UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Dream Act Coalition, et al., Plaintiffs, vs. Brewer, et al., Defendants.	No. 2:12-cv-02546-DGC **EXPERT REPORT AND DECLARATION OF STEPHEN W. YALE-LOEHR**

I. Qualifications

1. I reside in Ithaca, New York. I am an attorney licensed to practice law in New York and Washington, DC. I am an adjunct professor of law at Cornell Law School, where I have taught immigration law for over 20 years. I have been an immigration attorney for over 25 years.

2. I am recognized as a leading expert in the field of immigration law, and have authored or co-authored over 200 books or articles on immigration law and lectured widely on immigration law topics. I am also co-author of Immigration Law and Procedure, a 20-volume reference work, which is updated four times per year, and is the leading immigration law treatise and is considered the standard reference work in the field. Since I became co-author in 1994, the treatise has been cited more than 150 times by federal courts, including four times by the U.S. Supreme Court. My biographical information and CV are attached as Exhibit A.

3. The plaintiffs have asked me to provide my opinions concerning certain aspects of the relationship between the federal immigration system and Arizona

Executive Order 2012-06. In addition to the Executive Order, I have also reviewed related provisions of the Arizona code governing the issuance of driver's licenses, Arizona Revised Statutes §§ 28-3153(D), 28-3158(C), 28-3165(F)—and related policies of the Arizona Motor Vehicles Department ("MVD"), MVD Policy 16.1.4 (revised Sept. 18, 2012). I may amend or supplement this report as appropriate upon receipt of additional relevant information or documents.

II. Background

4. This lawsuit challenges Arizona's policy of denying driver's licenses to noncitizens who are authorized to remain in the United States by the federal government under the deferred action for childhood arrivals (DACA) program. On June 15, 2012, the Department of Homeland Security (DHS) announced that certain people in the United States without immigration status are eligible to obtain "deferred action" if they meet specific criteria. Memorandum from Janet Napolitano, DHS Secretary, *Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children* (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. To be considered for prosecutorial discretion under this particular deferred action program, individuals must satisfy the following requirements: (1) have come to the United States under the age of sixteen; (2) have continuously resided in the United States for at least five years and are present in the United States on June 15, 2012: (3) currently be in school, have graduated from high school, obtained a general education development (GED) certificate, or are honorably discharged veterans of the U.S. Coast Guard or Armed Forces; (4) have

not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and (5) not be above the age of thirty. *Id*.

III. The Federal Executive Branch's Authority to Grant Deferred Action is Well-Established

5. Deferred action is a well-established mechanism for exercising prosecutorial discretion in which the federal government decides to refrain from removing an individual noncitizen and to authorize his or her continued presence in the United States. In basic terms, "prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual." Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 1 (June 17, 2011) (Morton Memo), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

6. Deferred action is one of several mechanisms for exercising prosecutorial discretion. *See generally* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 246-65 (2010). As the former head of the legacy Immigration and Naturalization Service (INS) wrote in a memo to all INS officers in 2000, "[i]n the immigration context, the term [prosecutorial discretion] applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to

stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order." Memorandum from Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion 2 (Nov. 17**,** 2000).

7. General authority for deferred action exists under Immigration and Nationality Act (INA) § 103(a), 8 U.S.C. § 1103(a), which grants the Secretary of Homeland Security the authority to enforce the immigration laws. Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decisions to initiate, defer, or terminate enforcement proceedings fall squarely within the authority of the Executive. *See, e.g*., *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("A principal feature of the removal process is the broad discretion exercised by immigration officials[,]" including the authority to decide "whether it makes sense to pursue removal at all."); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

8. In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since the 1970s. Federal courts have acknowledged the existence of this executive power as far back as the mid–1970s. *See, e.g., Lennon v. INS*, 527 F.2d 187, 190-91 (2d Cir. 1975); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 757-58 (8th Cir. 1976); *David v. INS*, 548 F.2d 219, 223 & n.5 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979), *superseded by rule on other grounds*, as stated in *Romeiro de*

Silva v. Smith, 773 F.2d 1021, 1024 (9th Cir. 1985). *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 72.03[2][h] (rev. ed. 2012) (discussing deferred action generally); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 484 (1999) (discussing the history of deferred action and citing Immigration Law and Procedure).

