Hon. Alejandro N. Mayorkas
Secretary
Department of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, DC 20528

Via Email

August 24, 2021

Dear Secretary Mayorkas:

As immigration law scholars and teachers, we write to address the scope of the executive branch's legal authority to issue immigration directives that offer noncitizens or groups of noncitizens temporary reprieves from deportation. We do not take a policy position on what steps the administration should take. Rather, we comment on the history and legal foundations of prosecutorial discretion in immigration law enforcement.

This letter makes two central points. First, the Department of Homeland Security (DHS) has the legal authority to adopt and to publicly announce priorities that will guide its exercise of prosecutorial discretion. DHS and its predecessor agencies have exercised this authority many times for at least the past 50 years. Second, these decades of historical practice make clear that DHS has the legal authority to decide how to articulate these guidelines. In particular, DHS guidelines may be based on a noncitizen's affirmative equities, which can justify granting a temporary reprieve from removal.

Prosecutorial Discretion

"Prosecutorial discretion" is a common, long-accepted legal practice in practically every law enforcement context.[1] In immigration law, prosecutorial discretion refers to authority to decide how the immigration laws should be applied.[2] This discretion can include agency decisions to grant a stay of removal, parole, or deferred action. The federal government can also exercise prosecutorial discretion by refraining from enforcement measures such as serving or filing a charging document or Notice to Appear with an immigration court.[3] A favorable grant of prosecutorial discretion does not provide formal legal status or an independent basis for lawful

[1] Notably, in criminal law, prosecutorial discretion has existed for hundreds of years. It was a common reference point for the immigration agency in early policy documents describing prosecutorial discretion. *See* Memorandum from Doris Meissner, Immigration & Naturalization Service (INS) Commissioner, *Exercising Prosecutorial Discretion* 1 (Nov. 17, 2000) [hereinafter Meissner Memo]; Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

[2] *See* Stephen Yale-Loehr, Lenni Benson & Shoba Sivaprasad Wadhia, Immigration and Nationality Law: Problems and Strategies 798-807 (2d ed. 2020); T. Alexander Aleinikoff, David A Martin, Hiroshi Motomura, Maryellen Fullerton, Juliet P. Stumpf & Pratheepan Gulasekaram, Immigration and Citizenship: Process and Policy 700-09 (9th ed. 2021); Stephen H. Legomsky & David B. Thronson, Immigration and Refugee Law and Policy 803-06 (7th ed. 2019); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L. J. 243 (2010).

[3] *See, e.g.*, INA § 237(d)(4), 8 U.S.C. § 1227(d)(4); INA § 212(d)(5), 8 U.S.C. § 1182(d)(5); INA § 237(d)(2); 8 U.S.C. § 1227(d)(2).

permanent residence. Prosecutorial discretion can, however, provide a noncitizen with a temporary reprieve from arrest, detention, and removal from the United States.

The legal authority for prosecutorial discretion can be traced to the U.S. Constitution, decisions of the U.S. Supreme Court, the Immigration and Nationality Act and other immigration statutes, and pertinent regulations. In addition, the Take Care Clause of the U.S. Constitution states in part that the President "shall take Care that the Laws be faithfully executed."[4]

Inherent in the function of the "Take Care Clause" is the President's authority to enforce immigration laws in some cases and to exercise prosecutorial discretion favorably in other cases to refrain from pursuing removal. As the U.S. Supreme Court explained: "[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."[5]

In 1976, a legal opinion by then-INS General Counsel Sam Bernsen identified the Take Care Clause as the primary source for prosecutorial discretion in immigration cases. According to Bernsen: "The ultimate source for the exercise of prosecutorial discretion in the Federal Government is the power of the President. Under Article II, Section 1 of the Constitution, the executive power is vested in the President. Article II, Section 3, states that the President 'shall take care that the laws be faithfully executed.'"[6]

The Immigration and Nationality Act (INA), enacted in 1952, remains the primary statutory source of immigration law today. Congress has delegated most discretionary immigration functions to DHS. Section 103 of the INA provides that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . ."[7]

The U.S. Supreme Court recognized the fundamental and essential role of prosecutorial discretion in the immigration system in its 2012 decision in *Arizona v United States*. The Court noted that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials . . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."[8]

One reason often cited by federal agencies for this legal authority is that the resources authorized and appropriated by Congress are insufficient for total enforcement against all potential violators. In practice, some potentially removable noncitizens will not be put into proceedings to remove them from the United States. This means that *someone* in the federal government will

[4] U.S. Const. art. II, § 3.
[5] Heckler v. Chaney, 470 U.S. 821, 831 (1985).
[6] Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976), http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.
[7] INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2012).
[8] Arizona v. United States, 567 U.S. 387, 396 (2012); *see also* Reno v. AADC, 525 U.S. 471 (1999).

decide which noncitizens are put into the removal process. In making this decision, more than resource allocation is at stake.

