No. 14-10049

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTOPHER L. CRANE; DAVID A. ENGLE; ANASTASIA MARIE CARROLL; RICARDO DIAZ; LORENZO GARZA; FELIX LUCIANO; TRE REBSTOCK; FERNANDO SILVA; SAMUEL MARTIN; JAMES D. DOEBLER; STATE OF MISSISSIPPI, by and through Governor Phil Bryant,

Plaintiffs–Appellants/Cross-Appellees,

v.

JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; JOHN SANDWEG, in His Official Capacity as Director of Immigration and Customs Enforcement; LORI SCIALABBA, in Her Official Capacity as Acting Director of United States Citizenship and Immigration Services,

Defendants–Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE FEDERAL APPELLEES/CROSS-APPELLANTS

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INTRODUCTION AND SUMMARY

The Supreme Court has stated in unmistakably clear terms that immigration officials have broad prosecutorial discretion to determine whether to commence and pursue to conclusion proceedings to remove an alien from the United States. In *Reno* v. *American Arab Anti-Discrimination*

Committee, 525 U.S. 471, 483-84 (1999), the Court stated that "[a]t each stage [of the deportation process] the Executive has discretion to abandon the endeavor" and noted that immigration officials "had been engaging in a regular practice (which has come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." The Court recently reaffirmed that discretion, stressing that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). It accordingly held that a state law purporting to give state officers the power to arrest aliens on the basis of possible removability was preempted, precisely because it interfered with the Federal Government's long-established discretionary authority to decide whether to seek the alien's removal in the first instance. *Id*. at 2506-07.

Plaintiffs nonetheless maintain that Congress, in various provisions of 8 U.S.C. § 1225, has stripped the Executive Branch of this longstanding discretion to take account of resource constraints and humanitarian considerations when determining whether to institute removal proceedings

against aliens who have not been admitted to the United States. In their view, the immigration statutes now forbid immigration officials from considering whether the Executive Branch's finite enforcement resources should be focused on expeditiously removing aliens who have committed crimes or pose a threat to the national security. They would bar the government from "ensur[ing] that enforcement policies are consistent with the Nation's foreign policy * * *." *Arizona*, 132 S. Ct. at 2499. And they would end efforts to temper immigration enforcement with consideration of the positive contributions an alien may have made to our country or the profound impact on individuals, families, and society of deporting young people who came here as small children. Plaintiffs instead assert that the statutes now require the Federal Government to pursue removal of every unlawfully present alien in every circumstance.

In a system without prosecutorial discretion, only one choice exists: investigate every violation and remove anyone and everyone who is not lawfully present. Thus, in plaintiffs' view, kindergarteners and combat veterans must be treated in the same fashion as convicted felons – all, if

inadmissible, must be removed, without regard to resource constraints, enforcement priorities, or humanitarian considerations.

Contrary to plaintiffs' contentions, we do not maintain that Congress lacks the authority to impose statutory limitations on the Executive Branch. The Supreme Court has held that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler* v. *Chaney*, 470 U.S. 821, 833 (1985). But *Chaney* also holds that an agency's decision not to undertake enforcement action is traditionally committed to the agency's discretion and presumptively unreviewable. *Id*. at 831-33. It follows that this traditional discretion cannot be curtailed absent a clear and unequivocal statutory command.

Plaintiffs' attempt to find that command in the provisions of 8 U.S.C. § 1225 is without merit. They posit a reading of § 1225 that would compel the government to institute removal proceedings in circumstances where the government has no intention or legal obligation to pursue removal to

conclusion – an absurd result that has no discernible relationship to the object and purpose of the immigration law. They advocate a position that is unsupported by the plain language of the statute or its legislative history. And they compound these errors by disregarding principles recognizing "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 761 (2005).

As we have explained in our opening brief, the district court correctly dismissed plaintiffs' claims for lack of jurisdiction and these merits questions are not before the Court. If, however, the Court concludes there is jurisdiction, it should affirm the judgment on the alternative grounds that 8 U.S.C. § 1225(b)(2)(A) does not constrain the Federal Government's prosecutorial discretion, and that the policy memoranda challenged here are therefore lawful.