9. The immigration agencies have issued several memos since the 1970s providing guidance on factors to consider when deciding whether to exercise prosecutorial discretion, including deferred action. *See, e.g.*, Morton Memo, *supra*, at 1 (listing eight memos going back to 1976).

10. In more recent years, Congress has acknowledged the Executive Branch's discretionary authority to grant deferred action by referencing deferred action in discussing the relief that may be available to noncitizens on a number of occasions. For example, § 1703 of the National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1693, provides that a surviving alien spouse, child, or parent of a permanent resident member of the armed forces is eligible for deferred action. Similarly, § 1503(d) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1522, stated that certain individuals applying for immigration benefits under the Violence Against Women Act were "eligible for deferred action and work authorization." 8 U.S.C. § 1154(a)(1)(D)(i)(II).

11. On May 28, 2012, a group of 95 immigration law professors wrote President Obama a letter explaining that "there is clear executive authority for several forms of administrative relief to DREAM Act beneficiaries: deferred action, parole-in-

place, and deferred enforced departure." Hiroshi Motomura et al., *Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries* 1 (May 28, 2012), *available at* http://www.nilc.org/document.html?id=754.

12. The Executive Branch has granted deferred action at both a categorical and an individual level. In some circumstances, the Executive Branch grants deferred action on an individual basis. *See, e.g.*, Morton Memo, *supra*, at 4 (listing nineteen factors in determining whether to grant prosecutorial discretion, including deferred action, to an individual). The Executive Branch has exercised such individual grants of deferred action as part of its general discretionary powers, without specific congressional direction.

13. The Executive Branch has granted deferred action numerous times over the years to categories of noncitizens, similarly without specific congressional direction. *See generally* Office of the Citizenship and Immigration Services Ombudsman, U.S. Dep't of Homeland Security, *Recommendation from the CIS Ombudsman to the Director* (Apr. 6, 2007) (Ombudsman Deferred Action Recommendation), http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf (summarizing deferred action grants by the immigration agency without specific congressional authorization). The following paragraphs list several examples of categorical grants of deferred action that were not based on any specific congressional action.

14. Since 1998 the Executive Branch has granted deferred action and employment authorization to certain U visa applicants. Memorandum from Michael

Cronin, Acting INS Associate Commissioner, File No. HQ 204-P (Dec. 22, 1998), *referenced in* Ombudsman Deferred Action Recommendation, *supra*, at 2 n.5; 8 C.F.R. § 245.24(a)(3) (defining "U Interim Relief" as "deferred action and work authorization benefits provided by USCIS or the Immigration and Naturalization Service to applicants for U nonimmigrant status deemed prima facie eligible for U nonimmigrant status prior to publication of the U nonimmigrant status regulations").

15. In November 2005 the Executive Branch granted deferred action and employment authorization to certain foreign students affected by Hurricane Katrina. U.S. Citizenship and Immigration Services, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), http://www.uscis.gov/files/pressrelease/F1Student_11_25_05_PR.pdf.

16. In June 2009 the Executive Branch granted deferred action and employment authorization to widows and children of U.S. citizens while legislation to grant them statutory relief was under consideration. Office of the Press Secretary, U.S. Dep't of Homeland Security, *DHS Establishes Interim Relief for Widows of U.S. Citizens* (June 9, 2009), http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm; U.S. Citizenship and Immigration Services, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* (June 15, 2009) (USCIS Surviving Spouses Memo), http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf; Office of Communications, U.S. Citizenship and Immigration Services, *USCIS Provides Interim Deferred Action Relief for Surviving Spouses* (Aug. 31, 2009),

http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_fact_sheet_0831.pdf.

17. In March 2011 the Executive Branch granted deferred action and employment authorization to certain victims of human trafficking and sexual exploitation. U.S. Citizenship and Immigration Services, *USCIS Will Offer Protection for Victims of Human Trafficking and Other Violations* (Mar. 11, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=6e7bf0a4017ae210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

18. In April 2011 the Executive Branch granted deferred action and employment authorization to spouses and children of U.S. citizens or lawful permanent residents who are survivors of domestic violence. U.S. Citizenship and Immigration Services, *Battered Spouse, Children & Parents* (Apr. 7, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b85c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=b85c3e4d77d73210VgnVCM100000082ca60aRCRD.

