafficker, smuggler, or gang member's best friend."[4] The Attorney General has sent letters to San Francisco, as well as several other jurisdictions with sanctuary policies, threatening to withdraw or claw back federal funding if they do not certify that their laws comply with federal requirements.[5]

7. In the Administration's most recent effort to end sanctuary policies, the Office of Justice Programs ("OJP") a Department of Justice ("DOJ") agency that oversees the administration of the Byrne JAG program announced on July 25, 2017, that the FY 2017 Byrne JAG application would impose three immigration-related conditions on funding recipients.

8. The first condition relates to a federal statute, 8 U.S.C. Section 1373 ("Section 1373"). The FY 2017 Byrne JAG award requires San Francisco to certify that, with respect to the "program or activity" funded with Byrne JAG dollars, San Francisco does not have in effect, purport to have in effect, or is subject to or bound by "any prohibition or any restriction . . . that deals with either (1) a government entity or official sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. § 1373(a); or (2) a government entity or agency sending to, requesting

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[4] Press Release, U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks to Federal Law Enforcement Authorities About Sanctuary Cities (Sept. 19, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federal-law-enforcement-authorities; *see also* Press Release, U.S. Dep't of Justice, Statement by Attorney General Sessions on the City of Chicago's Lawsuit Against the U.S. Department of Justice (Aug. 7, 2017), https://www.justice.gov/opa/pr/statement-attorney-general-sessions-city-chicago-s-lawsuit-against-us-department-justice (characterizing sanctuary city laws as "an official policy of protecting criminal aliens who prey on their own residents").

[5] Press Release, U.S. Dep't of Justice, Department of Justice Sends Letter to Nine Jurisdictions Requiring Proof of Compliance with 8 U.S.C. § 1373 (Apr. 21, 2017), https://www.justice.gov/opa/pr/department-justice-sends-letter-nine-jurisdictions-requiring-proof-compliance-8-usc-1373; Press Release, U.S. Dep't of Justice, Justice Department Sends Letters to 29 Jurisdictions Regarding Their Compliance with 8 U.S.C. 1373 (Nov. 15, 2017), https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373. The letter San Francisco received is attached to this Amended Complaint as Exhibit A.

or receiving from, maintaining, or exchanging information of the types (and with respect to the entities) described in 8 U.S.C. § 1373(b)" ("Section 1373 Requirement").

9. DOJ lacks the constitutional power to require San Francisco to certify that it complies with Section 1373 in order to receive Byrne JAG funds. Only Congress may attach requirements to federal grants not DOJ. DOJ's attempt to use Byrne JAG as a weapon to require Section 1373 compliance exceeds what the Constitution allows.

10. But even if DOJ could impose the Section 1373 Requirement, DOJ may not deny San Francisco Byrne JAG funding because of purported non-compliance with Section 1373 because San Francisco fully conforms with Section 1373's mandate.

11. San Francisco does not prohibit or restrict its employees, or any departments or officials, from sharing information about the citizenship or immigration status of any individual with federal immigration officials. To the contrary, San Francisco has advised all of its employees that Section 1373 prohibits it from imposing any such restrictions. And in any case, San Francisco has a general policy of not collecting immigration status information in the first instance.

12. Nevertheless, the Attorney General has made clear that he believes San Francisco violates Section 1373, and has threatened to claw back FY 2016 Byrne JAG funding that San Francisco has already received. The Attorney General has also threatened to deny San Francisco's FY 2017 Byrne JAG funding. The Attorney General has further taken the incorrect position that Section 1373 applies not only to immigration status information as its text provides but also to vast swaths of other information like location, date of birth, and custody status.

13. The Attorney General's threats to withhold San Francisco's Byrne JAG funding, together with its erroneous interpretation of Section 1373, unlawfully attempt to force San Francisco to comply with the Trump Administration's political agenda. Declaratory relief from this Court is needed to put a stop to DOJ's coercion involving Section 1373.

14. The other two Byrne JAG conditions also unlawfully seek to interfere with San Francisco's considered policy judgments. The "Access Requirement" demands that San Francisco provide federal immigration officials unfettered access to local detention facilities to interrogate any suspected aliens held there. The "Notice Requirement" directs San Francisco to provide the

Department of Homeland Security ("DHS") with at least 48 hours' advance notice or at least as much notice as is practicable of the scheduled release date and time of an individual, where the federal government has requested notice to take that individual into custody for immigration reasons.

15. San Francisco does not comply with the Notice and Access Requirements, and for good reason: in practice, the Notice and Access Requirements could, and in many instances would, require San Francisco officials to unlawfully hold inmates longer than they otherwise would to ensure that DHS receives adequate advance notice. And they would compel San Francisco to abandon its longstanding laws and policies that deny federal immigration officials freewheeling access to local detention facilities.

16. The Notice and Access Requirements like the Section 1373 Requirement also violate the United States Constitution. The Constitution establishes a balance of power between the state and federal governments, as well as among the coordinate branches of federal government. This balance prevents the excessive accumulation of power in any single entity and reduces the risk of tyranny and abuse from any government office. Accordingly, an executive branch agency of the federal government may not seize for itself the power that the Constitution reserves for Congress. Nor may it intrude on authority that the Constitution has reserved for state and local governments. Yet the Notice and Access Requirements violate both of these precepts. DOJ is improperly attempting to wield powers that only Congress may invoke, and is seeking to compel San Francisco to cede its sovereign decision making to the federal government.

17. San Francisco faces the immediate prospect of losing over $1.4 million in this fiscal year if it does not receive FY 2017 Byrne JAG funds. Defendants have also made clear that they are contemplating clawing back up to $1.5 million in FY 2016 Byrne JAG monies from San Francisco. San Francisco uses these funds for a variety of important law enforcement purposes, including a pioneering Young Adult Court program that works to prevent at-risk youth from entering a "lifelong entanglement with the criminal justice system,"[6] and to fund other initiatives designed to reduce

[6] Tim Requarth, *A California Court for Young Adults Calls on Science*, N.Y. Times (Apr. 17, 2017), https://www.nytimes.com/2017/04/17/health/young-adult-court-san-francisco-california-neuroscience.html.

recidivism, deter drug use, provide services to at-risk youth, and supervise probationers with substance abuse and/or mental health issues.

18. San Francisco faces an unacceptable choice: either comply with DOJ's unconstitutional new grant conditions and abandon local policies that San Francisco has found to promote public safety and foster trust and cooperation between law enforcement and the public, or maintain these policies but forfeit critical funds that it relies on to provide essential services to San Francisco residents.

19. That choice is particularly stark with respect to the Section 1373 Requirement, which asks San Francisco to certify under penalty of perjury that its laws comply with Section 1373. While San Francisco firmly believes that it complies with Section 1373, DOJ's recent pronouncements and threats to San Francisco require San Francisco to make that certification under a cloud of uncertainty.

20. San Francisco accordingly seeks declaratory and injunctive relief to ensure that San Francisco and other sanctuary jurisdictions continue to be eligible for Byrne JAG funds which serve a critical public safety purpose instead of being coerced into enforcing federal immigration law, which it has no obligation to do.

San Francisco seeks a declaration that:

- San Francisco's Sanctuary City Laws San Francisco Administrative Code Chapters 12H and 12I comply with Section 1373;
- San Francisco does not have in place a prohibition or restriction that applies to the program or activity funded under the Byrne JAG program, and which deals with sending to, receiving from, requesting, or maintaining immigration status information with the federal government; and
- The Notice, Access, and Section 1373 Requirements are unconstitutional.

San Francisco further seeks an injunction that:

- Defendants cannot use the Notice, Access, and Section 1373 Requirements as funding restrictions for any Byrne JAG award;
- Defendants cannot withhold Byrne JAG funding from San Francisco on the basis of its compliance with Section 1373; and

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- Defendants cannot claw back Byrne JAG funding already awarded to San Francisco because of asserted non-compliance with Section 1373.

JURISDICTION AND VENUE

21. The Court has jurisdiction under 28 U.S.C. Sections 1331 and 1346. This Court has further remedial authority under the Declaratory Judgment Act, 28 U.S.C. Sections 2201 and 2202 *et seq*.

22. Venue properly lies within the Northern District of California because Plaintiff, San Francisco, resides in this judicial district and a substantial part of the events or omissions giving rise to this action occurred in this District. 28 U.S.C. §1391(e).

INTRADISTRICT ASSIGNMENT

23. Assignment to the San Francisco Division of this District is proper pursuant to Civil Local Rule 3-2(c)-(d) because a substantial part of the acts or omissions that give rise to this action occurred in the City and County of San Francisco.

PARTIES

24. Plaintiff San Francisco is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

25. Defendant Jefferson B. Sessions is the Attorney General of the United States. He is sued in his official capacity. The Attorney General is the federal official leading DOJ, which is responsible for the governmental actions at issue in this lawsuit.

26. Defendant Alan R. Hanson is Acting Assistant Attorney General of the United States in charge of OJP, which administers Byrne JAG funding. He is sued in his official capacity.

27. Defendant DOJ is an executive department of the United States of America that is responsible for administering the Byrne JAG program.

28. Doe 1 through Doe 100 are sued under fictitious names. Plaintiff San Francisco does not now know the true names or capacities of said Defendants, who were responsible for the alleged violations alleged, but pray that the same may be alleged in this complaint when ascertained.

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FACTUAL ALLEGATIONS

I. San Francisco's Sanctuary City Laws And Policies.

29. San Francisco has been a Sanctuary City since 1989, when it first enacted ordinances to protect Central American refugees who were escaping violent civil wars in their home countries and seeking legal protections in the United States. Since then, San Francisco's Sanctuary City Laws, codified in Chapters 12H and 12I of the San Francisco Administrative Code, have been amended to reflect San Francisco's broad dedication and commitment to promote public safety, public health, and community integrity.

30. San Francisco's Sanctuary City Laws do not protect criminals. They do not interfere with or hinder criminal prosecutions. They do not prohibit law enforcement in all other respects from collaborating with federal authorities to "protect public safety." *See* S.F. Admin. Code § 12I.4.

31. Instead, San Francisco's Sanctuary City Laws arise from San Francisco's commitment and responsibility to ensure public safety and welfare. The Board of Supervisors, as San Francisco's legislative body, found that public safety is "founded on trust and cooperation of community residents and local law enforcement." S.F. Admin Code § 12I.1. Citing a study by the University of Illinois, which found that at least 40 percent of Latinos surveyed were less likely to provide information to police because they feared exposing themselves, family, or friends to a risk of deportation, the Board of Supervisors stated that "civil immigration detainers and notifications regarding release undermine community trust of law enforcement by instilling fear in immigrant communities of coming forward to report crimes and cooperate with local law enforcement agencies." *Id.*; *see also id.* ("The City has enacted numerous laws and policies to strengthen communities and to build trust between communities and local law enforcement. Local cooperation and assistance with civil immigration enforcement undermines community policing strategies."). Indeed, a recent study shows that crime is statistically significantly lower in sanctuary counties compared to non-sanctuary counties. *See* Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/.

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32. The legislative findings set forth in Chapter 12I confirm the important purpose of San Francisco's Sanctuary City Laws. For example, the Board of Supervisors declared:

> Fostering a relationship of trust, respect, and open communication between City employees and City residents is essential to the City's core mission of ensuring public health, safety, and welfare, and serving the needs of everyone in the community, including immigrants. The purpose of this Chapter 12I, as well as of Administrative Code Chapter 12H, is to foster respect and trust between law enforcement and residents, to protect limited local resources, to encourage cooperation between residents and City officials, including especially law enforcement and public health officers and employees, and to ensure community security, and due process for all. (*See* Section 12I.2.)

33. San Francisco's Sanctuary City Laws perform several important functions. San Francisco Administrative Code Chapter 12H prohibits San Francisco departments, agencies, commissions, officers, and employees from using San Francisco funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the release status, or other confidential identifying information, of an individual unless such assistance is required by federal or state law.

34. Chapter 12H previously prohibited disseminating information regarding the immigration status of any individual, but the Board of Supervisors amended Chapter 12H in July 2016 to, *inter alia*, delete that prohibition to ensure compliance with Section 1373.

35. San Francisco Administrative Code Chapter 12I prohibits San Francisco law enforcement officials from detaining an individual who is otherwise eligible for release from custody on the basis of a civil immigration detainer request issued by the federal government. A detainer request is distinct from a criminal warrant, which San Francisco honors consistent with its Sanctuary City Laws. A detainer request is not issued by a judge based on a finding of probable cause. It is simply a request by ICE that a state or local law enforcement agency hold individuals after their release date to provide ICE agents extra time to decide whether to take those individuals into federal custody and then deport them.

36. Chapter 12I also prohibits San Francisco law enforcement officials from responding to a federal immigration officer's request for advance notification of the date and time an individual in San Francisco's custody is being released, unless the individual in question meets certain criteria. *See* S.F. Admin. Code § 12I.3(c)-(d).

37. Finally, as relevant here, Chapter 12I provides that "[l]aw enforcement officials shall not arrest or detain an individual, or provide any individual's personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws." *See* S.F. Admin. Code § 12I.3(e). "Personal information" is defined as "any confidential, identifying information about an individual, including, but not limited to, home or work contact information, and family or emergency contact information." *See* S.F. Admin. Code § 12I.2. Personal information does not include immigration status information.

38. Chapter 12I makes clear that its purpose and effect are limited to matters "relating to federal civil immigration detainers, notification of release of individuals, transmission of personal information, or civil immigration documents, based solely on alleged violations of the civil provisions of immigration laws." Chapter 12I expressly states that "[i]n all other respects, local law enforcement agencies may continue to collaborate with federal authorities to protect public safety." *See* S.F. Admin. Code § 12I.4.

39. San Francisco departments and agencies have adopted and implemented policies and practices consistent with Chapters 12H and 12I.

40. Specifically, the departments and agencies that administer Byrne JAG programs do not have in place any prohibitions or restrictions that apply to programs or activities funded under the Byrne JAG Program, and which deal with sending to, receiving from, requesting, or maintaining immigration status information with the federal government.

41. In addition, San Francisco has affirmatively instructed personnel regarding the substance of Section 1373 in a January 2017 memorandum sent to all San Francisco employees from the San Francisco Human Resources Director.

II. The Trump Administration Has Engaged In A Sustained Campaign To Eradicate Sanctuary City Policies.

42. San Francisco is far from the only jurisdiction to enact sanctuary policies that seek to promote public safety and build trusting and supportive relationships with immigrant communities. Numerous jurisdictions across the country have enacted similar policies. But despite the widespread

enactment of these policies, and the studies that justify their use (*see supra* ¶ 31), the Attorney General and other members of the Trump Administration have repeatedly criticized San Francisco, and other jurisdictions, for failing to allow ICE officials access to jails, provide notification of inmate release dates, or otherwise enforce federal immigration law.

43. For instance, in statements to the Daily Caller on July 7, 2015, then-Senator and now-Attorney General Sessions criticized San Francisco and other sanctuary jurisdictions for failing to carry out voluntary detainer requests. Sessions stated, "This disregarding of detainers and releasing persons that ICE has put a hold on it goes against all traditions of law enforcement. Laws and courtesies within departments if you have somebody charged with a crime in one city, you hold them until you complete your business with them . . . . So what was happening was, ICE authorities were filing detainers and sanctuary cities were saying, 'We're not gonna honor them. They finished paying for the crime they committed in our city we've released them.'"[7]

44. After the President appointed him to office, the Attorney General continued to take the same position targeting sanctuary cities. On July 12, 2017, the Attorney General described sanctuary city "policies" as those requiring law enforcement officials to "refuse to cooperate with federal immigration authorities regarding illegal aliens who commit crimes."[8] And he has frequently suggested that he will use every means necessary to withhold federal funding from "sanctuary cities." *See* March 27 Sessions remarks.

45. The Trump Administration has incorporated these views into its political agenda. President Trump has frequently promised to "defund" sanctuary cities, and to use the threat of withholding federal funds as "a weapon" to coerce local jurisdictions to change their policies.[9] Then-

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[7] Kerry Picket, *Sen. Sessions: City Officials Harboring Illegal Immigrant Felons Could Be Charged with Crime*, Daily Caller (July 7, 2015), http://dailycaller.com/2015/07/07/sen-sessions-city-officials-harboring-illegal-immigrant-felons-could-be-charged-with-crime/#ixzz4XE9I12Ux.

[8] Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks in Las Vegas to Federal, State and Local Law Enforcement About Sanctuary Cities and Efforts to Combat Violent Crime (July 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-las-vegas-federal-state-and-local-law.

[9] Alexander Mallin and Lissette Rodriguez, *Trump Threatens Defunding Sanctuary Cities as 'Weapon'*, ABC News (Feb. 5, 2017), http://abcnews.go.com/Politics/trump-threatens-%20defunding-sanctuary-states-weapon/story?id=45286642.

White House Press Secretary Sean Spicer also confirmed that "[w]e are going to strip federal grant money from the sanctuary states and cities that harbor illegal immigrants. The American people are no longer going to have to be forced to subsidize this disregard for our laws."[10]

46. The Administration carried through on these threats during President Trump's first week in office. President Trump issued Executive Order 13,768, which threatened to deny all federal funding to sanctuary jurisdictions and to authorize the Attorney General to take unspecified enforcement action against sanctuary cities. The Executive Order declared that "[s]anctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic." Executive Order at 8799.

47. To address that purported harm, the Executive Order established the policy that "jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." Executive Order at 8799. In furtherance of this policy, the Executive Order provided that:

> [T]he Attorney General and the Secretary [of Homeland Security], in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.

Executive Order § 9(a).

48. The Executive Order also mandated enforcement action: "The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." *Id.*

49. The Executive Order made clear that Section 1373 is the foundation for the Administration's efforts to deprive sanctuary cities of federal funds and to take unspecified punitive actions against them.

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[10] The White House, *1/25/17: White House Press Briefing*, YouTube (Jan. 25, 2017), https://www.youtube.com/watch?v=OaPriMVvtZA.

50. The Administration touted the Executive Order as a means for achieving the President's goal of "ending sanctuary cities . . . . [T]he President has been very clear through his executive order that federal funds, paid for by hardworking taxpayers, should not be used to help fund sanctuary cities."[11] The Administration vowed that "the President is going to do everything he can within the scope of the executive order to make sure that cities who don't comply with it counties and other institutions that remain sanctuary cities don't get federal government funding in compliance with the executive order."[12]

51. The Administration's efforts were stopped by this Court, which permanently enjoined Section 9(a) of the Executive Order for violating the Constitution. *San Francisco v. Trump*, 2017 WL 5569835, at *17. The Court held, *inter alia*, that the President and in turn, the Attorney General and the Secretary of DHS lacked the authority "to place a new condition on federal funds . . . not authorized by Congress," and thus had violated the "fundamental constitutional structure" of the separation of powers. *Id.* at *11. And the Court further held that even if the executive branch could exercise that spending power, the Executive Order was unconstitutional because it (1) used vague language that left localities unclear how to comply with the funding conditions; (2) lacked any nexus between the funds at issue and immigration enforcement; and (3) sought to compel local governments to "adopt certain policies" that they had determined, in their considered judgment, to be unwise. *Id.* at *12-*13. The Court found these violations to warrant a nationwide injunction. *Id.* at *17.