ARGUMENT

Plaintiffs' assertion that Congress has eliminated prosecutorial discretion in removal proceedings rests on a construction of two, inter-related statutory provisions: 8 U.S.C. § 1225(a)(1) and 8 U.S.C. § 1225(b)(2). Section 1225(a)(1) provides that:

> An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

Section 1225(b)(2)(A) provides, subject to exceptions not relevant here, that:

> [I]n the case of an alien who is an applicant for admission, 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 [removal] proceeding under section 1229a of this title.

Stressing that these provisions state that aliens "shall" be detained for removal proceedings, plaintiffs argue that Congress has mandated commencement of removal proceedings against inadmissible aliens in any and all cases. Pl. Cross-Appellee Br. at 53. They conclude that since the

statute invariably mandates the commencement of removal proceedings, prosecutorial discretion can only be exercised, if at all, *after* such proceedings have been initiated. *Ibid*. Plaintiffs err.

I. Plaintiffs' Construction Of The Statute Would Lead To Patently Absurd Results By Mandating Commencement of Removal Proceedings That The Government Has No Intention Or Obligation To Continue.

Plaintiffs' construction of the statute would lead to patently absurd results and should consequently be avoided unless there is no other plausible interpretation of the statutory text. It is well settled that constructions that would lead to senseless and arbitrary consequences unrelated to any congressional purpose are strongly disfavored. *United States* v. *Wilson*, 503 U.S. 329, 334 (1992); *United States* v. *Najera-Mendoza*, 683 F.3d 627, 34 (5th Cir. 2012).

Here, it is undisputed that the statute on which plaintiffs principally rely applies *only* to the initial decision to commence removal proceedings and does not apply to any subsequent stage of the case. The district court, though concluding that 8 U.S.C. § 1225(b)(2)(A) mandates *commencement*

of proceedings, expressly stated that "DHS's ability to exercise its discretion at later stages in the removal process by, for example, cancelling the Notice to Appear or moving to dismiss the removal proceedings is not at issue in the case, and nothing in this Order limits DHS's discretion at later stages of the removal process." ROA.951.

Plaintiffs do not dispute the district court's conclusions in this regard. Nor do they argue that the putative duties imposed by 8 U.S.C. § 1225(b)(2)(A) extend beyond the initial decision to commence removal proceedings. They thus urge a construction that would, without more, compel the government to initiate removal proceedings that it has no intention or legal obligation to pursue to conclusion – a nonsensical result that would waste government resources, pointlessly subject aliens and their families to the burdens and anxiety of removal proceedings, and serve no discernable congressional purpose.

"Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co.* v *Patterson*, 456 U.S. 63, 71 (1982). In an effort to avoid absurd results here, plaintiffs

assert that *other* statutory provisions constrain the Secretary's authority to suspend or terminate removal proceedings once they are begun. They thus argue that after proceedings are commenced, the proceedings must be prosecuted to conclusion unless the alien establishes entitlement to relief under 8 U.S.C. § 1229b(b), pertaining to cancellation of removal and adjustment of status for nonpermanent residents, or 8 U.S.C. §1231(b)(3), pertaining to the Attorney General's authority to withhold removal where the alien's life or freedom would be threatened on account of the alien's race, religion, or other specified characteristics. Pl. Cross-Appellee Br. at 53.

These contentions are at odds with Supreme Court precedent, published regulations, and decades of unchallenged administrative practice. In *American Arab Anti-Discrimination Committee*, the Supreme Court noted that the removal process involves "discrete acts of commencing proceedings, adjudicating cases, and executing removal orders" and stated that "[a]t *each stage* the Executive has discretion to abandon the endeavor." *Id.*, 525 U.S. at 483 (internal quotations omitted,

emphasis added). The Court reiterated the scope of the Executive Branch's discretion in *Arizona*, stressing that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," and stating that discretionary relief remains available *after* removal proceedings have commenced. *Id*., 132 S. Ct. at 2499.