19. These various authorities and examples demonstrate that the Executive Branch has clear legal authority to grant deferred action in immigration cases without specific congressional authorization, and has done so for decades. The deferred action received by DACA recipients is identical to the deferred action the federal government has granted to numerous other noncitizens (such as in the examples above) to authorize

otherwise removable noncitizens to remain in the United States.

IV. DACA Recipients Are Similarly Situated to Many Other Noncitizens Eligible for Arizona Driver's Licenses

20. Arizona Revised Statutes § 28-3153(D) provides that "[n]otwithstanding any other law, the [Arizona Department of Transportation] shall not issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Arizona Executive Order 2012-06 provides that "[t]he issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status," and thus may not be used to obtain a driver's license. MVD Policy 16.1.4 (revised Sept. 18, 2012) provides that although applicants generally may use an employment authorization document to show authorized presence to obtain a license, "[a] customer presenting a USCIS Employment Authorization Document . . . resulting from a Deferred Action Childhood Arrival is not acceptable" for this purpose.

21. Arizona Executive Order 2012-06 confuses the question whether a noncitizen has authorization to remain in the United States with whether he or she has a lawful immigration "status." Under federal immigration law, what determines whether a person has authorization to reside in the United States is not a matter of a classification, but rather the outcome of the removal procedures set forth in the INA, its implementing regulations, and the exercise of prosecutorial discretion, including deferred action.

22. Federal immigration law uses complex administrative mechanisms to determine "immigration status" – which is an imprecise, often fluid, and complicated matter – including administrative and judicial review. But a lack of formal immigration status does not mean that a noncitizen's presence in the United States is not authorized. Similarly, "lawfully present" and "not lawfully present" are not operative federal immigration statuses or classifications used for identifying the complete set of who will or will not in fact be deported or allowed to remain in the United States.

23. Rather, federal immigration law and procedure give federal immigration officials considerable discretion in determining a person's immigration status and in deciding whether to allow them to remain in the United States. Even people who are found to lack what is sometimes referred to as "lawful status" may be allowed to remain and work in the country. Deferred action recipients – including DACA recipients – are just one example of noncitizens who lack "lawful status" but who nonetheless have authorization to remain and work in the United States. To similar effect, what might appear to be a final determination that a person will not be permitted to remain in the United States frequently turns out not to be. For example, as discussed below, immigration officers have discretion to grant stays of deportation and work authorization based on public interest considerations even if a person has been issued a final order of deportation or removal. 8 C.F.R. § 241.6.

24. Numerous individuals whose stay in this country is otherwise contrary to the immigration laws may be allowed to stay in the United States as a matter of prosecutorial discretion, regulation, or for other reasons. Under Arizona's policy, many

individuals who, like DACA recipients, are permitted to remain in the United States without formal immigration status are nonetheless eligible to obtain driver's licenses by presenting their employment authorization documents.

25. The following examples describe different types of individuals who might appear removable but who nevertheless are allowed to remain and work in the United States. These categories of noncitizens below provide examples of persons similarly situated to DACA recipients because they are authorized to live and to work (upon receiving employment authorization) in the United States without a formal immigration status. These examples are for illustrative purposes only. They do not comprise a comprehensive list.

26. Individuals released from indefinite detention in accordance with *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), or otherwise released under supervision under 8 C.F.R. § 241.5 can be put on orders of supervision in lieu of deportation. Take, for example, a Cuban man who entered the United States without inspection and was subsequently found deportable. Because, like many Cubans ordered removed, he cannot be returned to Cuba, he would have been subject to indefinite detention until the Supreme Court's 2001 decision in *Zadvydas.* Following that decision, he is released on an order of supervision. He receives work authorization while on the order. 8 C.F.R. § 274a.12(c)(18). Yet he is still the subject of a final order of removal.

27. An individual who is ineligible for withholding of removal under the Convention Against Torture (CAT) due to a disqualifying criminal conviction can

nevertheless qualify for deferral of removal under the CAT if she proves that she is more likely than not to be tortured upon removal to her home country. Like the Cuban individual above, this person has been ordered deported, but is released on an order of supervision and is eligible for work authorization under 8 C.F.R. § 274a.12(c)(18). Take, for example, a client I represented several years ago through my immigration clinic at Cornell Law School. Our client was from Liberia and feared torture if forced to return to Liberia. However, she was ineligible for withholding of removal under the CAT based on previous criminal convictions. We helped her win deferral of removal under the CAT. She now reports to immigration officials once a year under her order of supervision. She also has work authorization that is renewed annually.

