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AFL-CIO Recommendations on Administrative Action on Immigration

As Republicans continue to abdicate their responsibility to the country by preventing a vote on comprehensive immigration reform (HR 15), families and communities across the country remain under siege. In response to this ongoing tragedy, the Department of Homeland Security can and should take immediate steps to address the urgent needs of workers and immigrant communities.

These steps should provide an affirmative mechanism for relief that will permit community members to step out of the shadows without fear of government or employer retaliation, must stop sweeping individuals into the deportation pipeline who do not belong there according to the Administration's own policies, must reform the enforcement and removal processes to stop criminalizing immigrant communities, must enforce DHS' own procedures to ensure that enforcement will not interfere with workers' rights, and must provide due process to those who find themselves in removal proceedings.

We thus recommend that DHS immediately take the following four interrelated steps and concrete actions:

(1) DHS should grant affirmative relief with work authorization to individuals who are low priorities for removal or eligible for prosecutorial discretion under existing DHS policies

DHS should exercise its prosecutorial discretion to create a mechanism for individuals to come forward and receive relief if they are low priorities for removal or eligible for an exercise of prosecutorial discretion as described in DHS's existing policy memoranda, a universe of individuals similar in scope and characteristics to those who would be eligible for relief under S. 744.

Based on our experience, most workers will not take action to enforce their workplace rights if they know they can be fired or, worse, deported if they complain about non-payment of wages, dangerous working conditions, or sexual harassment. The same is true when undocumented tenants face unsafe housing conditions but fear reporting violations to housing authorities or community members confront crime or other

dangerous conditions but fear contacting the police. Thus, DHS's current policy of only exercising prosecutorial discretion in a few cases after the fact – *after* brave individuals have stood up for their rights and the rights of their community, *after* these individuals have been arrested and placed in removal proceedings, and *after* organizing efforts have been chilled by these retaliatory arrests – is almost always too little relief arriving too late. Only a mechanism for affirmative relief will provide undocumented individuals with the confidence to come out of the shadows and engage in the civil life of their communities and workplaces without fear of facing immigration status-based retaliation, a result that will benefit not only these individuals and their families, but their neighbors, co-workers, and the community at-large as well.

There is no doubt that DHS has legal authority to exercise its prosecutorial discretion to provide a mechanism for affirmative relief. DHS and its predecessor agencies have affirmed for many years, "'an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" because, in a world of limited resources, such a decision is necessary in order "to use the resources [the agency] ha[s] in a way that best accomplishes [its] mission of administering and enforcing the immigration laws of the United States.'" D. Meissner, INS Commissioner, Exercising Prosecutorial Discretion 3-4 (Nov. 17, 2000) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). *See also* S. Bernsen, INS General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976) (discussing federal government's exercise of prosecutorial discretion in immigration matters dating back to 1909); J. Morton, ICE Director, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011) (reaffirming continuing vitality of principles of prosecutorial discretion set forth in Meissner and Bernsen memos).

Presidents have made use of this prosecutorial discretion authority on an affirmative and class-wide basis in the context of immigration enforcement on numerous occasions. For example:

- In 1990, President Bush used his discretion to defer the deportations of Chinese nationals through Executive Order 12711;
- Presidents have used discretionary powers to protect Cubans from deportation (in 1980 and 1994), and Haitian orphans (in 2010); and
- President Obama granted "deferred enforced departure" to Liberians after temporary protected status of that country expired in 2007.

In addition, as you know, during the current Administration, DHS has recently exercised its prosecutorial discretion authority to affirmatively extend relief to two groups who are low priorities for removal: providing deferred action to young people who were brought to the United States as children, J. Napolitano, DHS Secretary, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), and providing parole in place to military family members, USCIS Policy Memorandum 602-0091, Parole of Spouses, Children and Parents of Active Duty

Members of the U.S. Armed Forces, *et al.* (Nov. 15, 2013). As DHS explained in defending the former initiative against legal challenge, "the appropriate exercise of prosecutorial discretion in the commencement of civil enforcement proceedings . . . is inherently a matter committed to agency discretion." *Crane v. Napolitano*, No. 3:12-CV-3247-O (N.D. Tex.), Defs.' Opp. to Pls.' Application for Prelim. Inj., Dkt. 34 (filed 12/19/12), p. 13. *See generally id.* at pp. 12-16 (discussing legal authority for the DACA program, authority which also supports the exercise of prosecutorial discretion urged in this letter). DHS should exercise this same legal authority to extend similar relief to all individuals who are low priorities for removal or who are eligible for an exercise of prosecutorial discretion under DHS's existing policies.