Without visible guidelines for the exercise of prosecutorial discretion, government personnel will make enforcement decisions beyond any centralized agency control. The result will be a serious risk that DHS personnel will violate the constitutional command that all persons in the United States enjoy equal protection of the laws. Without visible guidelines, the risk of undetected unconstitutional discrimination, especially racial discrimination, is unacceptably high. Failure to minimize the risk of unlawful discrimination suggests failure to obey the command of the Take Care Clause of the U.S. Constitution "that the Laws be faithfully executed."[9]

Affirmative Equities as the Basis for Prosecutorial Discretion

Beyond the legal authority of federal agencies to adopt visible policies to guide prosecutorial discretion, the next question is whether federal agencies have the legal authority to base these guidelines on affirmative equities that may justify a temporary reprieve from removal. Some historical examples that use affirmative equities as a basis for prosecutorial discretion include the Immigration and Naturalization Service (INS) policy document known as the "Operations Instruction" (O.I.), a memo issued in 2000 by then-INS Commissioner Doris Meissner,[10] and a 2005 memorandum from William Howard, then-Chief Counsel for Immigration and Customs Enforcement (ICE).[11]

One of the earliest federal instruments used to identify the bases for deferred action was an INS policy document known as the "Operations Instruction" (O.I.). This document articulated prosecutorial discretion guidelines as a matter of humanitarian considerations and other affirmative equities. The result was a set of priorities for temporary reprieves from removal based on considerations that included: 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; 4) impact of deportation on family in the United States; and 5) criminal or adverse recent conduct.[12] In the early 1970s, attorney Leon Wildes obtained INS records for 1,843 grants of deferred action and identified five affirmative equities that had informed those grants: (1) tender age, (2) elderly age, (3) mental incompetency, (4) medical infirmity, and (5) family separation if deported.[13]

After the O.I., guidance documents from INS and its successor agencies in DHS similarly focused on affirmative equities to guide temporary reprieves from removal. In 2000, then-INS Commissioner Doris Meissner issued a memorandum listing "triggers" to help officers identify cases suitable for a favorable exercise of prosecutorial discretion: "Lawful permanent residents;

[9] U.S. Const. art. II, § 3.
[10] Meissner Memo, at 11.
[11] Memorandum from William J. Howard, U.S. Immigration & Customs Enforcement, *Prosecutorial Discretion* 3-4 (Oct. 24, 2005) [hereinafter, Howard Memo].
[12] *See* Shoba S. Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 17-18 (2015); *see also,* (LEGACY) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, 0.1. § 103.1(a)(1)(ii) (1975); (LEGACY) IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, O.I. 242.1(a)(18) (1997) (discussing discretion for members or former members of the Armed Forces of the United States).
[13] *See* Shoba S. Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 63 (2015).

Aliens with a serious health condition; Juveniles; Elderly aliens; Adopted children of U.S. citizens; U.S. military veterans; Aliens with lengthy presence in United States (i.e., 10 years or more); or Aliens present in the United States since childhood."[14]

After the Department of Homeland Security was established, a 2005 memorandum from William Howard, then-Chief Counsel for ICE, likewise based prosecutorial discretion guidelines on affirmative equities to guide temporary reprieves from enforcement. The categories were defined by equities that included, among others: the immediate relatives of U.S. military personnel, those with a clearly approvable family-based petition/adjustment application, and humanitarian factors that involve a family member in the United States with a medical condition or disability.[15] In focusing on affirmative equities, the Howard memo forthrightly explained that prosecutorial discretion can "deal with complex and contradictory provisions of the immigration laws and deal with cases of human suffering and hardship."[16]

The central role of affirmative equities in grants of deferred action is evident in federal agency data collected through the Freedom of Information Act (FOIA). For example, data collected in 2012 from ICE revealed that most individual grants of deferred action were based on one of these humanitarian grounds: 1) presence of a U.S. citizen 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.[17] Data collected in 2013 through FOIA from U.S. Citizenship and Immigration Services (USCIS) showed that many deferred action grants were based on family support, medical considerations, or other humanitarian reasons.[18]

This long history shows that DHS has the legal authority to use affirmative equities to identify categories of cases for temporary reprieves from removal. In fact, it is only a recent development that prosecutorial discretion guidelines have been articulated as reflecting priorities for removal, as opposed to priorities for reprieves from removal.