Consistent with the Supreme Court's holdings, administrative regulations provide for suspending or terminating removal proceedings after they have commenced. The regulations thus provide that the appropriate immigration officer may cancel the "notice to appear" commencing removal proceedings if the notice was "improvidently issued," 8 C.F.R. 239.2(a)(6), or if "changed circumstances" indicate that continuation of removal proceedings is "no longer in the interest of the government." 8 C.F.R. 239.2 (a)(7). Immigration judges may, upon the motion of the Department of Homeland Security, dismiss removal proceedings on similar grounds after jurisdiction has vested in the immigration court. 8 C.F.R. 239.2(c); 8 C.F.R. 1239.2(c).

The additional statutes on which plaintiffs now seek to rely do not limit this post-commencement discretion. Section 1229b(b) addresses the circumstances in which removal of nonpermanent resident aliens may be cancelled *in conjunction with* an adjustment of the alien's status to that of a lawful permanent resident. Cancellation of removal is itself a discretionary form of relief. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). The statute which authorizes it for nonpermanent residents, 8 U.S.C. § 1229b(b), contains no provision that expressly forbids the Executive Branch from exercising its longstanding discretion to refrain from pursuing removal in light of resource limitations, foreign policy concerns, humanitarian considerations, or the larger interests of the United States. And given that this statute concerns, not merely cancellation of removal, but conferral of lawful status as a permanent resident, there is no basis for inferring from the statute's silence an unstated intent to limit exercises of prosecutorial discretion that do not entail awarding this significant immigration benefit. *Cf. Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose

that Congress considered the unnamed possibility and meant to say no to it").

Similarly, withholding of removal under section 1231(b)(3) is directed to instances in which, although there is a final order of removal, removal to a specific country would jeopardize the alien's life or freedom. The withholding statute is thus a limitation on *where* an alien may be sent after removal proceedings are completed. *See Yu Zhao* v. *Gonzales*, 404 F.3d 295, 310 (5th Cir. 2005). It does not address whether proceedings should be instituted or prosecuted to conclusion and thus affords no basis for drawing an inference as to when the exercise of such prosecutorial discretion is permissible. Indeed, if the Supreme Court had understood this or any or any other statute to have limited the Executive Branch's prosecutorial discretion in the manner urged by plaintiffs, it would not have stressed the Executive Branch's "broad discretion" to suspend or terminate removal at "each stage" of the proceeding. *American Arab Anti-Discrimination Committee*, 525 U.S. at 483; *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012).

Contrary to plaintiffs' contentions, no statute compels the Secretary to continue a removal proceeding once it has been initiated. Thus, if plaintiffs' construction of 8 U.S.C. § 1225(b)(2)(A) were correct, it would compel the Secretary to commence removal proceedings where there is no intention or legal obligation to prosecute the proceedings to conclusion. That is an absurd result that should not be attributed to Congress if there are other plausible constructions of the statute.

II. The Plain Language Of The Statute Does Not Mandate Commencement Of Removal Proceedings Against Aliens Covered By The DACA Policy.

A. The Obligation To Detain For Removal Proceedings Applies Only To Aliens "Seeking Admission" To The United States.

The statutory provisions stating that inadmissible aliens "shall be detained" for removal proceedings apply only to aliens who are "seeking admission" to the United States. The ordinary meaning of this language would not include aliens eligible for Deferred Action for Childhood Arrivals ("DACA"), who have already gained physical entry to the United States. Aliens eligible for deferred action under the DACA memorandum,

by definition, have maintained a continuous physical presence in the United States since June 2007 or earlier (*see* ROA.432) and thus are not engaged in any action to present themselves for inspection, to cross the border without inspection, or to evade apprehension and inspection in areas near the border. Rather, as we have argued in our opening brief, to "seek" admission, in the ordinary sense of the word, means "to go in search of" or "to try to acquire or gain" admission (*Webster's Third New International Dictionary* at 2055 (1993)). Admission is, in turn, defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(3)(A). To "seek admission" thus entails affirmative actions to gain authorized entry that do not apply to aliens eligible for DACA, who have already established lives in the United States, maintained a continuous presence here since at least June 2007, and not sought immigration inspection.

