IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IRISH INTERNATIONAL IMMIGRANT CENTER, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 19-CV-11880-IT
KENNETH THOMAS CUCCINELLI II, Senior Official Performing the Duties of the Director, U.S. Citizenship & Immigration Services, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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TABLE OF EXHIBITS

* Exhibit 3 to Mr. Renaud's declaration is provided with limited nonsubstantive redactions just as it was produced to Congress.

† Exhibit B includes only those excerpts from the 66-page hearing transcript that are relied up by Defendants or that may be necessary for context. Because this transcript does not have line numbers for specific citation, the relevant statements have been highlighted.

INTRODUCTION

Plaintiff Irish International Immigrant Center's complaint must be dismissed as moot. The agency action it challenges was reversed by the Acting Secretary of the Department of Homeland Security (DHS) on September 18, 2019. In sworn congressional testimony, U.S. Citizenship and Immigration Services (USCIS or CIS) has confirmed that it has resumed processing deferred action requests under its pre-existing process. The case is therefore moot, and the "voluntary cessation" exception to mootness cannot create a live controversy here because: (1) federal agencies are afforded a presumption of good faith; (2) the reversal occurred for reasons unrelated to the litigation; and (3) there is no reasonable expectation that the specific challenged conduct will recur.

Even if the case were not moot, Plaintiff's claims would be subject to dismissal. The Administrative Procedure Act (APA) claim challenges DHS practices regarding the exercise of enforcement discretion, which are committed to agency discretion by law. Moreover, Plaintiff's Fifth Amendment equal protection claim must be dismissed because the complaint fails to state a plausible claim that the challenged USCIS action was taken on the basis of discriminatory animus.

For all of these reasons, the Court should dismiss Plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

BACKGROUND

I. Legal Framework

The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement" of the immigration laws. *See* 8 U.S.C. 1103(a)(1). The Secretary is vested with the authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the Act, and is given "control, direction, and supervision" of all DHS employees. *See* 8 U.S.C. § 1103(a)(2)-(3). DHS's immigration law responsibilities are

primarily divided among USCIS, U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). *See* 8 C.F.R. § 100.1.

Individual aliens are subject to removal if, inter alia, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see* 8 U.S.C. §§ 1182(a), 1227(a). As a practical matter, however, the Executive Branch lacks the resources to remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. For any alien subject to removal, DHS officials must first "decide whether it makes sense to pursue removal at all." *Id.* The threshold step for initiating removal proceedings is issuing a notice to appear (NTA), which is served on the alien and filed with the immigration court. *See* 8 U.S.C. § 1229. ICE, CBP, and USCIS all possess the authority to issue NTAs. *See* 8 U.S.C. § 239.1. However, once an NTA is filed with the immigration court, ICE assumes decision-making responsibility for that case on behalf of DHS. *See, e.g.*, Executive Office for Immigration Review, *Immigration Court Practice Manual* §§ 1.2(d), 1.5(e) (Dec. 2016) (link). ICE retains authority to exercise enforcement discretion throughout the removal process; even if a final order of removal has been issued by the immigration court, the alien may apply to ICE for a stay of removal. *See* 8 C.F.R. § 241.6(a).

Thus, "[a]t each stage" of the process, "the Executive has discretion to abandon the endeavor." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). In making these decisions, like other agencies exercising enforcement discretion, DHS must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Recognizing the need for such balancing, Congress has provided that the "Secretary [of Homeland Security] shall be responsible

for . . . [e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

Deferred action is a practice in which the Secretary of DHS exercises enforcement discretion to notify an alien of the agency's decision to forbear from seeking the alien's removal for a designated period. *AADC*, 525 U.S. at 484. It has long been exercised "for humanitarian reasons or simply for [the agency's] own convenience." *Id.* A grant of deferred action does not confer lawful immigration status and does not excuse any periods of unlawful presence before or after the deferred action period. *See* Exhibit A, Declaration of Daniel Renaud ("Renaud Decl.") ¶ 5. It is not an immigration benefit or a form of immigration relief. *Id.* DHS retains absolute discretion to revoke deferred action unilaterally, and the alien remains removable at any time. *Id.*[1]

Since 2003, the Secretary has delegated authority to USCIS to grant deferred action. *See* Renaud Decl. ¶ 9; Compl. ¶ 22. Certain deferred action requests (not implicated in this case) are governed by statutory provisions and special policies.[2] The USCIS Field Operations Directorate is responsible for the remaining deferred action requests. Renaud Decl. ¶¶ 1, 6. USCIS employs an internal process for such requests, but does not have a formal program or regulatory standards for considering requests. *Id.* ¶ 8. The USCIS field office with jurisdiction over the requester's residence accepts written requests for deferred action. *Id.* ¶ 10. After the field office collects relevant information, the Field Office Director and District Director make a case-by-case recommendation based on the totality of the circumstances, and those recommendations are

[1] Under DHS regulations, aliens granted deferred action may receive work authorization for the same period if they establish economic necessity. *See* 8 C.F.R. § 274a.12(c)(14) (under authority granted by 8 U.S.C. § 1324a(h)(3)). Deferred action also stops accrual of unlawful presence under 8 U.S.C. § 1182(a)(9)(B).