The legal authority of DHS to rely on affirmative equities as the basis of prosecutorial discretion guidelines has a foundation in the duty of every government agency to obey the U.S. Constitution. Here again, the constitutional guarantee of equal protection is crucial. If prosecutorial discretion guidelines start with enforcement priorities largely based on a noncitizen's contact with the criminal legal system, DHS would be relying on legal systems that target some people, because of their race, for criminal investigation and punishment, or for more severe punishment. By relying

[14] *See* Meissner Memo, at 11.
[15] *See* Howard Memo, at 3-4.
[16] Id. at 8.
[17] *See* Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 Geo. Immigr. L.J. 345, 357 (2013); *see also* Letter and data set from Joshua J. Fahrnkopf, Supervisory Paralegal Specialist, U.S. Immigration & Customs Enforcement, to Shoba Sivaprasad Wadhia (Aug. 2, 2021) (on file with authors).
[18] *See* Letter and data set from Jill A. Eggleston, Freedom of Information Act Operations Director, U.S. Citizenship & Immigration Services, to Shoba Sivaprasad Wadhia (Sept. 3, 2013) (on file with authors); *see also* Shoba S. Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 69 (2015).

on decisions in a system rife with racial bias,[19] DHS would run an unacceptable risk of amplifying the effects of unconstitutional discrimination elsewhere in the law.

Pervasive bias in the criminal legal system has often escaped judicial scrutiny because of courts' view of what equal protection doctrine requires to prove a constitutional violation.[20] This problem is compounded by judicial interpretations of the Fourth Amendment that disregard,[21] and even legitimate,[22] racial discrimination in policing. An even higher standard to prove selective enforcement exists in the immigration legal system.[23] DHS nevertheless has an obligation to defend the constitutional rights of all persons in the United States. As Justice Kennedy wrote in *Trump v. Hawaii*, "The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."[24]

By adopting prosecutorial discretion guidelines based on affirmative equities, and by avoiding reliance on the criminal legal system to set enforcement priorities, DHS would obey the command of the Take Care Clause of the U.S. Constitution "that the Laws be faithfully executed."[25] In this way, prosecutorial discretion guidelines are essential to advancing this Administration's stated commitment to "advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[26]

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[19] *See, e.g.*, Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1168 (2012) (marshalling evidence of implicit bias in criminal legal processes).

[20] *See, e.g.*, Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987) (criticizing the Supreme Court's equal protection analysis as insufficiently attentive to unconscious but real bias in the law); *see also* Sheri Lynn Johnson, *Un*conscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016 (1988) (proposing application of Lawrence's analysis to the criminal legal system and arguing the "blindspot" of the equal protection doctrine "is the empirical reality of unconscious racism."); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283 (1995) (applying theories advanced by Lawrence and others to explain failed legal challenges to the massive racial sentencing disparities caused by harsh federal cocaine sentencing laws).

[21] *See, e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 643 (2021) (illustrating empirically that judicial doctrine announced in Whren v. United States, 517 U.S. 806, 809, 819 (1996), "permitting police officers to engage in pretextual traffic stops contribute[s] to a statistically significant increase in racial profiling of minority drivers").

[22] See, e.g., Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Cal. L. Rev. 345, 352 (2019) (empirically demonstrating that judicial reliance on "high crime areas" as a factor justifying police searches and seizures, as endorsed in Illinois v. Wardlow, 528 U.S. 119, 124 (2000), exacerbates racial disparities in policing since "[t]he racial composition of the area and the identity of the officer are stronger predictors of whether an officer deems an area high crime than the crime rate.")

[23] Reno v. AADC, 525 U.S. 471 (1999).

[24] Trump v. Hawaii, 138 S.Ct. 2392, 2424 (2018) (Kennedy, J. concurring).

[25] U.S. Const. art. II, § 3.

[26] *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, Jan. 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

Conclusion

As this letter has explained, the Department of Homeland Security has the legal authority to issue a prosecutorial discretion guideline. DHS also has the legal authority to base such guidelines on a noncitizen's affirmative equities for granting temporary reprieves from removal. And in exercising its legal authority, DHS must ensure that its enforcement of the immigration laws is consistent with the U.S. Constitution.

Sincerely,

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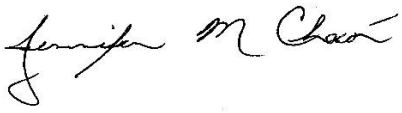

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