III. The Administration Is Attempting To Use The Byrne JAG Program To Coerce Cities Like San Francisco To Abandon Their Sanctuary City Policies.

A. The Byrne JAG Program Is A Longstanding Federal Formula Grant Program.

52. With its efforts to more broadly withhold federal funds stymied by this Court, the Administration adopted a more targeted approach: it identified an existing congressional program, the

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[11] Press Release, The White House, Office of the Press Secretary, Press Briefing by Press Secretary Sean Spicer, 2/1/2017, #6 (Feb. 1, 2017), https://www.whitehouse.gov/the-press-office/2017/02/01/press-briefing-press-secretary-sean-spicer-212017-6.

[12] Press Release, The White House, Office of the Press Secretary, Press Briefing by Press Secretary Sean Spicer, 2/8/2017, #10 (Feb. 8, 2017), https://www.whitehouse.gov/the-press-office/2017/02/08/press-briefing-press-secretary-sean-spicer-282017-10.

Byrne JAG program, as another device to pressure cities, states, and other local governments to abandon their sanctuary city policies.

53. Byrne JAG's origins trace back over three decades to the Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong. (1988), which created the Byrne Formula Grant program. In its original form, the Byrne Formula Grant program provided states with block grants based on population. *See* Anti-Drug Abuse Act § 6091(a), 42 U.S.C. § 3756 (1994). The program encouraged states to use those funds for very specific enumerated purposes, such as "disrupting illicit commerce in stolen goods and property," "developing and implementing programs which provide assistance to jurors and witnesses," and "addressing the problems of drug trafficking and the illegal manufacture of controlled substances in public housing." *See* 42 U.S.C. § 3751 (2000).

54. Several years after the Byrne Formula Grant program was enacted, Congress also authorized the creation of the Local Law Enforcement Block Grant ("LLEBG") program, through the FY 1996 law appropriating funding to DOJ. Omnibus Consolidated Rescissions and Appropriations Act of 1996, H.R. 3019, 194th Cong. (1996). The LLEBG program provided money to states and localities based on their crime rates.[13] Each year, the LLEBG and Byrne Formula Grant programs disbursed as much as $1 billion to states and local governments.

55. In 2006 Congress consolidated the LLEBG and Byrne Formula Grant programs as part of an effort to reduce duplication and streamline the programs. The consolidated program was renamed as today's Edward Byrne Memorial Justice Assistance Grant program. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. (2006); U.S. House of Representatives, Committee on the Judiciary, *Department of Justice Appropriations Authorization Act, Fiscal Years 2006 Through 2009, Report to accompany H.R. 3402*, 109th Cong., 1st Sess., H.R. Rep. No. 109-233, at 89 (2005) ("Judiciary Committee Report").

56. Congress's core purpose in reformulating the existing grant programs was "to cover the same ground" as the previous grant programs while allowing recipients more freedom "to use the

[13] *See* Nathan James, *Edward Byrne Memorial Justice Assistance Grant Program: Legislative and Funding History*, Congressional Research Service at 2-3 (Feb. 1, 2008), http://research.policyarchive.org/18740.pdf.

grants constructively." Judiciary Committee Report at 89. The reforms would "lessen the administrative burden of applying for the grants." *Id.* And the resulting program would be streamlined and would ensure that "the same authorized funding levels and uses will be available." 150 Cong. Rec. S9,950 (daily ed. Sept. 29, 2004) (statement of Sen. Leahy) (discussing similar, precursor version of 2005 Act).

57. To that end, Byrne JAG is structured as a formula grant, awarding funds to all eligible grantees according to a prescribed metric. Unlike discretionary grants, which agencies award pursuant to agency discretion, "'formula' grants . . . are not awarded at the discretion of a state or federal agency, but are awarded pursuant to a statutory formula." *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989). The Bureau of Justice Assistance ("BJA") a department within OJP awards Byrne JAG funds to all eligible grantees in amounts based on Bureau of Justice Statistics ("BJS") calculations derived from the Byrne JAG statutory formula. *See* 34 U.S.C. § 10156(d)(2)(A) (providing that the Attorney General "*shall* allocate to each unit of local government" funds consistent with the established formula) (emphasis added).

58. The formula for state allocations is a function of population and violent crime. *See id.* § 10156(a). For local governments, the allocation is a function of the state's allocation and the ratio of violent crime in the locality to violent crime in the state. *See id.* § 10156(d).

59. BJS first computes a preliminary allocation for each state and United States territory based on its share of violent crime and population (weighted equally). BJS then reviews that initial allocation amount to determine if it is less than the minimum amount defined in the statutory formula (0.25 percent of the total). U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Technical Report, *Justice Assistance Grant Program*, 2016 at 2 (Sept. 2016), https://www.bja.gov/jag/pdfs/JAG-Technical-Report.pdf. If this is the case, the state or territory is funded at the minimum level. *Id.* Each of the remaining states receives the minimum award plus an additional amount based on its share of violent crime and population. *Id.*

60. Once each state's final amount is determined, 60 percent is allocated to the state in the first instance, and 40 percent is allocated for direct grants to local governments. 34 U.S.C. § 10156(d).

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States are obligated to pass at least a certain percentage of the "state" grant to local governments within the state. *Id.* § 10156(c)(2).

61. For example, in FY 2017, California's total allocation is $28.3 million. Of this, $17.7 million (60 percent) is allocated to the State.[14] The other $10.6 million (40 percent) is allocated for direct grants to local jurisdictions.[15] Of the $17.7 million allocated to the State, a minimum of 62.9 percent must be passed through to local jurisdictions.[16] In recent years, California has passed through over 85 percent of JAG funds to local jurisdictions.[17]

62. Under the Byrne JAG statute, award recipients are entitled to their share of the formula allocation as long as their proposed programs satisfy one of the statutory purpose areas. In contrast to the Byrne Formula Grant statutory requirements which enumerated dozens of specific purposes the Byrne JAG program allows recipients to allocate their funds in furtherance of eight purpose areas: (1) law enforcement, (2) prosecution and courts, (3) prevention and education, (4) corrections and community corrections, (5) drug treatment, (6) planning, evaluation, and technology improvement, (7) crime victim and witness programs, and (8) mental health programs, including behavioral programs and crisis intervention teams. 34 U.S.C. § 10152(a)(1)(A)-(H).

63. None of these program purposes include federal immigration enforcement.

64. Congress imposed only a limited number of requirements on Byrne JAG applicants. First, applicants are required to supply information about their intended use of grant funding, to demonstrate that they will spend the money on programs supporting the purposes identified in the statute. *See* 34 U.S.C. § 10153(a)(2) & (a)(5)(A)-(C). Second, applicants must maintain and be prepared to report information demonstrating that they possess programmatic and financial integrity.

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[14] *See* https://www.bja.gov/Funding/17JAGStateAllocations.pdf.

[15] *See* https://www.bja.gov/Programs/JAG/jag17/17CA.pdf.

[16] Byrne JAG Frequently Asked Questions (FAQs) Updated August 2017, at 2, https://www.bja.gov/Funding/JAGFAQ.pdf; *see also* FY 2014 Justice Assistance Grant (JAG) Program Variable Passthrough (VPT) percentages, https://www.bja.gov/Funding/JAGvpt.pdf.

[17] *See, e.g.,* Byrne JAG Fiscal Year 2016 California State Application, at 26, http://www.bscc.ca.gov/downloads/2016%20BSCC%20Application%20to%20BJA%20for%20Byrne%20JAG%20Funding.pdf.

Id. § 10153(a)(4). Finally, applicants must "certif[y]," that they "will comply with all provisions of this part and all other applicable Federal laws." *Id.* § 10153(a)(5)(D).

65. The current Byrne JAG statute contains no immigration-related requirements. Indeed, Congress specifically removed an immigration-related funding requirement when it merged the Byrne Formula Grant program with LLEBG to create Byrne JAG. Congress eliminated the Byrne Formula Grant requirement that recipients make "[a]n assurance that the State has established a plan under which the State will provide without fee to the Immigration and Naturalization Service, within 30 days of the date of their conviction, notice of conviction of aliens who have been convicted of violating the criminal laws of the State and under which the State will provide the Service with the certified record of such a conviction within 30 days of the date of a request by the Service for such record." 42 U.S.C. § 3753(a)(11) (2002).

B. San Francisco Uses Byrne JAG Funds To Support Vital City Services.

66. The San Francisco Department of Children, Youth and their Families ("DCYF") applies for local Byrne JAG funds and state pass-through funds on behalf of the City. DCYF keeps a portion of the grant and also administers grant funds to the following departments: Adult Probation, District Attorney, Juvenile Probation, Public Defender, Police, and Sheriff. DCYF also passes through funds from the local grant to San Francisco Superior Court and a third party evaluator.

67. Consistent with the Byrne JAG statute, San Francisco uses its Byrne JAG funds to support critical law enforcement programs designed to reduce criminal behavior and improve public safety. Specific programs funded with this grant include: (1) Law Enforcement Assisted Diversion, an innovative approach that seeks to accomplish the goals of reduced criminal behavior and improved public safety by connecting appropriate low-level drug offenders with services; (2) Focused Drug Deterrence, short and long term proactive activities including targeted investigations and enforcement and social network analysis to increase the identification of individuals involved in high-level drug markets; (3) Drug Court Prosecution, which seeks to connect criminal defendants who suffer from a substantial substance abuse problem to treatment services in the community in order to enhance public safety, reduce recidivism, and to find appropriate dispositions to the criminal charges; (4) Targeted Drug Treatment for Underserved Populations, a treatment intervention conducted by the Sheriff's

Department for individuals in custody; (5) Intensive Probation Supervision, a targeted caseload of probationers with substance abuse and/or mental health issues; (6) Reentry Social Work through the Public Defender's Office, which provides legal and wraparound support to help indigent clients charged with felony drug cases and other felony offenses successfully exit the criminal justice system; and (7) Citywide Justice-Involved Youth Planning, which examines current criminal justice trends impacting youth and young adults and strengthens partnerships and collaboration at various levels to create a continuum of support for youth and young adults.

68. San Francisco uses Byrne JAG pass-through funds for two pilot projects designed to reduce recidivism for juveniles and young adults. One project works with the San Francisco Unified School District to create an alternative to suspension for at-risk youth. Students facing suspension or exhibiting behaviors that put them at risk for suspension are paired with trained role models who help them learn de-escalation skills and keep them from missing needed instruction time.

69. The other project is a Young Adult Court aimed at reducing recidivism for youth ages 18-25. This Court was designed in response to a growing body of neuroscience research showing that young adults are fundamentally different from both juveniles and older adults in how they process information and make decisions. Our traditional justice system is not well-equipped to address cases involving these individuals, who are qualitatively different in development, skills, and needs from both children and older adults. The Young Adult Court fills this gap by providing case management and other support for eligible young adult offenders from high-risk backgrounds.

70. These City programs span seven departments, and a total of approximately ten full time equivalent positions for these programs are funded with Byrne JAG funds. Without local and state Byrne JAG funds, San Francisco could be forced to reduce or eliminate these programs, including eliminating staff positions, unless other funding sources could be identified.

C. The Department Of Justice Unlawfully Requires San Francisco To Certify Compliance With Section 1373 As A Condition Of Receiving Byrne JAG Funding.

71. For many years, OJP administered the Byrne JAG program consistent with congressional intent: local jurisdictions received federal funding according to a formula to support law

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enforcement initiatives, and the federal government imposed few restrictions on state and local governments wishing to receive these grant funds.

72. But 2016, OJP began to change course. As noted above, the Byrne JAG authorizing statute requires a "certification" that "the applicant will comply with all provisions of this part and all other applicable federal laws." 34 U.S.C. § 10153(a)(5)(D). OJP issued guidance in July 2016 that Section 1373 was such an "applicable law" for which jurisdictions had to certify compliance to receive Byrne JAG funds.

73. Section 1373 provides that a "local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual." 8 U.S.C. § 1373(a). Section 1373 further provides that, "with respect to information regarding the immigration status . . . of any individual," "no person or agency may prohibit, or in any way restrict, a . . . local government entity from . . . (1) sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service[,] (2) maintaining such information[, or] (3) exchanging such information with any other Federal, State, or local government entity." *Id.* § 1373(b).

74. In July and October 2016, DOJ indicated that it viewed Section 1373 as an applicable federal law for the Byrne JAG program. *See* Office of Justice Programs, *Guidance Regarding Compliance with 8 U.S.C. § 1373*, U.S. Dep't Just. (July 7, 2016), https://www.bja.gov/funding/8uscsection1373.pdf ("OJP July Guidance"); Office of Justice Programs, *Additional Guidance Regarding Compliance with 8 U.S.C. § 1373*, U.S. Dep't Just. (Oct. 6, 2016), https://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf ("OJP October Guidance").

75. In the OJP July Guidance, OJP suggested that Section 1373 imposes an affirmative obligation on state and local governments. The Guidance states that to comply with Section 1373, "[y]our personnel *must* be informed that notwithstanding any state or local policies to the contrary, federal law does not allow any government entity or official to prohibit the sending or receiving of

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information about an individual's citizenship or immigration status with any federal, state or local government entity and officials." OJP July Guidance at 1 (emphasis added).

76. In the October 2016 Guidance, OJP indicated that all Byrne JAG recipients needed "to examine their policies and procedures" to ensure compliance with Section 1373. OJP reiterated that "all Byrne/JAG grant applicants must certify compliance with all applicable federal laws, including Section 1373, as part of the Byrne/JAG grant application process." OJP October Guidance at 1.

77. But OJP made clear at the time that "[n]o FY 2016 or prior year Byrne/JAG . . . funding will be impacted." OJP October Guidance at 1. OJP stated that its "goal is to ensure that our JAG . . . recipients are in compliance with all applicable laws and regulations, including Section 1373, not to withhold vitally important criminal justice funding from states and localities." *Id.*

78. Beginning in FY 2017, DOJ expanded upon this mandate, requiring a detailed Certification of Compliance ("Section 1373 Certification") to be completed by an applicant's Chief Legal Officer and submitted to OJP before it can accept the award of any Byrne JAG funds. *See* Byrne JAG FY 2017 Local Solicitation (attached hereto as Exhibit B) ("Local Solicitation") at 38.

79. Among other things, the Section 1373 Certification requires the applicant's Chief Legal Officer to certify under penalty of perjury that he or she has carefully reviewed Section 1373 and understands that DOJ requires local governments to comply with Section 1373 "with respect to any 'program or activity' funded in whole or in part" with Byrne JAG dollars. The Chief Legal Officer is required to conduct or cause to be conducted a "diligent inquiry and review" concerning both (1) the "program or activity" to be funded with Byrne JAG funds and (2) "any prohibitions or restrictions potentially applicable to the 'program or activity' sought to be funded . . . that deal with sending to, requesting or receiving from, maintaining, or exchanging information of the types described in [Section 1373]."

80. The Section 1373 Certification further requires that the Chief Legal Officer certify under penalty of perjury that:

> [N]either the jurisdiction, nor any entity, agency, or official of the jurisdiction has in effect, purports to have in effect, or is subject to or bound by, any prohibition or any restriction that would apply to the "program or activity" to be funded in whole or in part under the FY 2017 [Byrne JAG Program], and that deals with either (1) a government entity or official sending or receiving

> information regarding citizenship or immigration status as described in 8 U.S.C. § 1373(a); or (2) a government entity or agency sending to, requesting or receiving from, maintaining, or exchanging information of the types (and with respect to the entities) described in 8 U.S.C. § 1373(b).

81. The Section 1373 Certification further provides that the Chief Legal Officer must acknowledge that a "materially false, fictitious, or fraudulent statement (or concealment or omission of a material fact)" in the certification will potentially subject him or her to criminal prosecution and the applicant entity to civil penalties and administrative remedies for false claims.

82. The Section 1373 Certification is not the only time that jurisdictions will be required to assure DOJ that they comply with Section 1373. In addition, OJP has informed potential grant recipients that beginning on October 1, 2017, all Byrne JAG award recipients will be required to "certify each payment request before submission" to the federal Grant Payment Request System. That is, each time a grant recipient wishes to draw-down funds from a Byrne JAG award, the recipient must again certify compliance with Section 1373.

83. Specifically, OJP has informed recipients that they must make the following declaration, in addition to other assurances:

> To the best of my knowledge and belief, on behalf of myself and the award recipient, I certify to DOJ, under penalty of perjury, that the following are true as of the date of this request (1) The recipient is in compliance with all award conditions that affect the obligation, expenditure, and drawdown of award funds, as well as all related requirements that appear in the certifications and assurances for this award, specifically including any restrictions concerning obligations set out in requirements related to 8 U.S.C. § 1373.

84. Further, DOJ has indicated that it will conduct ongoing monitoring of a jurisdiction's compliance with Section 1373, and will deny and/or claw back funds if it deems a jurisdiction out of compliance with Section 1373. In a November 15, 2017 letter to San Francisco Mayor Edwin Lee, Defendant Hanson informed San Francisco that its "FY 2016 Byrne JAG grant award required you to comply with 8 U.S.C. § 1373. Section 1373 compliance is an ongoing requirement that the Department of Justice monitors." Exhibit A at 1.

85. The November 15, 2017 letter further informed San Francisco that the Department "is concerned that the following San Francisco laws, policies, or practices may violate section 1373." The

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letter identified San Francisco Administrative Code Sections 12H.2 and 12I.3 as such "laws, policies, or practices" that may violate Section 1373.

86. The letter directed San Francisco to submit a response to this letter by December 8, 2017, addressing whether San Francisco's laws, policies, or practices violate Section 1373. The letter further asked San Francisco to "address whether [it] would comply with section 1373 throughout the award period, should [it] receive an FY 2017 Byrne JAG grant award."

87. On December 7, 2017, San Francisco City Attorney Dennis Herrera responded to OJP's letter on behalf of San Francisco. San Francisco informed OJP that San Francisco has no laws, policies, or practices that violate Section 1373, as it is properly construed. San Francisco directed OJP to its briefing in *San Francisco v. Trump* for further explanation of its legal position. A copy of San Francisco's response letter is attached to this Amended Complaint as Exhibit C.

88. DOJ sent similar letters to 29 other jurisdictions on November 15, 2017. In a press release issued that same day, the Attorney General stated that "[j]urisdictions that adopt so-called 'sanctuary policies' also adopt the view that the protection of criminal aliens is more important than the protection of law-abiding citizens and the rule of law." Press Release, U.S. Dep't of Justice, Justice Department Sends Letters to 29 Jurisdictions Regarding Their Compliance with 8 U.S.C. 1373 (Nov. 15, 2017), https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373. The Attorney General further stated "I urge all jurisdictions found to be potentially out of compliance in this preliminary review to reconsider their policies that undermine the safety of their residents. We urge jurisdictions to not only comply with Section 1373, but also to establish sensible and effective partnerships to properly process criminal aliens." *Id.*

89. These letters were consistent with letters that DOJ sent to nine jurisdictions on April 21, 2017, "alert[ing]" the recipients that they were required to submit "documentation to OJP that validates your jurisdiction is in compliance with 8 U.S.C. § 1373." DOJ has engaged in a protracted back-and-forth with several of these jurisdictions including New York City, Philadelphia, and Chicago and has repeatedly communicated that these jurisdictions "appear[] to have laws, policies, or practices that violate 8 U.S.C. § 1373." In a speech delivered on the same day that he sent the April 21, 2017 letters, the Attorney General reiterated that "the Department of Justice sent letters to

jurisdictions that were identified (by the Obama administration) as having policies that potentially violate federal law to receive millions in federal grants." Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks Before Media Availability in San Diego, California (Apr. 21, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-media-availability-san-diego-california.