[2] *See, e.g.*, 8 U.S.C. 1154(a)(1)(D)(i)(II) and (IV) (certain aliens who self-petition for relief under the Violence Against Women Act are "eligible" to request "deferred action"); USA PATRIOT Act, Pub. L. No. 107-56, § 423(b), 115 Stat. 361 (Oct. 26, 2001) (certain family members of lawful permanent residents killed on September 11, 2001, or of citizens killed in combat, are "eligible for deferred action"); Nat'l Def. Auth. Act for FY 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1694 (Nov. 24, 2003) (same); *see also* Renaud Decl. ¶ 1 (noting that requests based on such statutes or the Deferred Action for Childhood Arrivals (DACA) policy are handled by another office).

forwarded to one of the four Regional Directors for a final decision. *Id.* ¶¶ 11-15.

II. Factual Background

On August 7, 2019, USCIS directed its Field Operations Directorate to no longer accept requests for non-military deferred action and to deny any pending requests. Renaud Decl. ¶ 18. Then-Acting Director of USCIS, Kenneth Cuccinelli, later explained to Congress that it "was my decision as the acting director." *See* Exhibit B, Hr'g Tr. at 24 (Oct. 30, 2019); *id.* at 25 ("I made this decision alone."); *see also id.* at 17 (testimony of Matthew Albence, Acting Director, ICE) ("[T]he ultimate decision and anything contemporaneous with that decision was made by CIS."). Mr. Cuccinelli explained that his decision was based on his conclusion that it is "more appropriate for this authority to rest with the prosecutorial element of the Department of Homeland Security which is not [USCIS]." *Id.* at 56; *see also id.* at 50 ("We do not participate in [the prosecutorial process], that's where deferred action has historically existed and been appropriate[.]").

Over the next month, USCIS field offices issued roughly 424 denial letters for then-pending requests and declined to accept any new requests for deferred action. Renaud Decl. ¶ 19. On September 2, 2019, USCIS announced that all requests for non-military deferred action that had been pending on August 7, 2019 and had thereafter been denied would be reopened and considered; letters to that effect were sent to each of the roughly 424 requesters who had received a denial letter. *Id.* ¶ 20. On September 11, 2019, the Civil Rights and Civil Liberties Subcommittee, House Oversight and Reform Committee, U.S. House of Representatives held a hearing regarding USCIS's decision, at which USCIS and ICE officials testified. *Id.* ¶ 22.

On September 18, 2019, then-Acting Secretary of Homeland Security Kevin McAleenan issued a memorandum to USCIS directing it to resume "its consideration of non-military deferred action requests on a discretionary, case-by-case basis, except as otherwise required by an applicable statute, regulation, or court order." *Id.* ¶ 23 & Ex. 2 at 2. Based on consultation with

relevant DHS components, the Acting Secretary concluded that "given the complexities and wide range of circumstances to which the law must be applied, it is . . . necessary and proper to maintain executive branch discretion—particularly where such discretion is appropriately and fairly exercised on a case-by-case basis." *Id.* Accordingly, he directed USCIS to ensure that it uses a consistent procedure for considering and responding to requests and "that discretionary, case-by-case deferred action is granted only based on compelling facts and circumstances." *Id.* Ex. 2 at 2.

Pursuant to the September 18, 2019 memorandum, USCIS immediately reinstated the same process that was in effect before August 7, 2019, and began processing the pending and reopened requests, along with any new requests received after that date. *Id.* ¶ 24. On October 18, 2019, USCIS submitted an update to the Acting Secretary, explaining that it had "fully complied with" the direction "to recommence deciding requests for deferred action" and was using "the procedures in place prior to August 7, 2019." *See id.* ¶ 25 & Ex. 3. On October 30, 2019, Mr. Cuccinelli provided sworn testimony before the congressional subcommittee, *see* Oct. 30 Hr'g Tr. at 9-10, explaining that his August decision had been "reversed" by the Acting Secretary, *id.* at 24, 30-31, after consideration of USCIS's recommendations, *id.* at 46-47, 56, and that he did not "expect to see any change [to the reinstated process] regardless of who the Secretary is," *id.* at 53.

