IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTOPHER L. CRANE, DAVID A. ENGLE, ANASTASIA MARIE CARROLL, RICARDO DIAZ, LORENZO GARZA, FELIX LUCIANO, TRE REBSTOCK, FERNANDO SILVA, SAMUEL MARTIN, and JAMES D. DOEBLER	**Civil Action No. 3:12-CV-_____**
Plaintiffs,	
v.	**COMPLAINT**
JANET NAPOLITANO, in her official capacity as Secretary of Homeland Security, and JOHN MORTON, in his official capacity as Director of Immigration and Customs Enforcement	
Defendants.	

INTRODUCTION

1. Plaintiffs are law enforcement officers of United States Immigration and Customs Enforcement ("ICE").

2. On June 15, 2012, Defendant Secretary of Homeland Security Janet Napolitano issued a Directive entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (hereinafter "the Directive"). The Directive, attached to this Complaint as Appendix A, instructs ICE officers to refrain from placing certain aliens who are unlawfully present in the United States ("illegal aliens") into removal proceedings, and to take actions to facilitate the granting of deferred action to aliens who are unlawfully present in

the United States. The Directive also directs DHS personnel to grant employment authorization to certain beneficiaries of the Directive.

3. The requirements that an unlawfully present alien must assert to be granted the privileges described in the Directive are that the alien:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding June 15, 2012, and was present in the United States on June 15, 2012;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and does not otherwise pose a threat to national security or public safety; and
- is not above the age of thirty.

4. The Directive commands ICE officers to violate federal law, as detailed below, commands ICE officers to violate their oaths to uphold and support federal law, violates the Administrative Procedure Act, unconstitutionally usurps and encroaches upon the legislative powers of Congress, as defined in Article I of the United States Constitution, and violates the obligation of the executive branch to faithfully execute the law, as required by Article II, Section 3, of the United States Constitution.

5. Plaintiffs bring this civil action to seek injunctive relief preventing the implementation of this unlawful and unconstitutional Directive.

6. This lawsuit seeks to prevent law enforcement officer Plaintiffs from being forced to either violate federal law if they comply with the unlawful Directive or risk adverse employment action if they disobey the unlawful orders of the DHS Secretary. This lawsuit also seeks to preserve the balance of legislative and executive powers established by the United States Constitution.

THE PARTIES

Plaintiffs

7. Plaintiff Christopher L. Crane is an ICE Deportation Officer. He serves in Enforcement and Removal Operations at the Salt Lake City Field Office at 2975 Decker Lake Drive, Stop A, in West Valley City, Utah. He is also the President of the ICE Agents and Officers Union, AFGE Council #118. As an ICE Deportation Officer, Crane is authorized by law to, *inter alia*, arrest aliens for administrative immigration violations or for any criminal offense against the United States and execute administrative and criminal arrest warrants.

8. Plaintiff David A. Engle is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations at the Dallas Field Office at 8101 N. Stemmons Freeway, in Dallas, Texas. As an ICE Immigration Enforcement Agent, Engle is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

9. Plaintiff Anastasia Marie Carroll is an ICE Immigration Enforcement Agent. She serves in Enforcement and Removal Operations at the El Paso Field Office at 1545 Hawkins Boulevard, in El Paso, Texas. As an ICE Immigration Enforcement Agent, Carroll is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

10. Plaintiff Ricardo Diaz is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations at the El Paso Field Office at 1545 Hawkins Boulevard, in El Paso, Texas. As an ICE Immigration Enforcement Agent, Diaz is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

11. Plaintiff Lorenzo Garza is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations at the Port Isabel Detention Center at 27791 Buena Vista Boulevard, in Los Fresnos, Texas. As an ICE Immigration Enforcement Agent, Garza is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

12. Plaintiff Felix Luciano is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations at the San Diego Field Office at 880 Front Street, Suite B-2232, in San Diego, California. As an ICE Immigration Enforcement Agent, Luciano is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

13. Plaintiff Tre Rebstock is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations at the Houston Field Office at 7405 C-1 Highway 75 South, in Huntsville, Texas. As an ICE Immigration Enforcement Agent, Rebstock is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

14. Plaintiff Fernando Silva is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations at the El Paso Field Office at 1545 Hawkins Boulevard, in El Paso, Texas. As an ICE Immigration Enforcement Agent, Silva is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and issue administrative arrest warrants for aliens.