90. These letters stand in stark contrast to DOJ's earlier representation that FY 2016 funding would *not* be implicated by DOJ's new decision to require compliance with Section 1373. DOJ has not offered any explanation for this change, or explained how it can retroactively attach grant conditions to award documents issued well over a year ago.

91. The Administration lacks the statutory authority to require Byrne JAG applicants and recipients to certify compliance with Section 1373. Although the Byrne JAG statute requires that recipients certify compliance with "all applicable laws," Section 1373 is not an applicable law for the Byrne JAG Program or for federal grants more generally. DOJ has unilaterally imposed the Section 1373 Requirement to further its own political ends of eradicating sanctuary cities.

92. Indeed, Congress has repeatedly considered and rejected legislation that would punish cities for setting their own law enforcement priorities by allowing federal agencies to withhold certain grants. *See, e.g.,* Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. (2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. (2016). None of this legislation has been enacted.

93. In July 2015, then-Senator and now-Attorney General Sessions introduced Senate Bill 1842, "Protecting American Lives Act." That bill would in part have expanded existing federal law to deprive jurisdictions having "in effect a statute, policy, or practice that prohibits law enforcement officers of the State, or of a political subdivision of the State, from assisting or cooperating with Federal immigration law enforcement in the course of carrying out the officers' routine law enforcement duties" of "any . . . law enforcement or Department of Homeland Security grant." S. 1842, 114th Cong. § 3 (2015). The bill never made it out of committee.

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D. The Department Of Justice Also Announced Two Additional Unlawful Requirements For The FY 2017 Byrne JAG Program.

94. In late July 2017, DOJ went even further when it announced two additional new requirements that it would unilaterally impose on Byrne JAG grant applicants. The Attorney General announced that "[r]ecipients for FY 2017 will be notified of new conditions of their grants."[18]

95. The Attorney General stated that:

> From now on, the Department will only provide Byrne JAG grants to cities and states that comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours notice before they release an illegal alien wanted by federal authorities. This is consistent with long-established cooperative principles among law enforcement agencies. This is what the American people should be able to expect from their cities and states, and these long overdue requirements will help us take down MS-13 and other violent transnational gangs, and make our country safer.[19]

96. DOJ made clear that the Notice and Access Requirements are distinct from Section 1373. The new conditions are not included as part of the existing requirement that recipient jurisdictions certify compliance with Section 1373. Byrne JAG FY 2017 State Solicitation (attached hereto as Exhibit D) ("State Solicitation") at 21; Local Solicitation at 20. Rather, they are independent "award conditions" not connected to any statutory requirement. State Solicitation at 32; Local Solicitation at 30.

97. OJP first included the Notice and Access Requirements in the State Solicitation. The State Solicitation was posted on OJP's website on July 25, 2017, and provided that applications were to be submitted no later than August 25, 2017.

98. The State Solicitation provided, first, that OJP will require grant applicants to "provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act." State Solicitation at 32.

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[18] *See* Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial.

[19] *Id.*

99. Further, the State Solicitation provided that OJP will require grant applicants to "permit personnel of the [DHS] to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States." State Solicitation at 32.

100. OJP included the same two requirements in the Local Solicitation, which was made available for applicants on August 3, 2017. Local Solicitation at 30. The Local Solicitation required that applications for FY 2017 Byrne JAG funding be submitted no later than September 5, 2017. As described in more detail below (*see infra* ¶¶ 126-27), San Francisco submitted its FY 2017 Byrne JAG application on September 5, 2017.

101. The Local Solicitation describes these two new requirements as "award requirements." Local Solicitation at 29. It provides that "[i]f selected for funding, in addition to implementing the funded project consistent with the OJP-approved application, the recipient must comply with all award requirements (including all award conditions)." *Id.* The Local Solicitation further provides that "[c]ompliance with the requirements of the two foregoing new award conditions will be an authorized and priority purpose of the award." Local Solicitation at 30.

102. San Francisco has not received a Byrne JAG award document at this time.

103. But DOJ has issued award documents to two other jurisdictions. *See* Dkt. No. 46-1, Declaration of Alan Hanson ("Hanson Decl.") ¶¶ 5-6 & Exh. B. Those award documents contain DOJ's description of the Notice and Access Requirements.

104. DOJ has asserted that it will describe the Notice and Access Requirements the same way in any future award documents. Hanson Decl. ¶¶ 5-6 ("Represented Final Conditions").

105. Paragraph 55 of one such award document describes the Notice and Access Requirements as requiring jurisdictions to have an affirmative statute, rule, regulation, policy, or practice "designed to ensure" compliance with the conditions for state or state-contracted correctional facilities "[w]ith respect to the 'program or activity' that is funded." The "[r]equirement" states in full:

> With respect to the "program or activity" that is funded (in whole or in part) by this award, as of the date the recipient accepts this award, and throughout the remainder of the period of performance for the award

A. A State statute, or a State rule, -regulation, -policy, or practice, must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given to access any State (or State-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States.

B. A State statute, or a State rule, -regulation, -policy, or practice, must be in place that is designed to ensure that, when a State (or State-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and as early as practicable (see para. 4.B. of this condition) provide the requested notice to DHS.

Hanson Decl., Exh. B at 18.

106. DOJ lacks statutory authority for imposing the Notice and Access Requirements on Byrne JAG recipients. As described above, the Byrne JAG authorizing legislation requires program applicants to certify that they will "comply with all provisions of this part and all other applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D). But no federal law requires that local jurisdictions provide advance notice before releasing a purported alien from their custody, or that they grant federal officials unfettered access to local detention facilities to interrogate individuals in local custody. Nor does any federal law give the Attorney General or any division of DOJ the authority to impose conditions of his choice.

107. Indeed, as described above (*see supra* ¶¶ 92-93), Congress has repeatedly considered and rejected legislation that would punish cities for setting their own law enforcement priorities by allowing federal agencies to withhold certain grants. Congress has never passed legislation requiring local jurisdictions to comply with the Notice Requirement or the Access Requirement, or any similar requirement for Byrne JAG grants. Nor has it authorized the executive branch to penalize local jurisdictions by withholding funds or through any other form of punishment based on their refusal to comply with the Notice or Access Requirements. Defendants' unilateral imposition of the Notice and Access Requirements, in these circumstances, is unprecedented, unauthorized, and unlawful.

108. Furthermore, the Notice and Access Requirements are ambiguous as to what jurisdictions must do to be in compliance. For example, the Notice Requirement as set forth in the Local Solicitation does not explain whether notice must be given only when the scheduled release date

and time is known at least 48 hours in advance, or whether it requires jurisdictions to hold inmates in custody for additional time to provide a full 48-hour period of notice to ICE.

109. DOJ has now taken the position in the Represented Final Conditions that the Notice Requirement does not authorize or require Byrne JAG funding recipients to maintain an individual in custody beyond the date and time the individual would otherwise be released. *See* Hanson Decl., Exh. B at 18. DOJ states in the Represented Final Conditions that "[i]n the event that . . . the scheduled release date and time for an alien are such as not to permit the advance notice [of scheduled release] that DHS has requested, it shall not be a violation of this condition to provide only as much advance notice as practicable." *Id.*

110. This post-hoc retreat from the Local Solicitation's broad language does not cure the ambiguity. It still leaves San Francisco uncertain about how much notice is "practicable" to provide, and thus leaves San Francisco with no way of knowing how it can ensure compliance with the Notice Requirement. The Represented Final Conditions still refer to a "scheduled release date and time," and do not acknowledge that inmates may at times be released with little or no notice. In these circumstances, San Francisco would have little or no opportunity to provide DOJ with any advance notice. The Represented Final Conditions do not suggest that this would be sufficient.

111. And in any event, DOJ's more recent characterization of the Notice Requirement suggests that the Requirement may still operate as a detainer requirement in disguise. Although Defendants now appear to be attempting to narrow the Notice Requirement's reach, there is no certainty that they will not at some future point revert to the broader, unqualified language that appeared in the Local Solicitation or adopt a similar interpretation.

112. Likewise, the Access Requirement is unclear on its face as to whether jurisdictions are required to provide access to inmates in custody only when those individuals consent, or instead whether jurisdictions are required to compel unwilling inmates to meet with ICE representatives.

113. In litigation DOJ has attempted to define the Access Requirement's scope. DOJ has stated in briefing in a case pending in the Eastern District of Pennsylvania that there is no ambiguity about what the Access Requirement demands. Defs.' Memo. in Opp. to Pltf.'s Mot. for Prelim. Inj., *Philadelphia v. Sessions*, No. 2:17-cv-03894-MMB, Dkt. No. 28, at 32. DOJ stated that the plaintiff in

that matter "wishfully identifies a supposed ambiguity about whether the [Access Requirement] requires allowing ICE agents access to visit an inmate even when the inmate has told the facility that the inmate does not consent to an interview. The answer is yes. The condition does require allowing access in this scenario, even if the inmate might decline to answer questions." *Id.*

114. Even with DOJ's qualification, the Access Requirement is still ambiguous regarding what type of access San Francisco must provide. The Requirement does not identify any limiting principle on the access that ICE agents must receive. For instance, must San Francisco allow ICE agents to use a jail interview room to "access" an uncooperative inmate for as long as ICE wishes? The Access Requirement does not answer this and similar questions.

115. The Access Requirement is particularly ambiguous in light of San Francisco's state law obligations under the Transparent Review of Unjust Transfers and Holds Act ("TRUTH Act"), Cal. Gov't Code § 7283 *et seq.* The TRUTH Act requires that, before an interview with ICE takes place, a local law enforcement officer must provide the detained individual with a "written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present." *Id.* § 7283.1(a). It is unclear whether the Access Requirement would preclude San Francisco from complying with the TRUTH Act. For example, it is ambiguous whether the Access Requirement prohibits San Francisco from informing inmates of their right to have a lawyer present or decline an interview with ICE officials, as the TRUTH Act requires it to do.

116. Further, it is unclear what DOJ will consider an adequate rule, regulation, policy, or practice for purposes of compliance with either the Notice or Access Requirements. The conditions provide no guidance or further information as to the meaning of these terms.

IV. San Francisco Faces Immediate Injury From DOJ's Newly Announced Requirements.

A. DOJ Has Threatened To Claw Back San Francisco's FY 2016 Byrne JAG Funding.

117. In FY 2016, San Francisco received a direct Byrne JAG grant of $522,943. San Francisco also received a state pass-through of Byrne JAG funds of $981,202.

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118. DOJ did not include a Section 1373 Requirement in its FY 2016 Byrne JAG award to San Francisco. In contrast, on information and belief DOJ did include a Section 1373 condition in certain Byrne JAG awards made to other recipients.

119. In July 2016 after San Francisco applied for the FY 2016 award OJP issued its July 2016 Guidance expressing its view that Section 1373 is an "applicable law" for Byrne JAG award purposes.

120. But in October 2016 after San Francisco accepted its FY 2016 award OJP issued its October 2016 Guidance stating that its determination that Section 1373 is an applicable law would not impact FY 2016 funding.

121. Despite this, DOJ's November 2017 letter to San Francisco threatens to claw back FY 2016 Byrne JAG funding on the basis of San Francisco's purported failure to comply with Section 1373.

122. In its about-face, DOJ did not acknowledge its change in position, nor explain how it can attach a retroactive new requirement to FY 2016 funds that San Francisco has already accepted.

123. San Francisco's FY 2016 funding has already been allocated to support a number of vital city services. The unlawful claw back of these funds threatens to disrupt San Francisco's ability to continue these critical city programs.

B. The Section 1373 Certification And Additional FY 2017 Requirements Put San Francisco To An Unconstitutional Choice.

1. San Francisco Will Soon Be Required To Execute The Section 1373 Certification And Agree To The Notice And Access Requirements.

124. San Francisco has received state and local Byrne JAG funds every year for decades, and has applied for Byrne JAG funds for the FY 2017 grant cycle.

125. For FY 2017, San Francisco is entitled to a direct Byrne JAG formula grant of $524,845. San Francisco also expects to receive a state pass-through of Byrne JAG funds in the amount of $923,401.

126. OJP posted the FY 2017 Local Solicitation on August 3, 2017, with an application deadline of September 5, 2017.

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127. On September 5, 2017, San Francisco submitted its FY 2017 Byrne JAG application. In connection with that application, San Francisco made clear that it was not certifying that it would comply with the Notice and Access Requirements, and stated that it was challenging those requirements in litigation. San Francisco informed DOJ that San Francisco DCYF submitted the application "without confirming that it complies with the access condition or notice condition, and without agreeing as part of this application to comply with those conditions."

128. OJP posted the FY 2017 State Solicitation on July 25, 2017, with an application deadline of August 25, 2017.

129. OJP has also posted state allocations showing that the State of California is entitled to $17.7 million in Byrne JAG funds for FY 2017. *See* www.bja.gov/Funding/17JAGStateAllocations.pdf.

130. On information and belief, the State of California has applied for Byrne JAG funds for FY 2017.

131. States must pass through a portion of state Byrne JAG awards to local jurisdictions in the state. *See* 34 U.S.C. § 10156(c). The California Board of State and Community Corrections ("BSCC") is the State Administering Agency responsible for oversight of Byrne JAG funding in California. The BSCC has adopted a multi-year strategy for Byrne JAG funding that prioritizes law enforcement; prevention and education programs; and courts, prosecution and defense. This multi-year strategy does not include or prioritize enforcement of federal immigration laws.

132. Once the State of California receives Byrne JAG funds, it issues a request for proposals ("RFP") for local jurisdictions to apply for pass-through funds. In 2014, California invited proposals for a three year funding cycle beginning on March 1, 2015, and ending on December 31, 2017. The initial RFP was released on September 15, 2014, with a Notice of Intent to Apply due October 3, 2014, and proposals due November 21, 2014. After the initial award, local jurisdictions were required to re-apply for the second and third year funds. San Francisco was awarded a grant for the Young Adult Court and alternative to suspension projects discussed above, with $1,045,624 awarded in 2015, $983,971 in 2016, and $981,202 in 2017.

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133. To receive pass-through Byrne JAG funds, San Francisco will be required to submit assurances that it will comply with all award requirements. This obligation flows from the requirement that sub-recipients of state Byrne JAG awards must certify their compliance with Section 1373, as applicable to the program and award to be funded, and assure that they will comply with all award conditions, including the Notice and Access Requirements.

134. DOJ has not yet issued a final award document to San Francisco. As of the date of this filing, San Francisco's 2017 Byrne JAG application appears as "submitted" in the federal grant processing system.

135. DOJ has stated that grant recipients will have 45 days from the date they receive award documents to accept or reject a FY 2017 Byrne JAG award. To accept a FY 2017 Byrne JAG award, recipients will be required to certify that they comply with all applicable award conditions including the Notice and Access Requirements and to submit an executed Section 1373 Certification.

2. The Notice, Access, And Section 1373 Requirements Create An Unconstitutional Choice For San Francisco.

136. The Notice, Access, and Section 1373 Requirements will create an untenable choice for San Francisco, when it is faced with the decision whether to accept the FY 2017 Byrne JAG award.

137. As to the Notice and Access Requirements, San Francisco is unable to comply with those Requirements, as is necessary to accept a FY 2017 Byrne JAG award and draw down the related funds. San Francisco cannot assure DOJ that it complies with these Requirements for three reasons.

138. First, San Francisco does not have in place any laws, rules, regulations, or policies that fulfill the Notice and Access Requirements, as DOJ has made clear is necessary for San Francisco to accept an award. Indeed, San Francisco's Sanctuary City Laws and policies conflict with the Notice and Access Requirements, as DOJ has described them.

139. Second, practical difficulties also prevent San Francisco from complying with the Notice and Access Requirements.

140. As to the Notice Requirement, the Sheriff's Department frequently does not know whether and when an inmate will be released with enough time to provide federal officials with 48 hours' advance notice, or very much notice at all. And those release dates and times are often dictated

by factors outside of San Francisco's control. For instance, an inmate's release is often controlled by a court order that requires San Francisco to release the inmate as quickly as possible. San Francisco and its officials potentially face liability for delaying an inmate's release once a court has ordered it. *See Berry v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004) (noting that local governments may violate the constitutional rights of inmates when they continue to hold inmates after a court has authorized their release).

141. As to the Access Requirement, the Sheriff's Department does not provide federal immigration officials access to inmates. Under the Sheriff's Department policy, Sheriff staff are not authorized to provide ICE representatives conducting civil immigration enforcement access to inmates in jail.

142. Third, San Francisco's uncertainty regarding what the Notice and Access Requirements demand in practice threatens to interfere with its ability to administer its jails. Although DOJ now disclaims the argument that the Notice Requirement functions as a de facto detainer request, the Notice and Access Requirements in fact could prolong an inmate's detention. DOJ's insistence that it receive access to inmates could delay an inmate's release, if ICE seeks to interview inmates when they would otherwise be released. Likewise, the Notice Requirement could delay an inmate's release in circumstances where an inmate is ordered to be released immediately. Although DOJ has suggested that it need not receive a full 48 hours' notice when that amount of time is "impracticable," the Notice Requirement still requires that *some* form of advance notice may be given. Thus, San Francisco may be forced to adjust inmates' release times to ensure that it can provide the federal government with the required period of notice. And San Francisco remains uncertain that DOJ will adhere to the "as early as practicable" limitation, which was not included in the Solicitations.

143. Coercing San Francisco to detain individuals past their projected release date as the Notice Requirement could do at least in practice likely violates the Fourth Amendment. Given the reality of how inmates' release times are determined, and the uncertainty regarding how DOJ will administer the Notice and Access Requirements, San Francisco fears that it may be unable to comply with these Requirements without running afoul of the Fourth Amendment.

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144. San Francisco is thus put in an untenable situation: it cannot comply with the Notice and Access Requirements without changing its local laws and policies. And even if it were willing to change its laws and policies which it is not those changes would expose it to potential constitutional liability. But if San Francisco refuses to change its laws and policies to enable it to accept the FY 2017 Byrne JAG award, it will be forced to forgo millions of dollars of vital law enforcement funding. Ironically, DOJ would deprive San Francisco of money for public safety because it questions San Francisco's legitimate exercise of judgment consistent with the allocation of power under the Constitution about what best serves the public safety of its own residents.

145. The Section 1373 Requirement likewise requires San Francisco to make another untenable choice: either sign the Section 1373 Certification under the cloud of DOJ's incorrect assertion that San Francisco's laws in particular, Chapters 12H and 12I of the San Francisco Administrative Code fail to satisfy Section 1373's demands, or decline to sign the certification and give up funding that City departments depend on.

