No. 22-58

IN THE

# Supreme Court of the United States

UNITED STATES, ET AL.,

*Petitioners*,

v.

TEXAS, ET AL.,

*Respondents*.

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

**BRIEF OF FORMER OFFICIALS OF THE DEPARTMENT OF HOMELAND SECURITY AND THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

*Counsel for Amici Curiae*

September 19, 2022

* Counsel of Record

## TABLE OF CONTENTS

| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF *AMICI CURIAE* | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 5 |
| I. As this Court Has Recognized, the Executive Branch Enjoys Substantial Discretion in the Enforcement of Immigration Law | 5 |
| II. Guidance Documents on Enforcement Priorities and Prosecutorial Discretion Are Essential to Effective Immigration Enforcement | 8 |
| III. The Final Memo Is a Valid Exercise of Executive Discretion in Immigration Enforcement | 19 |
| CONCLUSION | 24 |
| APPENDIX | 1A |

## TABLE OF AUTHORITIES

**Page(s)**

Cases

*Arizona v. Biden*,
40 F.4th 375 (6th Cir. 2022) ..................... 16

*Arizona v. United States*,
567 U.S. 387 (2012) ........................... 2, 7, 16, 24

*Chy Lung v. Freeman*,
92 U.S. 275 (1875) ..................................... 5

*Dep't of Homeland Sec. v. Regents of the Univ. of California*,
140 S. Ct. 1891 (2020) ............................... 8

*Harisiades v. Shaughnessy*,
342 U.S. 580 (1952) ................................... 5

*Heckler v. Chaney*,
470 U.S. 821 (1985) ................................... 1

*Jama v. ICE*,
543 U.S. 335 (2005) ............................... 2, 5, 6

*Lichter v. United States*,
334 U.S. 742 (1948) ................................... 5

*Mathews v. Diaz*,
426 U.S. 67 (1976) ..................................... 2

*Plyler v. Doe*,
457 U.S. 202 (1982) ................................... 15

*Reno v. American-Arab Anti-Discrimination Committee*,
525 U.S. 471 (1999) ............................... 2, 6, 10

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

*Texas v. United States*,
86 F. Supp. 3d 591 (S.D. Tex. 2015) ......... 15

*United States ex rel. Knauff v. Shaugnessy*,
338 U.S. 537 (1950) .................................. 5, 6

*Wan Chung Wen v. Ferro*,
543 F. Supp. 1016 (W.D.N.Y. 1982).......... 9

*Wayte v. United States*,
470 U.S. 598 (1985) .................................. 6

Statutes and Legislative Materials

Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 ...... 2

Homeland Security Act of 2002, Pub. L.
107-296, 116 Stat. 2135 ........................... 12

House Hearing, Serial No. 114-3, 114th
Cong. 70 (Feb. 25, 2015) ........................... 18, 23

Immigration and Nationality Act of 1952,
ch. 447, 66 Stat. 163................................. 2

6 U.S.C. § 202(5).......................................... 2, 5, 8

8 U.S.C. § 1103(a)(3) .................................... 6

8 U.S.C. § 1252(g)........................................ 6

Other Authorities

Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119
Yale L. J. 458 (2009) ................................. 6

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

Dep't Homeland Sec., *Background: Implementing an Effective Immigration Enforcement Strategy* (2011) ......................... 21

*Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC Immigr. (Jan. 18, 2022) .................................................... 4

David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J. L. & Politics 411 (2014) ......................................................... 10

David A. Martin, *Taming Immigration*, 36 Ga. State U. L. Rev. 971 (2020) ................ 17

Memorandum from Sam Bernsen, Gen. Couns., INS, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976) ................................ 3, 9, 16

Memorandum from Bo Cooper, General Counsel, INS, *INS Exercise of Prosecutorial Discretion* (July 11, 2000) ............... *passim*

Memorandum from William J. Howard, Principal Legal Advisor, ICE (Oct. 24, 2005) ................................................... 12, 17, 18

Memorandum from Jeh Johnson, Sec'y, DHS, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014)................... *passim*

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

Memorandum from John Kelly, Sec'y, DHS, *Enforcement of Immigration Laws to Serve the National Interest* (Feb. 20, 2017) ............................................ 15, 20, 22, 23

Memorandum from Doris Meissner, Comm'r, ICE, *Exercising Prosecutorial Discretion* (Nov. 17, 2000)...................... *passim*

Memorandum from John Morton, Dir., ICE, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (June 30, 2010) .... 13, 22

Memorandum from John Morton, Dir., ICE, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011) .................................................... 17

Memorandum from John Morton, Dir., ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011)................ 14

Memorandum from Julie L. Myers, Ass't Sec'y, ICE, *Prosecutorial and Custody Discretion* (Nov. 7, 2007)........................... 13, 17

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

Memorandum from Eric Schaeffer, Dir., Office Regul. Enf't, U.S. Env't Prot. Agency, *Issuance of Policy on Timely and Appropriate Enforcement Response to High Priority Violations* (Feb. 2, 1999) .... 18

Memorandum from John P. Torres, Dir., ICE, *Discretion in Cases of Extreme Or Severe Medical Concern* (Dec. 11 2006).... 13

Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, *Case-by-Case Review of Incoming and Certain Pending Cases* (Nov. 17, 2011) ................................ 21

Memorandum from William R. Yates, Ass't Dir. for Operations, USCIS, *Service Center Issuance of Notice to Appear* (Sept. 12, 2003) ........................................................ 12

*Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States*, 38 Op. O.L.C. 39 (Nov. 19, 2014) ......................................................... 16, 23

Abraham D. Sofaer, *The Change-of-Status Adjudication*,1 J. Legal Stud. 349 (1972).. 9

Eileen Sullivan, *Migrant Apprehensions Surpass a Fiscal Year Record*, N.Y. Times, Aug. 15, 2022.................................. 4

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are former officials of the Department of Homeland Security and the Immigration and Naturalization Service, who served in both Republican and Democratic administrations. *Amici* differ in their views of the Department of Homeland Security's *Guidelines for the Enforcement of Civil Immigration Law* as a matter of policy, but they all agree that guidance documents of this type are critical to the executive branch's exercise of prosecutorial discretion and enforcement of the nation's immigration laws. Indeed, *amici* have observed first-hand the important role that such documents play in the enforcement of immigration law, and they know that administrations of both parties have long used documents of this type to ensure that executive branch discretion is exercised in a consistent and transparent manner. Accordingly, *amici* have an interest in this case.

A full listing of *amici* appears in the Appendix.

## INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has long recognized, "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). Indeed, enforcement agencies "must not only assess whether a

---

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

violation has occurred, but whether agency resources are best spent on this violation or another," especially when operating in the context of scarce resources. *Id.*

As this Court has recognized, these principles apply to the enforcement of our nation's immigration laws. *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("[a] principal feature of the removal system is the broad discretion exercised by immigration officials"); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) ("AADC") (recognizing that executive discretion includes the authority to "abandon" removal at "each stage" of the process—including when determining whether to "institute proceedings, terminate proceedings, or . . . to execute a final order of [removal]"). Indeed, these principles are especially important in the immigration context because removal decisions "'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" *Jama v. ICE*, 543 U.S. 335, 348 (2005) (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

Congress has consistently recognized the executive's discretion in immigration enforcement, most recently by making the Secretary of the Department of Homeland Security ("DHS") responsible for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5); *see* Immigration and Nationality Act of 1952, ch. 447, § 103, 66 Stat. 163, 173 (1952) (providing that the Attorney General "shall establish such regulations . . . issue such instructions; and perform such other acts as he deems necessary"); Act of Feb. 5, 1917, ch. 29, 39 Stat. 874, 892 (providing that the Commissioner of Immigration "shall establish such rules and regulations, . . . and shall issue from time to time such instructions . . . as he shall deem best calculated for carrying out the provisions of this

[A]ct and for protecting the United States and aliens migrating thereto from fraud and loss").

And for decades, administrations of both parties have used their enforcement discretion to meet the unique and variable challenges that arise in the immigration context. Among other things, they have addressed the problem of limited enforcement resources by developing and implementing policies designed to prioritize the removal of certain noncitizens and deprioritize the removal of others. In fact, as early as 1909, the Immigration and Naturalization Service ("INS") instructed officers not to institute certain immigration proceedings unless doing so would achieve "substantial results . . . in the way of the betterment of the citizenship of the country." Memorandum from Sam Bernsen, Gen. Couns., INS, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* 4 (July 15, 1976) (quoting Dep't of Justice Circular Letter No. 107).

As former DHS and INS officials, *amici* know well the importance of these policies. Policies setting enforcement goals and priorities allow immigration officials to concentrate resources on noncitizens whose removal would best serve government interests—an especially important goal when "limitations in available enforcement resources . . . make it impossible for a law enforcement agency to prosecute all offenses that come to its attention." Memorandum from Bo Cooper, Gen. Couns., INS, *INS Exercise of Prosecutorial Discretion* 2 (July 11, 2000). These policies also enable administration officials to ensure that immigration enforcement aligns with other important considerations, including humanitarian concerns, law enforcement imperatives, and advancing the global perception of the United States.

These policies are especially important today, when immigration courts face a 1.7 million case backlog, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC Immigr. (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675, and unauthorized migration has reached record highs, *see* Eileen Sullivan, *Migrant Apprehensions Surpass a Fiscal Year Record*, N.Y. Times, Aug. 15, 2022, at A13 (noting that the "high number of crossings comes as the United Nations says there are more displaced people around the world than ever before"). In this environment, prosecutorial discretion permits immigration agencies to prioritize their resources effectively, address the equities of individual cases, and "channel and guide the discretion of its employees," Cooper Memo, *supra*, at 8.

To administer these policies, immigration officials across administrations have long published guidance documents instructing officers how "best to expend [agency] resources," and have guided prosecutorial discretion by requiring individualized assessments of whether the removal of a particular noncitizen aligns with the government's priorities. Memorandum from Doris Meissner, Comm'r, ICE, *Exercising Prosecutorial Discretion* 5 (Nov. 17, 2000). These guidance documents promote transparency, consistency, and efficiency in the enforcement of immigration law.