(2) DHS should reassert the primary role of the federal government in determining and implementing enforcement priorities by ending programs that effectively delegate those responsibilities to state and local law enforcement

DHS needs to reassert federal control over immigration enforcement priority decision-making and implementation by ending programs that effectively delegate these responsibilities to state and local law enforcement, many of whom do not share DHS's enforcement priorities and none of whom are invested in a uniform, nationwide approach to the enforcement of immigration law. In particular, DHS should terminate the Secure Communities program, the Criminal Alien Program, and 287(g) agreements. By enlisting local law enforcement to do the work of federal ICE agents, these programs have badly undermined DHS's stated enforcement priorities and prosecutorial discretion policies.

Relatedly, DHS's current detainer policies, which result in many individuals who are low enforcement priorities or are eligible for prosecutorial discretion being placed into removal proceedings, are urgently in need of reform. Like the programs discussed above, DHS's detainer system effectively delegates immigration enforcement decision-making authority to state and local law enforcement officials based on their arrest decisions, undermining a uniform national approach to enforcement prioritization and the exercise of prosecutorial discretion. The detainer system is also subject to manipulation by employers, landlords, and others who wield power over often-vulnerable undocumented individuals. These authorities can use the detainer system to retaliate against immigrants who assert their rights. When undocumented individuals complain about workplace or housing violations, authorities may report false or minor charges to the police, potentially leading to the individuals being placed in removal proceedings even if criminal charges are dropped. In addition to not issuing detainers where ICE is being enlisted by an employer or other entity for retaliatory purposes, ICE detainers should, more generally, not be issued for individuals who are low enforcement priorities or are eligible for prosecutorial discretion. And, any federal detainer reforms should take care not to affect laws or policies that reflect a state or locality's decision to separate local law enforcement from federal immigration enforcement, such as the TRUST Act or similar local detainer reform policies or agreements.

(3) DHS should reform the enforcement and removal system to stop criminalizing immigrant communities and ensure that individuals who are low priorities for removal or eligible for prosecutorial discretion are not removed

DHS should not remove individuals from the United States who are low priorities for removal or eligible for prosecutorial discretion. Ending the practice of removals without hearings or through expedited processes is key to achieving this goal. No individual who is *prima facie* eligible for relief from removal, who is a low priority for removal, or who is eligible for prosecutorial discretion should be removed without an adequate opportunity for a hearing. In addition, DHS should create an administrative appeal process for individuals to challenge an expedited or stipulated removal order, a visa waiver removal order, or voluntary departure. And, DHS should require all unrepresented individuals who agree to a stipulated removal to appear before an immigration judge, so that the judge may evaluate the individual's circumstances, advise the individual of his or her rights, and ensure that the individual has agreed to the order knowingly and voluntarily.

The unwarranted criminalization of immigrants for immigration-related violations – such as unlawful reentry convictions that result from undocumented individuals attempting to cross the southern border to rejoin spouses, children, and other family members in the United States – badly distorts DHS's efforts to enforce immigration law in a manner that reflects rational enforcement priorities and the exercise of appropriate prosecutorial discretion. The Pew Research Center recently reported that the number of individuals convicted for unlawful reentry into the United States increased *28-fold* between 1992 and 2012, remarkably accounting for nearly half of the increase in total criminal convictions in federal courts during that time period. Pew Research Center, The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth (March 18, 2014). DHS needs to reverse this trend of unfairly criminalizing immigrant communities and, in setting enforcement priorities and prosecutorial discretion standards, must distinguish between prior unlawful reentry convictions and non-immigration-related crimes.

(4) DHS should revise its internal operating instructions regarding enforcement of immigration laws in the workplace to ensure that such enforcement actions do not interfere with workers' rights

Employers continue to use the broken immigration system to undermine workers' rights. For example, a day laborer who filed a suit against his employer for non-payment of wages recently was met by ICE agents when he appeared for a court-related proceeding. The chilling effect of such action is clear. This example is not an anomaly. The Federal Government long ago recognized that employers embroil the federal immigration enforcement mechanisms into labor disputes, and adopted an internal operating instruction (OI 287.3(a), now designated as ICE Special Agents Field Manual 33.14(h)) to prevent that from happening. That operating instruction, however, was created at a time when worksite raids were the primary enforcement mechanism and was tailored to address issues that arose in connection to raids. Today's enforcement regime is very different, yet the operating instruction has not been updated in almost two

decades. DHS should immediately issue a revised operating instruction that adequately protects workers in the context of today's enforcement regime.