The usual presumption is that the "legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Plaintiffs nonetheless eschew any attempt to ground their

argument in the ordinary meaning of "seeking" admission. They instead argue that Congress used the terms "applicant for admission" and alien "seeking admission" interchangeably. Pl. Br. as Cross-Appellee at 60.

Plaintiffs' contention is meritless. Where Congress uses different language in the same statute, it ordinarily intends the respective terms to have different meanings, not the same meaning. *Russello* v. *United States*, 464 U.S. 16, 21 (1983). This presumption is particularly strong where Congress uses different phraseology in the very same statutory section. *United States* v. *Granderson*, 511 U.S. 39, 63 (1994) (Kennedy, J., concurring).

The presumption may nonetheless be overcome if there is other persuasive evidence that Congress intended the different words to have the same meaning. *Campbell* v. *Wells Fargo Bank. N.A.*, 781 F.2d 440, 442 (5th Cir. 1986). The structure of the statute, however, confirms that aliens "seeking admission" are a subset of "applicants for admission" rather than another name for that group.

In particular, the statute provides that an "applicant for admission" includes *two* categories of aliens: those who are "present in the United

States" but who have not been lawfully admitted (§ 1225(a)(1), first clause), and those who "arrive[] in the United States" (§ 1225(a)(1), second clause). *Both* categories of aliens – those actively seeking admission and those who are already present in the United States without inspection -- are defined as "applicants for admission" by the statute. *See* 8 U.S.C. § 1225(a)(1). Nothing in this structure suggests that Congress regarded aliens "seeking admission" and "applicants for admission" as equivalent, interchangeable terms. If that were the case, the statutory reference to aliens "seeking admission" would be redundant; Congress could simply have stated that all "applicants for admission" "shall be detained for" removal proceedings, without any reference to aliens "seeking admission." Plaintiffs' construction would thus render the phrase aliens "seeking admission" mere surplusage, in violation of yet another canon of statutory construction: that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citations omitted).

Finally, plaintiffs cannot escape the import of the plain language and structure of the statute by arguing that Congress could have used different language to express the same intent. They argue that, if Congress had intended to limit the obligation to "detain for removal proceedings" to aliens who are attempting to come into the United States, it would have used the term "arriving alien." Pl. Brief as Cross-Appellee at 60.

That Congress might have conveyed the same meaning with different language, however, does not warrant disregarding the ordinary meaning of the language enacted into law. Congress confined the directive to "detain for removal proceedings" to aliens "seeking admission." Plaintiffs do not even attempt to parse the meaning of this phrase using the ordinary tools of statutory construction. They instead point to what Congress might have said, not to what it did say.

Statutory construction, however, must begin with the plain language of the statute. The pertinent provisions of section 1225(b)(2)(A) refer to aliens "seeking admission." The ordinary meaning of that term does not include aliens who, like the category of aliens eligible for deferred action

under DACA, have already gained entry to the United States and continuously resided here since June 2007 or earlier. *See* ROA.432.

B. The Statute Is Addressed To Removal Procedures, Not To Whether Removal Proceedings Must Be Commenced.

Section 1225(b)(2)(A), moreover, is addressed solely to the obligation to detain for removal proceedings under section 1229a, not to the decision as to whether to seek the alien's removal in the first instance. The statutory text directs that aliens seeking admission "shall be detained for a proceeding under section 1229a of this title," *i.e.*, a removal proceeding under 8 U.S.C. § 1229a. Rather than constrain the Executive Branch's prosecutorial discretion, it serves to distinguish aliens subject to detention and removal under section 1225(b)(2)(A) from other aliens who may be removed *without* a hearing, through more expedited procedures.

