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AS TEXAS HAS BEEN SMACKED DOWN TWICE FOR LACK OF STANDING IN CHALLENGES TO FEDERAL IMMIGRATION POLICIES, BIDEN SHOULD GET EVEN BOLDER IN REFORMING OUR IMMIGRATION SYSTEM THROUGH EXECUTIVE ACTIONS

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On March 8, 2024, Judge Tipton in *Texas v. DHS* dismissed a lawsuit brought by Texas and 20 other states challenging President Biden's humanitarian parole program. Judge Tipton, who was appointed by Trump, has otherwise been receptive to challenges to Biden's immigration policies but not this time. Texas filed the lawsuit in his court thinking that Judge Tipton would again issue a favorable decision but Judge Tipton held that Texas did not have standing to bring the lawsuit.

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 Ukrainian and Venezuelan nationals all0wed 30,000 qualifying nationals of Cuba, Haiti, Nicaragua and Venezuela (CHNV) 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.

In *Texas v. DHS* the challengers asserted that the program exceeded the parole authority given to the administration under INA 212(d)(5) as it can be used 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit'". They also asserted that the program failed to include a notice and comment period and the program was arbitrary and capricious. Judge Tipton's

order did not address the merits because the plaintiffs did not demonstrate they had standing to bring the lawsuit.

Judge Tipton gave short shrift to Texas's claim that the parole of CHNV nationals would impose additional health care costs on the state or additional incarceration costs or an increase in education costs since the CHNV program has resulted in the decrease of migrants entering the US irregularly through the southern border. Judge Tipton also found that an increase in CHNV nationals seeking driver's licenses would not impose additional costs on Texas, in fact the increased applications would result in a profit for Texas. Prior to the CHNV program DHS released an average of 2,356 CHNV nationals per day but after the implementation of the program there were a total of 1,326 arrivals per day, which was a 44% reduction.

As a result, Texas was unable to show an "injury-in-fact" that the CHNV program increased the costs on Texas. In fact, to the contrary, the CHNV parole program has reduced the total number of individuals from the four countries and Texas has spent less money after the implementation of the parole program. Texas counter argued that even if there are fewer apprehended CHNV nationals, the court should consider the money Texas would spend on CHNV nationals under the parole program. Judge Tipton emphasized that the court must consider the "actual injury – not the labels put on the injury" as otherwise plaintiffs will engage in "artful pleading" to make an end run around the standing requirement under Article III of the Constitution. To determine whether actual injury exists the raw numbers need to be looked at in context rather than in a vacuum. The CHNV program reduced the overall numbers of CHNV nationals that the United States admitted prior to the implementation of the program.

The CHNV program, which will continue for now, has been a spectacular success thus far and is built on the US historically using parole to respond to immigration crises. The CHNV parole program has "redirected many migrants away from risky journeys through Mexico into a lawful framework. By allowing sponsors to financially support beneficiaries, the programs have facilitated safe and orderly migration, reducing the strain on government resources," according to the Cato report in the link.

Texas and the other states may appeal Judge Tipton's decision, but this is the second time that Texas's challenge has been smacked down due to lack of

standing. Last June 2023 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. Judge Tipton readily agreed by vacating the Mayorkas Memo. The Fifth Circuit affirmed but the Supreme Court reversed holding 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."

As a result of Texas losing twice on standing, the enforcement priorities under the Mayorkas Memo continue to be applied and the CHNV parole program will also allow CHNV nationals to enter the US through parole in an orderly manner and relieve the strain on the Southern border. It remains to be seen whether Texas's challenge to DACA can also be denied based on standing. Currently, the Fifth Circuit is reviewing Judge Hanen's ruling in September 2023 holding that

DACA is illegal. Judge Hanen also affirmed that Texas had standing to challenge DACA notwithstanding the Supreme Court decision in *United States v. Texas,* where Justice Kavanaugh also stated 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." Judge Hanen seized upon this sentence from Justice Kavanaugh's decision by holding that DACA involved "non prosecution with benefits" and so it was distinguishable from the enforcement priorities in the Mayorkas Memo. Judge Hanen also seized upon another part in Justice Kavanaugh's opinion stating that the "standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." Judge Hanen thought that DACA was such an example where the administration has abandoned its statutory responsibility to make arrests and bring prosecutions and thus violated the "Take Care Clause" of the Constitution.

Both *Texas v. DHS* and *United States v. Texas* should serve as templates for either the Fifth Circuit or the Supreme Court to once again deny Texas standing to challenge DACA and Texas's other serial challenges to Biden's immigration programs. Texas lacks standing because DACA like the CHNV parole program has been widely successful and it can be shown that it has not injured Texas. In

his order Judge Tipton contrasted *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), as revised, (Nov. 25, 2015), aff'd by equally divided Court, 597 U.S. 547 (2016), where President Obama's Deferred Action for Parents of Americans (DAPA) was found to be unlawful, with the CHNV program. The Fifth Circuit held that Texas demonstrated injury in fact because "DAPA would enable at lest 500,000 illegal aliens in Texas" and the extended DACA program would also cause "pocketbook injuries on the State in the form of healthcare, education, and social service costs." However, if DACA is viewed independently from DAPA, it can be demonstrated that the benefits from DACA recipients since 2012 in the form of tax contributions to Texas and increased profits from the issuance of driver's licenses, among other benefits, have not resulted in injury-in-fact to Texas. Using the comparative analysis of Judge Tipton in *Texas v. DHS*, it can also be argued that the number of DACA recipients did not increase after the implementation of DACA in 2012 as they were already in the US prior to its implementation.

Moreover, 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. Although 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. It is also worth mentioning that 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. As with the Mayorkas Memo, the DACA program also involves prosecutorial discretion and so Texas's challenge to DACA may suffer the same redressability problem identified by Justice Gorsuch.

As the latest order to Judge Tipton in *Texas v. DHS* and *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 parole initiatives and other executive actions without fear of being sued by these states. As a fitting coda, it is worth mentioning that the Judicial Conference of the United States, the policy arm of the judiciary, has strengthened the policy governing random case assignment, limiting the ability of litigants to effectively choose judges in certain cases by where they file a lawsuit. This new policy would make it more difficult for states like Texas to file

a lawsuit in courts where the judge might rule more favorably in a challenge to a Biden federal immigration policy. However, after receiving intense backlash from conservative lawmakers, judges and judicial experts, the Judicial Conference issued a revised policy making clear that the policy is a recommendation and district courts cannot be forced to follow it. Although Texas's choice of filing its lawsuit against the CHNV program in the United States District Court Southern District of Texas, Victoria Division, where Judge Tipton presides, backfired, even if this policy is non-binding guidance, it would still make it more difficult for Texas to try this strategy repeatedly in courts where other friendly judges preside like the United States District Court for the Southern District of Texas, Brownsville Division, where Judge Hanen presides.