Despite the long history and vital importance of transparent guidance for the exercise of immigration enforcement discretion, the district court vacated an agency memorandum establishing guidelines for implementing immigration enforcement priorities, *see* Pet. App. 136a (hereinafter "Final Memo"), and the court below affirmed. Their conclusion that the Final Memo is unlawful is at odds with the long history of executive branch discretion in the context of

immigration enforcement and the extensive use of guidance documents to help implement that discretion. If accepted, this conclusion would undermine the executive branch's ability to effectively enforce our nation's immigration laws. This Court should reverse.

## ARGUMENT

### I. As this Court Has Recognized, the Executive Branch Enjoys Substantial Discretion in the Enforcement of Immigration Law.

Immigration enforcement is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *see Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875) (noting that immigration enforcement has the potential to "bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend"). Removal decisions, in particular, "may implicate our relations with foreign powers" and require consideration of "changing political and economic circumstances." *Jama*, 543 U.S. at 348 (internal quotation marks omitted).

Because of this, the executive branch has long enjoyed significant "flexibility" and discretion in the enforcement of immigration law, thereby permitting "the adaptation of the congressional policy to infinitely variable conditions." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)).

In particular, the DHS Secretary enjoys the authority to "[e]stablish[] national immigration enforcement policies and priorities," *see* 6 U.S.C. § 202(5), and "establish such regulations . . . as he deems necessary for carrying out his authority" under the nation's

immigration laws, *see* 8 U.S.C. § 1103(a)(3). These provisions permit the executive to exercise its authority "for the best interests of the country," *Knauff*, 338 U.S. at 543, in accordance with the "customary policy of deference" to the executive in matters of immigration, *Jama*, 543 U.S. at 348; *see generally* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L. J. 458, 463 (2009) (arguing that the "detailed, rule-bound immigration code" developed by Congress "has had the counterintuitive consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive").

As this Court has explained, the executive branch's discretion in this context includes the decision to refrain from seeking a noncitizen's removal, either for "humanitarian reasons or simply for [the executive]'s own convenience," and to prioritize others for removal instead, *AADC*, 525 U.S. at 484. In *AADC*, this Court held that § 1252(g) of the INA—which restricts judicial review of the Attorney General's "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders"—deprived the courts of jurisdiction over a constitutional challenge to the government's decision to institute a particular removal proceeding. *Id.* at 473 (citing 8 U.S.C. § 1252(g)). In so holding, this Court affirmed the INS's "broad discretion" to determine whether to commence removal proceedings against removable noncitizens. *Id.* at 489 (citing *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)). Indeed, the Court explained that the jurisdictional statute reflected Congress's desire to "protect[] the Executive's discretion from the courts," *AADC*, 525 U.S. at 486, and specifically to eliminate

any "judicial constraints [on] prosecutorial discretion," *id*. at 485 n.9.

This Court has since reiterated the "broad discretion exercised by immigration officials" in the enforcement of immigration laws. *Arizona*, 567 U.S. at 396. In *Arizona*, the Court invalidated on preemption grounds several state laws, including one that permitted warrantless arrests of individuals upon probable cause that they had committed a removable offense. *Id*. at 407. It described the history and importance of the discretion "entrusted" to immigration officials—including their discretion to "decide whether it makes sense to pursue removal at all." *Id*. at 396. The Court concluded that the state's warrantless-arrest provision created an obstacle to federal immigration law because it would allow state officials to undermine federal officers' discretionary decisions about whom to remove—decisions that "touch on foreign relations and must be made with one voice." *Id*. at 409.

Moreover, even those justices who disagreed with the Court's conclusion as to preemption recognized the executive branch's broad discretion in the immigration sphere. *See id.* at 434 (Scalia, J., concurring in part and dissenting in part) (acknowledging the "Federal Executive's need to allocate its scarce enforcement resources," but concluding that the challenged laws were nonetheless valid); *id.* at 445 (Alito, J., concurring in part and dissenting in part) (concluding that the state law was not contrary to federal law "because the Federal Government retains the discretion that matters most—that is, the discretion to enforce the law in particular cases").

In the years since *Arizona*, this Court has continued to restate the foundational tenets of prosecutorial discretion in the immigration system. Indeed, it has noted that the decision not to seek removal of a

removable noncitizen is "squarely within the discretion" of the DHS Secretary, especially given the Secretary's statutory responsibility for "[e]stablishing national immigration enforcement policies and priorities." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1912 (2020) (citing 116 Stat. 2178, 6 U.S.C. § 202(5)).

To facilitate and guide the exercise of this discretion, federal immigration officials have published guidance documents setting enforcement priorities for decades, as the next Section discusses.

## II. Guidance Documents on Enforcement Priorities and Prosecutorial Discretion Are Essential to Effective Immigration Enforcement.

As *amici* know from their experiences serving in DHS and INS, these agencies have often coped with limited enforcement resources by carefully targeting particular noncitizens for removal. And they have often used guidance documents like the one at issue here to ensure that that discretion is exercised in a consistent and transparent manner.