This distinction is clear from a review of the statute's structure and legislative history. As explained in our opening brief, immigration laws historically drew a distinction between aliens seeking admission at a port of entry and those who had already entered the United States. Thus, under

the so-called "entry doctrine," aliens who were able to enter the United States were accorded additional procedural rights and privileges not extended to those merely on the threshold of entry, even if their prior entry was unlawful. *See Zadyvas* v. *Davis*, 533 U.S. 678, 693-94 (2001); *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958).

The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, Div. C. Title III, " 301 & 302, 110 Stat. 3009-575-584 (1996), was "intended to replace certain aspects of the 'entry doctrine,' under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry." H. Rep. No. 104-469, Pt. 1, 104th Cong., 2d Sess. 225-26 (1996). The change was accomplished by, among other provisions, amending 8 U.S.C. § 1225 – the statute at issue here -- so as to provide that aliens who had gained entry to the United States without inspection would nonetheless be defined as applicants for admission and thereby removable on the same grounds, and through the same formal removal procedures, applicable to

aliens arriving at the border. *See* H. Conf. Rep. No. 104-828, 104th Cong., 2d Sess. 208 (1996).

As part of these amendments, Congress modified statutory provisions governing the procedures used to determine whether an alien should be removed from the United States. Before enactment of these 1996 amendments, the procedures governing deportation of aliens present within the United States and the procedures for determining whether to exclude an alien seeking admission at the border were governed by separate statutory provisions. *Compare* 8 U.S.C. § 1252(b) (1994) (proceedings to determine deportability of aliens present within the United States) *with* 8 U.S.C. § 1226 (1994) (proceedings to determine whether to exclude aliens from admission).

The 1996 amendments, consistent with congressional intent to modify rights flowing from the entry doctrine, generally established a single proceeding to govern both circumstances. H. Conf. Rep. 104-828 at 211. Proceedings under the statute are now referred to as "removal" proceedings (rather than deportation or exclusion proceedings). The

governing statutory authority is set forth in 8 U.S.C. § 1229a. And it is these proceedings to which Congress refers in stating that "in the case of an alien who is an applicant for admission, 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.*" 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

An alien subject to removal through proceedings under section 1229a has a right to a hearing. *See* 8 U.S.C. § 1229a(b)(4). Congress, however, chose not to make section 1229a removal procedures available in every instance. It instead enacted provisions permitting some aliens to be removed through more expedited procedures.

For example, under 8 U.S.C. § 1225(b)(1)(A), Congress established separate removal procedures for aliens who are arriving in the United States and who are inadmissible because they lack appropriate entry documents (*see* 8 U.S.C. 1182(a)(7)) or have attempted to gain admission through fraud or misrepresentation (*see* 8 U.S.C. 1182(a)(6)(C)). Section 1225(b)(1)(A) provides that, unless these aliens indicate an intent to apply

for asylum or a fear of persecution, they shall be removed from the United States "*without* further hearing or review." *Id*. (emphasis added). In other words, these aliens may be removed through expedited procedures, without first conducting a hearing under section 1229a. *See* H. Conf. Rep. 104-828 at 209.

Viewed in this context, the purpose of the statutory directive in 8 U.S.C. § 1225(b)(2)(A) to detain certain aliens for a proceeding under section 1229a is clear. First, the statute directs that the removal of aliens subject to this provision be effected through the procedures established under section 1229a, rather than through expedited proceedings. That is why the statute states that the alien shall be detained "for a proceeding under section 1229a;" it is to mandate the use of § 1229a procedures when removal is sought and to distinguish other circumstances in which aliens may be removed through different, more summary procedures, without further hearing. *Cf*. 8 U.S.C. § 1225(b)(1)(A)(i) (expedited removal for aliens without entry documents or who have attempted to procure admission through fraud or misrepresentation); 8 U.S.C. § 1228(b)

(authorizing more expedited proceedings for removal of aliens convicted of an aggravated felony).