146. Although San Francisco firmly believes that its laws, policies, and practices comply with Section 1373, Defendants' statements give rise to a credible fear that DOJ will either deny the application, accept the application and later claw back funds, or attempt to hold San Francisco or its officials civilly or criminally liable for signing the Certification.

147. Defendants' November 15, 2017 letter, mentioning DOJ's "concern[s]" that Chapters 12H and 12I of the Administrative Code "may violate section 1373," exacerbates this fear.

148. This credible fear is compounded by the Administration's additional statements suggesting that San Francisco violates Section 1373. The White House has characterized "[s]anctuary cities, like San Francisco" as violating Section 1373 by "block[ing] their jails from turning over criminal aliens to Federal authorities for deportation."[20] The Attorney General has criticized San Francisco for having sanctuary city policies, which he described as a "refus[al] to cooperate with

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[20] Press Release, The White House, Office of the Press Secretary, Statement on Sanctuary Cities Ruling (Apr. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/04/25/statement-sanctuary-cities-ruling.

federal immigration authorities regarding illegal aliens who commit crimes."[21] And more recently, the Attorney General identified San Francisco's Sanctuary City Laws as having "led to the preventable and heartbreaking death of Kate Steinle" and vowed to "ensure that all jurisdictions place the safety and security of their communities above the convenience of criminal aliens."[22] These threats create substantial uncertainty for San Francisco about signing the Section 1373 Certification.

149. This uncertainty is compounded by the Trump Administration's continually changing interpretation of what Section 1373 requires. That interpretation has expanded repeatedly over the past year, creating apprehension for San Francisco about whether the Administration may refuse to accept San Francisco's Section 1373 Certification, or later take punitive action against San Francisco.

150. For instance, the Administration has repeatedly, and incorrectly, suggested that a local government violates Section 1373 when it refuses to honor detainer requests or allow access to jails. DOJ specifically linked Section 1373 to ICE detainers in a 2016 Office of the Inspector General memorandum that analyzed ten jurisdictions' compliance with Section 1373 and stated that detainer policies "may be causing local officials to believe and apply the policies in a manner that prohibits or restricts cooperation with ICE in all respects . . . [which], of course, would be inconsistent with and prohibited by Section 1373." May 2016 OJP Guidance. ICE Director Thomas Homan also testified to Congress that over 100 jurisdictions violated Section 1373 because they "have some sort of policy where they don't honor detainers or allow us access to the jails."[23]

151. More recently, DOJ has adopted an even broader interpretation of Section 1373 as preventing jurisdictions from prohibiting or restricting their employees from sharing vast swaths of information, far removed from Section 1373's reference to "immigration status."

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[21] Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks in Las Vegas to Federal, State and Local Law Enforcement About Sanctuary Cities and Efforts to Combat Violent Crime (July 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-las-vegas-federal-state-and-local-law.

[22] Press Release, U.S. Dep't of Justice, Attorney General Sessions Statement on the Verdict in People of the State of California vs. Jose Ines Garcia Zarate aka Juan Francisco Lopez Sanchez (Nov. 30, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-statement-verdict-people-state-california-vs-jose-ines-garcia.

[23] H. Approps. Comm. Hr'g Tr., Fed. News Serv. Transcripts, 2017 WLNR 18737622 (June 13, 2017).

152. For instance, in letters Defendant Hanson has sent to other jurisdictions regarding their supposed violations of Section 1373, DOJ indicated that it believes Section 1373 requires local governments to allow their employees to share not only immigration status information, but also information regarding a person's custody status and release date. *See* Ltr. to Eddie T. Johnson, Chicago Superintendent of Police, from Alan R. Hanson (Oct. 11, 2017), https://www.justice.gov/opa/press-release/file/1003016/download. DOJ, in those letters, also made clear that it expects local jurisdictions not only to avoid having in place a "prohibition or any restriction" regarding the sending of immigration-status information as the Section 1373 Certification suggests but also to make affirmative communications to their employees. Ltr. to Hon. Jim Kenney, City of Philadelphia, from Alan R. Hanson (Oct. 11, 2017), https://www.justice.gov/opa/press-release/file/1003046/download.

153. And in just the past few weeks, DOJ's incorrect interpretation of Section 1373 has expanded again. In an October 2017 hearing on San Francisco's Motion for Summary Judgment in the related *San Francisco v. Trump* case, counsel for DOJ stated that Section 1373's reference to "immigration status" information includes a person's custody status, release date, a person's "identity and age," date of birth, residence, and home address. Hr'g Tr. (Oct. 23, 2017) at 21:8-23:3. Further, in recent briefing in the related *California v. Sessions* case, No. 3:17-cv-04701-WHO, DOJ took the view that Section 1373 also includes information about familial relationships. Dkt. No. 42, Defs.' Opp. to Pltf.'s Amended Mot. for Prelim Inj. at 21. In addition, at the same *San Francisco v. Trump* hearing, counsel for DOJ further stated that a "restriction" might include a jurisdiction's failure to inform its employees about Section 1373 to ensure that they "honor 1373." *Id.* at 20:22-21:5.

154. Although Defendants' overbroad reading of Section 1373 is incorrect, it nonetheless creates undue pressure for San Francisco. Although San Francisco knows that it complies with Section 1373 as properly interpreted, it has a credible fear of denial of its 2017 Byrne JAG application, the subsequent claw back of its FY 2017 Byrne JAG funds, or future enforcement actions against it or its officials if it executes the Section 1373 Certification in the face of Defendants' representations.

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155. But at the same time, San Francisco will suffer harm if it declines to execute the Section 1373 Certification. Doing so will render San Francisco ineligible for FY 2017 Byrne JAG funding.

156. Together, these conditions harm San Francisco, no matter what choices San Francisco makes regarding Byrne JAG grants. It can sacrifice its sovereignty and accede to the Administration's demands. And in doing so, it can potentially expose itself to criminal penalties, if the Administration later rejects its Section 1373 Certification, or to civil liability, if the Administration's Notice and Access Requirements intrude on individual's constitutional rights. Or it can refuse to change its considered and constitutionally protected policy judgments but forgo law enforcement dollars that are important to the community's public safety.

V. San Francisco Needs Declaratory Relief That It Properly Can Certify Compliance with Section 1373 As Required To Receive Byrne JAG Funds.

157. There is an actual controversy between San Francisco and DOJ regarding San Francisco's compliance with Section 1373, particularly in light of San Francisco's fear that DOJ will reject San Francisco's FY 2017 Section 1373 Certification, accept the Certification and later take enforcement action against San Francisco, or attempt to claw back FY 2016 Byrne JAG grant funds.

158. Even if DOJ could lawfully require San Francisco to execute the Section 1373 Certification, it cannot withhold funding from San Francisco based on San Francisco's purported non-compliance with Section 1373 because San Francisco fully satisfies the Section 1373 Certification's requirements.

159. Nothing in San Francisco Administrative Code Chapters 12H or 12I limits communications regarding citizenship or immigration status in any way, and these laws therefore comply with Section 1373.

160. San Francisco's laws do not restrict the sharing of immigration status information. Neither San Francisco nor any entity, agency, or official therein has in effect, or is subject to or bound by, any prohibition or restriction that applies to the programs or activities funded by the Byrne JAG program, and which concerns the government entity or official's sending to, or receiving from, the federal government any information regarding citizenship or immigration status.

161. None of the San Francisco departments administering a Byrne JAG-funded program has in place a prohibition or restriction on the sending to, or receiving from, the federal government any information regarding citizenship or immigration status, or on the maintaining of such information.

162. The departments administering Byrne JAG-funded programs are subject to and bound by Administrative Code Chapters 12H and 12I, and conduct their practices in accordance with those laws.

163. San Francisco has adopted policies and practices consistent with Administrative Code Chapters 12H and 12I.

164. San Francisco does not enforce detainer requests (as distinct from warrants), does not provide ICE access to its jails, and does not respond to notification requests from the federal government unless certain conditions are met. But compliance with these requests is not required by Section 1373, which speaks only to communications regarding citizenship and immigration status. Construing Section 1373 to extend to these activities would raise serious constitutional concerns.

165. San Francisco does not prohibit or in any way restrict the sharing of citizenship or immigration status information. San Francisco also does not provide a person's home address, residence, date of birth, or similar sensitive personal information to federal immigration officials. But the sharing of this information with the federal government is not required by Section 1373, which speaks only to communications regarding citizenship and immigration status.

COUNT ONE:

DECLARATORY RELIEF – SAN FRANCISCO COMPLIES WITH THE REQUIREMENTS OF THE SECTION 1373 CERTIFICATION

166. Plaintiff repeats and incorporates by reference each allegation of the prior paragraphs as if fully set forth herein.

167. San Francisco disputes Defendants' authority to require it to execute the Section 1373 Certification. But even if Defendants could require the Section 1373 Certification, they cannot withhold Byrne JAG funding from San Francisco in connection with that Certification because San Francisco complies with Section 1373.

168. San Francisco does not have in effect, purport to have in effect, or is subject to or bound by any prohibition or restriction that applies to the program or activity funded with Byrne JAG monies that deals with either the sending to, or receipt of, information regarding an individual's immigration status information with the federal government, or the maintenance of such information.

169. San Francisco's laws comply with Section 1373. San Francisco Administrative Code Chapters 12H and 12I do not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, immigration officials information regarding the citizenship or immigration status of any individual, or maintaining such information.

170. The departments administering Byrne JAG-funded programs are subject to and bound by these laws. These departments have policies and practices in place that are consistent with these laws.

171. Defendants contend that Chapters 12H and 12I of the San Francisco Administrative Code do not comply with Section 1373, based on their incorrect interpretation of Section 1373.

172. Defendants have not identified any other San Francisco laws, policies, or practices that do not comply with Section 1373.

173. Defendants' interpretation of Section 1373 is incorrect. Section 1373 only governs restrictions on the sharing and receiving of information related to citizenship and immigration status, and requesting from federal immigration enforcement agents, and maintaining of, information related to citizenship and immigration status. Section 1373 does not prohibit restrictions on detainer requests, notification requests, civil immigration authorities' access to jails, or requests for sensitive information like date of birth, residence, or home address. *See Steinle v. City and County of San Francisco*, 230 F. Supp. 3d 994, 1015-16 (N.D. Cal. 2017).

174. An actual controversy presently exists between San Francisco and Defendants about whether San Francisco's laws comply with Section 1373.

175. An actual controversy presently exists between San Francisco and Defendants regarding whether San Francisco has in effect, purports to have in effect, or is subject to or bound by any prohibition or restriction that applies to the program or activity funded with Byrne JAG monies

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that deals with either the sending to, or receiving from, immigration status information with the federal government, or the maintaining of such information.

176. A judicial determination resolving this controversy is necessary and appropriate.

COUNT TWO:
SEPARATION OF POWERS
(Notice, Access, and Section 1373 Requirements)

177. Plaintiff repeats and incorporates by reference each allegation of the prior paragraphs as if fully set forth herein.

178. In July and August 2017, Defendants issued solicitations seeking applications for the Byrne JAG program.

179. San Francisco has applied for the FY 2017 Byrne JAG program, but has not yet received a response to its application.

180. The solicitations state: "Individual FY 2017 JAG awards will include two new express conditions that, with respect to the 'program or activity' that would be funded by the FY 2017 award, are designed to ensure that States and units of local government that receive funds from the FY 2017 JAG award: (1) permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States; and (2) provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act." State Solicitation at 32; Local Solicitation at 30.

181. DOJ has subsequently stated that any FY 2017 award document San Francisco receives will require that:

> With respect to the "program or activity" that is funded (in whole or in part) by this award, as of the date the recipient accepts this award, and throughout the remainder of the period of performance for the award
>
> A. A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given to access any State (or State-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States.

> B. A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that, when a State (or State-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and as early as practicable (see para. 4.B. of this condition) provide the requested notice to DHS.

182. DOJ has also instructed that jurisdictions wishing to accept 2017 Byrne JAG funds will have to execute a Certification of Compliance with 8 U.S.C. § 1373.

183. The Constitution vests Congress with legislative powers, *see* U.S. Const. art. 1, § 1, and the spending power, *see* U.S. Const. art. 1, § 8, cl. 1. Absent a statutory provision or an express delegation, only Congress is entitled to attach conditions to federal funds.

184. Congress has not enacted the Notice, Access, and Section 1373 Requirements as part of any statutory scheme.

185. Congress has not enacted the Section 1373 Requirement as applicable to Byrne JAG funds.

186. Congress has not delegated to Defendants the ability to impose the Notice, Access, and Section 1373 Requirements on Byrne JAG funds.

187. Defendants are unilaterally imposing the Notice, Access, and Section 1373 Requirements without authorization from Congress.

188. For these reasons, the Notice, Access, and Section 1373 Requirements unlawfully and unconstitutionally intrude upon and usurp powers that have been assigned to Congress, violating principles of separation of powers.

COUNT THREE:
SPENDING CLAUSE
(Notice, Access, and Section 1373 Requirements)

189. Plaintiff repeats and incorporates by reference each allegation of the prior paragraphs as if fully set forth herein.

190. As described above, the Notice, Access, and Section 1373 Requirements violate separation of powers principles because they are not authorized by Congress, expressly or impliedly.

191. Even if Congress had delegated its authority to impose conditions on Byrne JAG funds, the Notice, Access, and Section 1373 Requirements would violate the Spending Clause by:

a. imposing conditions that are ambiguous, *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously…The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts [Congress' conditions]… There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."); and

b. imposing conditions that are not germane to the stated purposes of the Byrne JAG funds, *see South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[C]onditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'").

192. The Notice and Access Requirements additionally violate the Spending Clause by imposing conditions that would require Byrne JAG recipients to engage in unconstitutional activity such as detaining individuals without probable cause in violation of the Fourth Amendment, *see Dole*, 483 U.S. at 210 (Congress's spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional.").

PRAYER FOR RELIEF

Wherefore, San Francisco prays that the Court grant the following relief:

1. Declare that Chapters 12H and 12I of the San Francisco Administrative Code comply with Section 1373;

2. Declare that San Francisco does not have in place a prohibition or restriction that applies to the program or activity funded under the Byrne JAG program, and which deals with sending to, receiving from, or requesting immigration status information with the federal government, or maintaining such information;

3. Declare the Notice, Access, and Section 1373 Requirements Defendants have imposed on the Byrne JAG program unconstitutional;

4. Permanently enjoin Defendants from using the Notice, Access, and Section 1373 Requirements as funding restrictions for any Byrne JAG awards;

5. Enjoin Defendants from denying San Francisco Byrne JAG funding on the basis of Defendants' assertion that San Francisco does not comply with Section 1373;

6. Enjoin Defendants from clawing back San Francisco's Byrne JAG funds on the basis of Defendants' assertion that San Francisco does not comply with Section 1373;

7. Award San Francisco reasonable costs and attorneys' fees; and

8. Grant any other further relief that the Court deems fit and proper.

Dated: December 12, 2017

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CITY AND COUNTY OF SAN FRANCISCO

EXHIBIT A

U.S. Department of Justice

Office of Justice Programs

Washington, DC 20531

November 15, 2017

Edwin Lee
Mayor of the City of San Francisco
1 Dr. Carlton B. Goodlett Place, Suite 496
San Francisco, CA 94102

Dear Mayor Lee,

Your FY 2016 Byrne JAG grant award required you to comply with 8 U.S.C. § 1373. Section 1373 compliance is an ongoing requirement that the Department of Justice monitors. The Department is concerned that the following San Francisco laws, policies, or practices may violate section 1373:

- San Francisco Administrative Code Section 12H.2. This section prohibits the use of city funds or resources to "assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or other personal information . . . ." The Department is concerned that this appears to restrict the sending, maintaining, or receiving of information regarding immigration status, in violation of section 1373(a) and (b).

- San Francisco Administrative Code Section 12I.3. This section restricts "provid[ing] any individual's personal information to a federal immigration officer . . . ." The Department is concerned that this appears to restrict the sending of information regarding immigration status, in violation of section 1373(a).

By December 8, 2017, please submit a response to this letter that addresses whether San Francisco has laws, policies, or practices that violate section 1373, including those discussed above. In addition to your compliance in FY 2016, please address whether you would comply with section 1373 throughout the award period, should you receive an FY 2017 Byrne JAG grant award. To the extent San Francisco laws or policies contain so called "savings clauses," please explain in your submission the way these savings clauses are interpreted and applied, and whether these interpretations are communicated to San Francisco officers or employees.

The Department has not made a final determination regarding San Francisco's compliance with section 1373. This letter does not constitute final agency action and nothing in this letter creates any right or benefit enforceable at law against the United States.

Sincerely.

Alan R. Hanson

Alan Hanson
Acting Assistant Attorney General

EXHIBIT B

OMB No. 1121-0329
Approval Expires 12/31/2018

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

The U.S. Department of Justice (DOJ), Office of Justice Programs (OJP), Bureau of Justice Assistance (BJA) is seeking applications for the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. This program furthers the Department's mission by assisting State, local, and tribal efforts to prevent or reduce crime and violence.

Edward Byrne Memorial Justice Assistance Grant Program

FY 2017 Local Solicitation

Applications Due: September 5, 2017

Eligibility

Only units of local government may apply under this solicitation. By law, for purposes of the JAG Program, the term "units of local government" includes a town, township, village, parish, city, county, borough, or other general purpose political subdivision of a state; or, it may also be a federally recognized Indian tribal government that performs law enforcement functions (as determined by the Secretary of the Interior). A unit of local government may be any law enforcement district or judicial enforcement district established under applicable State law with authority to independently establish a budget and impose taxes; for example, in Louisiana, a unit of local government means a district attorney or parish sheriff.

A JAG application is not complete, and a unit of local government may not receive award funds, unless the chief executive of the applicant unit of local government (e.g., a mayor) properly executes, and the unit of local government submits, the "Certifications and Assurances by Chief Executive of Applicant Government" attached to this solicitation as Appendix I.

In addition, as discussed further below, in order validly to accept a Fiscal Year (FY) 2017 JAG award, the chief legal officer of the applicant unit of local government must properly execute, and the unit of local government must submit, the specific certification regarding compliance with 8 U.S.C. § 1373 attached to this solicitation as Appendix II. (Note: this requirement does not apply to Indian tribal governments.) (The text of 8 U.S.C. § 1373 appears in Appendix II.)

Eligible allocations under JAG are posted annually on the JAG web page under "Funding."

Deadline

Applicants must register in the OJP Grants Management System (GMS) prior to submitting an application under this solicitation. All applicants must register, even those that previously registered in GMS. Select the "Apply Online" button associated with the solicitation title. All registrations and applications are due by 5 p.m. eastern time on September 5, 2017.

This deadline does **not** apply to the certification regarding compliance with 8 U.S.C. § 1373. As explained below, a unit of local government (other than an Indian tribal government) may not validly accept an award unless that certification is submitted to the Office of Justice Programs (OJP) on or before the day the unit of local government submits the signed award acceptance documents.