III. Procedural History

Plaintiff filed suit on September 5, 2019, before the congressional hearings and the Acting Secretary's September 18, 2019 memorandum. *See* Compl., ECF No. 1. At the time the case was filed, Plaintiff alleged that it represented 19 families for which deferred action was relevant: (i) 9 had pending requests (7 of whom received denial letters from USCIS in August 2019), *see id.* ¶¶ 45, 52; (ii) 3 were in the process of submitting initial requests, *id.* ¶ 46; and (iii) 7 were recipients of deferred action that would expire in 2020, *id.* ¶ 47. Plaintiff alleged that "eliminating the authority of USCIS field offices to grant deferred action to individuals with dire medical needs is

arbitrary, capricious, and based on impermissible animus" in violation of the APA, 5 U.S.C. § 706(2), and equal protection under the Fifth Amendment. *Id.* ¶ 7. The Court stayed the litigation in October 2019 so that the parties could discuss a non-judicial resolution of the case; that stay has now expired. *See* Order, Oct. 31, 2019, ECF No. 13; Minute Order, Jan. 28, 2020; Order, Feb. 7, 2020, ECF No. 19.

ARGUMENT

I. Plaintiff's Suit Is Moot Because the Challenged Agency Action Has Been Reversed.

A. Plaintiff's Claims Are Moot, And Plaintiff Lacks Standing to Seek Prospective Injunctive Relief.

A court "has no authority . . . to adjudicate moot questions." *Gonzalez v. Velez*, 864 F.3d 45, 56 (1st Cir. 2017). "[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. Another way of putting this is that a case is moot when the court cannot give any effectual relief to the potentially prevailing party." *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops* (*ACLUM*), 705 F.3d 44, 52 (1st Cir. 2013) (internal quotation marks and citations omitted).[3]

This case is moot because the agency action it challenges has been reversed. Plaintiff exclusively challenges the "termination of USCIS's non-military deferred action authority." Compl. ¶¶ 93-96, 99-100. But USCIS's action that triggered this lawsuit was reversed by the Acting Secretary of Homeland Security on September 18, 2019. *See* Renaud Decl. ¶ 23 & Ex. 2. USCIS reinstated the roughly 424 requests for which it had sent denial letters in August 2019. *See id.* ¶¶ 20, 24. It began accepting new requests. *See id.* ¶¶ 24-25 & Ex. 3. And it decides those requests under the same process that was in place before August 2019. *See id.* ¶ 24. Plaintiff errs in asserting that "Defendants themselves" had not confirmed this reversal. *See* Joint Status Report

[3] Hereinafter, internal citations, quotations, and alterations are omitted unless otherwise indicated.

at 3, ECF No. 15 (Jan. 27, 2020). Mr. Cuccinelli provided sworn testimony to Congress regarding these very facts. *See* Oct. 30 Hr'g Tr. at 11, 13, 22, 24, 30-31, 62; Renaud Decl. ¶ 25 & Ex. 3.

Because USCIS's deferred action request process has been reinstated, there is no live controversy. "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013). The challenged USCIS action has been superseded by the Acting Secretary's decision, just as a challenge to an interim rule is moot when superseded by a final rule. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 221 (1st Cir. 2019) (holding that APA challenge to superseded rule was moot because "there is no justiciable controversy regarding the procedural defects of [interim final rules] that no longer exist"). Accordingly, the Court cannot grant the injunctive relief requested—"set[ting] aside the . . . termination," Compl., Req. for Relief ¶ 1, and enjoining Defendants from "implementing or enforcing the termination," *id.* ¶ 5, because the challenged termination no longer exists.

In the Joint Status Report, Plaintiff suggested that "the challenged conduct" might not have ceased because USCIS will "issue new denials." *See* ECF No. 15 at 3. But Plaintiff's complaint does not allege that their clients are entitled to deferred action or that USCIS is bound by any practice or regulation to grant it in any specific case. Instead, Plaintiff alleged that it and its clients were harmed because they lost the opportunity to request deferred action and receive USCIS's consideration of their requests. *See* Compl. ¶¶ 35-47, 67-79. That opportunity has been restored. Yet, deferred action—both before August 2019 and now—remains an exercise of enforcement discretion based on the totality of the circumstances. *See* Renaud Decl. ¶¶ 12-13, 23-24; *AADC*, 525 U.S. at 484. Thus, denials are to be expected, and do nothing to revive Plaintiff's claims.

Moreover, Plaintiff's desire to monitor USCIS's *future actions* does not create a justiciable controversy. *See* Joint Status Report at 3 (seeking "more time . . . to assess whether Defendants' challenged conduct has ceased" and hoping to review USCIS's internal "report [to the Secretary] on the status of the deferred action program in March"). Courts must "consider the law as it exists at the time of our review, . . . not as it might speculatively exist in the future. Thus, even if [courts] were permitted to issue an advisory opinion on hypothetical conduct, which we are not, we would decline to do so." *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016).

