United States District Court
Northern District of Texas
Dallas Division

The State of Texas, *et al.* *Plaintiffs,* *v.* Joseph R. Biden, Jr., in his official capacity as President of the United States, *et al,* *Defendants*.	Civ. Action No. 3:22-cv-00780-M

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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IDENTITY AND INTEREST OF AMICUS CURIAE

IRLI is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including: *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

SUMMARY OF ARGUMENT

The Central American Minors program ("CAM") allows certain aliens residing in the United States, many of whom entered illegally and are only permitted to remain on a temporary basis, to petition the federal government to bring their otherwise inadmissible children into the country. CAM relies on two provisions of the Immigration and Nationality Act ("INA"): 8 U.S.C. § 1157 (the Refugee Admissions Program, or "RAP") and 8 U.S.C. § 1182(d)(5)(A) (the parole statute). Under this program, aliens who do not satisfy the statutory definition of a refugee, 8 U.S.C. § 1101(a)(42), are considered for, and generally granted, parole.

Defendants have reinstated the CAM program in violation of the procedures required by the Administrative Procedure Act ("APA") and in direct contradiction to the commands and objectives of Congress laid out in the INA.

First, the CAM program is a substantive rule that must go through notice and comment rulemaking procedures under the APA. Aliens whose CAM applications are granted may "lawfully enter and live temporarily in the United States and . . . apply for work authorization," USCIS, CAM Program, https://www.uscis.gov/CAM. They are also eligible for various benefits, including "any means-tested public benefit," 8 U.S.C. § 1613(a), such as Medicaid or food stamps. Because

Defendants restarted the CAM program without following notice and comment procedures, it is invalid.

Second, CAM is contrary to the parole statute and exceeds Defendants' statutory authority to grant parole. Because the INA only permits parole on a "case-by-case basis," parole cannot supply the basis for a categorical program of admitting aliens. Additionally, while a noble goal, reunifying families that have been separated due to illegal immigration does not satisfy the statutory requirement that parole be granted "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5). Historically, the test for parole has been whether a specific alien has unique circumstances or qualities such that his or her presence in the United States would meaningfully address an urgent humanitarian concern or significantly benefit the public. The CAM program does not comport with these statutory requirements.

Finally, Defendants' abuse of the parole power to create a categorical program of admission suspends or dispenses with the parole statute's case-by-case requirement for a large class of persons who are granted parole *en masse* and outside of this requirement. CAM thus violates the Take Care Clause of the U.S. Constitution.

ARGUMENT

The CAM program contradicts the INA by providing a path for aliens, including illegal aliens, to bring more otherwise inadmissible aliens into the country. *See generally* U.S. Citizenship & Imm. Servs., "Central American Minors (CAM) Refugee and Parole Program," https://www.uscis.gov/CAM (last updated June 23, 2023). Defendants have impermissibly construed the refugee and parole statutes to create a pathway into the United States not only unintended by Congress, but in direct conflict with the clear objectives and commands of

Congress. And they have done all this through procedurally invalid measures meant to usurp the authority of Congress and implement their own vision of immigration into the United States.

The CAM program was initially begun in 2014 through a joint press release from the Departments of State and Justice. *See* Bureau of Population, Refugees, and Migration, U.S. Dep't. of State, "In Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the United States" (Nov. 14, 2014), https://bit.ly/3yJBgC8. In 2017, the program was cancelled due to concerns that it contained an improper application of the parole statute. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017). In 2021, the CAM program was reinstated, once again via press release. *See* U.S. Dep't of State, "Restarting the Central American Minors Program," (Mar. 10, 2021), https://www.state.gov/restarting-the-central-american-minors-program/.

The CAM program is a substantive rule that should have been issued according to the notice and comment procedures laid out in the APA. Even proper procedure, however, would not save the program, because it is contrary to the INA provisions it claims to implement. Despite the explicitly limited nature of the parole statute, Defendants established a new category of aliens who are virtually guaranteed to receive a grant of parole.

The CAM program is not only contrary to law. It is also suspends or dispenses with the law for a large, defined class of people, and thus is a failure of Defendants' constitutional duty to take care that the laws be faithfully executed. Defendants have rejected the implementation of the parole statute in pursuit of their own preferred policies, but that is no justification; the Take Care Clause of the U.S. Constitution does not permit the executive to substitute its own policies for those of the law.

I. The Central American Minors Program Violates the Administrative Procedure Act.

A. The Central American Minors Program is a substantive rule that should have been issued following notice and comment rulemaking procedures.