28. Certain individuals who entered the United States without inspection were made eligible under federal immigration law to apply to adjust to permanent resident status notwithstanding their illegal entry. 8 U.S.C. § 1255(i). Such persons who are beneficiaries of immigrant visa petitions that were filed before April 30, 2001 can apply for adjustment of status under § 1255(i). Thousands of persons properly submitted applications under this provision, and many others continue to do so. Such people with pending applications may receive work authorization. Although they do not acquire permanent resident status until their applications are approved, they may apply to leave and return to the United States with the approval of the federal government. Immigration agency officials have explicit authority not to initiate removal proceedings against such individuals, based on their pending applications. Moreover, even if proceedings are begun they may be terminated to allow the adjustment application to proceed, or the

individual may pursue her adjustment application in the removal proceedings as a form of relief from removal.

29. 8 U.S.C. § 1254a gives the DHS authority to grant temporary protected status ("TPS") to citizens of countries that are undergoing armed civil conflict or have suffered natural disasters. *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 33.08 (rev. ed. 2012). People who are physically present in the United States may apply for TPS even if they entered the country without inspection or overstayed their visas. The statute provides interim benefits, designated as temporary treatment benefits, for noncitizens who show prima facie eligibility for TPS after a designation by the DHS has been announced, but before the period for registration has begun. 8 U.S.C. § 1254a(a)(4); 8 C.F.R. § 244.5. Such benefits are also available during the registration period if a final determination cannot be made at the time of the initial interview. Temporary treatment benefits include employment authorization and a stay of removal. 8 C.F.R. §§ 244.10(e)(1), 274a.12(c)(19).

30. Certain persons, if they fall into a class designated under the Legal Immigration Family Equity Act, enacted as tit. XI of Act of Dec. 21, 2000, Pub. L. No. 106-553, §§ 1103-04, 114 Stat. 2762, 2762A144-49, can apply to adjust their status to become permanent residents, even though they may not otherwise be in a lawful classification. 66 Fed. Reg. 29,661 (June 1, 2001); 8 C.F.R. § 245a.10-245a.21. Such individuals with pending applications are also eligible for work authorization. 8 C.F.R. § 274a.12(c)(22).

31. The DHS has authority to parole noncitizens into the United States for emergency or humanitarian reasons or because it is in the public interest. 8 C.F.R. § 212.5. Parolees can apply for work authorization. 8 C.F.R. § 274a.12(c)(11). Parolees do not have a formal visa status or classification. Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 62.01[1] (rev. ed. 2012).

32. Under Arizona's policy, individuals in the circumstances discussed in paragraphs 26-31 would be able to obtain an Arizona driver's license upon presenting an employment authorization document. DACA recipients are similarly situated to the groups described in the preceding paragraphs because they are authorized to live and work in the United States, but DACA recipients are the only such group Arizona has deemed ineligible for driver's licenses under the state's policy.

V. Compensation

33. I am not being compensated for my services on behalf of the Plaintiffs in this case. If required to testify at a deposition, my hourly rate would be $695, and I would expect to be reimbursed for any travel expenses.

VI. Prior Testimony

34. Listed below are the cases in which I have been retained as an expert since December 2008, four years before the date of this report:

- *Fearon v. New York City Partnership Housing Development Fund Company, Inc*., Index No. 17683/07 (N.Y. Supreme Court (Bronx County) 2010).

- *Northeast Kansas Bioenergy, LLC v. Russell Teall*, No. 1220041047 (California JAMS arbitration) (2010).
- *Togrides v. Sporn*, Docket No. FST-CV-09-4017228-S (Ct. Superior Ct. 2010).
- *Miller v. Lewis*, Index No. 11358/2009 (N.Y. Supreme Court (Kings County) 2011).
- *Martinez v. City of Fremont*, Civil Action No. 4:10-cv-3140 (D. Neb. 2011).
- *RCI Capital Group, Inc. v. FPP Investments LLC*, No. 50 148 T 00212 12 (American Arbitration Association 2012).
- *Kyu Seock Lee v. U.S. Citizenship and Immigration Services*, No. SACV 10-1423 DOC (RNBx) (C.D. Cal. 2012).

Date: December 10, 2012

Submitted by

Stephen W. Yale-Loehr

Exhibit A: CV and biographical information