B. Plaintiff Is Not Entitled To Declaratory Relief.

This result is not altered because Plaintiff also seeks declaratory relief. *See* Compl., Req. for Relief ¶¶ 2-4. "For declaratory relief to withstand a mootness challenge, the facts alleged must 'show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *ACLUM*, 705 F.3d at 53-54 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975)). "[F]ederal courts 'are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.'" *Id.* at 53 (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)). Claims for such relief are thus equally appropriate for dismissal on mootness and standing grounds as claims for injunctive relief.

Because the Acting Secretary reversed the challenged USCIS action, "[t]he controversy here is at this point neither immediate nor real." *ACLUM*, 705 at 54; *Town of Portsmouth*, 813 F.3d at 59. A judicial pronouncement regarding whether the challenged USCIS action lacked a "reasoned basis," Compl. ¶ 93, or was "based on impermissible animus," *id.* ¶¶ 95, 99-100, would have no immediate effect on Defendants' behavior. Accordingly, this is plainly a case where "pronouncing whether [defendant's] past actions were right or wrong, would be merely advisory." *Eves v. LePage*, 927 F.3d 575, 590 (1st Cir. 2019). Any adjudication, declaratory or otherwise, of Plaintiff's claim would not result in a "cessation of action." *Hewitt v. Helms*, 482 U.S. 755, 761

(1987) (explaining that "what makes [a judicial pronouncement] a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*") (emphasis in original). Nor would a backward-looking judicial pronouncement meaningfully address Plaintiff's fear that Defendants might make some unspecified changes to deferred action in the future. "Whatever future disputes may arise have not yet been and may never be adequately framed by their factual dimensions." *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 916 F.3d 98, 112 (1st Cir. 2019).

In sum, any opinion the Court might render concerning past harms (whether actual or conjectural) would be advisory, and any opinion the Court might render concerning potential future harms could only be speculative. Neither of these is a proper ground for the exercise of Article III jurisdiction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (discussing limits on appropriateness of obtaining prospective injunctive relief in the context of law enforcement activities); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) ("But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture.").

C. No Exception to the Mootness Doctrine Applies.

Contrary to Plaintiff's assertion, *see* Joint Status Report at 2, the "voluntary cessation" exception does not apply in this case.[4] This exception's purpose is to prevent "a manipulative litigant immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *ACLUM*, 705 F.3d at 54-55. It is rooted in "the principle that a party should not be able to evade judicial review, or to defeat a judgment, by

[4] Plaintiff has not argued that the mootness exception for events "capable of repetition but evading review" applies here. It plainly does not. *See ACLUM*, 705 F.3d at 57 (exception applies only in "exceptional situations" where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again").

temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n. 1 (2001). The exception does not apply here because (1) it is generally inapplicable to government entities, which are afforded a presumption of good faith, (2) it does not apply where the change occurred for reasons unrelated to the litigation, and (3) Plaintiff cannot establish a reasonable expectation of recurrence of the challenged conduct.

First, there is no basis for the Court to conclude that Defendants are trying to game the system by temporarily stopping allegedly wrongful conduct in order to avoid an unfavorable judgment. Indeed, the opposite is presumptively true: Courts have routinely recognized that the coordinate branches of government are presumed to act in good faith when altering their conduct or changing policies or laws and have accordingly declined to apply the voluntary cessation exception to mootness in such cases. *See, e.g.*, *Town of Portsmouth*, 813 F.3d at 59 (invoking presumption "that a state legislature enacts laws in good faith, . . . not with the improper motive of mooting pending litigation"); *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc) (observing that the voluntary cessation doctrine was designed to "prevent[] a private defendant from manipulating the judicial process" and that it would be "inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose").[5] It is well-recognized that "withdrawal or alteration of administrative policies can moot an attack on those policies." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010); *see also Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 246 (5th

[5] *Accord Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 324–25 (5th Cir. 2009) (dismissing case as moot and stating that "[w]ithout evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing"); *Troiano v. Supervisor of Elections in Palm Beach Cnty, Fl.*, 382 F.3d 1276, 1285 (11th Cir. 2004) ("In short, this Court has consistently held that a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated.").

Cir. 2006) ("Corrective action by an agency can moot an issue.").