15. Plaintiff Samuel Martin is an ICE Immigration Enforcement Agent. He serves in Enforcement and Removal Operations in the El Paso Field Office at 8915 Montana Avenue, in El Paso, Texas. As an ICE Immigration Enforcement Agent, Martin is authorized to, *inter alia*, arrest aliens for immigration violations, arrest any person for felonies regulating the admission or removal of aliens, and execute administrative arrest warrants for aliens.

16. Plaintiff James D. Doebler is an ICE Deportation Officer. He serves in Enforcement and Removal Operations in the Dover Sub-Office at 1305 McD Drive, in Dover, Delaware. As an ICE Deportation Officer, Doebler is authorized by law to, *inter alia*, arrest aliens for administrative immigration violations or for any criminal offense against the United States and execute administrative and criminal arrest warrants.

17. Each plaintiff is authorized to execute the laws of the United States pursuant to statutory authority and delegated authority under regulations of the Department of Homeland Security.

Defendants

18. Defendant Janet Napolitano is the Secretary of Homeland Security and the head of the United States Department of Homeland Security ("DHS") and in her official capacity is responsible for the enforcement of federal immigration laws, 6 U.S.C. § 112, 8 U.S.C. § 1101, et seq., pursuant to 8 U.S.C. § 1103(a)(2).

19. Defendant John Morton is the Director of United States Immigration and Customs Enforcement (ICE) and in his official capacity is responsible for administering all operations of the ICE. Defendant Morton is not authorized to promulgate regulations implementing the Immigration and Nationality Act.

20. Defendant Napolitano issued the Directive on June 15, 2012, and is the executive branch official responsible for its implementation by and through her inferior officers and other employees of DHS. Defendant Napolitano is the official authorized to promulgate regulations implementing the Immigration and Nationality Act in the Department of Homeland Security.

JURISDICTION AND VENUE

21. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiffs' claims under the Constitution and laws of the United States. This Court is authorized to grant Plaintiffs' requests for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

22. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because the majority of the Plaintiffs named in this complaint reside and work in the State of Texas. Plaintiff Engle resides and works in the Northern District of Texas.

THE DIRECTIVE AND RELATED EVENTS

23. On June 17, 2011, Defendant Morton issued a Memorandum entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (the "Morton Memorandum").

24. On June 15, 2012, Defendant Napolitano issued the Directive.

25. In July 2012, DHS issued the "ERO Supplemental Guidance: Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as

Children" which directs Plaintiffs and other DHS personnel to implement the terms of the Directive.

26. In early August 2012, DHS issued a document of more than 90 pages explaining how applicants for the benefits of the Directive would be processed by DHS, entitled "National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)."

27. On August 15, 2012, DHS began full implementation of the Directive, including receiving applications and distributing the benefits of deferred action and employment authorization.

28. The orders in the field that have been given to Plaintiffs by their supervisors are that an alien only needs to *claim* that he is covered by the Directive in order to be released and offered the benefits of the Directive. ICE agents are prohibited from demanding that an alien provide proof that he meets the Directive's criteria.

29. On August 16, 2012, the Department of Homeland Security published a Federal Register Notice soliciting public comments on the Directive. The Notice offered for review and comment no actual rules that will be promulgated. Instead, it only solicited comments on the questions to be posed on the form that DHS has developed to accept applications for benefits under the Directive. DHS categorized the notice as an "information collection" exercise.

30. According to official estimates provided on August 16, 2012, by the U.S. Citizenship and Immigration Service, pursuant to the Paperwork Reduction Act, the number of aliens unlawfully present in the United States who qualify for the benefits offered by the Directive <u>is estimated to be 1.76 million</u>. Source: U.S. Citizenship and Immigration Services, *Agency Information Collection Activities: Consideration of Deferred Action for Childhood*

Arrivals, Form I–821D, New Information Collection; Emergency Submission to the Office of Management and Budget; Comment Request, 77 Fed. Reg. 49451 (Aug. 16, 2012) (1,041,300 estimated total number of responses for new Consideration of Deferred Action for Childhood Arrivals, Form I-821D, USCIS); U.S. Citizenship and Immigration Services, *Agency Information Collection Activities: Application for Employment Authorization, Form I–765, Revision of a Currently Approved Information Collection; Emergency Submission to the Office of Management and Budget; Comment Request*, 77 Fed. Reg. 49453 (Aug. 16, 2012) (estimated 1,761,300 responses related to Application for Employment Authorization Document, Form I–765, USCIS; 1,385,292 responses related to Biometrics; 1,047,357 responses related to Application for Employment Authorization Document Worksheet, Form I–765WS, USCIS; and 1,761,300 responses to required Passport-Style Photographs).