**A.** In their exercise of enforcement discretion, DHS and INS have consistently used guidance documents, like the one at issue here, to instruct immigration officers as to how to best use the government's limited enforcement resources. Like the Final Memo, these documents have identified certain categories of noncitizens as priorities for removal and required personnel to consider certain individualized factors when making enforcement decisions.

In the 1960s, for example, INS's Operations Instructions directed officers to refrain from deporting noncitizens when doing so would align with "compelling humanitarian factors" or was necessary to avoid

subjecting the government to "public ridicule." Abraham D. Sofaer, *The Change-of-Status Adjudication*, 1 J. Legal Stud. 349, 406-07 (1972) (citing Operations Instructions § 103.1(a)(1) (Feb. 23, 1967)). The agency instructed immigration officers to consider a variety of factors to assess whether deprioritizing a particular noncitizen's deportation was appropriate, including the noncitizen's "physical or mental condition," the noncitizen's criminal history, and the "extent of [the noncitizen's] residence in the United States." *Id.* at 407.

In 1976, INS General Counsel Sam Bernsen published a legal opinion approving of the agency's use of prosecutorial discretion in a variety of contexts, including in the enforcement of deportation provisions. Bernsen Memo, *supra*, at 6 ("In addition to the discretion not to institute deportation proceedings, prosecutorial discretion may be exercised in connection with various other discretionary remedies . . . ."). As Bernsen explained, "[t]he reasons for the exercise of prosecutorial discretion are both practical and humanitarian . . . [t]here simply are not enough resources to enforce all of the rules and regulations presently on the books." *Id.* at 1.

And in subsequent revisions to the Operations Instructions, INS explicitly permitted officers to defer the deportation of certain deportable noncitizens based on "sympathetic factors" and other case-specific considerations. *See Wan Chung Wen v. Ferro*, 543 F. Supp. 1016, 1018 (W.D.N.Y. 1982) (quoting Operations Instructions § 103.1(a)(1)(ii)). This permitted officers to focus on "a class of deportable aliens whose removal ha[d] been given a high enforcement priority," *id.*, and otherwise pursue the government's geopolitical and humanitarian goals, *see* Sofaer, *supra*, at 406-07; *see*

*also AADC*, 525 U.S. at 483-84 (describing INS's "regular practice" of deferred action).

In 1996, Congress amended the Immigration and Naturalization Act to create what the court below called an "arrest and detention mandate" for noncitizens removable due to the commission or conviction of certain crimes. *See* Pet. App. 20-21a (citing 8 U.S.C. § 1226(c)(1) and 8 U.S.C. § 1231(a)). Even after the passage of these amendments, INS continued to use internal guidance documents to prioritize certain noncitizens for removal and deprioritize others. In a memorandum issued by INS Commissioner Doris Meissner, the agency acknowledged that its officers were "not only authorized by law but *expected* to exercise discretion in a judicious manner" during the immigration enforcement process. Meissner Memo, *supra*, at 1 (emphasis added). As the memo explained, the agency's use of prosecutorial discretion was especially important because the 1996 amendments had also limited the opportunities for Immigration Judges to provide relief after the entry of an order of removal. *Id*. at 1; *see* David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J. L. & Politics 411, 461 (2014) (noting that INS "launched a process to authorize and encourage the use of prosecutorial discretion" at the urging of members of Congress, including those who had supported the 1996 Act, who sought to "soften" the impact of the amendments that eliminated the discretion of Immigration Judges to cancel removal).

Commissioner Meissner's memo acknowledged and regulated INS's use of prosecutorial discretion. Referencing the Principles of Federal Prosecution governing the conduct of U.S. Attorneys, Meissner explained that "[a]s 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." Meissner Memo, *supra*, at 5. She also instructed that immigration officers "must take into account" certain issues when exercising prosecutorial discretion. *Id*. at 1. Specifically, officers were required to "give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving [INS's] goals," *id*. at 4, including the need to protect public safety and "maximize the likelihood that serious offenders will be identified," *id*. at 5. Officers were also required to consider a non-exhaustive list of factors when deciding whether to prioritize or deprioritize a noncitizen's removal, including the length of residence in the United States, the existence (or not) of a criminal history, the presence of family in the United States, and other "humanitarian concerns." *Id*. at 7.

Significantly, Commissioner Meissner explicitly permitted immigration officers to decline prosecution "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." *Id*. at 6. Operating on the assumption that the recently-enacted mandatory detention provisions did not curtail agencies' discretion in the initiation of removal proceedings, Meissner provided that officers should "examin[e] a number of factors" to determine whether to remove a particular noncitizen, *id*. at 4, even when their criminal history would ordinarily make them a "high priority for the Service," *id*. at 6; *see also* Cooper Memo, *supra*, at 11 (explaining that in § 1226(c) and § 1231(a) Congress "expressly limited the [immigration agencies'] administrative discretion . . . not to detain criminal aliens once the decision is made to place

them in removal proceedings," but that it "reaffirmed" the agency's broad discretion to determine whether removal proceedings would be appropriate in the first instance).

