**United States District Court**
**Southern District of Texas**
**Victoria Division**

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| STATE OF TEXAS, *et al.*,<br>*Plaintiffs,*<br>v.<br>U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,<br>*Defendants*. | Case 6:23-cv-00007 |

**PLAINTIFF STATES' REPLY SUPPORTING THEIR MOTION FOR PRELIMINARY INJUNCTION**

The Court has stated that the parties will have an opportunity to file post-trial briefs. The Plaintiff States therefore focus this reply on the major reasons why they are entitled to their requested injunctive relief.

## I. The States have standing.

### A. The CHNV program's imposition of costs is sufficient to confer standing.

The evidence establishes that the Defendants' unlawful CHNV parole program has caused many thousands of aliens with no right to enter the United States to be released into the United States to sponsors and stated destinations in Texas. Additional aliens paroled into the country under that program will end up in Texas, whose economy makes it a continuing magnet for migration within the United States. And as in other cases, the evidence shows that such migration imposes substantial costs and burdens on Texas,[1] which must furnish these persons with driver's licenses, public education, and healthcare

[1] The States focus on Texas's standing because the Court can proceed to the merits if even one plaintiff has standing. *Rumsfeld v. Forum for Academic & Instl. Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006).

and which must also pay for the additional law enforcement, corrections, and other social costs that attend.

Standing does not require tying particular costs to particular aliens as the Defendants and Intervenors demand. *See, e.g., Texas v. United States* ("*DACA*"), 50 F.4th 498 (5th Cir. 2022). Texas need only show by a preponderance of the evidence that some quantum—not a specific amount—of those costs have been or are likely to be incurred as a result of the Defendants' CHNV program. *DACA*, 50 F.4th at 517–18 ("The record does not indicate precisely what portion of all costs for illegal aliens is spent on DACA recipients, but no one doubts that some are"); *Texas v. United States* ("*DAPA*"), 809 F.3d 134, 155 (5th Cir. 2015) (precise quantification of costs not required). Even a small amount of money is ordinarily a sufficient injury for standing purposes. *E.g., Czyzewski v. Jevic Holding Corp.,* 137 S. Ct. 973, 983 (2017). Nor does CHNV parolees' constituting only a fraction of the large number of illegal aliens that cost Texas millions of dollars per year detract from Texas's standing, including traceability. *DACA*, 50 F.4th at 519 ("DACA is not the sole cause of the State's injury, but DACA has exacerbated it. That is sufficient").

Similarly, it is irrelevant whether illegal aliens may in some way confer "benefits" upon Texas that offset the costs they impose. As the Fifth Circuit has stated multiple times, standing is not the "accounting exercise" that the Defendants and Intervenors claim. *See DAPA*, 809 F.3d at 155–56 ("Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant."); *DACA*, 50 F.4th at 518 (same).

**B. The States enjoy special solicitude in the standing analysis because the CHNV program imposes upon their quasi-sovereign interests.**

Were the imposition of costs upon Texas and the other States not enough, they are also entitled to special solicitude in assessing standing because the CHNV program imposes upon their quasi-sovereign interests. Texas's procedural right under the APA to challenge agency action that injures it, which the CHNV program does, is sufficient to confer standing to challenge the program—and Fifth Circuit precedent establishes this. As in the *DAPA* and *DACA* cases, DHS here made "an affirmative decision to set guidelines for granting a lawful presence to a broad class of illegal aliens." *E.g., DAPA*, 809 F.3d at 152. And as in DAPA and DACA, the Defendants' action challenged here implicates Texas' quasi-sovereign interests in classifying aliens. *E.g.*, *DACA*, 50 F.4th at 514–15; *DAPA*, 809 F.3d at 154–55. As in those cases, Texas has standing to sue.

The Supreme Court's recent decision regarding Texas's standing to challenge DHS's prioritization memo does not affect this result. *See United States v. Texas*, No. 22-58, 2023 WL 4139000 (U.S. June 23, 2023). That opinion concluded that standing was lacking because "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* at *4 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). In the Supreme Court's view, it was being asked "to order [DHS] to alter its arrest policy so [DHS] arrests *more* noncitizens." *Id.* at *3. Unlike the prioritization case, however, this case is not about arrests or custody. Whatever discretion the Defendants might have in choosing which aliens to arrest or otherwise take into custody, they have no

discretion to parole into the country aliens who do not meet the statutory criteria for parole.

This also demonstrates why Texas's injuries are redressable through a judgment from the Court—especially given that the special solicitude to which Texas is entitled allows it to "establish redressability" so long as "there is some possibility that the requested relief will reduce the harm." *DACA*, 50 F.4th at 519–20. Here, the CHNV program allows the Defendants to parole into the United States—parole into Texas and other States—up to 120,000 aliens per month. An injunction preventing them from operating that program—or setting the program aside as a violation of the APA—will eliminate their justification for doing so, eliminate the accelerated pathway for the aliens to request that they do so, and therefore reduce the number of alien parolees— the number of illegal aliens—present in the Plaintiff States. At the very least, it is possible that a judgment will do so, which is all that is required.