For additional information, see How to Apply in Section D. Application and Submission Information.

Contact Information

For technical assistance with submitting an application, contact the Grants Management System (GMS) Support Hotline at 888–549–9901, option 3, or via email at GMS.HelpDesk@usdoj.gov. The GMS Support Hotline operates 24 hours a day, 7 days a week, including on federal holidays.

An applicant that experiences unforeseen GMS technical issues beyond its control that prevent it from submitting its application by the deadline must email the National Criminal Justice Reference Service (NCJRS) Response Center at grants@ncjrs.gov **within 24 hours after the application deadline** in order to request approval to submit its application. Additional information on reporting technical issues appears under "Experiencing Unforeseen GMS Technical Issues" in How to Apply in Section D. Application and Submission Information.

For assistance with any other requirement of this solicitation, applicants may contact the NCJRS Response Center by telephone at 1–800–851–3420; via TTY at 301–240–6310 (hearing impaired only); by email at grants@ncjrs.gov; by fax to 301–240–5830, or by web chat at https://webcontact.ncjrs.gov/ncjchat/chat.jsp. The NCJRS Response Center hours of operation are 10:00 a.m. to 6:00 p.m. eastern time, Monday through Friday, and 10:00 a.m. to 8:00 p.m. eastern time on the solicitation close date. Applicants also may contact the appropriate BJA State Policy Advisor.

Funding opportunity number assigned to this solicitation: BJA-2017-11301

Release date: August 3, 2017

Contents

Edward Byrne Memorial Justice Assistance Grant Program
FY 2017 Local Solicitation
CFDA #16.738

A. Program Description

Overview
The Edward Byrne Memorial Justice Assistance Grant (JAG) Program is the primary provider of federal criminal justice funding to States and units of local government. BJA will award JAG Program funds to eligible units of local government under this FY 2017 JAG Program Local Solicitation. (A separate solicitation will be issued for applications to BJA directly from States.)

Statutory Authority: The JAG Program statute is Subpart I of Part E of Title I of the Omnibus Crime Control and Safe Streets Act of 1968. Title I of the "Omnibus Act" generally is codified at Chapter 26 of Title 42 of the United States Code; the JAG Program statute is codified at 42 U.S.C. §§ 3750-3758. See also 28 U.S.C. § 530C(a).

Program-Specific Information

Permissible uses of JAG Funds – In general
In general, JAG funds awarded to a unit of local government under this FY 2017 solicitation may be used to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of the following:

- Law enforcement programs
- Prosecution and court programs
- Prevention and education programs
- Corrections and community corrections programs
- Drug treatment and enforcement programs
- Planning, evaluation, and technology improvement programs
- Crime victim and witness programs (other than compensation)
- Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams

Under the JAG Program, units of local government may use award funds for broadband deployment and adoption activities as they relate to criminal justice activities.

Limitations on the use of JAG funds
Prohibited and controlled uses of funds – JAG funds may not be used (whether directly or indirectly) for any purpose prohibited by federal statute or regulation, including those purposes specifically prohibited by the JAG Program statute as set out at 42 U.S.C. § 3751(d):

(1) Any security enhancements or any equipment to any nongovernmental entity that is not engaged in criminal justice or public safety.

(2) Unless the Attorney General certifies that extraordinary and exigent circumstances exist that make the use of such funds to provide such matters essential to the maintenance of public safety and good order—

(a) Vehicles (excluding police cruisers), vessels (excluding police boats), or aircraft (excluding police helicopters)
(b) Luxury items
(c) Real estate
(d) Construction projects (other than penal or correctional institutions)
(e) Any similar matters

For additional information on expenditures prohibited under JAG, as well as expenditures that are permitted but "controlled," along with the process for requesting approval regarding controlled items, refer to the JAG Prohibited and Controlled Expenditures Guidance. Information also appears in the JAG FAQs.

Cap on use of JAG award funds for administrative costs – A unit of local government may use up to 10 percent of a JAG award, including up to 10 percent of any earned interest, for costs associated with administering the award.

Prohibition of supplanting; no use of JAG funds as "match" – JAG funds may not be used to supplant State or local funds but must be used to increase the amounts of such funds that would, in the absence of federal funds, be made available for law enforcement activities. See the JAG FAQs on BJA's JAG web page for examples of supplanting.

Although supplanting is prohibited, as discussed under "What An Application Should Include," the leveraging of federal funding is encouraged.

Absent specific federal statutory authority to do so, JAG award funds may not be used as "match" for the purposes of other federal awards.

Other restrictions on use of funds – If a unit of local government chooses to use its FY 2017 JAG funds for particular, defined types of expenditures, it must satisfy certain preconditions:

- Body-Worn Cameras (BWC)
  A unit of local government that proposes to use FY 2017 JAG award funds to purchase BWC equipment or to implement or enhance BWC programs, must provide to OJP a certification(s) that the unit of local government has policies and procedures in place related to BWC equipment usage, data storage and access, privacy considerations, training, etc. The certification can be found at: https://www.bja.gov/Funding/BodyWornCameraCert.pdf.

A unit of local government that proposes to use JAG funds for BWC-related expenses will have funds withheld until the required certification is submitted and approved by OJP.

The BJA BWC Toolkit provides model BWC policies and best practices to assist departments in implementing BWC programs.

Apart from the JAG Program, BJA provides funds under the Body-Worn Camera Policy and Implementation Program (BWC Program). The BWC Program allows jurisdictions to develop and implement policies and practices required for effective program adoption and address program factors including the purchase, deployment, and maintenance of camera systems and equipment; data storage and access; and privacy considerations. Interested units of local government may wish to refer to the BWC web page for more information. Units of local government should note, however, that JAG funds may not be used as any part of the 50 percent match required by the BWC Program.

- Body Armor
  Ballistic-resistant and stab-resistant body armor can be funded through the JAG Program, as well as through BJA's Bulletproof Vest Partnership (BVP) Program. The BVP Program is designed to provide a critical resource to local law enforcement through the purchase of ballistic-resistant and stab-resistant body armor. For more information on the BVP Program, including eligibility and application, refer to the BVP web page. Units of local government should note, however, that JAG funds may not be used as any part of the 50 percent match required by the BVP Program.

  Body armor purchased with JAG funds may be purchased at any threat level, make, or model from any distributor or manufacturer, as long as the body armor has been tested and found to comply with the latest applicable National Institute of Justice (NIJ) ballistic or stab standards. In addition, body armor purchased must be made in the United States.

  As is the case in the BVP Program, units of local government that propose to purchase body armor with JAG funds must certify that law enforcement agencies receiving body armor have a written "mandatory wear" policy in effect. FAQs related to the mandatory wear policy and certifications can be found at: https://www.bja.gov/Funding/JAGFAQ.pdf. This policy must be in place for at least all uniformed officers before any FY 2017 funding can be used by the unit of local government for body armor. There are no requirements regarding the nature of the policy other than it being a mandatory wear policy for all uniformed officers while on duty. The certification must be signed by the Authorized Representative and must be attached to the application if proposed as part of the application. If the unit of local government proposes to change project activities to utilize JAG funds to purchase body armor after the award is accepted, the unit of local government must submit the signed certification to BJA at that time. A mandatory wear concept and issues paper and a model policy are available by contacting the BVP Customer Support Center at vests@usdoj.gov or toll free at 1–877–758–3787. The certification form related to mandatory wear can be found at: www.bja.gov/Funding/BodyArmorMandatoryWearCert.pdf.

- DNA Testing of Evidentiary Materials and Upload of DNA Profiles to a Database

If JAG Program funds will be used for DNA testing of evidentiary materials, any resulting **eligible** DNA profiles must be uploaded to the Combined DNA Index System (CODIS, the national DNA database operated by the Federal Bureau of Investigation [FBI]) by a government DNA lab with access to CODIS. No profiles generated with JAG funding may be entered into any other non-governmental DNA database without prior express written approval from BJA.

In addition, funds may not be used for purchase of DNA equipment and supplies when the resulting DNA profiles from such technology are not accepted for entry into CODIS.

- Interoperable Communication
  Units of local government (including subrecipients) that use FY 2017 JAG funds to support emergency communications activities (including the purchase of interoperable communications equipment and technologies such as voice-over-internet protocol bridging or gateway devices, or equipment to support the build out of wireless broadband networks in the 700 MHz public safety band under the Federal Communications Commission [FCC] Waiver Order) should review FY 2017 SAFECOM Guidance. The SAFECOM Guidance is updated annually to provide current information on emergency communications policies, eligible costs, best practices, and technical standards for State, local, tribal, and territorial grantees investing federal funds in emergency communications projects. Additionally, emergency communications projects should support the Statewide Communication Interoperability Plan (SCIP) and be coordinated with the fulltime Statewide Interoperability Coordinator (SWIC) in the State of the project. As the central coordination point for their State's interoperability effort, the SWIC plays a critical role, and can serve as a valuable resource. SWICs are responsible for the implementation of SCIP through coordination and collaboration with the emergency response community. The U.S. Department of Homeland Security Office of Emergency Communications maintains a list of SWICs for each of the States and territories. Contact OEC@hq.dhs.gov. All communications equipment purchased with FY 2017 JAG Program funding should be identified during quarterly performance metrics reporting.

  In order to promote information sharing and enable interoperability among disparate systems across the justice and public safety communities, OJP requires the recipient to comply with DOJ's Global Justice Information Sharing Initiative guidelines and recommendations for this particular grant. Recipients must conform to the Global Standards Package (GSP) and all constituent elements, where applicable, as described at: https://www.it.ojp.gov/gsp_grantcondition. Recipients must document planned approaches to information sharing and describe compliance to GSP and an appropriate privacy policy that protects shared information, or provide detailed justification for why an alternative approach is recommended.

Required compliance with applicable federal laws
By law, the chief executive (e.g., the mayor) of each unit of local government that applies for an FY 2017 JAG award must certify that the unit of local government will "comply with all provisions of [the JAG program statute] and all other applicable Federal laws." To satisfy this requirement, each unit of local government applicant must submit two properly executed certifications using the forms shown in Appendix I and Appendix II.

All applicants should understand that OJP awards, including certifications provided in connection with such awards, are subject to review by DOJ, including by OJP and by the DOJ

Office of the Inspector General. Applicants also should understand that a materially false, fictitious, or fraudulent statement (or concealment or omission of a material fact) in a certification submitted to OJP in support of an application may be the subject of criminal prosecution, and also may result in civil penalties and administrative remedies for false claims or otherwise. Administrative remedies that may be available to OJP with respect to an FY 2017 award include suspension or termination of the award, placement on the DOJ high risk grantee list, disallowance of costs, and suspension or debarment of the recipient.

BJA areas of emphasis

BJA recognizes that there are significant pressures on local criminal justice systems. In these challenging times, shared priorities and leveraged resources can make a significant impact. As a component of OJP, BJA intends to focus much of its work on the areas of emphasis described below, and encourages each unit of local government recipient of an FY 2017 JAG award to join us in addressing these challenges:

- *Reducing Gun Violence* – Gun violence has touched nearly every State and local government in America. While our nation has made great strides in reducing violent crime, some municipalities and regions continue to experience unacceptable levels of violent crime at rates far in excess of the national average. BJA encourages units of local government to invest JAG funds in programs to combat gun violence, enforce existing firearms laws, and improve the process for ensuring that persons prohibited from purchasing guns are prevented from doing so by enhancing reporting to the FBI's National Instant Criminal Background Check System (NICS).

- *National Incident-Based Reporting System (NIBRS)* – The FBI has formally announced its intentions to establish NIBRS as the law enforcement crime data reporting standard for the nation. The transition to NIBRS will provide a more complete and accurate picture of crime at the national, State, and local levels. Once this transition is complete, the FBI will no longer collect summary data and will accept data only in the NIBRS format. Also, once the transition is complete, JAG award amounts will be calculated on the basis of submitted NIBRS data. Transitioning all law enforcement agencies to NIBRS is the first step in gathering more comprehensive crime data. BJA encourages recipients of FY 2017 JAG awards to use JAG funds to expedite the transition to NIBRS.

- *Officer Safety and Wellness* The issue of law enforcement safety and wellness is an important priority for the Department of Justice. Preliminary data compiled by the National Law Enforcement Officers Memorial Fund indicates that there were 135 line-of-duty law enforcement deaths in 2016—the highest level in the past 5 years and a 10 percent increase from 2015 (123 deaths).

  Firearms-related deaths continued to be the leading cause of death (64), increasing 56 percent from 2015 (41). Of particular concern is that of the 64 firearms-related deaths, 21 were as a result of ambush-style attacks representing the highest total in more than two decades. Traffic-related deaths continued to rise in 2016 with 53 officers killed, a 10 percent increase from 2015 (48 deaths). Additionally, there were 11 job-related illness deaths in 2016, mostly heart attacks.

  BJA sees a vital need to focus not only on tactical officer safety concerns but also on health and wellness as they affect officer performance and safety. It is important for law enforcement to have the tactical skills necessary, and also be physically and mentally well, to perform, survive, and be resilient in the face of the demanding duties of the

profession. BJA encourages units of local government to use JAG funds to address these needs by providing training, including paying for tuition and travel expenses related to attending trainings such as VALOR training, as well as funding for health and wellness programs for law enforcement officers.

- *Border Security* – The security of United States borders is critically important to the reduction and prevention of transnational drug-trafficking networks and combating all forms of human trafficking within the United States (sex and labor trafficking of foreign nationals and U.S. citizens of all sexes and ages). These smuggling operations on both sides of the border contribute to a significant increase in violent crime and U.S. deaths from dangerous drugs. Additionally, illegal immigration continues to place a significant strain on federal, State, and local resources—particularly on those agencies charged with border security and immigration enforcement—as well as the local communities into which many of the illegal immigrants are placed. BJA encourages units of local government to use JAG funds to support law enforcement hiring, training, and technology enhancement in the area of border security.

- *Collaborative Prosecution* – BJA supports strong partnerships between prosecutors and police as a means to improve case outcomes and take violent offenders off the street. BJA strongly encourages State and local law enforcement to foster strong partnerships with prosecutors to adopt new collaborative strategies aimed at combating increases in crime, particularly violent crime. (BJA's "Smart Prosecution" Initiative is a related effort by OJP to promote partnerships between prosecutors and researchers to develop and deliver effective, data-driven, evidence-based strategies to solve chronic problems and fight crime.)

Goals, Objectives, and Deliverables
In general, the FY 2017 JAG Program is designed to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice. The JAG Local Program is designed to assist units of local government with respect to criminal justice.

As discussed in more detail below, a unit of local government that receives an FY 2017 JAG award will be required to prepare various types of reports and to submit data related to performance measures and accountability. The Goals, Objectives, and Deliverables are directly related to the JAG Progam accountability measures.

Evidence-Based Programs or Practices
OJP strongly emphasizes the use of data and evidence in policy making and program development in criminal justice, juvenile justice, and crime victim services. OJP is committed to:

- Improving the quantity and quality of evidence OJP generates
- Integrating evidence into program, practice, and policy decisions within OJP and the field
- Improving the translation of evidence into practice

OJP considers programs and practices to be evidence-based when their effectiveness has been demonstrated by causal evidence, generally obtained through one or more outcome evaluations. Causal evidence documents a relationship between an activity or intervention (including technology) and its intended outcome, including measuring the direction and size of a change, and the extent to which a change may be attributed to the activity or intervention.

Causal evidence depends on the use of scientific methods to rule out, to the extent possible, alternative explanations for the documented change. The strength of causal evidence, based on the factors described above, will influence the degree to which OJP considers a program or practice to be evidence-based. The OJP CrimeSolutions.gov website is one resource that applicants may use to find information about evidence-based programs in criminal justice, juvenile justice, and crime victim services.

A useful matrix of evidence-based policing programs and strategies is available through the Center for Evidence-Based Crime Policy at George Mason University. BJA offers a number of program models designed to effectively implement promising and evidence-based strategies through the BJA "Smart Suite" of programs, including Smart Policing, Smart Supervision, Smart Pretrial, Smart Defense, Smart Prosecution, Smart Reentry, and others (see: https://www.bja.gov/Programs/CRPPE/smartsuite.html). BJA encourages units of local government to use JAG funds to support these "smart on crime" strategies, including effective partnerships with universities, research partners, and non-traditional criminal justice partners.

BJA Success Stories
The BJA Success Stories web page features projects that have demonstrated success or shown promise in reducing crime and positively impacting communities. This web page will be a valuable resource for States, localities, territories, tribes, and criminal justice professionals that seek to identify and learn about JAG and other successful BJA-funded projects linked to innovation, crime reduction, and evidence-based practices. **BJA strongly encourages the recipient to submit success stories annually (or more frequently).**

If a unit of local government has a success story it would like to submit, it may be submitted through My BJA account, using "add a Success Story" and the Success Story Submission form. Register for a My BJA account using this registration link.

B. Federal Award Information

BJA estimates that it will make up to 1,100 local awards totaling an estimated $83,000,000.

Awards of at least $25,000 are 4 years in length, and award periods will be from October 1, 2016 through September 30, 2020. Extensions beyond this period may be made on a case-by-case basis at the discretion of BJA and must be requested via GMS no less than 30 days prior to the grant end date.

Awards of less than $25,000 are 2 years in length, and award periods will be from October 1, 2016 through September 30, 2018. Extensions of up to 2 years can be requested for these awards via GMS **no less than 30 days prior to the grant end date**, and will be automatically granted upon request.

All awards are subject to the availability of appropriated funds and to any modifications or additional requirements that may be imposed by statute.

Type of Award
BJA expects that any award under this solicitation will be in the form of a grant. See Statutory and Regulatory Requirements; Award Conditions, under Section F. Federal Award Administration Information, for a brief discussion of important statutes, regulations, and award conditions that apply to many (or in some cases, all) OJP grants.

JAG awards are based on a statutory formula as described below.

Once each fiscal year's overall JAG Program funding level is determined, BJA works with the Bureau of Justice Statistics (BJS) to begin a four-step grant award calculation process, which, in general, consists of:

(1) Computing an initial JAG allocation for each State, based on its share of violent crime and population (weighted equally).

(2) Reviewing the initial JAG allocation amount to determine if the State allocation is less than the minimum award amount defined in the JAG legislation (0.25 percent of the total). If this is the case, the State is funded at the minimum level, and the funds required for this are deducted from the overall pool of JAG funds. Each of the remaining States receive the minimum award plus an additional amount based on its share of violent crime and population.

(3) Dividing each State's final award amount (except for the territories and District of Columbia) between the State and its units of local governments at a rate of 60 and 40 percent, respectively.

(4) Determining unit of local government award allocations, which are based on their proportion of the State's 3-year violent crime average. If the "eligible award amount" for a particular unit of local government as determined on this basis is $10,000 or more, then the unit of local government is eligible to apply directly to OJP (under the JAG Local solicitation) for a JAG award. If the "eligible award amount" to a particular unit of local government as determined on this basis would be less than $10,000, however, the funds are not made available for a direct award to that particular unit of local government, but instead are added to the amount that otherwise would have been awarded to the State.

