November 3, 2014

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We write as law professors* with particular expertise in the interaction of executive action and immigration law to clarify that there is no *legal* requirement that the executive branch limit deferred action or any other exercise of prosecutorial discretion to individuals whose dependents are lawfully present in the United States. Indeed, no legal principle requires that beneficiaries have any dependents at all, as DACA itself and the other examples provided in this letter illustrate. In this letter, we take no position on which individuals the Administration *should* include in any future prosecutorial discretion program. We do, however, seek to make clear that any conditions for a familial status, such as a requirement that an individual have a dependent with lawful immigration status – and more generally any other criteria for deferred action or other exercises of prosecutorial discretion – are policy choices, not legal constraints.

Prosecutorial discretion in immigration law is a long accepted principle and has been exercised long before DACA to individuals and groups.[1] The legal authority for applying prosecutorial discretion to groups and individuals is grounded in the United States Constitution and reinforced by the immigration statute, and regulations and has been recognized by even the most conservative judges on the United States Supreme Court.[2] None of these legal sources identify individuals with shared characteristics who are precluded from the favorable exercise of prosecutorial discretion, and this is largely because choices made by the Administration about which individuals should be covered based on prosecutorial discretion are policy decisions not legal ones.

The immigration agency uses prosecutorial discretion as a tool for managing resources wisely, in part by assuring that the finite resources appropriated by Congress are targeted at the most serious offenders rather than at those who present the most positive equities. One of the earliest instruments used to determine the basis for deferred action was a policy document coined as the "Operations Instruction" (O.I.) which outlined the following non-exhaustive categories under which a person should qualify: 1) advanced or tender age; 2) many years presence in the United States; 3) physical or mental condition requiring care or treatment in the United States; and 4) impact of deportation on family in the United States.[3]

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[1] See e.g., Shoba Sivaprasad Wadhia, T*he Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L. J. 243, 244 (Sept. 21, 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341.

[2] See generally Letter from Law Professors to The President (Sept. 3, 2014) *available at* https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf.

[3] (Legacy) Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

While the O.I. has since been withdrawn, these same factors have shaped the policy instruments used by the immigration agency to process deferred action requests.[4]

Data collected over the past decade further illustrate that deferred action grants have not been limited to, for example, parents of USCs or LPRs, but rather, have included primary caregivers and those with physical or mental health conditions, many years presence in the United States, advanced or tender age, or other equities.[5] For example, data collected from Immigration and Customs Enforcement (ICE) in 2012 reveal that most non-DACA deferred action cases granted are based on one of the following humanitarian grounds: 1) presence of a USC dependent, 2) presence in the United States since childhood, 3) primary caregiver of an individual who suffers from a serious mental or physical illness, 4) length of presence in the United States, or 5) suffering from a serious mental or medical care condition.[6]

Additional data collected from United State Citizenship and Immigration Services (USCIS) in 2013 reveal that many non-DACA grants of deferred action are grounded in: 1) family support; 2) medical, or 3) other humanitarian reasons, and that related denials are generally based on a lack of compelling factors. These data confirm that deferred action decisions are not limited to the presence or absence of a dependent with lawful status.[7] Details from categorical deferred action programs administered by USCIS in the past reveal a similar philosophy. For example, the deferred action program announced for foreign students affected by Hurricane Katrina in 2005[8] and undocumented "Dreamers" under the DACA program in 2012[9] did not rest on the presence of absence of a dependent in lawful status.

An undocumented person with USC or LPR dependents or spouse may have a compelling reason for requesting deferred action or another form of prosecutorial discretion based on

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[4] See e.g., Memorandum from Doris Meissner, Comm'r, Immigration and Naturalization Service, on Exercising Prosecutorial Discretion to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel (Nov. 17, 2000); Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel (Jun. 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (June 17, 2011).

[5] See e.g., Shoba Sivaprasad Wadhia**,** *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev 1, 41 (2011) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443; Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 Geo. Immigr. L.J. 345 (Jan. 2013) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758.

[6] Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 Geo. Immigr. L.J. 345, 351 (Jan. 2013) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758.

[7] Letter and data set from Jill A. Eggleston, Freedom of Information Act Operations Director, U.S. Citizenship and Immigration Services, to Shoba Sivaprasad Wadhia (September 3, 2013) (on file with authors).

[8] Press Release, U.S, Citizenship and Immigration Services, USCIS Announces Interim Relief for Foreign Students Adversely Impacted By Hurricane Katrina (Nov. 25, 2005) available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

[9] U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals* (DACA), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

her equities and the legal status of her dependents or spouse. However, it does not follow that other groups, like the undocumented parents of children who are "lawfully present" (such as DACA recipients) are prohibited from this protection as a matter of law or history. It is more than conceivable that undocumented persons with dependents or young people bearing positive equities may have a qualifying reason for requesting prosecutorial discretion.

Any decision by the Administration to include or exclude certain groups will be a policy choice not a legal one. We encourage the Administration to review the recommendations provided by the Department of Justice and the Department of Homeland Security in light of the broad prosecutorial discretion grounded in the Constitution and other laws of the United States.

Sincerely,

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