In the years that followed, guidance documents from immigration agencies confirmed the continued relevance of prosecutorial discretion and the Meissner Memo. After the Homeland Security Act of 2002 dismantled INS and separated the agency into various components within DHS, *see* Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, 2192, Meissner's guidance remained applicable in each of these components throughout the George W. Bush administration. In September 2003, for example, U.S. Citizenship and Immigration Services ("USCIS"), which assumed responsibility for the immigration services component of INS's work, determined that "each decision to issue a [Notice to Appear for removal proceedings] must be made in accordance" with Meissner's instructions. Memorandum from William R. Yates, Ass't Dir. for Operations, USCIS, *Service Center Issuance of Notice to Appear* 2 (Sept. 12, 2003).

In 2005, U.S. Immigration and Customs Enforcement ("ICE")'s Office of the Principal Legal Advisor, which prosecutes all removal proceedings, reiterated the importance of prosecutorial discretion. The Office instructed all attorneys to consider the "universe of opportunities to exercise prosecutorial discretion," and to "discourage" the initiation of removal proceedings in certain instances—including when the "situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion." Memorandum from William J. Howard, Principal Legal Advisor, ICE, 2, 4 (Oct. 24, 2005).

Two years later, the Assistant Secretary of ICE instructed agents and officers on their "responsibility . . .

to use discretion" in meritorious cases involving noncitizen caregivers, and explicitly reiterated the relevance of the Meissner Memo. *See* Memorandum from Julie L. Myers, Ass't Sec'y, ICE, *Prosecutorial and Custody Discretion* 1 (Nov. 7, 2007) ("[T]he process for making discretionary decisions is outlined in the attached memorandum"). As the Assistant Secretary made clear, ICE agents were "not only authorized by law to exercise discretion . . . but expected to do so in a judicious manner at all stages of the enforcement process." *Id.*; *see* Memorandum from John P. Torres, Dir., ICE, *Discretion in Cases of Extreme or Severe Medical Concern* (Dec. 11, 2006) (referencing Meissner Memo and noting that "[f]ield officers are not only authorized by law to exercise discretion within the authority of the agency but are expected to do so").

Even as administrations changed, immigration officials continued to use guidance documents to inform the exercise of prosecutorial discretion. In June 2010, ICE Director John Morton issued a broad memorandum about the agency's "Civil Enforcement Priorities" and limited resources, highlighting the importance of prosecutorial discretion. Memorandum from John Morton, Dir., ICE, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* 1-2 (Jun 30, 2010). Morton's guidance categorized noncitizens based on their priority for removal. *Id.* Noncitizens who posed a danger to national security or public safety—including violent criminals, felons, and repeat offenders—were the highest priority for removal, followed by "recent illegal entrants." *Id.* at 1-2; *see also id.* at 1 ("These priorities shall apply across all ICE programs and shall inform enforcement activity, detention decisions, budget requests and execution, and strategic planning.").

In June 2011, ICE issued a second guidance document that supported the previous year's Civil Enforcement Priorities. Like the Meissner Memo, the 2011 memo instructed officers to consider a non-exhaustive list of factors "[w]hen weighing whether an exercise of prosecutorial discretion may be warranted," including a noncitizen's "criminal history," immigration history, and their "ties and contributions to the community." Memorandum from John Morton, Dir., ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 4 (June 17, 2011). The document also instructed officers that they "should consider all relevant factors," including whether a noncitizen poses a "clear risk to national security," is a "serious felon[]," or has a "lengthy criminal record of any kind." *Id*. at 5.

In 2014, DHS Secretary Jeh Johnson issued Department-wide guidance setting "enforcement priorities" to guide the exercise of prosecutorial discretion. Memorandum from Jeh Johnson, Sec'y, DHS, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* 2 (Nov. 20, 2014). The memo instructed officers to prioritize the removal of noncitizens who represent threats to national security, border security, and public safety, unless "compelling and exceptional factors . . . clearly indicate" that removal was not warranted. *Id*. at 5. Despite the priority system, DHS personnel were required to "exercise discretion based on individual circumstances," rather than the fact of conviction alone. *Id*. at 5. To guide this assessment, the Secretary provided a non-exhaustive list of factors that officers must consider in every case, including any "extenuating circumstances involving the offense of conviction," the "length of time since the offense of conviction," the length of a noncitizen's

residence in the United States, and "compelling humanitarian factors" such as poor health. *Id.* at 6; *see Texas v. United States*, 86 F. Supp. 3d 591, 658 (S.D. Tex. 2015) ("this Court finds nothing unlawful about the Secretary's priorities").

Finally, in February 2017, DHS Secretary John Kelly issued a memorandum rescinding previous guidance and instructing DHS personnel to "prioritize removable aliens" in certain categories, including those who had been convicted of, charged with, or committed a criminal offense, those who had "engaged in fraud or willful misrepresentation" before a government agency, and those who had abused a public benefits program. Memorandum from John Kelly, Sec'y, DHS, *Enforcement of Immigration Laws to Serve the National Interest* 2 (Feb. 20, 2017). Secretary Kelly also instructed that the "exercise of prosecutorial discretion . . . shall be made on a case-by-case basis in consultation with the head of the field office component . . . that initiated or will initiate the enforcement action." *Id.* at 4; *see id.* (providing that the memo "is not intended to remove the individual, case-by-case decisions of immigration officers").