Second, the statute states that aliens shall be *detained* for these removal proceedings. The statutory directive to employ section 1229a proceedings to effect a removal would have little meaning absent a practical ability to ensure that an alien seeking admission be available for examination. The statute accordingly states that aliens "shall be detained" for such proceedings.[1] Indeed, the current statute is, in this regard, consistent with its historical predecessor, which similarly provided that arriving aliens who were not clearly and beyond a doubt entitled to entry "shall be detained for further inquiry." 8 U.S.C. § 1225(b) (1994). Then, as now, the statute mandated detention to facilitate the government's practical ability to determine the alien's admissibility. Neither the current statute nor its predecessor were ever construed as curbing the

[1] In a separate statute, Congress further provided that DHS may – in its discretion and on a case-by-case basis – parole applicants for admission into the United States. 8 U.S.C. § 1182(d)(5)(A). Parole may be granted, on a case-by-case basis, for "urgent humanitarian reasons" or "significant public benefit." 8 U.S.C. § 1182(d)(5)(A). 8 C.F.R. §§ 212.5(b), 235.3(b)(4)(ii), 235.3(b)(2)(iii), 235.3(c).

government's discretion to determine whether to institute removal proceedings in the first instance.

Plaintiffs assert that this is a "bizarre" reading of the statute that violates the rules of grammar. Pl. Brief as Cross-Appellee at 65-66. But there is nothing bizarre about mandating detention so that removal proceedings can go forward. It is rather an eminently practical requirement that is consistent with congressional intent to mandate use of removal proceedings rather than the more expedited procedures applicable to other aliens.

Finally, if Congress had intended the amended section 1225 to serve a different purpose and to limit the Executive Branch's prosecutorial discretion, it surely would have made some reference to this objective in the legislative history. As the Supreme Court explained in *American Arab Anti-Discrimination Committee*, by the time Congress took up consideration of the 1996 amendments, the government "had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own

convenience." *Id.*, 525 U.S. at 483-84. Nothing in the legislative history takes issue with the government's longstanding policy of granting deferred action in appropriate cases or expresses an intention to restrict its use.

The absence of any legislative history supporting plaintiffs' position is especially telling here. The Supreme Court has concluded that Congress not only was aware of the use of discretion to defer enforcement action when it enacted the 1996 amendments but took steps to facilitate its exercise. In particular, the Court noted that deferred action had opened the door to litigation in instances where the government chose *not* to exercise prosecutorial discretion. *Id*. at 944. The Court concluded that, rather than attempting to rein in this discretion, Congress sought in the 1996 statute to protect its exercise by limiting the circumstances in which aliens could obtain judicial review of discretionary determinations made in the course of the removal process. *Id*. at 483-85. The Court concluded that "*many* provisions of [the 1996 statute] are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme

of the legislation." *Id*. at 486; *accord Rivas* v. *Gonzalez*, 220 Fed. Appx. 892, 894 (10th Cir. 2007) (unpublished).

III. Statutes Providing That The Government "Shall" Take Enforcement Action Are Not Construed To Limit Prosecutorial Discretion.

This Court and others have made clear that although "shall" is normally interpreted to impose a mandatory duty, "when duties within the traditional realm of prosecutorial discretion are involved, the courts have not found this maxim controlling." *Seabrook* v. *Costle*, 659 F.2d 1371, 1374 n.3 (5th Cir. 1981); *accord Asika* v. *Ashcroft*, 362 F.3d 264, 268 & n.5 (4th Cir. 2004); *Dubois* v. *Thomas*, 820 F.2d 943, 947-47 (8th Cir. 1987); *Inmates of Attica* v. *Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

The Supreme Court applied this principle in a leading case on prosecutorial discretion: *Heckler* v. *Chaney*. *Chaney* involved provisions of the Food, Drug and Cosmetic Act stating that a person who violates the Act's substantive prohibitions "shall be imprisoned * * * or fined." *Id*., 470 U.S. at 835. The Court nonetheless held that, despite the use of the term

"shall," the Act's enforcement provisions "commit complete discretion to the Secretary to decide how and when they should be exercised." *Ibid*.