Financial Management and System of Internal Controls
Award recipients and subrecipients (including recipients or subrecipients that are pass-through entities[1]) must, as described in the Part 200 Uniform Requirements[2] as set out at 2 C.F.R. 200.303:

(a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that [the recipient (and any subrecipient)] is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance in "Standards for Internal Control in the Federal Government" issued by the Comptroller General of the United States and the "Internal Control Integrated Framework", issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(b) Comply with Federal statutes, regulations, and the terms and conditions of the Federal awards.

[1] For purposes of this solicitation, the phrase "pass-through entity" includes any recipient or subrecipient that provides a subaward ("subgrant") to carry out part of the funded award or program.
[2] The "Part 200 Uniform Requirements" refers to the DOJ regulation at 2 C.F.R Part 2800, which adopts (with certain modifications) the provisions of 2 C.F.R. Part 200.

(c) Evaluate and monitor [the recipient's (and any subrecipient's)] compliance with statutes, regulations, and the terms and conditions of Federal awards.

(d) Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings.

(e) Take reasonable measures to safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or [the recipient (or any subrecipient)] considers sensitive consistent with applicable Federal, State, local, and tribal laws regarding privacy and obligations of confidentiality.

To help ensure that applicants understand the administrative requirements and cost principles, OJP encourages prospective applicants to enroll, at no charge, in the DOJ Grants Financial Management Online Training, available here.

Budget and Financial Information
Trust Fund – Units of local government may draw down JAG funds either in advance or on a reimbursement basis. To draw down in advance, a trust fund must be established in which to deposit the funds. The trust fund may or may not be an interest-bearing account. If subrecipients draw down JAG funds in advance, they also must establish a trust fund in which to deposit funds.

Tracking and reporting regarding JAG funds used for State administrative costs – As indicated earlier, a unit of local government may use up to 10 percent of a JAG award, including up to 10 percent of any earned interest, for costs associated with administering the award. Administrative costs (when utilized) must be tracked separately; a recipient must report in separate financial status reports (SF-425) those expenditures that specifically relate to each particular JAG award during any particular reporting period.

No commingling – Both the unit of local government recipient and all subrecipients of JAG funds are prohibited from commingling funds on a program-by-program or project-by-project basis. *For this purpose, use of the administrative JAG funds to perform work across all active awards in any one year is not considered comingling.*

Disparate Certification – In some cases, as defined by the legislation, a disparity may exist between the funding eligibility of a county and its associated municipalities. Three different types of disparities may exist:

- The first type is a zero-county disparity. This situation exists when one or more municipalities within a county are eligible for a direct award but the county is not; yet the county is responsible for providing criminal justice services (such as prosecution and incarceration) for the municipality. In this case, the county is entitled to part of the municipality's award because it shares the cost of criminal justice operations, although it may not report crime data to the FBI. This is the most common type of disparity.

- A second type of disparity exists when both a county and a municipality within that county qualify for a direct award, but the award amount for the municipality exceeds 150 percent of the county's award amount.

- The third type of disparity occurs when a county and multiple municipalities within that county are all eligible for direct awards, but the sum of the awards for the individual municipalities exceeds 400 percent of the county's award amount.

Jurisdictions certified as disparate must identify a fiscal agent that will submit a joint application for the aggregate eligible allocation to all disparate municipalities. The joint application must determine and specify the award distribution to each unit of local government and the purposes for which the funds will be used. When beginning the JAG application process, a Memorandum of Understanding (MOU) that identifies which jurisdiction will serve as the applicant or fiscal agent for joint funds must be completed and signed by the Authorized Representative for each participating jurisdiction. The signed MOU should be attached to the application. For a sample MOU, go to: www.bja.gov/Funding/JAGMOU.pdf.

Cost Sharing or Match Requirement
The JAG Program does not require a match.

For additional cost sharing and match information, see the DOJ Grants Financial Guide.

Pre-Agreement Costs (also known as Pre-award Costs)
Pre-agreement costs are costs incurred by the applicant prior to the start date of the period of performance of the grant award.

OJP does *not* typically approve pre-agreement costs. An applicant must request and obtain the prior written approval of OJP for any such costs. All such costs incurred prior to award and prior to approval of the costs are incurred *at the sole risk* of the applicant. (Generally, no applicant should incur project costs *before* submitting an application requesting federal funding for those costs.)

Should there be extenuating circumstances that make it appropriate for OJP to consider approving pre-agreement costs, the applicant may contact the point of contact listed on the title page of this solicitation for the requirements concerning written requests for approval. If approved in advance by OJP, award funds may be used for pre-agreement costs, consistent with the recipient's approved budget and applicable cost principles. See the section on "Costs Requiring Prior Approval" in the DOJ Grants Financial Guide for more information.

Prior Approval, Planning, and Reporting of Conference/Meeting/Training Costs
OJP strongly encourages every applicant that proposes to use award funds for any conference-, meeting-, or training-related activity (or similar event) to review carefully—before submitting an application—the OJP and DOJ policy and guidance on approval, planning, and reporting of such events, available at:
https://www.ojp.gov/financialguide/DOJ/PostawardRequirements/chapter3.10a.htm.

OJP policy and guidance (1) encourage minimization of conference, meeting, and training costs; (2) require prior written approval (which may affect project timelines) of most conference, meeting, and training costs for cooperative agreement recipients, as well as some conference, meeting, and training costs for grant recipients; and (3) set cost limits, which include a general prohibition of all food and beverage costs.

Costs Associated with Language Assistance (if applicable)
If an applicant proposes a program or activity that would deliver services or benefits to individuals, the costs of taking reasonable steps to provide meaningful access to those services

or benefits for individuals with limited English proficiency may be allowable. Reasonable steps to provide meaningful access to services or benefits may include interpretation or translation services, where appropriate.

For additional information, see the "Civil Rights Compliance" section under "Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards" in the OJP Funding Resource Center.

C. Eligibility Information

For information on eligibility, see the title page of this solicitation.

Note that, as discussed in more detail below, the certification regarding compliance with 8 U.S.C. § 1373 must be executed and submitted before a unit of local government (other than an Indian tribal government) can make a valid award acceptance. Also, a unit of local government may not receive award funds (and its award will include a condition that withholds funds) until it submits a properly executed "Certifications and Assurances by Chief Executive of Applicant Government."

D. Application and Submission Information

What an Application Should Include
This section describes in detail what an application should include. An applicant should anticipate that if it fails to submit an application that contains all of the specified elements, it may negatively affect the review of its application; and, should a decision be made to make an award, it may result in the inclusion of award conditions that preclude the recipient from accessing or using award funds until the recipient satisfies the conditions and OJP makes the funds available.

An applicant may combine the Budget Narrative and the Budget Detail Worksheet in one document. If an applicant submits only one budget document, however, it must contain **both** narrative and detail information. Please review the "Note on File Names and File Types" under How to Apply to be sure applications are submitted in permitted formats.

OJP strongly recommends that applicants use appropriately descriptive file names (e.g., "Program Narrative," "Budget Detail Worksheet and Budget Narrative," "Timelines," "Memoranda of Understanding," "Résumés") for all attachments. Also, OJP recommends that applicants include résumés in a single file.

In general, if a unit of local government fails to submit required information or documents, OJP either will return the unit of local government's application in the Grants Management System (GMS) for submission of the missing information or documents, or will attach a condition to the award that will withhold award funds until the necessary information and documents are submitted. (As discussed elsewhere in this solicitation, the certification regarding compliance with 8 U.S.C. § 1373—which is set out at Appendix II—will be handled differently. Unless and until that certification is submitted, the unit of local government (other than an Indian tribal government) will be unable to make a valid acceptance of the award.)

1. **Information to Complete the Application for Federal Assistance (SF-424)**
   The SF-424 is a required standard form used as a cover sheet for submission of pre-applications, applications, and related information. GMS takes information from the applicant's profile to populate the fields on this form.

   To avoid processing delays, an applicant must include an accurate legal name on its SF-424. Current OJP award recipients, when completing the field for "Legal Name," should use the same legal name that appears on the prior year award document, which is also the legal name stored in OJP's financial system. On the SF-424, enter the Legal Name in box 5 and Employer Identification Number (EIN) in box 6 exactly as it appears on the prior year award document. An applicant with a current, active award(s) must ensure that its GMS profile is current. If the profile is not current, the applicant should submit a Grant Adjustment Notice updating the information on its GMS profile prior to applying under this solicitation.

   A new applicant entity should enter the Official Legal Name and address of the applicant entity in box 5 and the EIN in box 6 of the SF-424.

   Intergovernmental Review: This solicitation ("funding opportunity") **is** within the scope of Executive Order 12372, concerning State opportunities to coordinate applications for federal financial assistance. See 28 C.F.R. Part 30. An applicant may find the names and addresses of State Single Points of Contact (SPOCs) at the following website: https://www.whitehouse.gov/omb/grants_spoc/. If the State appears on the SPOC list, the applicant must contact the State SPOC to find out about, and comply with, the State's process under E.O. 12372. In completing the SF-424, an applicant whose State appears on the SPOC list is to make the appropriate selection in response to question 19 once the applicant has complied with its State E.O. 12372 process. (An applicant whose State does not appear on the SPOC list should answer question 19 by selecting the response that the "Program is subject to E.O. 12372 but has not been selected by the State for review.")

2. **Project Abstract**
   Applications should include a high-quality project abstract that summarizes the proposed project in 400 words or less. Project abstracts should be:

   - Written for a general public audience.
   - Submitted as a separate attachment with "Project Abstract" as part of its file name.
   - Single-spaced, using a standard 12-point font (Times New Roman) with 1-inch margins.
   - Include applicant name, title of the project, a brief description of the problem to be addressed and the targeted area/population, project goals and objectives, a description of the project strategy, any significant partnerships, and anticipated outcomes.
   - Identify up to 10 project identifiers that would be associated with proposed project activities. The list of identifiers can be found at www.bja.gov/funding/JAGIdentifiers.pdf.

3. **Program Narrative**
   The following sections **should** be included as part of the program narrative[3]:

   a. Statement of the Problem – Identify the unit of local government's strategy/funding priorities for the FY 2017 JAG funds, the subgrant award process and timeline, and a

[3] For information on subawards (including the details on proposed subawards that should be included in the application), see "Budget and Associated Documentation" under Section D. Application and Submission Information.

description of the programs to be funded over the grant period. Units of local government are strongly encouraged to prioritize the funding on evidence-based projects.

b. Project Design and Implementation – Describe the unit of local government's strategic planning process, if any, that guides its priorities and funding strategy. This should include a description of how the local community is engaged in the planning process and the data and analysis utilized to support the plan; it should identify the stakeholders currently participating in the strategic planning process, the gaps in the needed resources for criminal justice purposes, and how JAG funds will be coordinated with State and related justice funds.

c. Capabilities and Competencies – Describe any additional strategic planning/coordination efforts in which the units of local government participates with other criminal justice criminal/juvenile justice agencies in the State.

d. Plan for Collecting the Data Required for this Solicitation's Performance Measures – OJP will require each successful applicant to submit specific performance measures data as part of its reporting under the award (see "General Information about Post-Federal Award Reporting Requirements" in Section F. Federal Award Administration Information). The performance measures correlate to the goals, objectives, and deliverables identified under "Goals, Objectives, and Deliverables" in Section A. Program Description. Post award, recipients will be required to submit quarterly performance metrics through BJA's Performance Measurement Tool (PMT), located at: https://bjapmt.ojp.gov. The application should describe the applicant's plan for collection of all of the performance measures data listed in the JAG Program accountability measures at: https://bjapmt.ojp.gov/help/jagdocs.html.

BJA does not require applicants to submit performance measures data with their application. Performance measures are included as an alert that BJA will require successful applicants to submit specific data as part of their reporting requirements. For the application, applicants should indicate an understanding of these requirements and discuss how they will gather the required data, should they receive funding.

Note on Project Evaluations

An applicant that proposes to use award funds through this solicitation to conduct project evaluations should be aware that certain project evaluations (such as systematic investigations designed to develop or contribute to generalizable knowledge) may constitute "research" for purposes of applicable DOJ human subjects protection regulations. However, project evaluations that are intended only to generate internal improvements to a program or service, or are conducted only to meet OJP's performance measure data reporting requirements, likely do not constitute "research." Each applicant should provide sufficient information for OJP to determine whether the particular project it proposes would either intentionally or unintentionally collect and/or use information in such a way that it meets the DOJ regulatory definition of research that appears at 28 C.F.R. Part 46 ("Protection of Human Subjects").

Research, for the purposes of human subjects protection for OJP-funded programs, is defined as "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge." 28 C.F.R. 46.102(d).

For additional information on determining whether a proposed activity would constitute research for purposes of human subjects protection, applicants should consult the decision tree in the "Research and the Protection of Human Subjects" section of the "Requirements related to Research" web page of the "Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017" available through the OJP Funding Resource Center. Every prospective applicant whose application may propose a research or statistical component also should review the "Data Privacy and Confidentiality Requirements" section on that web page.

4. Budget and Associated Documentation

(a) Budget Detail Worksheet

A sample Budget Detail Worksheet can be found at www.ojp.gov/funding/Apply/Resources/BudgetDetailWorksheet.pdf. An applicant that submits its budget in a different format should use the budget categories listed in the sample budget worksheet. The Budget Detail Worksheet should break out costs by year.

For questions pertaining to budget and examples of allowable and unallowable costs, see the DOJ Grants Financial Guide.

(b) Budget Narrative

The Budget Narrative should thoroughly and clearly describe every category of expense listed in the proposed Budget Detail Worksheet. OJP expects proposed budgets to be complete, cost effective, and allowable (e.g., reasonable, allocable, and necessary for project activities). This narrative should include a full description of all costs, including administrative costs (if applicable).

An applicant should demonstrate in its Budget Narrative how it will maximize cost effectiveness of award expenditures. Budget narratives should generally describe cost effectiveness in relation to potential alternatives and the goals of the project. For example, a budget narrative should detail why planned in-person meetings are necessary, or how technology and collaboration with outside organizations could be used to reduce costs, without compromising quality.

The Budget Narrative should be mathematically sound and correspond clearly with the information and figures provided in the Budget Detail Worksheet. The narrative should explain how the applicant estimated and calculated all costs, and how those costs are necessary to the completion of the proposed project. The narrative may include tables for clarification purposes, but need not be in a spreadsheet format. As with the Budget Detail Worksheet, the Budget Narrative should describe costs by year.

(c) Information on Proposed Subawards (if any), as well as on Proposed Procurement Contracts (if any)

Applicants for OJP awards typically may propose to make "subawards." Applicants also may propose to enter into procurement "contracts" under the award.

Whether—for purposes of federal grants administrative requirements—a particular agreement between a recipient and a third party will be considered a "subaward" or instead considered a procurement "contract" under the award is determined by federal rules and applicable OJP guidance. It is an important distinction, in part because the

federal administrative rules and requirements that apply to "subawards" and procurement "contracts" under awards differ markedly.

In general, the central question is the relationship between what the third party will do under its agreement with the recipient and what the recipient has committed (to OJP) to do under its award to further a public purpose (e.g., services the recipient will provide, products it will develop or modify, research or evaluation it will conduct). If a third party will provide some of the services the recipient has committed (to OJP) to provide, will develop or modify all or part of a product the recipient has committed (to OJP) to develop or modify, or conduct part of the research or evaluation the recipient has committed (to OJP) to conduct, OJP will consider the agreement with the third party a subaward for purposes of federal grants administrative requirements.

This will be true **even if** the recipient, for internal or other non-federal purposes, labels or treats its agreement as a procurement, a contract, or a procurement contract. Neither the title nor the structure of an agreement determines whether the agreement—for purposes of federal grants administrative requirements—is a "subaward" or is instead a procurement "contract" under an award.

Additional guidance on the circumstances under which (for purposes of federal grants administrative requirements) an agreement constitutes a subaward as opposed to a procurement contract under an award is available (along with other resources) on the OJP Part 200 Uniform Requirements web page.

(1) Information on proposed subawards and required certification regarding 8 U.S.C. § 1373 from certain subrecipients

General requirement for federal authorization of any subaward; statutory authorizations of subawards under the JAG Program statute. Generally, a recipient of an OJP award may not make subawards ("subgrants") unless the recipient has specific federal authorization to do so. Unless an applicable statute or DOJ regulation specifically authorizes (or requires) particular subawards, a recipient must have authorization from OJP before it may make a subaward.

JAG subawards that are required or specifically authorized by statute (see 42 U.S.C. § 3751(a) and 42 U.S.C. § 3755) do not require prior approval to authorize subawards. This includes subawards made by units of local government under the JAG Program.

A particular subaward may be authorized by OJP because the recipient included a sufficiently detailed description and justification of the proposed subaward in the application as approved by OJP. If, however, a particular subaward is not authorized by federal statute or regulation and is not sufficiently described and justified in the application as approved by OJP, the recipient will be required, post award, to request and obtain written authorization from OJP before it may make the subaward.

If an applicant proposes to make one or more subawards to carry out the federal award and program, and those subawards are not specifically authorized (or required) by statute or regulation, the applicant should: (1) identify (if known) the proposed subrecipient(s), (2) describe in detail what each subrecipient will do to carry out the federal award and federal program, and (3) provide a justification for the

subaward(s), with details on pertinent matters such as special qualifications and areas of expertise. Pertinent information on subawards should appear not only in the Program Narrative but also in the Budget Detail Worksheet and budget narrative.

NEW ***Required certification regarding 8 U.S.C. § 1373 from any proposed subrecipient that is a unit of local government or "public" institution of higher education.*** Before a unit of local government may subaward FY 2017 award funds to another unit of local government or to a public institution of higher education, it will be required (by award condition) to obtain a properly executed certification regarding compliance with 8 U.S.C. § 1373 from the proposed subrecipient. (This requirement regarding 8 U.S.C. § 1373 will not apply to subawards to Indian tribes). The specific certification the unit of local government must require from another unit of local government will vary somewhat from the specific certification it must require from a public institution of higher education. The forms will be posted and available for download at: https://ojp.gov/funding/Explore/SampleCertifications-8USC1373.htm.

(2) Information on proposed procurement contracts (with specific justification for proposed noncompetitive contracts over $150,000)

Unlike a recipient contemplating a subaward, a recipient of an OJP award generally does not need specific prior federal authorization to enter into an agreement that—for purposes of federal grants administrative requirements—is considered a procurement contract, **provided that** (1) the recipient uses its own documented procurement procedures and (2) those procedures conform to applicable federal law, including the Procurement Standards of the (DOJ) Part 200 Uniform Requirements (as set out at 2 C.F.R. 200.317 - 200.326). The Budget Detail Worksheet and budget narrative should identify proposed procurement contracts. (As discussed above, subawards must be identified and described separately from procurement contracts.)

The Procurement Standards in the (DOJ) Part 200 Uniform Requirements, however, reflect a general expectation that agreements that (for purposes of federal grants administrative requirements) constitute procurement "contracts" under awards will be entered into on the basis of full and open competition. If a proposed procurement contract would exceed the simplified acquisition threshold—currently, $150,000—a recipient of an OJP award may not proceed without competition, unless and until the recipient receives specific advance authorization from OJP to use a non-competitive approach for the procurement.