**B.** Whatever the precise details of the prioritization policies and accompanying guidance (and those have clearly varied across administrations), these kinds of prioritization documents serve several sensible and important policy objectives.

First, prioritization policies are necessary to make the most efficient use of limited enforcement resources. As this Court has long recognized, Congress has never allocated enough resources to enable immigration enforcement agencies to remove every person who is not authorized to be in the United States. *See Plyler v. Doe*, 457 U.S. 202, 219 n.17 (1982) (noting that immigration agencies "have neither the

resources, the capability, nor the motivation to uproot and deport millions of" removable noncitizens (citing congressional testimony of Attorney General William French Smith)); *Arizona*, 567 U.S. at 434 (Scalia, J., concurring in part and dissenting in part) (describing "the need to allocate scarce enforcement resources wisely" in the immigration context); *see also Arizona v. Biden*, 40 F.4th 375, 381 (6th Cir. 2022) (explaining that DHS "lacks the resources to apprehend and remove every one of the more than 11 million removable noncitizens in the country").

Prioritization guidance helps enforcement agencies respond to this reality by enabling agencies to make "policy choices as to the most effective and desirable way in which to deploy their limited resources." Bernsen Memo, *supra*, at 1; *see also* Johnson Memo, *supra*, at 2 ("Due to limited resources, DHS . . . cannot respond to all immigration violations or remove all persons illegally in the United States."); Cooper Memo, *supra*, at 2 ("[L]imitations in available enforcement resources . . . make it impossible for a law enforcement agency to prosecute all offenses that come to its attention."); Meissner Memo, *supra*, at 4 ("Like all law enforcement agencies, the INS has finite resources . . . ."). As the Office of Legal Counsel observed when evaluating DHS's 2014 prioritization policy, *see* Johnson Memo, *supra*, "setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency." *Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States*, 38 Op. O.L.C. 39, 51 (Nov. 19, 2014).

On top of that, publishing guidance on prosecutorial discretion allows immigration agencies to pursue

important national priorities. For example, agencies have exercised their discretionary judgment not to remove noncitizens who are critical witnesses or informants in high-priority investigations because of the "effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice," Memorandum from John Morton, ICE Dir., *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* 1 (June 17, 2011); Howard Memo, *supra*, at 6 ("There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States . . . ."). Other administrations have used enforcement discretion to respond to "appealing humanitarian factors," *id.* at 6; Myers Memo, *supra*, 1 (instructing agents and officers to exercise prosecutorial discretion for nursing mothers), often with beneficial political or geopolitical consequences, *see* David A. Martin, *Taming Immigration*, 36 Ga. State U. L. Rev. 971, 984 (2020) (suggesting that the effective use of prosecutorial discretion can curtail "backlash" from potential law enforcement partners). Indeed, guidance on prosecutorial discretion has been essential to advancing a wide variety of agency aims, including "responding to community complaints," Meissner Memo, *supra*, at 5, "building partnerships to solve local problems," *id.*, and focusing agency resources on "national security" and public safety, *see* Howard Memo, *supra*, at 1; Morton, *Exercising Prosecutorial Discretion*, *supra*, at 2.

In addition to helping agencies pursue administrative objectives, publishing guidance documents on enforcement priorities promotes uniformity, consistency, and "effective management," Meissner Memo, *supra*, at 2. Without binding immigration officials to a particular action, each guidance document represents an

effort to ensure uniform application of "sound principles of prosecutorial discretion," *see* Howard Memo, *supra*, at 3; *see also id.* ("[I]t is important that we all apply sound principles of prosecutorial discretion uniformly throughout our offices and in all of our cases.").

Relatedly, guidance documents provide clarity not only to the agency, but also to the public, facilitating "public confidence in fairness and consistency of the agency's enforcement action." Cooper Memo, *supra*, at 8; Johnson Memo, *supra*, at 1 ("[t]he intent of this new policy is to provide clearer and more effective guidance . . . [and to] promote public confidence in our enforcement activities"). Clarity and consistency, in turn, foster political accountability and good governance. Instead of making the decision to prosecute an individual dependent on which individual officer happens to encounter them, published guidance ensures that prosecutorial decisions are "made by the leaders, who are politically accountable." House Hearing, Serial No. 114-3, 114th Cong. 70 (Feb. 25, 2015) (reprinting written testimony of Stephen H. Legomsky) (hereinafter *Legomsky Testimony*).