31. According to the Department of Homeland Security, the number of aliens unlawfully present in the United States is estimated to be 11.5 million. Michael Hoefer, Nancy Rytina, and Bryan Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011" (March 2012), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf

FEDERAL STATUTORY BACKGROUND

32. In 1996, Congress sought to significantly reduce executive discretion in the enforcement of federal immigration laws: "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. 104-725 (1996), at 383.

33. Enacted in 1996, 8 U.S.C. § 1225(a)(1) provides that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission."

34. 8 U.S.C. § 1225(a)(3) provides that all applicants for admission "shall be inspected by immigration officers."

35. 8 U.S.C. § 1225(b)(2)(A) mandates that "if the examining immigration officer determines that an alien seeking admission is not *clearly and beyond a doubt* entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." (emphasis added).

36. Deferred action is not specifically authorized anywhere in federal law. Historically, deferred action has been utilized sparsely for small numbers of aliens in discrete distress pending statutory or foreign policy-mandated regulatory changes. No group of aliens has been granted deferred action in the past 15 years that approaches a fraction of the size of the class of aliens subject to the Directive.

37. Regulations describe deferred action only in the application sense as authorizing employment upon *application* in 8 C.F.R. § 274a.12(c)(14), or application for social security benefits, 8 C.F.R. § 1.3(a)(4)(vi). Accordingly, "deferred action" is a substantive government *benefit*.

38. Federal regulations do not authorize the Secretary to grant deferred action wholesale to a large number of illegal aliens.

39. Eligibility for a substantive benefit may not be conferred as a matter of discretion, but only by regulations promulgated under authority delegated by Congress, consistent with the terms of the law authorizing the regulations.

40. By definition, "prosecutorial discretion" cannot be used to confer a substantive benefit.

HARM

41. Plaintiffs have each sworn an oath to support and defend the Constitution of the United States and the laws of the United States.

42. Plaintiffs believe that if they follow the Directive, they will be violating their oath of office, as well as violating several laws of the United States.

43. Plaintiffs reasonably fear, based upon official communications to them, their knowledge of communications to Plaintiff Doebler, Plaintiff Martin, and Plaintiff Crane from their superiors, past events, and public sources, that if they follow the requirements of federal law, contrary to the "Directive," and arrest an alien or issue an alien an Notice to Appear (NTA) in removal proceedings, they will be disciplined or suffer other adverse employment consequences.

44. Plaintiff James D. Doebler arrested an alien who was unlawfully present in the United States and issued the alien an NTA, contrary to the general directions of his supervisors that he should decline to issue NTAs to certain illegal aliens. Plaintiff Doebler was issued a Notice of Proposed Suspension. Plaintiff Doebler is facing a three-day suspension for arresting and processing the alien for a hearing rather than exercising the "prosecutorial discretion" commanded by his supervisors. Plaintiff Doebler requested a written directive ordering him not to issue the NTA. His supervisors have refused to give him a written directive and would not sign any paperwork authorizing the use of "prosecutorial discretion."

45. Plaintiff Doebler reasonably fears, based on his past experience, that if he follows the requirements of federal law, contrary to the "Directive," and arrests an alien or issues the

alien an NTA, he will be disciplined again. He reasonably fears that a second disciplinary action will result in the loss of his job.

46. On July 17, 2012, Plaintiff Samuel Martin, along with another immigration enforcement agent, picked up an illegal alien from the El Paso County Jail. While the agents were trying to place the alien in the vehicle, the alien attempted to escape, and resisted and assaulted Plaintiff Martin and his colleague. The agents regained custody of the alien and transported him to the El Paso Criminal Alien Program office for processing. Plaintiff Martin's supervisors ordered him to release the alien without any charges being filed against the alien and ordered Plaintiff Martin not to issue an NTA. The agents who were present protested the release of the alien; but they were told "it was a management decision, based on the President's new immigration policies." No supervisor ever asked the agents if they were injured or if they needed assistance. It is the understanding of Plaintiff Martin, reflected in his signed statement concerning the incident, that his supervisors gave him these orders based on the Directive.

