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TEXAS'S LEGAL CHALLENGE TO BIDEN'S HUMANITARIAN PAROLE PROGRAM IS BOTH FLAWED AND INHUMAN

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By Cyrus D. Mehta and Kaitlyn Box*

President Biden's humanitarian parole program is a wonderful example of how executive action can reshape immigration policy in the face of Congressional inaction. It allows people fleeing troubled spots to come to the US in an orderly manner. The program initially implemented for Ukranian and Venezuelan nationals will allow 30,000 qualifying nationals of Cuba, Haiti, Nicaragua and Venezuela to be admitted to the United States every month for up to two years. These individuals will be eligible for work authorization, and must have a U.S. sponsor who agrees to provide them with financial support for the duration of the parole period.

But alas, on January 24, 2023, Texas and nineteen other states filed a suit challenging the Biden administration's implementation of the program. The plaintiff states argue that the "Department's parole power is exceptionally limited, having been curtailed by Congress multiple times, and can be used 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit'". The complaint further alleges that the program "amounts to the creation of a new visa program that allows hundreds of thousands of aliens to enter the United States who otherwise have no basis for doing so", and asserts that the Biden Administration failed to engage in notice-and-comment rulemaking under the Administrative Procedure Act (APA).

Notably, the complaint refers to individuals entering the United States under humanitarian parole as "illegal aliens". Page 3 of the complaint, for example, asserts that "he Department does not have the authority to invite more than a

third of a million more illegal aliens into the United States annually as it has announced with this program." However, the plaintiff states' characterization of parolees as "illegal aliens" is entirely erroneous. INA § 212(d)(5) provides the legal authority for humanitarian parole, Biden's expansion of the program notwithstanding. This provision authorizes humanitarian parole on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit" for individuals who present neither a security risk nor a risk of absconding. Because humanitarian parole is a longstanding program authorized by the INA, individuals who enter the U.S. pursuant to this program cannot thus be accurately characterized as "illegal aliens".

The complaint also refers to the Migration Policy Institute (MPI) Noncitizen Respondents in U.S. Census Bureau Survey Data, which provides demographic information about unauthorized immigrants living in each state. The complaint relies on this data to support the idea that the humanitarian parole program would impose a financial burden on the plaintiff states due to the costs involved in supporting undocumented immigrants. However, the MPI survey includes TPS recipients, DACA recipients, and individuals who entered the United States without authorization but have since applied for asylum. The MPI figures regarding unauthorized populations each state include noncitizens who may also be authorized to remain in the U.S., and may have work authorization, even if they were previously undocumented. The complaint's reliance on this data to illustrate the burden that the humanitarian parole program would impose on states thus appears to be misplaced.

Further, the complaint asserts that the humanitarian parole program violates the requirements laid out in INA § 212(d)(5) that the benefit be granted only "on a case-by-case basis for urgent humanitarian reasons or for a significant public benefit". However, even a narrow reading of this provision does not indicate that there is a numerical limit on the benefit. Even if a large group of noncitizens, in this case 360,000 individuals, are granted humanitarian parole, this does not mean that the benefit will not be granted on a case-by-case basis, or that the justifications of "urgent humanitarian reasons" or "a significant public benefit" will not be present. Each applicant can still be reviewed on an individual basis, and their applications can denied if they do not meet the requirements for humanitarian parole.

The humanitarian parole program is based on the Uniting for Ukraine program, which has not been challenged by this lawsuit. The programs bear many

similarities, as well. The Uniting for Ukraine program also requires that individuals who are granted parole can be supported by a U.S. sponsor who files an I-134. We thus question whether Texas and the other plaintiff states' true objection is not a perceived violation of INA § 212(d)(5), but rather the fact that the expanded program will benefit Cuban, Nicaraguan, Haitian, and Venezuelan noncitizens rather than Ukrainians. Other humanitarian programs intended to benefit large groups of noncitizens have also not been challenged, including the Haitian Family Reunification Parole Program that allows certain beneficiaries of I-130 petitions from Haiti to be paroled into the U.S. pursuant to INA § 212(d)(5), and the Filipino World War II Veterans Program, which also benefits direct and derivative beneficiaries of I-130 petitions.

In addition to being consistent with the "case by case basis" requirement, there is clearly an urgent humanitarian reason for this program given the large number of people from these countries who have been coming to the U.S. to seek asylum. The humanitarian parole program provides an orderly path for people from these countries to come to the U.S. legally without being aided by smugglers and without needing to take perilous paths to the U.S. that can result in death. Though not without flaws, namely the fact that it stands to be implemented alongside the draconian Title 42 policy, the program provides a model for paroling large groups of noncitizens into the U.S. in an organized manner and providing them with work authorization. Even if the Biden administration's humanitarian parole program is ultimately struck down, the Biden administration has the authority to continue to grant the benefit to individuals pursuant to INA § 212(d)(5). It is hoped that the Supreme Court will ultimately uphold the federal district court's lifting of Title 42 restrictions in this scenario, and allow noncitizens to apply for asylum under Title 8, pursuant to the Immigration and Nationality Act, and be able to utilize the CBP One app to schedule an appointment to make a claim for asylum at the border in an orderly manner.

Texas has been serially challenging Biden's executive actions that have been designed to provide relief to hundreds of thousands of people. These lawsuits are designed to hurt human beings from DACA recipients to those fleeing persecution under the new humanitarian program. While plaintiffs claim that the administration has no authority to implement these programs on a mass scale, they have never claimed that exercising discretion on an individualized basis is unlawful. If it is lawful for the government to exercise discretion in

paroling one person into the U.S. or deferring the removal of that person, then it seems illogical to deny the administration the ability to exercising its discretion in relation to a large group. How big should the size of the group be before the government's valid exercise of discretion is no longer deemed valid? Is the Uniting for Ukraine program that has remained unscathed thus far too big or the right size? According to a Migration Policy Report, "idway through its term, the Biden administration, midway through its term, has notched some significant advances. The quiet transformation of immigration enforcement in the U.S. interior, use of parole and other mechanisms to grant humanitarian protection, and restoration of legal immigration to pre-pandemic levels will have a lasting legacy." It is hoped that at some point five justices in the Supreme Court will see through the absurdities of these lawsuits and preclude states like Texas from running and ruining federal immigration policy!

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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