Second, "the exception ordinarily does not apply where the voluntary cessation occurred for reasons unrelated to the litigation." *Town of Portsmouth*, 813 F.3d at 59 (holding that exception did not apply because "there is no basis upon which to conclude that the state legislature repealed [the statute] in order to make the present litigation moot"), *affirming Town of Portsmouth, R.I., v. Lewis*, 62 F. Supp. 3d 233, 239 (D.R.I. 2014) (noting that the state "responded to an outpouring of political and public pressure" rather than to the litigation). Here, the challenged USCIS decision was reversed by the Acting Secretary of Homeland Security for governmental reasons after conferring with the relevant DHS components. *See* Renaud Decl. Ex. 2. That September 18, 2019 decision was also made in light of substantial congressional scrutiny, including a September 11, 2019 hearing and requests for documents and more testimony. *See* Renaud Decl. ¶ 22; Oct. 30 Hr'g Tr. at 4-5, 23-24. These provide straightforward "reasons unrelated to the litigation." *Town of Portsmouth*, 813 F.3d at 59. Plaintiff cannot carry its burden to show that the voluntary cessation occurred "because of the litigation." *Sze v. INS*, 153 F.3d 1005, 1008 (9th Cir. 1998) (cited with approval by *ACLUM*, 705 F.3d at 55). The fact that the Acting Secretary's decision occurred two weeks after Plaintiff filed suit is merely "correlation" not "causation," *id.*, especially in light of the reasons discussed above. *See, e.g., Gutierrez v. DHS*, No. 18-1958, 2019 WL 6219936, at *6 (D.D.C. Nov. 21, 2019) (agency action mooted claim, even though it came shortly after TRO motion, absent evidence it occurred "because of the litigation").

Third, invoking the exception "requires some reasonable expectation of recurrences of the challenged conduct. Under circuit precedent, the voluntary cessation exception can be triggered only when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case." *ACLUM*, 705 F.3d at 55-56. No such expectation can be established here.

After all, courts "give some weight" to the fact that "a cabinet member [has], as a matter of policy, abandoned the prior practice." *Id.* at 56. And the decisionmaker for the challenged USCIS action, Mr. Cuccinelli, stated in sworn congressional testimony that, in light of the Acting Secretary's decision directing USCIS to resume processing deferred action requests, he does not "expect to see any change [to the reinstated process] regardless of who the Secretary is." *Id.* at 53. There are no grounds upon which Plaintiff can show that deferred action is likely to change following dismissal of this case. Moreover, a future alteration to deferred action would only be a "recurrence" if it involved the same alleged aspects—lack of a reasoned basis and alleged discriminatory animus. That is far too speculative to overcome the sworn testimony here. *Cf. Town of Portsmouth*, 62 F. Supp. 3d at 239 (finding no reasonable expectation of recurrence where plaintiff offered only "hypothetical and speculative prospect").

In sum, Plaintiff's claims are moot, no exceptions to the doctrine apply, and the case must be dismissed for lack of subject matter jurisdiction.

II. Even If Not Moot, Plaintiff's Claims Must Be Dismissed.

In addition to the fact that Plaintiff's claims are not justiciable because they are now moot, the Court lacks jurisdiction over Plaintiff's APA claim and Plaintiff fails to state an equal protection claim. For these additional reasons, the complaint must be dismissed.

A. USCIS's Challenged Decision is Committed to Agency Discretion by Law.

Count 1 of Plaintiff's complaint must be dismissed because the APA does not permit judicial review of agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision applies where "statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), and "a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

Section 701(a)(2) thus "precludes judicial review of . . . type[s] of administrative decisions traditionally left to agency discretion." *Lincoln*, 508 U.S. at 191. It "typically [applies] when review involves foreign affairs, the military, or other areas in which the very act of reviewing may impede the agency's ability to carry out its functions." *Dugan v. Ramsay*, 727 F.2d 192, 195 (1st Cir. 1984). Courts have found it to preclude review, for example, of an agency's decision not to institute enforcement actions, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Mass. Pub. Interest Research Grp., Inc. v. Nuclear Regulatory Comm'n*, 852 F.2d 9, 14 (1st Cir. 1988); an agency's determination of when to act on an immigrant's application for adjustment of status, *Touarsi v. Mueller*, 538 F. Supp. 2d 447, 452 (D. Mass. 2008); an agency's discretion regarding whether to enter DNA samples into an FBI database, *Cowels v. FBI*, 327 F. Supp. 3d 242, 249-50 (D. Mass. 2018), *aff'd on other grounds*, 936 F.3d 62 (1st Cir. 2019); and an agency's allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U.S. at 192. The same is especially true of an agency decision to end a discretionary practice of nonenforcement against removable individuals.

Chaney is most instructive. In *Chaney*, the Supreme Court considered a challenge to the decision of the Food and Drug Administration (FDA) not to enforce the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301 *et seq.*, against the "unapproved use of approved drugs" for capital punishment. *Chaney*, 470 U.S. at 824. The FDA had reasoned that it lacked jurisdiction to bring such enforcement actions and that, even if it had jurisdiction, the agency would exercise its "inherent" enforcement discretion to decline to do so. *Id.* The Supreme Court refused to subject the agency's decision to arbitrary-and-capricious review. *Id.* at 831.

