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DHS'S FAMILY REUNIFICATION PAROLE INITIATIVE CAN SERVE AS TEMPLATE FOR OTHER BOLD EXECUTIVE ACTIONS TO REFORM THE IMMIGRATION SYSTEM WITHOUT FEAR OF BEING SUED BY A STATE

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On July 7, 2023, DHS announced a new family reunification parole initiative for beneficiaries of approved I-130 petitions who are nationals of Colombia, El Salvador, Guatemala, & Honduras. Nationals of these countries can be considered for parole on a case-by-case basis for a period of up to three years while they wait to apply to become lawful permanent residents. This is an example of the administration using its executive authority to shape immigration policy in the absence of meaningful Congressional action to reform the system. Indeed, this initiative can serve as a template to allow beneficiaries of approved I-130, I-140, and I-526 petitions to be paroled into the US while they wait for a visa number to become available, which under the backlogs in the employment and family preference categories, can take several years to decades.

Section 212(d)(5) of the Immigration and Nationality Act (INA) authorizes the Secretary of Homeland Security, in his discretion, to parole noncitizens into the United States temporarily on a case-by-case basis for urgent humanitarian reasons or significant public benefit. The parole authority has long been used to establish family reunification parole (FRP) processes administered by U.S. Citizenship and Immigration Services, including the Cuban Family Reunification Parole Program, which was established in 2007, and the Haitian Family Reunification Parole Program, which was established in 2014.

The processes begin, according to the DHS announcement, with the

Department of State issuing an invitation to the petitioning U.S. citizen or lawful permanent resident family member whose Form I-130 on behalf of a Colombian, Salvadoran, Guatemalan, or Honduran beneficiary has been approved. Beneficiaries awaiting an immigrant visa could include certain children and siblings of U.S. citizens and certain spouses and children of permanent residents. The invited petitioner can then initiate the process by filing a request on behalf of the beneficiary and eligible family members to be considered for advance travel authorization and parole.

The new processes allow for parole only on a discretionary, case-by-case, and temporary basis upon a demonstration of urgent humanitarian reasons or significant public benefit, as well as a demonstration that the beneficiary warrants a favorable exercise of discretion. Individuals paroled into the United States under these processes will generally be considered for parole for up to three years and will be eligible to request employment authorization while they wait for their immigrant visa to become available. When their immigrant visa becomes available, they may apply to become a lawful permanent resident.

The Federal Register Notices for Colombia, El Salvador, Guatemala, and Honduras provide more information on the FRP process and eligibility criteria.

According to the federal register notices, the justification for the new FRP initiative is part of a broader, multi-pronged, and regional strategy to address the challenges posed by irregular migration through the Southwest border. Consideration of noncitizens for parole on a case-by-case basis will meaningfully contribute to the broader strategy of the United States government (USG) to expand access to lawful pathways for individuals who may otherwise undertake an irregular migration journey to the United States. The case-by-case parole of noncitizens with approved family-based immigrant visa petitions under this process will, in general, provide a significant public benefit by furthering the USG's holistic migration management strategy, specifically by: (1) promoting family unity; (2) furthering important foreign policy objectives; (3) providing a lawful and timely alternative to irregular migration; (4) reducing strain on limited U.S. resources; and (5) addressing root causes of migration through economic stability and development supported by increased remittances.

It remains to be seen whether states like Texas will attack this program in

federal court. A similar humanitarian parole program has been the subject of a lawsuit by Texas and nineteen other states, and allows 30,000 qualifying nationals of Cuba, Haiti, Nicaragua and Venezuela to be admitted to the United States every month for up to two years. The new FRP initiative is more narrowly tailored as it applies only to spouse, children and sibling beneficiaries of approved I-130 petitions. Also, 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. Although that case dealt with whether a state could challenge the federal government's ability to exercise prosecutorial discretion, it can also potentially deter a state's ability to demonstrate standing when it challenges other federal immigration policies.

In Texas' challenge to the Deferred Action for Childhood Arrivals (DACA) program, Texas has argued that it is entitled to "special solicitude." The doctrine first enunciated in *Massachusetts v. EPA* allows states to skirt some of the usual standing requirements, like whether the court can redress an alleged injury. However, Justice Brett Kavanaugh addressed the doctrine in a footnote in *United States v. Texas* stating that the states' reliance on *Massachusetts v. EPA* to support their argument for standing was misplaced. *Massachusetts v. EPA* held that the state could challenge the U.S. Environmental Protection Agency's failure to regulate greenhouse gases based on special solicitude, although that case dealt with a "statutorily authorized petition for rulemaking, not a challenge to an exercise of the executive's enforcement discretion," the footnote said. Another footnote in Justice Kavanaugh's majority opinion said lower courts need to be mindful of constraints on lawsuits filed by states, saying that indirect effects on state spending from federal policies don't confer standing. Still, Justice Kavanaugh's opinion in *United States v. Texas* left open the possibility 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". Note that Justice Kavanaugh said that it "could" lead to a different standing analysis and not that it would.