An applicant that (at the time of its application) intends—without competition—to enter into a procurement contract that would exceed $150,000 should include a detailed justification that explains to OJP why, in the particular circumstances, it is appropriate to proceed without competition. Various considerations that may be pertinent to the justification are outlined in the DOJ Grants Financial Guide.

(d) Pre-Agreement Costs

For information on pre-agreement costs, see Section B. Federal Award Information.

5. Indirect Cost Rate Agreement (if applicable)

Indirect costs may be charged to an award only if:

(a) The recipient has a current (that is, unexpired), federally approved indirect cost rate; or

(b) The recipient is eligible to use, and elects to use, the "de minimis" indirect cost rate described in the (DOJ) Part 200 Uniform Requirements, as set out at 2 C.F.R. 200.414(f).

Note: This rule does not eliminate or alter the JAG-specific restriction in federal law that charges for administrative costs may not exceed 10 percent of the award amount, regardless of the approved indirect cost rate.

An applicant with a current (that is, unexpired) federally approved indirect cost rate is to attach a copy of the indirect cost rate agreement to the application. An applicant that does not have a current federally approved rate may request one through its cognizant federal agency, which will review all documentation and approve a rate for the applicant entity, or, if the applicant's accounting system permits, applicants may propose to allocate costs in the direct cost categories.

For assistance with identifying the appropriate cognizant federal agency for indirect costs, please contact the OCFO Customer Service Center at 1–800–458–0786 or at ask.ocfo@usdoj.gov. If DOJ is the cognizant federal agency, applicants may obtain information needed to submit an indirect cost rate proposal at: www.ojp.gov/funding/Apply/Resources/IndirectCosts.pdf.

Certain OJP recipients have the option of electing to use the "de minimis" indirect cost rate. An applicant that is eligible to use the "de minimis" rate that wishes to use the "de minimis" rate should attach written documentation to the application that advises OJP of both: (1) the applicant's eligibility to use the "de minimis" rate, and (2) its election to do so. If an eligible applicant elects the "de minimis" rate, costs must be consistently charged as either indirect or direct costs, but may not be double charged or inconsistently charged as both. The "de minimis" rate may no longer be used once an approved federally-negotiated indirect cost rate is in place. (No entity that ever has had a federally approved negotiated indirect cost rate is eligible to use the "de minimis" rate.)

6. **Tribal Authorizing Resolution (if applicable)**
An applicant that proposes to provide direct services or assistance to residents on tribal lands should include in its application a resolution, a letter, affidavit, or other documentation, as appropriate, that demonstrates (as a legal matter) that the applicant has the requisite authorization from the tribe(s) to implement the proposed project on tribal lands.

OJP will not deny an application for an FY 2017 award for failure to submit such tribal authorizing resolution (or other appropriate documentation) by the application deadline, but a unit of local government will not receive award funds (and its award will include a condition that withholds funds) until it submits the appropriate documentation.

7. **Financial Management and System of Internal Controls Questionnaire (including applicant disclosure of high-risk status)**
Every unit of local government is to complete the OJP Financial Management and System of Internal Controls Questionnaire as part of its application. In accordance with the Part 200 Uniform Requirements as set out at 2 C.F.R. 200.205, federal agencies must have in place a framework for evaluating the risks posed by applicants before they receive a federal award.

8. **Applicant Disclosure of High Risk Status**
Applicants that are currently designated high risk by another federal grant making agency must disclose that status. For purposes of this disclosure, high risk includes any status under which a federal awarding agency provides additional oversight due to the applicant's past performance, or other programmatic or financial concerns with the applicant. If an applicant is designated high risk by another federal awarding agency, the applicant must provide the following information:

- The federal agency that currently designated the applicant as high risk
- Date the applicant was designated high risk
- The high risk point of contact at that federal awarding agency (name, phone number, and email address).
- Reasons for the high risk status, as set out by the federal awarding agency

OJP seeks this information to help ensure appropriate federal oversight of OJP awards. An applicant that is considered "high risk" by another federal awarding agency is not automatically disqualified from receiving an OJP award. OJP may, however, consider the information in award decisions, and may impose additional OJP oversight of any award under this solicitation (including through the conditions that accompany the award document).

9. **Disclosure of Lobbying Activities**
An applicant that expends any funds for lobbying activities is to provide all of the information requested on the form Disclosure of Lobbying Activities (SF-LLL).

10. **Certifications and Assurances by the Chief Executive of the Applicant Government**
A JAG application is not complete, and a unit of local government may not receive award funds, unless the chief executive of the applicant unit of local government (e.g., the mayor) properly executes, and the unit of local government submits, the "Certifications and Assurances by the Chief Executive of the Applicant Government" attached to this solicitation as Appendix I.

OJP will not deny an application for an FY 2017 award for failure to submit these "Certifications and Assurances by the Chief Executive of the Applicant Government" by the application deadline, but a unit of local government will not receive award funds (and its award will include a condition that withholds funds) until it submits these certifications and assurances, properly executed by the chief executive of the unit of local government (e.g., the mayor).

11. **Certification of Compliance with 8 U.S.C. § 1373 by the Chief Legal Officer of the Applicant Government**
The chief legal officer of an applicant unit of local government (e.g., the General Counsel) is to carefully review the "State or Local Government: FY 2017 Certification of Compliance with 8 U.S.C. § 1373" that is attached as Appendix II to this solicitation. If the chief legal officer determines that he or she may execute the certification, the unit of local government is to submit the certification as part of its application. (Note: this requirement does not apply to Indian tribal governments.)

As discussed further below, a unit of local government (other than an Indian tribal government) applicant will be *unable to make a valid award acceptance* of an FY 2017 JAG

award unless and until a properly executed certification by its chief legal officer is received by OJP on or before the day the unit of local government submits an executed award document.

12. Additional Attachments

(a) Applicant Disclosure of Pending Applications

Each applicant is to disclose whether it has (or is proposed as a subrecipient under) any pending applications for federally funded grants or cooperative agreements that (1) include requests for funding to support the same project being proposed in the application under this solicitation and (2) would cover identical cost items outlined in the budget submitted to OJP as part of the application under this solicitation. The applicant is to disclose applications made directly to federal awarding agencies, and also applications for subawards of federal funds (e.g., applications to State agencies that will subaward ("subgrant") federal funds).

OJP seeks this information to help avoid any inappropriate duplication of funding. Leveraging multiple funding sources in a complementary manner to implement comprehensive programs or projects is encouraged and is not seen as inappropriate duplication.

Each applicant that has one or more pending applications as described above is to provide the following information about pending applications submitted within the last 12 months:

- The federal or State funding agency
- The solicitation name/project name
- The point of contact information at the applicable federal or State funding agency

Federal or State Funding Agency	Solicitation Name/Project Name	Name/Phone/Email for Point of Contact at Federal or State Funding Agency
DOJ/Office of Community Oriented Policing Services (COPS)	COPS Hiring Program	Jane Doe, 202/000-0000; jane.doe@usdoj.gov
Health & Human Services/ Substance Abuse and Mental Health Services Administration	Drug-Free Communities Mentoring Program/ North County Youth Mentoring Program	John Doe, 202/000-0000; john.doe@hhs.gov

Each applicant should include the table as a separate attachment to its application. The file should be named "Disclosure of Pending Applications." The applicant Legal Name on the application must match the entity named on the disclosure of pending applications statement.

Any applicant that does not have any pending applications as described above is to submit, as a separate attachment, a statement to this effect: "[Applicant Name on SF-424] does not have (and is not proposed as a subrecipient under) any pending applications submitted within the last 12 months for federally funded grants or cooperative agreements (or for subawards under federal grants or cooperative agreements) that request funding to support the same project being proposed in this application to OJP and that would cover identical cost items outlined in the budget submitted as part of this application."

(b) Research and Evaluation Independence and Integrity (if applicable)

If an application involves research (including research and development) and/or evaluation, the applicant must demonstrate research/evaluation independence and integrity, including appropriate safeguards, before it may receive award funds. The applicant must demonstrate independence and integrity regarding both this proposed research and/or evaluation, and any current or prior related projects.

Each application should include an attachment that addresses **both** i. and ii. below.

i. For purposes of this solicitation, each applicant is to document research and evaluation independence and integrity by including one of the following two items:

a. A specific assurance that the applicant has reviewed its application to identify any actual or potential apparent conflicts of interest (including through review of pertinent information on the principal investigator, any co-principal investigators, and any subrecipients), and that the applicant has identified no such conflicts of interest—whether personal or financial or organizational (including on the part of the applicant entity or on the part of staff, investigators, or subrecipients)—that could affect the independence or integrity of the research, including the design, conduct, and reporting of the research.

OR

b. A specific description of actual or potential apparent conflicts of interest that the applicant has identified—including through review of pertinent information on the principal investigator, any co-principal investigators, and any subrecipients—that could affect the independence or integrity of the research, including the design, conduct, or reporting of the research. These conflicts may be personal (e.g., on the part of investigators or other staff), financial, or organizational (related to the applicant or any subrecipient entity). Some examples of potential investigator (or other personal) conflict situations are those in which an investigator would be in a position to evaluate a spouse's work product (actual conflict), or an investigator would be in a position to evaluate the work of a former or current colleague (potential apparent conflict). With regard to potential organizational conflicts of interest, as one example, generally an organization would not be given an award to evaluate a project, if that organization had itself provided substantial prior technical assistance to that specific project or a location implementing the project (whether funded by OJP or other sources), because the organization in such an

instance might appear to be evaluating the effectiveness of its own prior work. The key is whether a reasonable person understanding all of the facts would be able to have confidence that the results of any research or evaluation project are objective and reliable. Any outside personal or financial interest that casts doubt on that objectivity and reliability of an evaluation or research product is a problem and must be disclosed.

ii. In addition, for purposes of this solicitation, each applicant is to address possible mitigation of research integrity concerns by including, at a minimum, one of the following two items:

a. If an applicant reasonably believes that no actual or potential apparent conflicts of interest (personal, financial, or organizational) exist, then the applicant should provide a brief narrative explanation of how and why it reached that conclusion. The applicant also is to include an explanation of the specific processes and procedures that the applicant has in place, or will put in place, to identify and prevent (or, at the very least, mitigate) any such conflicts of interest pertinent to the funded project during the period of performance. Documentation that may be helpful in this regard may include organizational codes of ethics/conduct and policies regarding organizational, personal, and financial conflicts of interest. There is no guarantee that the plan, if any, will be accepted as proposed.

OR

b. If the applicant has identified actual or potential apparent conflicts of interest (personal, financial, or organizational) that could affect the independence and integrity of the research, including the design, conduct, or reporting of the research, the applicant is to provide a specific and robust mitigation plan to address each of those conflicts. At a minimum, the applicant is expected to explain the specific processes and procedures that the applicant has in place, or will put in place, to identify and eliminate (or, at the very least, mitigate) any such conflicts of interest pertinent to the funded project during the period of performance. Documentation that may be helpful in this regard may include organizational codes of ethics/conduct and policies regarding organizational, personal, and financial conflicts of interest. There is no guarantee that the plan, if any, will be accepted as proposed.

OJP will assess research and evaluation independence and integrity based on considerations such as the adequacy of the applicant's efforts to identify factors that could affect the objectivity or integrity of the proposed staff and/or the applicant entity (and any subrecipients) in carrying out the research, development, or evaluation activity; and the adequacy of the applicant's existing or proposed remedies to control any such factors.

(c) Local Governing Body Review

Applicants must submit information via the Certification and Assurances by the Chief Executive (See Appendix I) which documents that the JAG application was made available for review by the governing body of the unit of local government, or to an organization designated by that governing body, for a period that was not less than 30

days before the application was submitted to BJA. The same Chief Executive Certification will also specify that an opportunity to comment on this application was provided to citizens prior to the application submission to the extent applicable law or established procedures make such opportunity available. In the past, this has been accomplished via submission of specific review dates; now OJP will only accept a chief executive's certification to attest to these facts. Units of local government may continue to submit actual dates of review should they wish to do so, in addition to the submission of the Chief Executive Certification.

How to Apply

An applicant must submit its application through the Grants Management System (GMS), which provides support for the application, award, and management of awards at OJP. Each applicant entity **must register in GMS for each specific funding opportunity.** Although the registration and submission deadlines are the same, OJP urges each applicant entity to **register promptly**, especially if this is the first time the applicant is using the system. Find complete instructions on how to register and submit an application in GMS at www.ojp.gov/gmscbt/. An applicant that experiences technical difficulties during this process should email GMS.HelpDesk@usdoj.gov or call 888–549–9901 (option 3), 24 hours every day, including during federal holidays. OJP recommends that each applicant **register promptly** to prevent delays in submitting an application package by the deadline.

Note on File Types: GMS does not accept executable file types as application attachments. These disallowed file types include, but are not limited to, the following extensions: ".com," ".bat," ".exe," ".vbs," ".cfg," ".dat," ".db," ".dbf," ".dll," ".ini," ".log," ".ora," ".sys," and ".zip."

Every applicant entity must comply with all applicable System for Award Management (SAM) and unique entity identifier (currently, a Data Universal Numbering System [DUNS] number) requirements. If an applicant entity has not fully complied with applicable SAM and unique identifier requirements by the time OJP makes award decisions, OJP may determine that the applicant is not qualified to receive an award and may use that determination as a basis for making the award to a different applicant.

All applicants should complete the following steps:

1. Acquire a unique entity identifier (DUNS number). In general, the Office of Management and Budget requires every applicant for a federal award (other than an individual) to include a "unique entity identifier" in each application, including an application for a supplemental award. Currently, a DUNS number is the required unique entity identifier.

A DUNS number is a unique nine-digit identification number provided by the commercial company Dun and Bradstreet. This unique entity identifier is used for tracking purposes, and to validate address and point of contact information for applicants, recipients, and subrecipients. It will be used throughout the life cycle of an OJP award. Obtaining a DUNS number is a free, one-time activity. Call Dun and Bradstreet at 866–705–5711 to obtain a DUNS number or apply online at www.dnb.com. A DUNS number is usually received within 1–2 business days.

2. Acquire registration with the SAM. SAM is the repository for certain standard information about federal financial assistance applicants, recipients, and subrecipients. All applicants for OJP awards (other than individuals) must maintain current registrations in the SAM database.

Each applicant must **update or renew its SAM registration at least annually** to maintain an active status. SAM registration and renewal can take as long as 10 business days to complete.

Information about SAM registration procedures can be accessed at https://www.sam.gov/.

3. Acquire a GMS username and password. New users must create a GMS profile by selecting the "First Time User" link under the sign-in box of the GMS home page. For more information on how to register in GMS, go to www.ojp.gov/gmscbt. Previously registered applicants should ensure, prior to applying, that the user profile information is up-to-date in GMS (including, but not limited to, address, legal name of agency and authorized representative) as this information is populated in any new application.

4. Verify the SAM (formerly CCR) registration in GMS. OJP requires each applicant to verify its SAM registration in GMS. Once logged into GMS, click the "CCR Claim" link on the left side of the default screen. Click the submit button to verify the SAM (formerly CCR) registration.

5. Search for the funding opportunity on GMS. After logging into GMS or completing the GMS profile for username and password, go to the "Funding Opportunities" link on the left side of the page. Select BJA and **FY 17 Edward Byrne Memorial Local Justice Assistance Grant (JAG) Program.**

6. Register by selecting the "Apply Online" button associated with the funding opportunity title. The search results from step 5 will display the "funding opportunity" (solicitation) title along with the registration and application deadlines for this solicitation. Select the "Apply Online" button in the "Action" column to register for this solicitation and create an application in the system.

7. Follow the directions in GMS to submit an application consistent with this solicitation. Once the application is submitted, GMS will display a confirmation screen stating the submission was successful. **Important:** In some instances, applicants must wait for GMS approval before submitting an application. OJP urges each applicant to submit its application **at least 72 hours prior** to the application due date.

Note: Application Versions
If an applicant submits multiple versions of the same application, OJP will review **only** the most recent system-validated version submitted.

Experiencing Unforeseen GMS Technical Issues
An applicant that experiences unforeseen GMS technical issues beyond its control that prevent it from submitting its application by the deadline may contact the GMS Help Desk or the SAM Help Desk (Federal Service Desk) to report the technical issue and receive a tracking number. The applicant is expected to email the NCJRS Response Center identified in the Contact Information section on the title page **within 24 hours after the application deadline** to request approval to submit its application after the deadline. The applicant's email must describe the technical difficulties, and must include a timeline of the applicant's submission efforts, the complete grant application, the applicant's DUNS number, and any GMS Help Desk or SAM tracking number(s).

Note: OJP does not automatically approve requests to submit a late application. After OJP reviews the applicant's request, and contacts the GMS Help Desk to verify the reported technical issues, OJP will inform the applicant whether the request to submit a late application

has been approved or denied. If OJP determines that the untimely application submission was due to the applicant's failure to follow all required procedures, OJP will deny the applicant's request to submit its application.

The following conditions generally are insufficient to justify late submissions to OJP solicitations:

- Failure to register in SAM or GMS in sufficient time (SAM registration and renewal can take as long as 10 business days to complete.)
- Failure to follow GMS instructions on how to register and apply as posted on the GMS website
- Failure to follow each instruction in the OJP solicitation
- Technical issues with the applicant's computer or information technology environment such as issues with firewalls

E. Application Review Information

Review Process
OJP is committed to ensuring a fair and open process for making awards. BJA reviews the application to make sure that the information presented is reasonable, understandable, measurable, and achievable, as well as consistent with the solicitation. BJA will also review applications to help ensure that JAG program-statute requirements have been met.

Pursuant to the (DOJ) Part 200 Uniform Requirements, before awards are made, OJP also reviews information related to the degree of risk posed by applicants. Among other things, to help assess whether an applicant that has one or more prior federal awards has a satisfactory record with respect to performance, integrity, and business ethics, OJP checks whether the applicant is listed in SAM as excluded from receiving a federal award. In addition, if OJP anticipates that an award will exceed $150,000 in federal funds, OJP also must review and consider any information about the applicant that appears in the non-public segment of the integrity and performance system accessible through SAM (currently, the Federal Awardee Performance and Integrity Information System; "FAPIIS").

Important note on FAPIIS: An applicant, at its option, may review and comment on any information about itself that currently appears in FAPIIS and was entered by a federal awarding agency. OJP will consider any such comments by the applicant, in addition to the other information in FAPIIS, in its assessment of the risk posed by the applicant.

The evaluation of risks goes beyond information in SAM, however. OJP itself has in place a framework for evaluating risks posed by applicants. OJP takes into account information pertinent to matters such as—

1. Applicant financial stability and fiscal integrity
2. Quality of the management systems of the applicant, and the applicant's ability to meet prescribed management standards, including those outlined in the DOJ Grants Financial Guide
3. Applicant's history of performance under OJP and other DOJ awards (including compliance with reporting requirements and award conditions), as well as awards from other federal agencies

4. Reports and findings from audits of the applicant, including audits under the (DOJ) Part 200 Uniform Requirements
5. Applicant's ability to comply with statutory and regulatory requirements, and to effectively implement other award requirements

Absent explicit statutory authorization or written delegation of authority to the contrary, the Assistant Attorney General will make all final award decisions.