The First Circuit has characterized *Chaney* as holding "that an agency's decision *not* to take requested action is presumptively unreviewable." *Mass. Public Interest Research Grp.*, 852 F.2d at 14; *see also Chaney*, 470 U.S. at 831 (observing that "an agency's decision not to prosecute

or enforce, whether through civil or criminal process," is "generally committed to an agency's absolute discretion" and "unsuitab[le] for judicial review"). *Chaney* explained that a decision not to enforce "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," including "whether agency resources are best spent on this violation or another" and whether enforcement in a particular scenario "best fits the agency's overall policies." *Chaney*, 470 U.S. at 831. The Court also noted that when an agency declines to enforce, it "generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Accordingly, *Chaney* concluded that, absent a statute "circumscribing an agency's power to discriminate among issues or cases it will pursue," the agency's "exercise of enforcement power" is "committed to agency discretion by law." *Id.* at 833, 835.

USCIS's (now-reversed) decision to stop considering non-military deferred action requests is exactly the type of agency decision that is unsuitable for judicial review and therefore "committed to agency discretion" under Section 701(a)(2). Like the decision to *adopt* a practice of nonenforcement, the decision whether to *retain* such a practice "often involves a complicated balancing" of factors that are "peculiarly within [the] expertise" of the agency, including determining how the agency's resources are best spent in light of its overall priorities. *Chaney*, 470 U.S. at 831. Likewise, a decision to end an existing nonenforcement practice will not, by itself, bring to bear the agency's coercive power over any individual; that will occur only if any resulting enforcement proceeding leads to a final adverse order. Accordingly, absent a statutory directive "otherwise circumscribing" DHS's traditional discretion, there is no "law to apply" to judge the Secretary's exercise of his or her broad enforcement discretion. *Chaney*, 470 U.S. at 833-34. Nothing in the INA expressly or implicitly circumscribes the Secretary's authority to

decline to consider requests to exercise enforcement discretion before removal proceedings are initiated.[6] Section 701(a)(1) therefore squarely applies.[7]

These principles of nonreviewability apply with particular force in the context of enforcement of immigration laws. As the Supreme Court has observed, the "broad discretion exercised by immigration officials" has become a "principal feature of the removal system." *Arizona v. United States*, 567 U.S. 387, 396 (2012). Moreover, courts cannot "ignore unmistakable congressional efforts increasingly to insulate executive decision-making in the area of immigration from judicial review." *Touarsi*, 538 F. Supp. 2d at 451. In that context, the concerns inherent in any challenge to prosecutorial discretion "are greatly magnified." *AADC*, 525 U.S. at 490. "Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts," a delay in the enforcement of immigration laws "permit[s] and prolong[s] a continuing violation of United States law." *Id.* Congress's particular concern for these principles is underscored by the INA. Section 1252(g) of the INA channels "any cause or claim by or on behalf of any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien" into petitions for review of final removal orders. 8 U.S.C. § 1252(g). And Section 1252(b)(9) likewise provides that "*all* questions of law and fact . . . arising from *any* action taken or proceeding brought to remove an alien from the United States under this subchapter" are subject only to "judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9) (emphasis added). The Court has previously recognized that these provisions were "designed to give some measure of protection to 'no deferred action'

[6] Plaintiff argues that deferred action "has been ratified by regulation and statute," Compl. ¶ 94, but such acknowledgements that it *can* be an appropriate exercise of enforcement discretion do not make it required. Indeed, USCIS's action did not affect any form of deferred action that had an express statutory basis. *See* Renaud Decl. ¶ 1.

[7] Indeed, like a decision to adopt a nonenforcement policy, an agency's decision not to retain a prior practice of nonenforcement is akin to changes of criminal prosecutorial discretion policies. Such discretion has never been considered amenable to APA review. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485; *see INS v. St. Cyr*, 533 U.S. 289, 313 & n.37 (2001). The challenged USCIS action is the sort of "discretionary determination" *AADC*, 525 U.S. at 485, that Congress intended to channel through the INA's carefully cabined review scheme. That statutory scheme confirms the importance Congress placed on shielding DHS's discretionary decisions from review, and reinforces why, even more than individual discretionary decisions, immigration enforcement *policy* decisions such as the one challenged here, are unreviewable under the APA as "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). *Cf. Touarsi*, 538 F. Supp. 2d at 452 (determining that adjustment-of-status application process was committed to agency discretion, observing that "Congress has repeatedly expressed an intention to restrict the federal judiciary's role in the immigration arena by amending the [INA] to strip the federal courts of jurisdiction over various immigration-related matters").