The APA provides that that certain "rules must undergo notice and comment" rulemaking procedures. *Texas v. EEOC*, 633 F. Supp. 3d 824, 842 (N.D. Tex. 2022) (citing 5 U.S.C. § 553; *Texas v. United States*, 809 F.3d 134, 170-71 (5th Cir. 2015). Thus, where "a rule is 'substantive' . . . the full panoply of notice-and-comment requirements must be adhered to scrupulously." *Id.* (citing *Texas*, 809 F.3d at 171). Pertinently here, "[c]ourts require agencies to engage in notice and comment rulemaking when implementing policy changes with substantive consequences for refugees and other immigrants." *Panhandle Producers & Royalty Owners Asso. v. Econ. Regulatory Admin.*, 847 F.2d 1168, 1174 (5th Cir. 1998).

To determine if an agency action is a substantive rule, courts look to "whether the rule (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decisionmakers free to exercise discretion." *Texas*, 809 F.3d at 171 (internal quotation marks and citation omitted). *See also Rodriguez v. Carroll*, No. 4:19-cv-01406, 2020 U.S. Dist. LEXIS 215842, at *20 (S.D. Tex. 2020) ("A 'substantive rule' is one that creates new rights or obligations and is binding in its application.") (citing *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015)). But "[t]he mere existence of some discretion is not sufficient . . . for a rule to be classified as a general statement of policy[,]" instead of a substantive rule. *Texas v. United States*, 50 F.4th 498, 524 (5th Cir. 2022) (quoting *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 (D.C. Cir. 1978)). Finally, courts must be "mindful but suspicious of the agency's own characterization" of the challenged rule. *Texas v. United States*, 787 F.3d 733, 763 (5th Cir. 2015). (quotation marks and citation omitted). Accordingly, courts "focus[] primarily on whether the rule

has binding effect on agency discretion or severely restricts it." *Id*. "Thus, while labels are not unimportant, the true test is how the program is actually administered and whether it affects rights and obligations." *Texas v. United States*, 328 F. Supp. 3d 662, 729 (S.D. Tex. 2018).

By these criteria, the CAM program is a substantive rule for which notice and comment rulemaking was required. CAM is similar to the recently invalidated Deferred Action for Childhood Arrivals ("DACA") program. *Texas v. United States*, No. 1:18-cv-00068, 2023 U.S. Dist. LEXIS 162598 (S.D. Tex. Sep. 13, 2023). Like DACA, the CAM program "affects the rights and obligations of . . . recipients because it gives them lawful presence [and] the right to apply for work authorization[.]" *Texas v. United States*, 328 F. Supp. at 731. Additionally, CAM enrollees become eligible for "Social Security, Medicare . . . and an array of other federal and state benefits." *Id*.

The actual administration and impact of the CAM program show that it is a substantive rule subject to notice and comment rulemaking. As one court reviewing the 2017 termination explained, "[f]rom its inception, the CAM Program granted parole broadly. Throughout its operation, the Program approved approximately 99% of beneficiaries who were interviewed and considered for parole. The Program also was expanding geometrically and approving increasing numbers of beneficiaries for parole." *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1078 (N.D. Cal. 2018). And, as Defendants' response to interrogatories shows, the rate of parole approval in the first month of the reinstated CAM program was similarly high. ECF No. 125-5 at 114. While Defendants may claim that the CAM program is discretionary, the near automatic grants of parole under it tell a different story. The CAM program is substantive but was created without notice and comment rulemaking procedures, and is therefore procedurally invalid.

B. The Central American Minors Program exceeds the authority provided by the parole provision of the Immigration and Nationality Act.

The parole statute provides that the DHS Secretary may,

> in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A). The language of the statute is intentionally limited to foreclose any *en masse* grant of admission. *See Biden v. Texas*, 142 S. Ct. 2528, 2543-44 (2022) ("Importantly, the authority is not unbounded: DHS may exercise its discretion to parole applicants 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'") (quoting 8 U.S.C. § 1182(d)(5)). The statute calls plainly for an individualized determination that the parole of "any [individual] alien applying for admission to the United States" serves an "urgent humanitarian" purpose or that the presence of *that alien* would provide a "significant public benefit." 8 U.S.C. § 1182(d)(5).

This restrictive language reflects Congress's intention that the parole power not be used to categorically admit aliens. Indeed, "Congress twice amended 8 U.S.C. § 1182(d)(5) to limit the scope of the parole power and *prevent the executive branch from using it as a programmatic policy tool*." *Texas v. Biden*, 20 F.4th 928, 947 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022) (emphasis added). The legislative history of the parole statute reflects Congress's disapproval of the Executive Branch's overuse of the parole authority. For example, the House Judiciary Committee Report lamented the "recent abuse of the parole authority" by the Clinton

administration "to admit up to 20,000 Cuban nationals annually." H.R. Rep. No. 104-469, pt. 1 at 140 (1996).