Florida has already challenged the Biden administration's "Parole Plus Alternatives to Detention" (Parole+ATD) and "Parole with Conditions in Limited Circumstances Prior to the Issuance of a Charging Document" (PWC) policies in *Florida v. Mayorkas* that is currently pending before the Eleventh Circuit Court

of Appeals. In a brief filed on July 5, 2023, the government argued that the "special solicitude" doctrine proffered by states in *United States v. Texas.* should not apply in the humanitarian parole context. Florida asserted that it was entitled to special solicitude for the same reasons articulated by Texas in *United States v. Texas* – "a challenge to its sovereignty and indirect fiscal costs flowing from the presence of more noncitizens in its state." Because the Supreme Court rejected an almost identical argument for the application of special solicitude in *United States v. Texas*, the government argued that Florida is similarly not entitled to avail of the doctrine.

The Supreme Court's decision in *United States v. Texas* could have interesting implications for challenges to DACA, as well, and DACA recipients as intervenors have filed additional briefing to the US District Court for the Southern District of Texas in US v. Texas, Case No. 1:18-CV-68. In his concurrence in *United States v. Texas,* Justice Gorsuch argued that the harm Texas and the states that joined it were concerned with – primarily increased spending to provide healthcare and other services to higher numbers of undocumented immigrants present in the state – was not redressable. Although an injunction would prevent the implementation of the Biden administration's enforcement guidelines, Justice Gorsuch argued that this remedy was unavailable to the states because of 8 U. S. C. § 1252(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of " certain immigration laws, including the provisions that the states want to see enforced. The district court attempted to avoid offending this provision by "vacating" the Biden administrations guidelines instead of issuing an injunction, but Judge Gorsuch argued in part that a vacatur order nullifying the guidelines does nothing to redress the states' supposed injuries because the "federal officials possess the same underlying prosecutorial discretion", even in the absence of the guidelines. DACA recipients argued that this program also represents an exercise of inherent prosecutorial discretion, and states' challenge of the program therefore suffers from the same redressability problem identified by Judge Gorsuch. Similarly, the states challenging the DACA program have alleged indistinct injuries similar to those articulated by Texas in *United States v. Texas*. Because the Supreme Court found that Texas lacked standing to challenge the Biden administration's guidelines, DACA recipients have argued that states do not have stating to challenge the DACA program based on similar theories.

DOJ attorneys and intervenor defendants filed a joint motion on July 7, 2023, asking Judge Tipton of the United States District Court for the Southern District of Texas to delay a bench trial in the earlier lawsuit filed by Texas to challenge the Biden administration's parole program for Cubans, Haitians, Nicaraguans, and Venezuelans. Although the motion argued that the outcome of *United States v. Texas* would determine whether Texas had standing in the federal suit, Judge Tipton predictably declined to push back the trial date. Texas had previously argued that the parole program is distinguishable from the Biden administration's enforcement guidelines because "hatever discretion might have in choosing which aliens to arrest or otherwise take into custody, no discretion to parole into the country aliens who do not meet the statutory criteria for parole." At this point, states like Texas are arguing that their legal challenges to Biden's earlier humanitarian parole or DACA program can be distinguished from *United States v. Texas,* which involved enforcement priorities, while the Biden administration and intervenors such as DACA recipients are arguing that Texas should not have standing to challenge even other immigration programs.

Returning to the idea of how this initiative can be broadened, parole can potentially be expanded to all beneficiaries of approved I-130, I-140, and I-526 petitions who are waiting overseas in the green card backlogs. Even if parole is expanded, the administration can still remain faithful to INA § 212(d)(5) by approving parole on a discretionary and case-by-case basis for urgent humanitarian reasons or a significant public benefit. For instance, it may be possible to justify the parole of certain beneficiaries of I-526 petitions who have made a minimum investment of $500,000 in a US business prior to May 15, 2022 or $800,000 after this date, and created 10 jobs as that could be considered a significant public benefit. The same justification can be made for certain beneficiaries of approved I-140 petitions in the EB-1, EB-2, and EB-3 preference categories whose presence in the US can benefit US employers who have sponsored them through the labor certification process or who have demonstrated that they are either persons of extraordinary ability or are well situated to advance the national interest of the United States. Beneficiaries of approved I-130 petitions who are caught in backlogs can make a justification for parole for urgent humanitarian reasons to unite with family members in the US.

Out of the four proposals Cyrus Mehta made to the Biden administration in

May 2021 for reforming the legal immigration system without waiting for Congress to act, we are happy to see that two have come to fruition- parole for beneficiaries of I-130 petitions and using the Dates for Filing (DFF) for protecting the age of the child under the Child Status Protection Act. Cyrus Mehta has also proposed that the administration has the authority to advance the DFF in the State Department Visa Bulletin to current to maximize the number of people who can file for adjustment of status in the US. Cyrus Mehta has also proposed that there is nothing in INA § 203(d) that requires the counting of derivatives in the family and employment green card preferences, although since the submission of this proposal, the DC Circuit Court of Appeals in *Wang v. Blinken* ruled that INA § 203(d) requires the counting of derivative. Hence, any hope of administrative reform with regards to the unitary counting of family members has been shelved for the time being unless Congress is able to provide clarification on §203(d). Even if the administration issues a new interpretation to INA § 203(d) and abandons the position it took in *Wang v. Blinken*, the DC Circuit Court of Appeal's interpretation will still prevail within the jurisdiction.

As *Texas v. United States* has made it harder for a state like Texas, which has reflexively sued on every immigration policy to get standing, the Biden administration should consider moving forward more boldly by reforming the immigration system through executive actions without fear of being sued by these states. It may be no coincidence that the latest family reunification parole initiative was unveiled within two weeks of the favorable ruling for the Biden administration in *Texas v. United States*!

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