B. USCIS's Action Did Not Violate Equal Protection.

Count 2 of Plaintiff's complaint must be dismissed because USCIS's action did not violate the equal protection principles of the Fifth Amendment. Plaintiff contends that USCIS's exercise of enforcement discretion was motivated by discriminatory animus. Although review of this constitutional claim is not foreclosed by the APA's § 701(a)(2), *see Webster v. Doe*, 486 U.S. 592, 603-604 (1988); *Chaney*, 470 U.S. at 838, the claim fails to state a claim for multiple reasons.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[F]or an equal protection claim to survive a motion to dismiss, a plaintiff must allege facts plausibly demonstrating that compared with others similarly situated, the plaintiff was selectively treated based on impermissible considerations such as race." *Mulero-Carrillo v. Roman-Hernandez*, 790

F.3d 99, 106 (1st Cir. 2015); *Pimentel v. City of Methuen*, 323 F. Supp. 3d 255, 269 (D. Mass. 2018) ("To state an equal-protection claim, a plaintiff must show that she was treated differently from others similarly situated based on impermissible considerations."). Plaintiff has not alleged that similarly situated individuals were treated differently, and therefore has failed to carry its burden. *See Rodríguez–Cuervos v. Wal–Mart Stores, Inc.*, 181 F.3d 15, 21 (1st Cir. 1999) (holding that a plaintiff "bears the burden of showing that the individuals with whom he seeks to be compared have been subject to the same standards and have engaged in the same conduct").

Moreover, Plaintiff has not alleged that the challenged action in fact had a disparate impact on specific races, ethnicities, or national origins. Nor does Plaintiff allege that the relevant decisionmakers were aware of the demographics of the hundreds of affected individuals. *See Nat'l Amusements, Inc., v. Town of Dedham*, 43 F.3d 731, 743 (1st Cir. 1995) (failure to allege that decisionmakers were "aware at that time of the racial composition of [the affected population]" is "fatal to a claim of intentional racial discrimination"). *Cf.* Oct. 30 Hr'g Tr. at 38-39 (stating that Mr. Cuccinelli had not "read individual cases when making a procedural decision like that" and that he did not know at the time about the specific cases raised by the congressman).[8]

Most importantly, a discriminatory-enforcement claim is not cognizable in the immigration context. As the Court explained in *AADC*, "a selective prosecution claim is a *rara avis*." 525 U.S. at 489. Even in the ordinary criminal context, discriminatory-motive challenges to enforcement discretion "invade a special province of the Executive" and "threaten[] to chill law enforcement

[8] Regardless, given natural immigration patterns, the potential for any immigration policy to have a greater impact on people of ethnicities significantly represented among the immigrant population is neither surprising nor illuminating of the agency's motives. If a broad-scale immigration decision's impact on individuals of any particular ethnicity were enough to state an equal protection claim, virtually any such decision could be challenged on that ground. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (emphasizing that "cases are rare" for which "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"); *McGuire v. Reilly*, 386 F.3d 45, 63 (1st Cir. 2004) ("[C]ourts have been loathe to infer intent from mere effect[.]").

by subjecting the prosecutor's motives and decisionmaking to outside inquiry." *Id.* at 489-90. In the immigration context, these concerns are "greatly magnified," because a selective-prosecution claim not only delays "just deserts," but "permit[s] and prolong[s] a continuing violation" of law. *Id.* at 490. Courts are also "ill equipped" to consider the authenticity or the adequacy of the foreign-policy considerations that motivate such decisions. *Id.* at 491. For those reasons, although the Court has "not rule[d] out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome," as a general matter, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488, 491.

The principles set out in *AADC* apply with equal force to the "termination of deferred action" allegedly motivated by animus regarding race, national origin, and disability. Compl. ¶¶ 99-100. A challenge to USCIS's decision as motivated by a discriminatory purpose directly implicates *AADC*'s concerns about inhibiting prosecutorial discretion, allowing continuing violations of immigration law, and impacting foreign relations. *See* 525 U.S. at 490-91. Because USCIS's facially neutral ending of one nonenforcement practice—which did not impair DHS's ability to exercise enforcement discretion regarding whether to initiate the removal process or to discontinue that process—is not the rare case where an exception to *AADC* may be warranted, Plaintiff's claim fails. *Cf. Kandamar v. Gonzales*, 464 F.3d 65, 73-74 (1st Cir. 2006) (holding that "a claim of selective enforcement based on national origin is virtually precluded by [*AADC*]").

In any event, even under the general equal protection standard articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), Plaintiff does not state a claim. None of the factors Plaintiff relies on, either alone or together, "state facts sufficient to establish a claim to relief that is plausible on its face," so the claim must be dismissed.

See, e.g., *Najas Realty LLC v. Seekonk Water Dist.*, 821 F.3d 134, 140, 144-45 (1st Cir. 2016).