Significantly, these types of guidance documents are not unique to immigration enforcement. Federal agencies have used guidance documents that set out enforcement priorities in a variety of contexts. *See, e.g.*, U.S. Env't Prot. Agency & U.S. Dep't of Army, *Guidance on Judicial Civil and Criminal Enforcement Priorities* 1-3 (Dec. 12, 1990) (requiring "enforcement personnel [to] consider the following factors when deciding" whether to refer a civil action for prosecution under the Clean Water Act, including "equitable considerations"); Memo from Eric Schaeffer, Dir., Office Regul. Enf't, U.S. Env't Prot. Agency, *Issuance of Policy on Timely and Appropriate Enforcement Response to High Priority Violations* (Feb. 2, 1999) (designating

"high priority violations" of environmental laws and requiring tracking and "accounting of how long the lead agency took to address the violation(s)"). These guidance documents serve important functions—"consistency," "integrity," and the "direct[ion] of limited program resources," U.S. Env't Prot. Agency & Agency & U.S. Dep't of Army, *supra*, at 1—even outside of immigration law.

### III. The Final Memo Is a Valid Exercise of Executive Discretion in Immigration Enforcement.

The Final Memo establishes "civil immigration enforcement priorities" for apprehension and removal. Specifically, it instructs officers to prioritize noncitizens who represent threats to "our national security, public safety, and border security." Pet. App. 138a. Noting that DHS "lacks the resources to apprehend and seek removal of every one of the more than 11 million removable noncitizens in the country," the Memo explains that these instructions are intended to "focus [DHS's] enforcement resources in a more targeted way." *Id.* at 137a.

Like the guidance documents utilized in previous administrations, *see supra* Part II, the Final Memo requires personnel to review a variety of individualized factors to determine whether noncitizens fit into priority groups. Under the Memo, "[w]hether a noncitizen poses a current threat to public safety" is "not to be determined according to bright lines or categories," but rather "an assessment of the individual and the totality of the facts and circumstances." Pet. App. 138a. To that end, the Final Memo identifies a number of aggravating and mitigating factors that immigration officers should consider when determining whether to prioritize a noncitizen for apprehension or removal. *Id.* As the Final Memo makes explicit, the list of

factors is not "exhaustive," and "the exercise of prosecutorial discretion [is left] to the judgment of [DHS] personnel." *Id.* at 139a-40a. The Memo does not "compel an action to be taken or not taken," *id.* at 140a, and it is "not intended to, does not, and may not be relied upon to create any right or benefit," *id.* at 142a.

**A.** Although the Memo's plain terms make clear that it vests ultimate discretionary authority in "the judgment of [DHS] personnel," *id.* at 140a, the court below concluded that the memo impermissibly "strips from ICE agents their once-held discretion," *id.* at 25a, because it "implements various mechanisms to ensure compliance," including training, review procedures, and data collection, *id.* at 16a. But no administration—Republican or Democratic—has ever understood the law to operate in this way. Indeed, if the reasoning of the court below were correct, then every guidance document described above would have been an impermissible imposition on officers' discretion.

Indeed, many previous memoranda required supervision of officers' exercise of prosecutorial discretion. Commissioner Meissner's memo, for example, provided that officers exercising prosecutorial discretion would "remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion." Meissner Memo, *supra*, at 5; *id.* (instructing personnel to consider "appropriate procedures for supervisory and legal review of individual [Notice to Appear] issuing decisions"); *id.* at 11 (instructing that "cases should . . . be reviewed at a supervisory level where a decision can be made as to whether to proceed"); *see also* Kelly Memo, *supra*, at 4 (requiring "consultation" with various supervisory officials in the exercise of prosecutorial discretion). And when implementing the prosecutorial discretion policy described above, ICE Commissioner John Morton

provided that agency departments were required to create standard operating procedures for the implementation of prosecutorial discretion, each of which "must include" "supervisory review" and "notification to a supervisory official . . . of the decision to exercise prosecutorial discretion." Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, *Case-by-Case Review of Incoming and Certain Pending Cases* 2 (Nov. 17, 2011); *see* Morton, *Exercising Prosecutorial Discretion*, *supra*, at 3 (requiring "appropriate supervisory oversight" of the exercise of prosecutorial discretion).

Other memoranda provided specifically for training of officers on enforcement priorities. Under Commissioner Meissner, for example, training was be conducted at the regional level, and included a "discussion of accountability and periodic feedback on implementation issues," Meissner Memo, *supra*, at 13; *see* Johnson Memo, *supra*, at 6 ("Implementing training and guidance will be provided to the workforce . . . ."); Dep't Homeland Sec., *Background: Implementing an Effective Immigration Enforcement Strategy* 2 (2011) ("The interagency working group will also issue guidance to prevent low priority cases from entering the system on a case-by-case basis.").

And many administrations have collected data on officers' exercise of prosecutorial discretion and adherence to enforcement priorities. Secretary Johnson, for example, instructed the Department to "collect, maintain, and report" apprehension and removal statistics and publicly "report that data in accordance with the priorities." Johnson Memo, *supra*, at 6. Agencies collected similar data under Director Morton and used that data to ensure consistency among agency personnel. DHS Background, *supra,* at 2 (noting that "[s]tatistical outliers in local jurisdictions will be subject to an in-depth analysis" and "DHS and ICE will take

appropriate steps to resolve any issues"); *see also* Morton, *Civil Immigration*, *supra*, at 4 (requiring that "ICE programs shall develop appropriate measures and methods for recording and evaluating their effectiveness in implementing the priorities," and instructing ICE to update data tracking systems and methods). Secretary Kelly similarly required the collection of data regarding the apprehension of noncitizens and disposition of their cases, and instructed personnel to "utilize a format that is easily understandable by the public" in order to promote "transparency in the immigration enforcement mission." Kelly Memo, *supra*, at 6; *see generally* Meissner Memo, *supra*, at 11 (requiring documentation of the use of prosecutorial discretion).