**C. The States are in the INA's zone of interests.**

A plaintiff has standing to challenge an action under the APA whenever it is "arguably" within the zone of interests the statute protects, and the Supreme Court "has always conspicuously included the word 'arguably' … to indicate that the benefit of any doubt goes to the plaintiff[.]" *DAPA*, 809 F.3d at 162 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). As the Fifth Circuit stated last year, the test here is not especially demanding, *see DACA*, 50 F.4th at 520 (quoting *Lexmark Intl., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2017)); a plaintiff lacks standing only when its claims are so marginally related or inconsistent with the purposes of the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *DAPA*, 809 F.3d at 162.

Here, the question is not even close: "The interests that Texas and other Plaintiff States seek to protect clearly fall within the zone of interests of the INA." *DAPA*, 809 F.3d at 163. The INA was intended to "set the terms and conditions of admission into the country and the subsequent treatment of aliens lawfully in the country." *DACA*, 50 F.4th at 521. The INA "encompasses [the States'] concerns about the financial burdens of illegal immigration. 'It's clear that the INA aimed, at least in part, to protect States from those kinds of [fiscal] harms.'" *Id.* (quoting *Texas v. Biden*, 20 F.4th 928, 971 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022)).

## II. The CHNV program is final agency action reviewable under the APA.

There is a well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action. *DAPA*, 809 F.3d at 163 (quoting *Reno v. Catholic Soc. Servs., Inc.*, 113 S. Ct. 2485 (1993)). Only a narrow group of matters are regarded as "committed to agency discretion," such that they are exempt from review under the APA under 5 U.S.C. § 701(a)—an agency's decision not to institute enforcement proceedings, for example, or statutes drawn in such broad terms that "there is no law to apply." *DAPA*, 809 F.3d at 163. That is not the case here, where Congress set forth both specific legal criteria for eligibility for parole and a specific process for determining whether those criteria are met. *See* 8 U.S.C. § 1182(d)(5).

Similarly, the CHNV program is final agency action because it "consummate[s] the agency's decisionmaking process" of interpreting the parole criteria for applicants from those four countries. Moreover, the program creates rights (to apply through a particular process not available to other applicants) and produces legal consequences (parole into the United States through a process not available to other applicants), hallmarks of a final,

substantive agency action. The Defendants do not have discretion to disregard the statutory parole criteria for classes of applicants; that a CBP agent rubber-stamps an application for parole upon an applicant's arrival at a port of entry does not convert the imposition of a class-based program into a case-by-case procedure that is consummated only upon the rubber-stamping. *See Biden v. Texas*, 142 S. Ct. 2528, 2545 n.7 (2022) ("The fact that the agency could not cease implementing MPP, as directed by the October 29 Memoranda" until the occurrence of a contingent event "did not make the October 29 Memoranda any less the agency's final determination of its employees' obligation to do so once such judicial authorization had been obtained.").

## III. Adopting the CHNV program required notice and comment, and its adoption was arbitrary and capricious.

The CHNV program is no mere policy statement. As in *DAPA*, the CHNV program's "discretionary," "case-by-case" decision-making is a fiction. In reality, nearly all properly completed and submitted applications are accepted. *See DAPA*, 809 F.3d 171–72; *Texas v. United States*, 328 F. Supp. 3d 662, 731 (S.D. Tex. 2018). The class-based definitions the Defendants draw in the program as purported qualifications for application are in fact outcome-determinative.

Nor does the CHNV program qualify for a foreign-affairs exemption from the APA's notice-and-comment requirements. Establishing that exemption requires a "strong showing" that even a short notice-and-comment period "will provoke definitely undesirable international consequences." *E. Bay Sanc. Cov. v. Trump*, 932 F.3d 742, 775–76 (9th Cir. 2018) (Bybee, J.); *E.B. v. U.S. Dep't of State*, 583 F. Supp. 3d 58, 65 (D.D.C. 2022) ("the foreign affairs function exception covers heartland cases in which the rule itself directly involves the

conduct of foreign affairs"). There is no evidence here to support such a conclusion, much less evidence sufficient to pass the requisite strength check.

Finally, Defendants failed to refute the many reasons the adoption of the CHNV program was arbitrary and capricious. They ignored the costs the program imposes on the States. They ignored that they were paroling large numbers of aliens who had no urgent humanitarian reason for entry into the United States and no plans to appear at the Southwest Border that the CHNV program forestalled. And they ignored a problem of their own creation—the difficulty of deporting from the United States hundreds of thousands of aliens who had for two years build connections and relationships here. No retroactive declarations of success—even assuming away their dubiousness—can mask that the program's justifications were arbitrary and capricious at their inception and remain so today.

## CONCLUSION AND PRAYER

The Plaintiff States respectfully request that the Court render the decree and declaration they request and set aside the CHNV program as adopted in violation of the APA.

Dated June 27, 2023.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

On June 27, 2023, this document was filed through the Court's CM/ECF system, which automatically serves a copy on all counsel of record.

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