First, one cannot find discriminatory intent for USCIS's challenged action from unrelated actions by other officials in the Executive Branch. *See* Compl. ¶ 81. Plaintiff specifically cites Acting Secretary of Homeland Security Elaine Duke's rescission of DACA in 2017;[9] Secretary of Homeland Security Kirstjen Nielsen's termination of temporary protected status (TPS) for Salvadorans in 2018, *see* 83 Fed. Reg. 2654 (Jan. 18, 2018);[10] and the Department of Defense's 2017 changes to its Military Accessions Vital to the National Interest (MAVNI) program.[11] *See* Compl. ¶ 81. These actions by other officials occurring long before August 2019 have nothing to do with USCIS's action here. These do not constitute the "historical background" of USCIS's decision. *Arlington Heights*, 429 U.S. at 267. And the government continues to defend each of these actions in court; it would not be appropriate or efficient for the Court to conduct mini-trials regarding these unrelated actions to determine whether they were discriminatory, let alone whether they provide any basis to infer improper intent here. *Cf. Lawson v. Graphic Packaging Int'l, Inc.*, 549 F. App'x 253, 256 (5th Cir. 2013) (observing that plaintiff in discrimination case "may not effectively force the employer to defend 'mini-trials' on other employees' claims of discrimination that are not probative on the issue of whether the plaintiff faced discrimination").

Second, the alleged statements by the President, *see* Compl. ¶¶ 82-83, are irrelevant both because they have nothing to do with deferred action or the exercise of enforcement discretion in the immigration context and because there is no basis to conclude that the President had anything

[9] The Supreme Court heard argument regarding the rescission of DACA on November 12, 2019. *See DHS v. Regents of the Univ. of Calif.*, No. 18-587; *Trump v. NAACP*, No. 18-588; *McAleenan v. Vidal*, No. 18-589.

[10] Litigation regarding termination of TPS for Salvadorans is pending before the Ninth Circuit and two district courts. *See Ramos v. Nielsen*, No. 18-16981 (9th Cir.) (oral argument held Aug. 14, 2019); *Centro Presente v. DHS*, No. 18-cv-10340-DJC (D. Mass.); *Casa De Maryland, Inc. v. Trump*, No. 18-cv-845-GJH (D. Md.).

[11] Two cases remain pending regarding the October 2017 changes to the MAVNI program. *See Kirwa v. U.S. Dep't of Defense*, No. 17-1793 (D.D.C.); *Nio v. DHS*, No. 17-0998 (D.D.C.).

to do with this decision. Mr. Cuccinelli testified that *he* made the decision, *see* Oct. 30 Hr'g Tr. at 24, 25, 32, on the basis of USCIS institutional concerns, *see id.* at 16, 50, 56.

Third, the statements Plaintiff has cobbled together do not suggest that Mr. Cuccinelli himself harbors any discriminatory animus. His advocacy as a state legislator for the legal theory that large scale illegal immigration constitutes an "invasion" under Article 4, Section 4 of the U.S. Constitution, *see* Compl. ¶ 85, is not evidence of animus. Nor is his defense of the "public charge" rule promulgated by then-Acting Secretary Kevin McAleenan in August 2019. *See* 84 Fed. Reg. 41292 (Aug. 14, 2019). Mr. Cuccinelli explained in interviews that this regulation interpreted a statutory requirement for new immigrants that has been in place since 1882. *See* USCIS, Public Charge Provision of Immigration Law: A Brief Historical Background (link); 8 U.S.C. § 1182(a)(4). His rapid-fire interaction with a news reporter on August 13, 2019 has been much mischaracterized. *See* Compl. ¶¶ 86-87. In context, it is clear that he was not suggesting that the race of immigrants mattered, but instead that immigrants could be considered "wretched" in the terms of Emma Lazarus's famous poem for reasons other than poverty.[12]

In short, whether considered separately or collectively under either *AADC* or *Arlington Heights*, Plaintiff's allegations are wholly insufficient to show that USCIS acted with racial animus in its (now-reversed) decision to stop considering certain deferred action requests before the initiation of the removal process. Plaintiff's equal protection claim fails as a matter of law.

[12] In response to a reporter quoting lines from Emma Lazarus's famous poem, including "Give me your tired, your poor, . . . The wretched refuse of your teeming shore," Mr. Cuccinelli commented "Well, of course, that poem was referring back to people coming from Europe where they had class-based societies *where people were considered wretched if they weren't in the right class*, and it was introduced, it was written one year after the first federal public charge rule was written." *See* Excerpt from CNN Interview (Aug. 13, 2019 at 7:10pm) (emphasis added), available at https://www.youtube.com/watch?v=Ks6t4eTegqU. *See also* Oct. 30 Hr'g Tr. at 36 (Mr. Cuccinelli testifying that he did not think U.S. "immigration policy should treat immigrants from Europe differently from other immigrants from other parts of the world.").

CONCLUSION

For the foregoing reasons, the Court should dismiss this case.

Dated February 28, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Galen N. Thorp
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Local Rule 7.1 Certification

I hereby certify that I have spoken with counsel for the Plaintiff on several occasions regarding disposition of this matter and have been unable to resolve or narrow the issue.

/s/ Galen N. Thorp

Galen N. Thorp