**B.** The court below also concluded that the Final Memo eliminates officers' discretion because it "prohibit[s] them [from] rely[ing] solely on a statutorily qualifying conviction or removal order," Pet. App. 15a, and instead mandates that they evaluate an individual based on the "'totality of the facts and circumstances,'" *id*. at 26a. But, again, many of the policy memoranda described above required officers to conduct individualized assessments of the relevant circumstances, while also preserving key elements of the officers' discretion.

In 2014, for example, DHS officers were required to prioritize noncitizens with certain criminal histories, but were also required to "exercise discretion based on individual circumstances," rather than the fact of conviction alone. Johnson Memo, *supra*, at 3-5. And in 2000, INS officers were "require[d to] examin[e] a number of factors" to determine whether to prosecute a particular case, Meissner Memo, *supra*, at 4, and to make decisions "based on the totality of the circumstances, not on any one factor considered in isolation,"

*id*. at 8; *id*. at 1 ("[i]n exercising this discretion, officers *must* take into account the principles described below" (emphasis added)). Similarly, in 2017, Secretary Kelly provided that the exercise of prosecutorial discretion "*shall* be made on a case-by-case basis," Kelly Memo, *supra*, at 4 (emphasis added).

Just like the Final Memo at issue here ultimately leaves the "exercise of prosecutorial discretion to the judgment of [DHS] personnel," Pet. App. 140a, these earlier memoranda also made clear that officers were not deprived of the ultimate authority to initiate removal proceedings against any removable noncitizen. *Id.* at 4; *see also* Johnson Memo, *supra*, at 5 (leaving the decision to depart from the agency's priorities to the "judgment of . . . immigration officer[s]"); Meissner Memo, *supra*, at 8-9 (leaving the ultimate decision to the "judgment [of] the responsible officer"). In other words, the Final Memo, like these earlier policies, creates general threshold criteria at the front end while "requiring individualized, case-by-case discretion at the back end." *Legomsky Testimony*, *supra*, at 70. And while these policies may have "limit[ed] the discretion of immigration officials" by requiring them to consider individualized factors or respect certain priorities, they still "le[ft] ample room for the exercise of individualized discretion by responsible officials," *Prioritizing and Deferring Removal*, *supra*, at 52.

* * *

In sum, the decision of the court below ignores the considerable discretion the executive branch has long exercised in the immigration context and is at odds with the practice of multiple administrations of both parties. If accepted, that decision would make it more difficult for immigration agencies to ensure that the federal government speaks "with one voice" on

immigration matters, *Arizona*, 567 U.S. at 409, and would frustrate the executive branch's ability to effectively enforce the nation's immigration laws.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

*Counsel for Amici Curiae*

September 19, 2022

* Counsel of Record

## APPENDIX:

LIST OF *AMICI*

**T. Alexander Aleinikoff**
University Professor & Director of the Zolberg Institute on Migration and Mobility, The New School
*Executive Associate Commissioner for Programs, INS, 1995-1996; General Counsel, INS, 1994-1995*

**Roxana Bacon**
*Chief Counsel, USCIS, DHS, 2009-2011*

**Bo Cooper**
*General Counsel, INS, 1999-2003*

**Seth Grossman**
Vice President of People and External Affairs & Counselor to the President, American University
*Counselor to the Secretary of Homeland Security, DHS, 2013; Deputy General Counsel, DHS, 2011-2013; Chief of Staff to the General Counsel, DHS, 2010-2011*

**Stephen H. Legomsky**
John S. Lehmann University Professor Emeritus, Washington University School of Law
*Senior Counselor to the Secretary of Homeland Security, DHS, 2015; Chief Counsel, USCIS, DHS, 2011-2013; Advisor to the Commissioner of INS and Chair of the Commissioner's Policy Advisory Group, 1990-1993*

**(list continued on next page)**

**Doris Meissner**
Senior Fellow and Director, U.S. Immigration Policy Program, Migration Policy Institute
*Commissioner of INS, 1993-2000; Executive Associate Commissioner of INS, 1981-1986; Acting Commissioner of INS, 1981-1982*

**Julie Myers Wood**
CEO, Guidepost Solutions
*Assistant Secretary of Homeland Security, ICE, DHS, 2006-2008*

**Leon Rodriguez**
Partner, Seyfarth Shaw LLP
*Director, USCIS, DHS, 2014-2017*

**John R. Sandweg**
Partner, Nixon Peabody LLP
*Acting Director, ICE, DHS, 2013-2014; Acting General Counsel, DHS, 2012-2013; Senior Counselor to the Secretary of Homeland Security, DHS, 2010-2012; Chief of Staff, General Counsel, DHS, 2009-2010*

† Current institutional affiliations are listed for identification purposes only.