47. On January 25, 2012, Plaintiff Christopher L. Crane, in his capacity as President of the ICE Agents and Officers Union, filed a Demand to Bargain with Defendants, expressing significant concerns with the Morton Memorandum, including that the actions that ICE agents would have to take or not take under it were contrary to federal law. The Demand to Bargain included the proposal that: "No employee will be subject to disciplinary or adverse action for refusing to obey an unlawful order."

48. On April 5, 2012, Plaintiff Christopher L. Crane, in his capacity as President of the ICE Agents and Officers Union, submitted Additional Proposals, reiterating that officers should not be subject to discipline or adverse action for refusing to obey an unlawful order. Plaintiff Crane also filed an Information Request at that time.

49. On August 20, 2012, nearly eight months after the January 25, 2012, Demand to Bargain, Defendant Morton sent a letter to the ICE Agents and Officers Union merely indicating that Defendant Morton “may” formally respond to the January 25, 2012, Demand to Bargain and the April 5, 2012, Additional Proposals at an unspecified time in the future. In the past, when confronted with a Demand to Bargain letter, Defendants have ultimately refused to bargain at all and have refused to make any changes to their policies.

50. As of the filing of this complaint, Defendants have not changed ICE policies in any way in response to Plaintiff Crane’s January 25, 2012, Demand to Bargain and April 5, 2012, Additional Proposals.

51. Plaintiffs reasonably expect that the filing of a similar Demand to Bargain in order to protest the Directive would be treated in a similarly non-responsive manner, and that it would not result in any response or alteration of the Directive policy.

52. Because Plaintiffs are now being ordered to implement the Directive, they have an immediate and urgent need for relief. They are being ordered to violate federal law and are facing discipline or adverse employment action if they follow federal law.

53. Defendants are obligated, under the terms of their signed agreement with the ICE Agents and Officers Union, to issue an “Article 9A Notice of Proposed Change” prior to the alteration of agency policies. The purpose of such a Notice is to allow ICE agents and officers to provide input regarding proposed agency policies. No such Notice was issued prior to the June 15, 2012, Directive or its August 15, 2012, implementation date.

FIRST CAUSE OF ACTION
THE DIRECTIVE EXPRESSLY VIOLATES FEDERAL STATUTES REQUIRING THE INITIATION OF REMOVALS

54. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

55. 8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." The proceedings under 8 U.S.C. § 1229a are removal proceedings in United States immigration courts.

56. The Directive orders Plaintiffs to violate the above-listed provisions of federal law by declining to place certain aliens into removal proceedings, when federal law clearly requires Plaintiffs to place such aliens into removal proceedings.

57. The Morton Memorandum, as implemented by Defendants, asserts "prosecutorial discretion… [not] to issue, reissue, serve, file, or cancel a Notice to Appear (NTA)," in direct contradiction of 8 U.S.C. § 1225(b)(2)(A) in cases in which that statute applies.

58. Because Congress has expressly limited the discretion of Defendants to not initiate removal proceedings, any "prosecutorial discretion" that Defendants exercise must be consistent with 8 U.S.C. § 1225 and can only occur after an alien has been placed into removal proceedings as required by 8 U.S.C. § 1225, or under a provision of federal law expressly authorizing such "prosecutorial discretion."

59. Defendant Napolitano's authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize her to order her subordinate officers or employees to violate the requirements of federal law expressed in 8 U.S.C. § 1225.

60. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

SECOND CAUSE OF ACTION
THE DIRECTIVE VIOLATES FEDERAL LAW BY CONFERRING A NON-STATUTORY FORM OF BENEFIT, DEFERRED ACTION, TO MORE THAN 1.7 MILLION ALIENS, RATHER THAN A FORM OF RELIEF OR BENEFIT THAT FEDERAL LAW PERMITS ON SUCH A LARGE SCALE

61. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

62. "Deferred action" is a benefit that is not authorized in federal statute and is only authorized to a limited extent and for limited purposes in federal regulations.

63. No federal regulation authorizes the granting of the benefit of deferred action to aliens who are in the position of the more than 1.7 million beneficiaries of the Directive.

64. No federal regulation authorizes the conferral of the benefit of deferred action to an entire category of unlawfully present aliens numbering in excess of 1.7 million persons.

65. If an executive agency's practice contradicts the express terms of federal law, that practice is *ultra vires* and unlawful.

66. Defendant Napolitano's authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize her to order her subordinate officers or employees to violate the requirements of federal law expressed in 8 U.S.C. § 1225.

67. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

THIRD CAUSE OF ACTION
THE DIRECTIVE VIOLATES FEDERAL LAW BY CONFERRING THE LEGAL BENEFIT OF EMPLOYMENT AUTHORIZATION WITHOUT ANY STATUTORY BASIS AND UNDER THE FALSE PRETENSE OF "PROSECUTORIAL DISCRETION"

68. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

69. The Directive purports to use "prosecutorial discretion" to grant the benefit of employment authorization to unlawfully present aliens.

70. Employment authorization is a benefit under federal regulations that is "granted" to beneficiary aliens. 8 C.F.R. § 274a.12(c)(14).

71. Federal law specifies the circumstances under which aliens may be granted the benefit of employment authorization.

72. The Morton Memorandum on pp. 2-3 lists twelve ways in which "prosecutorial discretion" may purportedly be exercised in immigration law, but nowhere mentions the conferral of the benefit of employment authorization.

73. "Prosecutorial discretion," insofar as it is permitted by federal immigration law, is by definition the exercise of discretion not to remove; it is not the conferral of a benefit.

74. To the limited extent that any "prosecutorial discretion" is permitted by federal immigration law, such discretion allows ICE to seek the cancellation or withholding of a removal. The exercise of "prosecutorial discretion" does not permit any DHS employee or officer to grant unlawfully present aliens the benefit of employment authorization in the manner attempted by the Directive.

75. U.S. Citizenship and Immigration Services is not a law enforcement agency.

76. A non-law-enforcement agency cannot exercise prosecutorial discretion.

77. Defendant Napolitano's authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize her to order her subordinate officers or employees to confer a substantive benefit on aliens that is not authorized by federal law.

78. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

FOURTH CAUSE OF ACTION
THE DIRECTIVE VIOLATES THE CONSTITUTIONAL ALLOCATION OF LEGISLATIVE POWER TO CONGRESS

79. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

80. Article I, section 1, of the United States Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

81. The Development, Relief, and Education for Alien Minors Act (DREAM Act), in various forms, has been proposed in Congress at least 24 times. It was introduced in the following bills: S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801-1813 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621–632 (2006); H.R. 1275, 110th Cong. (2007); H.R. 1645, 110th Cong. §§ 621-632 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621–632 (2007) (as amended by S.A. 1150 §§ 612–619); S. 1639, 110th Cong. §§ 612-620 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. §§ 5-16 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531-542 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong.

(2010); S. 3992, 111th Cong. (2010); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141-149 (2011); H.R. 5869, 112th Cong. (2012).

82. The principal provisions of the DREAM Act, as reiterated in the two dozen DREAM Act bills introduced in Congress, are that it establishes a class of unlawfully present aliens who may apply for cancellation of removal and either temporary or conditional lawful residence, and then may adjust to lawful permanent resident status or have the conditions removed. The class is generally defined as those aliens who arrived in the United States as minors, have been physically present in the United States for a period of years (typically five years) prior to enactment, have not been convicted of a felony or two or more misdemeanors and do not pose a threat to national security or public safety, have earned a high school diploma or a general education development certificate in the United States, and are below a certain age (typically early to mid-thirties) on the date of enactment. Qualifying aliens whose removal is cancelled and who are granted temporary or conditional residence then must be admitted to, or earn a certain number of credits in, an institution of higher education or serve honorably in the U.S. Armed Forces for a certain period in order to adjust to lawful permanent resident status or have the conditions on their status removed.

83. The DREAM Act has never been passed by both houses of Congress and signed into law by the President.

84. The fact that the DREAM Act has been proposed in Congress two dozen times, and has been voted on by the United States House of Representatives and by the United States Senate, indicates Congress's understanding that federal legislation is required in order to achieve these objectives.

85. The Directive attempts to confer continued presence in the United States, as well as employment authorization, to all aliens meeting the criteria specified in the Directive.

86. The unlawfully present aliens who are given benefits by the Directive are substantially the same aliens that would have been given benefits by the DREAM Act, had it passed both Houses of Congress and been signed into law by the President.

87. The conferral of legal rights and privileges to a large class of persons meeting certain criteria is a legislative act.

88. The application of “deferred action” to approximately 15% of aliens who are in the United States without authorization is not an exercise of executive branch discretion permitted by the Constitutioin. The application of “deferred action” to approximately 15% of aliens who are in the United States without authorization is a legislative act of amnesty, the granting of a legislative benefit, or an act otherwise exceeding the Secretary’s authority as a principal officer under the Constitution by usurping legislative authority.