The approval rate data of the CAM program reflects the same overuse Congress aimed to eliminate. In 2017, the year the program was terminated, "the CAM Program had approved 99% of the beneficiaries who had been interviewed as refugees or recommended them for parole (30% as refugees, 69% for parole) and [] only 1% had been denied both refugee status and parole. . . . [T]he CAM Parole program provided parole very broadly and not in accordance with the statu[t]e and the President's Executive Order." *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1079 (N.D. Cal. 2018). Recent data provided by Defendants reflects a similarly high rate of approval for CAM program applicants. During an approximately month-long period earlier this year, 30.7% of alien applicants were approved as refugees and 67.4% were approved for parole. ECF 125-5 at 114. Then and now, the parole aspect of the CAM program is the kind of categorical parole Congress amended the INA to prevent.

The House Judiciary Committee report on the statute limiting the parole authority included examples of circumstances that would qualify for humanitarian or public interest parole:

> Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, *such as life-threatening humanitarian medical emergencies*, or for specified public interest reasons, *such as assisting the government in law-enforcement related activity*. It should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.

H.R. Rep. No. 104-469, pt. 1 at 141 (emphases added). The report from the Senate Judiciary Committee states the same intent to "reduce[] the abuse of parole" and "[t]ighten[] the Attorney General's parole authority," and that "[t]he committee bill is needed to address . . . the abuse of humanitarian provisions such as asylum and parole." S. Rep. No. 104-249 at 2 (1996).

Further language of the provision establishes the individualized nature of the parole authority. It directs that "*the* alien" who receives temporary parole "shall forthwith return or be returned from custody from which *he* was paroled and thereafter *his* case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States" "when the purposes of such parole shall . . . have been served[.]" 8 U.S.C. § 1182(d)(5) (emphases added). This language clearly establishes that each and every parole applicant must show that his or her specific presence serves either the "urgent humanitarian" or "significant public benefit" purposes permitted for parole.

Defendants ignore this requirement for limited individualized analysis of the reasons to grant parole by creating a categorical, near automatic, program they describe as "an important step toward expanding lawful pathways for humanitarian protection and opportunity in the United States." U.S. Dep't of State, "Restarting the Central American Minors Program," (Mar. 10, 2021), https://www.state.gov/restarting-the-central-american-minors-program/. Such purpose is at clear odds with both the plain language and recognized objective of Congress. *See Texas v. Biden*, 646 F. Supp. 3d 753, 776 (N.D. Tex. 2022) ("Section 1182(d)(5)(A)'s historical context confirms DHS cannot exercise its parole authority to parole categories of aliens, rather than individuals."); *Texas*, 20 F.4th at 947 (explaining that Congress amended the parole statute in response to "the executive branch on multiple occasions purport[ing] to use the parole power to bring in large groups of immigrants.").

The CAM program fails to satisfy either the "urgent humanitarian" or "significant public benefit" criteria for parole. "DHS has traditionally construed its authority to grant advance parole for 'urgent humanitarian' reasons to be limited to urgent medical, family, and related needs, and its authority to grant advance parole for 'significant public benefit' to be limited to those

individuals aiding law enforcement—such as a witness." *Texas v. United States*, Civil Action No. 1:18-CV-00068, 2023 U.S. Dist. LEXIS 162598, at *44 (S.D. Tex. Sep. 13, 2023). The intention to create a "comprehensive regional migration management strategy [by] expanding legal pathways" patently does not satisfy the narrow parole standard. U.S. Dep't of State, "Restarting the Central American Minors Program," (Mar. 10, 2021), https://www.state.gov/restarting-the-central-american-minors-program/. This is especially true because the crisis at the border and the consequent need for a migration management strategy are due to Defendants' own refusal to administer and enforce the immigration laws as enacted by Congress. *See, e.g., Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB, 2023 U.S. Dist. LEXIS 40169, at *16 (N.D. Fla. Mar. 8, 2023) (stating that Defendants' enforcement policies "[a]re akin to posting a flashing 'Come In, We're Open' sign on the southern border.").

II. Defendants Violate the Take Care Clause by Suspending the Law.

The constitutional separation of powers is fundamental to the structure of our government. That division is reflected in the language of the Take Care Clause, which requires that the President "shall take care that the laws be faithfully executed." U.S. Const. art II, § 3.

Procedurally, violation of the Take Care Clause, like other unconstitutional agency action or inaction, violates the APA and can be enjoined on such basis. *See* 5 U.S.C. § 706. Take Care Clause violations also are actionable independently of the APA. Thus, this Court can enjoin a Take Care violation under its inherent equitable powers. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327–28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing back to England"); *Davis v. Passman*, 442 U.S. 228, 241-44 (1979) (holding that the Constitution itself, coupled with 28 U.S.C. § 1331, provides a cause of action to challenge federal officials who violate the Constitution). Furthermore, the Constitution provides any parties

with standing to raise equitable claims (and injunctive relief) against federal officers who injure them by acting unconstitutionally. *Larson v. Domestic & Foreign Comm. Crop.*, 337 U.S. 682, 698-99 (1949); *cf. Ex parte Young*, 209 U.S. 123 (1908). Thus, even if Plaintiffs' claims fail under the APA, the Take Care Clause provides a cause of action to challenge Defendants' abuse of parole.

Substantively, the Fifth Circuit has explained that the Take Care Clause acts as a limit on executive powers and precludes the executive branch from suspending or dispensing with the law. *Texas*, 20 F.4th at 978-82; *id*. at 979 (describing the power to dispense with the law as "the power to grant permission to an individual or corporation to disobey a statute" or alternatively as the power to make it lawful for an individual to violate a statutory provision so long as that person has "dispensation").

While judicial precedent on application of the Take Care Clause is rare, the Supreme Court has suggested that executive action runs afoul of the Take Care Clause "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Cheney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).[1]

The D.C. Circuit has held, moreover, that the Take Care Clause "does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed

[1] In recent years the Supreme Court has indicated a willingness to address the Take Care Clause. When the Court granted *certiorari* in *United States v. Texas*, 577 U.S. 1101 (2016), in addition to the questions presented, it ordered the parties to brief "[w]hether the [Deferred Action for Parents of Americans and Lawful Permanent Residents] Guidance violates the Take Care Clause of the Constitution, Art. II, § 3." The Fifth Circuit had declined to address the Take Care Clause issue. *See Texas v. United States*, 809 F.3d 134, 146 n.3 (5th Cir. 2015) (as revised). That decision was affirmed by an equally divided Supreme Court in *United States v. Texas*, 136 S. Ct. 2271 (2016).

by the judiciary." *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). In fact, "the judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch." *Id*.

More recently, the Southern District of Texas addressed the parameters of the Take Care Clause, ruling that the executive branch, including agencies, "must exercise any discretion accorded to it by statute in the manner which Congress has prescribed" and "may not dispense with a clear congressional mandate under the guise of exercising 'discretion.'" *Texas v. United States*. 2021 U.S. Dist. LEXIS 156642, at *138-39 (S.D. Tex. Aug. 19, 2021). *See also Texas v. United States*, 524 F. Supp. 3d 598, 649 (S.D. Tex. 2021) (holding that the executive's inherent authority over immigration "does not include the authority to 'suspend' or 'dispense with' Congress's exercise of legislative Powers in enacting immigration laws") (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (Day, J., dissenting); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) ("If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. The revocation is invalid unless the [congressional] command has been obeyed.").

Furthermore, the Supreme Court has made clear that the executive may not rely on political opposition to enforcement of immigration law—much less on political opposition to that law itself—as justification for refusing to take constitutionally mandated actions. As Justice Kagan has stated, the executive's duty under the Take Care Clause requires "fidelity to the law itself, not to every presidential policy preference." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., dissenting). The Supreme Court has rejected the proposition that the Take Care Clause is consistent with the President's authority to dispense with the laws, holding that recognizing such a power "would be clothing the President with a power entirely to control

the legislation of [C]ongress." *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838). *See also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 547 (2009) (explaining that although an agency has "broad authority to determine relevant policy . . . it does not [have the authority] to make policy choices for purely political reasons.") (Breyer, J., dissenting). Political opposition is also no justification for the executive to frustrate Congress's objectives.

For a large and defined class of aliens, the CAM program suspends and dispenses with the comprehensive framework of immigration laws enacted by Congress, in particular the Illegal Immigration Reform and Immigrant Relief Act of 1996, Pub. L. No. 104-208 ("IIRIRA"). IIRIRA included the amendment to the parole provision at issue here, which was "needed to address . . . the abuse of humanitarian provisions such as asylum and parole." S. Rep. No. 104-249 at 2 (1996). Simply put, Congress believed that the executive was overusing its parole authority, and acted to restrict it. Defendants cannot simply suspend that restriction for a large class of people. The CAM program violates the duty to take care because it thus "usurps the power of Congress to dictate a national scheme of immigration laws." *Texas v. United States*, 549 F. Supp. 3d 572, 615 (S.D. Tex. 2021).

The executive must defer to the supremacy of legislative enactments; it does not have the authority to override Congress. *See Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) ("There is a basic difference between filling a gap left by Congress'[s] silence and rewriting rules that Congress has affirmatively and specifically enacted."); *Medellin v. Texas*, 552 U.S. 491, 523 (2008) (explaining that executive authority "must stem either from an act of Congress of from the Constitution itself."). IIRIRA commands individualized and limited use of the parole authority, and the executive cannot programmatically suspend that command.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Dated: November 17, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2023, a true and accurate copy of the foregoing document was filed electronically via CM/ECF and served on all counsel of record.

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