Plaintiffs' attempts to distinguish this authority are each without merit. First, plaintiffs misread *Seabrook*. They correctly note that the Court stated that an administrative agency's enforcement discretion can be limited by a statutory command. Pl. Brief as Cross-Appellee at 64, citing *Seabrook*, 659 F.2d at 674. But the question is whether a provision stating that an agency "shall" take enforcement action imposes such a limitation. *Seabrook* holds that it does not.

Second, plaintiffs err in relying on *Succar* v. *Ashcroft*, 394 F.3d 8 (1st Cir. 2005). *Succar* invalidated a regulation defining certain aliens as ineligible to apply for adjustment of their status to that of a lawful permanent resident. *Id*. at 9. The First Circuit, in the course of deciding this question, stated in passing that Congress had not afforded the Attorney General discretion as to which applicants for admission should be placed in removal proceedings. *Id*. at 10. The court, however, was addressing the government's authority to adjudicate applications for

adjustment of status and did not have before it the question whether the government has prosecutorial discretion under 8 U.S.C. § 1225. The statement cited by the plaintiffs is thus dictum – dictum that was rendered without addressing the statute's plain language, legislative history, or any of the other arguments presented here.

Moreover, this Court has considered and expressly rejected adopting *Succar* as the law of this Circuit, instead holding that Congress gave the government unreviewable discretion to adjudicate individual applications for adjustment of status. *Ahktar* v. *Gonzales* , 450 F.3d 587, 592-95 (5th Cir. 2006). For all these reasons, *Succar* is neither binding precedent nor persuasive authority.[2]

Finally, plaintiffs err in relying on cases in which, outside the prosecutorial discretion context, the term "shall" has been construed to impose a mandatory duty to act. Statutory language must be read in context, and the same term, depending on the objectives and purposes of the provision at issue, may take on different meanings, even within the

[2] The regulation at issue in *Succar* and *Ahktar* was subsequently repealed. 71 Fed. Reg. 27,585, 27,587 (2006).

same statute. *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2441 (2014). This basic principle of statutory construction makes clear that the term "shall" may have different meanings in different contexts, and that it may thus connote a mandatory duty in some circumstances but not in others.

It is for this reason that cases such as *Federal Express Corporation* v. *Holowecki*, 552 U.S. 389 (2008), and *Lopez* v. *Davis*, 531 U.S. 241 (2001), are not controlling. *Federal Express* involved whether the use of the term "shall" imposed a mandatory duty to conduct informal dispute resolution processes in the course of adjudicating a claim of age discrimination. *Id*., 552 U.S. at 400. And *Lopez* involved whether the term "shall" imposed a mandatory duty to provide prisoners a drug treatment program. *Id*., 531 U.S. at 241. Neither involved statutes addressing the government's prosecutorial authority, where statutes providing that the government "shall" take enforcement action are not construed to impose mandatory duties. *Seabrook* v. *Costle*, 659 F.2d at 1374 n.3 (5th Cir. 1981).

Plaintiffs and their amici suggest that adopting a construction of the statute that would permit the government to refrain from enforcing it in particular circumstances would violate the Executive's constitutional duty to "take Care that the Laws be faithfully executed * * *." U.S. Const. art II, § 3. That, however, is exactly backwards, for "[t]he power to decide when to investigate, and when to prosecute, lies at the *core* of the Executive's duty to see to the faithful execution of the laws * * *." *Community for Creative Non-Violence* v. *Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (emphasis added). As this Court has held, "prosecutorial discretion 'flows not from a desire to give *carte blanche* to law enforcement officials but from recognition of the constitutional principle of separation of powers.'" *United States* v. *Hayes*, 589 F.2d 811, 819 n.3 (5th Cir. 1979), quoting *United States* v. *Ream*, 491 F.2d 1243, 1246 n. 2 (5th Cir. 1974); *see also Chaney*, 470 U.S. at 832 ("[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'"); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc); *see also In re Aiken County*, 725 F.3d 255, 262-63 (D.C. Cir. 2013) (op. of Kavanaugh, CJ.).