89. Because the Directive is a legislative act that Defendants have implemented through executive action, it is in violation of Article I, section 1, of the United States Constitution.

90. Defendant Napolitano’s authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize her to exercise legislative powers through the issuance of directives.

91. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

FIFTH CAUSE OF ACTION
THE DIRECTIVE VIOLATES THE ARTICLE II, SECTION 3, CONSTITUTIONAL OBLIGATION OF THE EXECUTIVE TO TAKE CARE THAT THE LAWS ARE FAITHFULLY EXECUTED

92. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

93. Article II, section 3, of the United States Constitution requires that the President, by and through his executive branch officials, including Defendants, "shall take Care that the Laws be faithfully executed."

94. The application of "deferred action" to approximately 15% of aliens who are in the United States without authorization is not consistent with the executive's duty to take care that the laws be faithfully executed. In effect, the Directive orders that the law shall not be executed against a class of more than 1.7 million aliens.

95. Defendant Napolitano's authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize her to order her subordinate officers or employees to decline to enforce federal immigration laws against a class of more than 1.7 million aliens.

96. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

SIXTH CAUSE OF ACTION
THE DIRECTIVE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT THROUGH CONFERRAL OF A BENEFIT WITHOUT REGULATORY IMPLEMENTATION

97. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

98. The Administrative Procedure Act requires that agencies implementing Congressional statutes in whole or in part through an agency statement of general applicability

and future effect designed to implement, interpret, or prescribe law or policy do so through a rulemaking. A rulemaking under the Administrative Procedure Act is defined as the agency process for formulating, amending, or repealing a rule through notice and comment procedures under the Administrative Procedure Act, 5 U.S.C. § 553. The Immigration and Nationality Act delegates authority to the Secretary of Homeland Security and the Attorney General to implement its provisions through regulations. The Secretary has not promulgated any regulation that establishes the criteria for eligibility for relief from removal from the United States or the granting of employment authorization. The Directive identifies a large class of individuals by specific eligibility criteria against whom the immigration laws of the United States requiring their removal shall not be executed and who are made eligible for specific benefits.

99. Establishing a class of eligibility by criteria for exception from removal from the United States and affirmative eligibility for benefits is quintessentially a "rule" under the Administrative Procedure Act, 5 U.S.C. § 551(4). The Secretary has not issued a notice of proposed rulemaking or promulgated a final rule in conformity with the Administrative Procedure Act. The Directive is not a rule under the Administrative Procedure Act.

100. The Directive is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, and without observance of procedure required by the Administrative Procedure Act.

101. Defendant Napolitano's issuance of a Federal Register Notice on August 16, 2012, as part of a so-called "information collection" exercise in no way satisfies the publication and comment requirements for rulemaking under the Administrative Procedure Act.

102. Defendant Napolitano's authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize her to order her subordinate officers or employees to circumvent the terms of

the Administrative Procedure Act by simply issuing "directives" or "orders" that confer substantive legal benefits and privileges, and significantly transform the enforcement of federal immigration law.

103. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

A. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(B) that the Directive is unlawful and in violation of Article I of the Constitution of the United States as a usurpation of legislative authority and vacate the Directive;

B. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(B) that the Directive is unlawful and in violation of Article II of the Constitution of the United States as in excess of executive authority and vacate the Directive;

C. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(B) that the Directive and relevant provisions of the Morton Memorandum are unlawful and in violation of 8 U.S.C. § 1225(b)(2)(A) and vacate the Directive and relevant provisions of the Morton Memorandum.

D. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(C) that the Directive is unlawful and in violation of the Immigration and Nationality Act as in excess of delegated authority and vacate the Directive;

E. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(D) that the Directive is unlawful and in violation of the Administrative Procedure Act as a rule promulgated without conforming to the procedure described therein and vacate the Directive;

F. Temporarily restrain, preliminarily enjoin, and permanently enjoin Defendants and their subordinate officers, employees, and agents from implementing or enforcing the Directive, or taking any adverse action against plaintiffs pursuant to the Directive or for not following the Directive;

G. Direct Defendants to pay all costs associated with this lawsuit; and

H. Grant such other and further relief as this Court deems equitable, just, and proper.

Dated: August 23, 2012

By: s/ Kris W. Kobach

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Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

EXHIBIT
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Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano