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WHILE SUPREME COURT HOLDS THAT STATES HAVE NO STANDING TO CHALLENGE FEDERAL IMMIGRATION ENFORCEMENT PRIORITIES IN UNITED STATES V. TEXAS, HOW DOES THIS BODE FOR DACA AND OTHER IMMIGRATION POLICIES?

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By Cyrus D. Mehta

In United States v. Texas, the Supreme Court in an 8-1 majority opinion rendered a blow to Texas and Louisiana in holding that they had no standing to challenge the Biden administration on federal immigration policy on enforcement priorities. Writing for the majority, Justice Kavanaugh said, "The States have brought an extraordinarily unusual lawsuit. They want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit; indeed, the States cite no precedent for a lawsuit like this."

Originally laid out in the 2021 Mayorkas Memo, this list of enforcement priorities would have allowed ICE to focus its efforts on the apprehension and removal of noncitizens who pose a threat to “national security, public safety, and border security”. The attorneys general of Texas and Louisiana swiftly challenged these enforcement priorities, arguing that ICE would be allowed to overlook noncitizens for whom detention was required, which would subject the citizens of these states to crime committed by noncitizens who should be in detention, and force the state to spend resources providing education and medical care to noncitizens who should be detained.. The question turned on whether the Biden administration’s enforcement priorities in the Mayorkas Memo contradicted two statutory provisions – 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a). 8 U.S.C. § 1231(a) pertains to the detention and removal of those who

have been ordered removed. § 1226(c) lays out a list of noncitizens who "shall" be taken into custody by the Attorney General, including those who have committed certain criminal offenses. Trump appointed Judge Tipton readily agreed by vacating the Mayorkas Memo.

Justice Kavanaugh held that in order to get standing the plaintiff states must show that the alleged injury must be legally and judicially cognizable and that the dispute must also be redressable in federal court. As Kavanaugh explains, the plaintiff states "have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest of or prosecution policies so that the Executive Branch makes more arrests of initiates more prosecutions." In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), cited in the majority opinion, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Similarly, a state government like the private citizen in this case cannot bring such a lawsuit. In another case *Heckler v. Chaney*, 470 US 821 (1983), the Court recognized that the government has to balance several factors such as resource constraints and changing public safety and public welfare needs, and that such a complicated balancing process leaves the courts without meaningful standards for assessing those policies.

The Court recognized that the Executive Branch exercises absolute discretion to prosecute a case, and this discretion extends to the immigration context. The Court previously in *Arizona v. United States*, 567 U.S. 387 (2012) declared that the Executive Branch retains discretion over whether to remove a noncitizen from the United States. Indeed, prosecutorial discretion is so inevitable in immigration enforcement that even after the Mayorkas Memo was set aside, ICE has continued to exercise discretion by moving to dismiss thousands of removal cases in immigration courts but without referring to the priorities in the Mayorkas Memo.

This decision bodes well for the other cases where Texas and other states have challenged federal immigration policy, although with respect to the Deferred Action for Childhood Arrivals (DACA) program, Kavanaugh's opinion states that "a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis." One wonders whether this would give Judge Hanen some leeway in distinguishing this case from *United States v. Texas*. Still, DACA is also part of enforcement priorities as the administration has decided to defer the removal of youths who

fell out of status for no fault of their own. The final rule's definition of "lawful presence" is also a significant provision. The final rule points to 8 CFR § 1.3(a)(4)(vi), which defines "an alien who is lawfully present in the United States" as "an alien who belongs to one of the following classes of aliens permitted to remain in the United States because DHS has decided for humanitarian or other public policy reasons not to initiate removal proceedings or enforce departure" including "aliens currently in deferred action status". As this provision makes clear, all recipients of deferred action, not DACA recipients alone, are considered lawfully present for certain purposes. Lawful presence does not confer any immigration status in the United States, a distinction that has long been misunderstood. In a 2017 decision that upheld a challenge to DAPA by the state of Texas, the Fifth Circuit viewed a grant of deferred action as something akin to an immigration status. Judge Hanen in 2021, too, seemed to conflate lawful presence with a legal immigration status. Rather, lawful presence renders individuals who have been granted deferred action eligible for certain federal benefits and ensures that they do not accrue unlawful presence for inadmissibility purposes, which could render them subject to the 3- and 10- year bars. Moreover, since they are considered lawfully present, DACA recipients will be eligible for Social Security benefits, including a Social Security number itself when they apply for employment authorization, which assists individuals in filing taxes, obtaining identification cards, and obtaining employment. Most important, a clarification of lawful presence not being legal status should put DACA in the same category of cases where the DHS has exercised prosecutorial discretion, and should in turn preclude Texas and other states from getting standing to challenge the program.

There is also this fear whether this ruling would preclude an immigrant friendly state like New York, Hawaii, Washington or California to challenge an anti-immigrant policy of a future president. Would Hawaii be able to challenge a future travel ban based on discriminatory grounds like it did in *Trump v. Hawaii*? Or would a state like New York be able get standing to sue a future administration if it again restricted the public charge parameters? Assuming that *United States v. Texas* precludes standing for these states in the future, there will also be plaintiffs who have been actually injured such as noncitizens whose travel has been blocked to the US or who have been denied permanent residence as they could not meet the new restrictive public charge grounds. *United States v. Texas* serves as a shield against plaintiffs who wants to play

offense but does not come in the way of an injured plaintiff who needs to play defense. It also remains to be seen whether the standing analysis in the ruling is limited to challenging the government regarding non-prosecutions or exercising prosecutorial discretion or whether it would apply to other matters.

If the standing analysis applies to other matters, then the Biden administration should consider boldly providing relief to backlogged skilled immigrants by radically advancing the dates for filing in the State Department Visa Bulletin so that thousands of beneficiaries of approved I-140 employment petitions may file for adjustment of status in the US and obtain benefits such as interim work authorization, travel permission and the ability to exercise job portability. The administration can also consider providing parole to beneficiaries of approved I-130 family, I-140 employment and I-526 investor petitions who are waiting overseas to immigrated until their priority dates becomes current. These are just a few examples where the Biden administration can tread more boldly without fear of being sued by Texas, Louisiana or Missouri.

In the immediate aftermath of the decision where Justice Alito was the only dissenter, DHS Secretary Alejandro Mayorkas said that the DHS would reinstate the guidelines, which were paused last summer by the Supreme Court. He said this would "enable DHS to most effectively accomplish its law enforcement mission with the authorities and resources provided by Congress." Texas Gov. Greg Abbott said that Texas would "continue to deploy the National Guard to repel turn back illegal immigrants trying to enter Texas illegally."