Consistent with these principles, statutes providing that the Executive "shall" take enforcement action are ordinarily treated as statutes of empowerment rather than limitation. Indeed, such ostensibly mandatory language is commonplace in statutes dealing with prosecutorial power. *See*, *e.g.* 28 U.S.C. § 547 ("each United States attorney, within his district, shall (1) prosecute for all offenses against the United States * * * (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied that justice does not require the proceedings."); 18 U.S.C. § 1621 (person guilty of perjury "shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both"). Yet, in light of the deep-rooted nature of enforcement discretion, these statutes are rarely if ever deemed to limit the Executive's authority to

decide whether and when to take enforcement action. *Town of Castle Rock*, 545 U.S. at 760-61; *Chicago* v. *Morales*, 527 U.S. 41, 47 n.2 & 62 n.32 (1999).

Plaintiffs and their amici complain that the Secretary's prosecutorial discretion policy is misguided and point to the recent influx of unaccompanied minors at the border as evidence of its flaws. The wisdom of deferred action, however, is not before the Court. Apart from the jurisdictional issues discussed in our opening brief, the sole question presented here is whether 8 U.S.C. § 1225(b)(2)(A) eliminates the government's prosecutorial discretion to make such policy choices and instead compels the commencement of removal proceedings against every inadmissible alien in every circumstance -- without regard to the resource constraints or humanitarian considerations, without regard to the government's enforcement priorities, in derogation of decades of settled administrative practice, and notwithstanding the Supreme Court's repeated pronouncements that the government has broad discretion at every stage of the removal process.

There is no support for construing 8 U.S.C. § 1225(b)(2)(A) to impose such limitations on the government. Rather, its text, structure, and legislative history all demonstrate that the Secretary retains discretion to determine when to institute removal proceedings. In sum, the prosecutorial discretion memoranda challenged here are substantively and procedurally lawful and, if the Court finds jurisdiction, should be upheld on the merits.[3]

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[3] Plaintiffs' amicus, the Eagle Forum asserts that the prosecutorial discretion memoranda are invalid for the additional reason that they were not promulgated in accordance with the "notice and comment" rulemaking requirements of the Administrative Procedure Act. Plaintiffs themselves have not raised this issue on appeal and it therefore is not before the Court. *Garcia-Melendez* v. *Ashcroft*, 351 F.3d 657, 662 n.2 (5th Cir. 2003) ("It is well settled in this Circuit that an amicus curiae generally cannot expand the scope of the appeal to implicate issues that have not been presented by the parties to the appeal") (internal quotation and citation omitted).

In any event, the memoranda are not subject to "notice and comment" rulemaking requirements. Contrary to amicus's contention, the prosecutorial discretion memoranda expressly state that they do not confer any right or benefit. ROA.430; ROA.434. The memoranda are instead general statements of discretionary enforcement policy and, as such, are exempted from notice and comment rulemaking requirements by 5 U.S.C. 553(b)(3)(A). *See Lincoln* v. *Vigil*, 508 U.S. 182, 196-97 (1993) ("statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" are

CONCLUSION

The district court's judgment dismissing the case for lack of jurisdiction should be affirmed. In the alternative, should the Court find jurisdiction, it should remand the case with instructions to enter judgment on the merits for the Secretary.

Respectfully submitted,

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exempted from notice and comment rulemaking requirements) (internal quotation and citations omitted).

FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared in Microsoft Word using a 14-point, proportionally spaced font, and that based on word processing software, the brief contains 5,980 words.

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CERTIFICATE OF SERVICE

I certify that on September 29, 2014, I electronically filed the foregoing Brief for the Federal Appellees/Cross-Appellants using the Court's CM/ECF system, which constitutes service under the Court's rules.

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No. 14-10049 Christopher Crane, et al v. Jeh Johnson, et al
USDC No. 3:12-CV-3247

Dear Mr. Clair,

The following pertains to your reply brief electronically filed on September 29, 2014.

You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 with grey covers within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
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