F. Federal Award Administration Information

Federal Award Notices
OJP expects to issue award notifications by September 30, 2017. OJP sends award notifications by email through GMS to the individuals listed in the application as the point of contact and the authorizing official. The email notification includes detailed instructions on how to access and view the award documents, and steps to take in GMS to start the award acceptance process. GMS automatically issues the notifications at 9:00 p.m. eastern time on the award date.

NOTE: In order validly to accept an award under the FY 2017 JAG Program, a unit of local government (other than an Indian tribal government) must submit to GMS the certification by its chief legal officer regarding compliance with 8 U.S.C. § 1373, executed using the form that appears in Appendix II. (The form also may be downloaded at https://ojp.gov/funding/Explore/SampleCertifications-8USC1373.htm.) Unless the executed certification either (1) is submitted to OJP together with the signed award document or (2) is uploaded in GMS no later than the day the signed award document is submitted, **OJP will reject as invalid** any submission by a unit of local government (other than an Indian tribal government) that purports to accept an award under this solicitation.

Rejection of an initial submission as an invalid award acceptance is not a denial of the award. Consistent with award requirements, once the unit of local government **does** submit the necessary certification regarding 8 U.S.C. § 1373, the unit of local government **will** be permitted to submit an award document executed by the unit of local government on or after the date of that certification.

Also, in order for a unit of local government applicant validly to accept an award under the FY 2017 JAG Program, an individual with the necessary authority to bind the applicant will be required to log in; execute a set of legal certifications and a set of legal assurances; designate a financial point of contact; thoroughly review the award, including **all** award conditions; and sign and accept the award. The award acceptance process requires physical signature of the award document by the authorized representative and the scanning of the fully executed award document (along with the required certification regarding 8 U.S.C. § 1373, if not already uploaded in GMS) to OJP.

Statutory and Regulatory Requirements; Award Conditions
If selected for funding, in addition to implementing the funded project consistent with the OJP-approved application, the recipient must comply with all award requirements (including all award conditions), as well as all applicable requirements of federal statutes and regulations (including those referred to in assurances and certifications executed as part of the application or in

connection with award acceptance, and administrative and policy requirements set by statute or regulation).

OJP strongly encourages prospective applicants to review information on post-award legal requirements generally applicable to FY 2017 OJP awards and common OJP award conditions **prior** to submitting an application.

Applicants should consult the "Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards," available in the OJP Funding Resource Center. In addition, applicants should examine the following two legal documents, as each successful applicant must execute both documents in GMS before it may receive any award funds.

- Certifications Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters; and Drug-Free Workplace Requirements

- OJP Certified Standard Assurances (attached to this solicitation as Appendix IV*)*

The web pages accessible through the "Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards" are intended to give applicants for OJP awards a general overview of important statutes, regulations, and award conditions that apply to many (or in some cases, all) OJP grants and cooperative agreements awarded in FY 2017. Individual OJP awards typically also will include additional award conditions. Those additional conditions may relate to the particular statute, program, or solicitation under which the award is made; to the substance of the funded application; to the recipient's performance under other federal awards; to the recipient's legal status (e.g., as a for-profit entity); or to other pertinent considerations.

Individual FY 2017 JAG awards will include two new express conditions that, with respect to the "program or activity" that would be funded by the FY 2017 award, are designed to ensure that States and units of local government that receive funds from the FY 2017 JAG award: (1) permit personnel of the U.S. Department of Homeland Security (DHS) to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States and (2) provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act.

Compliance with the requirements of the two foregoing new award conditions will be an authorized and priority purpose of the award. The reasonable costs (to the extent not reimbursed under any other federal program) of developing and putting into place statutes, rules, regulations, policies, or practices as required by these conditions, and to honor any duly authorized requests from DHS that is encompassed by these conditions, will be allowable costs under the award.

General Information about Post-Federal Award Reporting Requirements
A unit of local government recipient of an award under this solicitation will be required to submit the following reports and data:

Required reports. Recipients typically must submit quarterly financial status reports, semi-annual progress reports, final financial and progress reports, and, if applicable, an annual audit report in accordance with the (DOJ) Part 200 Uniform Requirements or specific award conditions. Future awards and fund drawdowns may be withheld if reports are delinquent. (In appropriate cases, OJP may require additional reports.)

Awards that exceed $500,000 will include an additional condition that, under specific circumstances, will require the recipient to report (to FAPIIS) information on civil, criminal, and administrative proceedings connected with (or connected to the performance of) either the OJP award or any other grant, cooperative agreement, or procurement contract from the federal government. Additional information on this reporting requirement appears in the text of the award condition posted on the OJP website at: https://ojp.gov/funding/FAPIIS.htm

Data on performance measures. In addition to required reports, each recipient of an award under this solicitation also must provide data that measure the results of the work done under the award. To demonstrate program progress and success, as well as to assist DOJ with fulfilling its responsibilities under GPRA and the GPRA Modernization Act of 2010, OJP will require State recipients to provide accountability metrics data. Accountability metrics data must be submitted through BJA's Performance Measurement Tool (PMT), available at https://bjapmt.ojp.gov. The accountability measures are available at: https://bjapmt.ojp.gov/help/jagdocs.html. (Note that if a law enforcement agency receives JAG funds from a State, the State must submit quarterly accountability metrics data related to training that officers have received on use of force, racial and ethnic bias, de-escalation of conflict, and constructive engagement with the public.)

OJP may restrict access to award funds if a recipient of an OJP award fails to report required performance measures data in a timely manner.

G. Federal Awarding Agency Contact(s)

For OJP contact(s), see the title page of this solicitation.

For contact information for GMS, see the title page.

H. Other Information

Freedom of Information Act and Privacy Act (5 U.S.C. § 552 and 5 U.S.C. § 552a)
All applications submitted to OJP (including all attachments to applications) are subject to the federal Freedom of Information Act (FOIA) and to the Privacy Act. By law, DOJ may withhold information that is responsive to a request pursuant to FOIA if DOJ determines that the responsive information either is protected under the Privacy Act or falls within the scope of one of nine statutory exemptions under FOIA. DOJ cannot agree in advance of a request pursuant to FOIA not to release some or all portions of an application.

In its review of records that are responsive to a FOIA request, OJP will withhold information in those records that plainly falls within the scope of the Privacy Act or one of the statutory exemptions under FOIA. (Some examples include certain types of information in budgets, and names and contact information for project staff other than certain key personnel.) In appropriate

circumstances, OJP will request the views of the applicant/recipient that submitted a responsive document.

For example, if OJP receives a request pursuant to FOIA for an application submitted by a nonprofit or for-profit organization or an institution of higher education, or for an application that involves research, OJP typically will contact the applicant/recipient that submitted the application and ask it to identify—quite precisely—any particular information in the application that applicant/recipient believes falls under a FOIA exemption, the specific exemption it believes applies, and why. After considering the submission by the applicant/recipient, OJP makes an independent assessment regarding withholding information. OJP generally follows a similar process for requests pursuant to FOIA for applications that may contain law-enforcement sensitive information.

Provide Feedback to OJP

To assist OJP in improving its application and award processes, OJP encourages applicants to provide feedback on this solicitation, the application submission process, and/or the application review process. Provide feedback to OJPSolicitationFeedback@usdoj.gov.

IMPORTANT: This email is for feedback and suggestions only. OJP does **not** reply to messages it receives in this mailbox. A prospective applicant that has specific questions on any program or technical aspect of the solicitation **must** use the appropriate telephone number or email listed on the front of this solicitation document to obtain information. These contacts are provided to help ensure that prospective applicants can directly reach an individual who can address specific questions in a timely manner.

If you are interested in being a reviewer for other OJP grant applications, please email your résumé to ojppeerreview@lmsolas.com. (Do not send your résumé to the OJP Solicitation Feedback email account.) **Note:** Neither you nor anyone else from your organization or entity can be a peer reviewer in a competition in which you or your organization/entity has submitted an application.

Application Checklist

Edward Byrne Memorial Justice Assistance Grant (JAG) Program:

FY 2017 Local Solicitation

This application checklist has been created as an aid in developing an application.

What an Applicant Should Do:

Prior to Registering in GMS:
_____ Acquire a DUNS Number (see page 27)
_____ Acquire or renew registration with SAM (see page 27)
To Register with GMS:
_____ For new users, acquire a GMS username and password* (see page 27)
_____ For existing users, check GMS username and password* to ensure account access (see page 27)
_____ Verify SAM registration in GMS (see page 27)
_____ Search for correct funding opportunity in GMS (see page 27)
_____ Select correct funding opportunity in GMS (see page 27)
_____ Register by selecting the "Apply Online" button associated with the funding opportunity title (see page 27)
_____ Read OJP policy and guidance on conference approval, planning, and reporting available at ojp.gov/financialguide/DOJ/PostawardRequirements/chapter3.10a.htm (see page 14)
_____ If experiencing technical difficulties in GMS, contact the NCJRS Response Center (see page 2)

*Password Reset Notice – GMS users are reminded that while password reset capabilities exist, this function is only associated with points of contact designated within GMS at the time the account was established. Neither OJP nor the GMS Help Desk will initiate a password reset unless requested by the authorized official or a designated point of contact associated with an award or application.

Overview of Post-Award Legal Requirements:

_____ Review the "Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards" in the OJP Funding Resource Center.

Scope Requirement:

_____ The federal amount requested is within the allowable limit(s) of the FY 2017 JAG Allocations List as listed on BJA's JAG web page.

What an Application Should Include:

_____ Application for Federal Assistance (SF-424) (see page 16)
_____ Project Abstract (see page 16)
_____ Program Narrative (see page 17)
_____ Budget Detail Worksheet (see page 18)
_____ Budget Narrative (see page 18)
_____ Indirect Cost Rate Agreement (if applicable) (see page 21)
_____ Tribal Authorizing Resolution (if applicable) (see page 21)
_____ Financial Management and System of Internal Controls Questionnaire (see page 22)
_____ Disclosure of Lobbying Activities (SF-LLL) (if applicable) (see page 22)
_____ Certifications and Assurances by Chief Executive (see page 22)
_____ Certification of Compliance with 8 U.S.C. § 1373 by Chief Legal Officer (Note: this requirement does not apply to Indian tribal governments.) (see page 23)
_____ OJP Certified Standard Assurances (see page 40)
_____ Additional Attachments
_____ Applicant Disclosure of Pending Applications (see page 23)
_____ Research and Evaluation Independence and Integrity (if applicable) (see page 24)

Appendix I

Certifications and Assurances by the Chief Executive of the Applicant Government

Template for use by *chief executive* of the "Unit of local government" (e.g., the mayor)

Note: By law, for purposes of the JAG Program, the term "unit of local government " includes a town, township, village, parish, city, county, borough, or other general purpose political subdivision of a state; or, it may also be a federally recognized Indian tribal government that performs law enforcement functions (as determined by the Secretary of the Interior). A unit of local government may be any law enforcement district or judicial enforcement district established under applicable State law with authority to independently establish a budget and impose taxes; for example, in Louisiana, a unit of local government means a district attorney or parish sheriff.

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS

Edward Byrne Justice Assistance Grant Program
FY 2017 Local Solicitation

Certifications and Assurances
by the Chief Executive of the Applicant Government

On behalf of the applicant unit of local government named below, in support of that locality's application for an award under the FY 2017 Edward Byrne Justice Assistance Grant ("JAG") Program, and further to 42 U.S.C. § 3752(a), I certify under penalty of perjury to the Office of Justice Programs ("OJP"), U.S. Department of Justice ("USDOJ"), that all of the following are true and correct:

1. I am the chief executive of the applicant unit of local government named below, and I have the authority to make the following representations on my own behalf and on behalf of the applicant unit of local government. I understand that these representations will be relied upon as material in any OJP decision to make an award, under the application described above, to the applicant unit of local government.

2. I certify that no federal funds made available by the award (if any) that OJP makes based on the application described above will be used to supplant local funds, but will be used to increase the amounts of such funds that would, in the absence of federal funds, be made available for law enforcement activities.

3. I assure that the application described above (and any amendment to that application) was submitted for review to the governing body of the unit of local government (e.g., city council or county commission), or to an organization designated by that governing body, not less than 30 days before the date of this certification.

4. I assure that, before the date of this certification— (a) the application described above (and any amendment to that application) was made public; and (b) an opportunity to comment on that application (or amendment) was provided to citizens and to neighborhood or community-based organizations, to the extent applicable law or established procedure made such an opportunity available.

5. I assure that, for each fiscal year of the award (if any) that OJP makes based on the application described above, the applicant unit of local government will maintain and report such data, records, and information (programmatic and financial), as OJP may reasonably require.

6. I certify that— (a) the programs to be funded by the award (if any) that OJP makes based on the application described above meet all the requirements of the JAG Program statute (42 U.S.C. §§ 3750-3758); (b) all the information contained in that application is correct; (c) in connection with that application, there has been appropriate coordination with affected agencies; and (d) in connection with that award (if any), the applicant unit of local government will comply with all provisions of the JAG Program statute and all other applicable federal laws.

7. I have examined certification entitled "State or Local Government: FY 2017 Certification of Compliance with 8 U.S.C. § 1373" executed by the chief legal officer of the applicant government with respect to the FY 2017 JAG program and submitted in support of the application described above, and I hereby adopt that certification as my own on behalf of that government.

I acknowledge that a materially false, fictitious, or fraudulent statement (or concealment or omission of a material fact) in this certification, or in the application that it "supports, may be the subject of criminal prosecution (including under 18 U.S.C. §§ 1001 and/or 1621, and/or 42 U.S.C. § 3795a), and also may subject me and the applicant unit of local government to civil penalties and administrative remedies for false claims or otherwise (including under 31 U.S.C. §§ 3729-3730 and §§ 3801-3812). I also acknowledge that OJP awards, including certifications provided in connection with such awards, are subject to review by USDOJ, including by OJP and by the USDOJ Office of the Inspector General.

_____ _____
Signature of Chief Executive of the Applicant Unit of Local Government — Date of Certification

_____ _____
Printed Name of Chief Executive — Title of Chief Executive

_____
Name of Applicant Unit of Local Government

Appendix II

State or Local Government:
Certification of Compliance with 8 U.S.C. § 1373

Template for use by the *chief legal officer* of the "Local Government" (e.g., the General Counsel) (Note: this Certification is not required by Indian tribal government applicants.)

Available for download at:
https://ojp.gov/funding/Explore/SampleCertifications-8USC1373.htm

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS

State or Local Government: FY 2017 Certification of Compliance with 8 U.S.C. § 1373

On behalf of the applicant government entity named below, and in support of its application, I certify under penalty of perjury to the Office of Justice Programs ("OJP"), U.S. Department of Justice ("USDOJ"), that all of the following are true and correct:

(1) I am the chief legal officer of the State or local government of which the applicant entity named below is a part ("the jurisdiction"), and I have the authority to make this certification on behalf of the jurisdiction and the applicant entity (that is, the entity applying directly to OJP). I understand that OJP will rely upon this certification as a material representation in any decision to make an award to the applicant entity.

(2) I have carefully reviewed 8 U.S.C. § 1373(a) and (b), including the prohibitions on certain actions by State and local government entities, -agencies, and -officials regarding information on citizenship and immigration status. I also have reviewed the provisions set out at (or referenced in) 8 U.S.C. § 1551 note ("Abolition ... and Transfer of Functions"), pursuant to which references to the "Immigration and Naturalization Service" in 8 U.S.C. § 1373 are to be read, as a legal matter, as references to particular components of the U.S. Department of Homeland Security.

(3) I (and also the applicant entity) understand that the U.S. Department of Justice will require States and local governments (and agencies or other entities thereof) to comply with 8 U.S.C. § 1373, with respect to any "program or activity" funded in whole or in part with the federal financial assistance provided through the FY 2017 OJP program under which this certification is being submitted ("the FY 2017 OJP Program" identified below), specifically including any such "program or activity" of a governmental entity or -agency that is a subrecipient (at any tier) of funds under the FY 2017 OJP Program.

(4) I (and also the applicant entity) understand that, for purposes of this certification, "program or activity" means what it means under title VI of the Civil Rights Act of 1964 (see 42 U.S.C. § 2000d-4a), and that terms used in this certification that are defined in 8 U.S.C. § 1101 mean what they mean under that section 1101, except that the term "State" also shall include American Samoa (*cf.* 42 U.S.C. § 901(a)(2)). Also, I understand that, for purposes of this certification, neither a "public" institution of higher education (*i.e.*, one that is owned, controlled, or directly funded by a State or local government) nor an Indian tribe is considered a State or local government entity or -agency.

(5) I have conducted (or caused to be conducted for me) a diligent inquiry and review concerning both—

(a) the "program or activity" to be funded (in whole or in part) with the federal financial assistance sought by the applicant entity under this FY 2017 OJP Program; and

(b) any prohibitions or restrictions potentially applicable to the "program or activity" sought to be funded under the FY 2017 OJP Program that deal with sending to, requesting or receiving from, maintaining, or exchanging information of the types described in 8 U.S.C. § 1373(a) or (b), whether imposed by a State or local government entity, -agency, or -official.

(6) As of the date of this certification, neither the jurisdiction nor any entity, agency, or official of the jurisdiction has in effect, purports to have in effect, or is subject to or bound by, any prohibition or any restriction that would apply to the "program or activity" to be funded in whole or in part under the FY 2017 OJP Program (which, for the specific purpose of this paragraph 6, shall not be understood to include any such "program or activity" of any subrecipient at any tier), and that deals with either— (1) a government entity or -official sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. § 1373(a); or (2) a government entity or -agency sending to, requesting or receiving from, maintaining, or exchanging information of the types (and with respect to the entities) described in 8 U.S.C. § 1373(b).

I acknowledge that a materially false, fictitious, or fraudulent statement (or concealment or omission of a material fact) in this certification, or in the application that it supports, may be the subject of criminal prosecution (including under 18 U.S.C. §§ 1001 and/or 1621, and/or 42 U.S.C. § 3795a), and also may subject me and the applicant entity to civil penalties and administrative remedies for false claims or otherwise (including under 31 U.S.C. §§ 3729-3730 and §§ 3801-3812). I also acknowledge that OJP awards, including certifications provided in connection with such awards, are subject to review by USDOJ, including by OJP and by the USDOJ Office of the Inspector General.

Signature of Chief Legal Officer of the Jurisdiction	Printed Name of Chief Legal Officer
Date of Certification	Title of Chief Legal Officer of the Jurisdiction

Name of Applicant Government Entity (*i.e.*, the applicant to the FY 2017 OJP Program identified below)

FY 2017 OJP Program: **Byrne Justice Assistance Grant ("JAG") Program**

Appendix III

8 U.S.C. § 1373 (as in effect on June 21, 2017)

Communication between government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
(2) Maintaining such information.
(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

See also provisions set out at (or referenced in) 8 U.S.C. § 1551 note ("Abolition … and Transfer of Functions")

Appendix IV

OJP Certified Standard Assurances