IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS; STATE OF LOUISIANA, Plaintiffs, v. The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.	Civil Action No. 6:21-cv-00016

BRIEF OF IMMIGRATION REFORM LAW INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS' MOTION TO POSTPONE THE EFFECTIVE DATE OF AGENCY ACTION OR,
IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

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INTRODUCTION

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively in Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Upon their admission to the Union, Texas and Louisiana (at least absent "actual[] inva[sion]," U.S. CONST. art. I, §10) ceded their sovereign prerogative to control their respective borders to the federal government. But now the Executive branch of the federal government, by refusing to enforce—indeed, effectively suspending—the laws passed by Congress, is producing the opposite of a controlled border, and thus signally failing to take care that the laws be faithfully executed.

To begin with, the DHS Secretary's September 30 Memorandum violates the Administrative Procedure Act. In that Memorandum, the Secretary issues a rule barring officers from taking any enforcement action against an alien solely on the basis that that alien is removable under the law. *See* Ex. X at 2 ("The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way."). This directive, which withholds officers' discretion and is therefore a substantive rule, is nothing short of a vast executive amnesty, and procedurally invalid because issued without the required notice and opportunity for comment.

Further, though Congress has permitted DHS to exercise broad discretion in enforcing some aspects of the immigration system, it has constrained that discretion by mandating certain enforcement actions with respect to certain classes of aliens, including criminal aliens and illegal border crossers. Nevertheless, in the face of such congressional directives, DHS has issued another substantive rule that officers "should not" base enforcement action "on the fact of conviction or the result of a database search alone." Ex. X at 4. But Congress has mandated the detention and removal of certain criminal aliens based upon the fact of conviction alone. This rule, too, is procedurally invalid, as well as contrary to law.

Finally, the Executive action challenged here both suspends statutory directives enacted by Congress and is calculated to frustrate Congress's very purposes in enacting those directives. Instead of a secure border, the September 30 Memorandum, alone and in concert with other Executive policies, is calculated to produce a highly porous border that will attract yet more illegal entrants. This suspension of the law, and extreme Executive frustration of Congress's purposes, is no garden variety failure to take care that the laws be faithfully executed, but constitutes active opposition to those laws.

Because the September 30 Memorandum is contrary to law, procedurally invalid, and the antithesis of the Executive's duty to take care that the laws be faithfully executed, this Court should preliminarily enjoin Defendants, nationwide, from implementing it.

ARGUMENT

I. The September 30 Memorandum is Both Contrary to Law and Procedurally Invalid

Congress has established a comprehensive and uniform immigration system governing who may enter and remain in the United States by enacting the Immigration and Nationality Act ("INA"). Congress specified numerous classes of aliens who are either inadmissible or removable from the United States, including aliens who attempt to enter illegally, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and whose work would undermine wages or working conditions of American workers. *See generally* 8 U.S.C. §§ 1182(a), 1227(a). Congress has charged the Department of Homeland Security ("DHS") with the responsibility of enforcing the immigration laws. See 8 U.S.C. § 1103(a)(1) (the DHS Secretary "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens"). By simply defining the various classes of inadmissible or removable aliens and by merely establishing the system by which such aliens may be ordered removed, *see* 8 U.S.C. § 1229a (establishing removal proceedings), Congress left many enforcement decisions to the discretion of DHS. Thus, it is fair to say, as DHS Secretary Mayorkas does in the September 30 Memorandum, that the Executive branch exercises broad authority over immigration enforcement. *See* Ex. X at 2.

Congress did not, however, leave such enforcement discretion unbounded. Congress exercised its legislative power in defining which classes of aliens are removable from the United States, and nowhere did Congress suggest that DHS has the authority to narrow those classifications.[1] In other words, Congress did not authorize DHS to modify or alter which classes of aliens are removable under the law.

But in its September 30 Memorandum, DHS attempts to do just that by proclaiming that the fact that an alien is removable under the law is an insufficient basis to take enforcement action against such an alien. *See* Ex. X at 2 ("The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way."). That is to say that what Congress deems both necessary and *sufficient* for removal, DHS now deems necessary but *insufficient* to warrant removal. Under the Memorandum, DHS will require something more than the law specifies before it deems an alien removable. As Plaintiffs suggest, Plaintiffs' Motion at 38, by purporting to transform or modify which classes of aliens are removable under the law, the Memorandum has substantive legal consequences such that it is procedurally invalid. *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) ("[I]f a rule is 'substantive,' … the full panoply of notice-and-comment requirements [under the APA] must be adhered to scrupulously.").

[1] Instead, Congress authorized the Executive to grant certain discretionary forms of relief to removable aliens under specific circumstances. *See, e.g.*, 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal).

This directive in the Memorandum is a substantive rule for another reason. Though couched in terms of discretion, it actually removes discretion in officers to initiate enforcement action against an alien simply because that alien is, as Congress has established, removable. *See, e.g.*, *Texas*, 809 F.3d at 172-73 (holding that the Deferred Action for Childhood Arrivals program was a substantive rule because it withheld officers' discretion). Because this substantive rule—constituting a massive administrative amnesty—was issued without notice and comment, it is procedurally invalid.

In addition, DHS now treats statutorily mandated enforcement actions as discretionary. Congress has mandated that certain enforcement actions be taken against specific classes of aliens, including those aliens who are convicted of certain crimes or who attempt to enter the United States illegally. As Plaintiffs have demonstrated, Plaintiffs' Motion at 24-28, aliens who have been convicted of certain crimes must be detained pending removal proceedings.[2] *See* 8 U.S.C. § 1226(c). The only prerequisite for such mandatory detention is a conviction of a qualifying crime. *See* 8 U.S.C. § 1226(c)(1)(A),(B) (specifying criminal offenses). But in its September 30 Memorandum, DHS declares it will not "rely on the fact of conviction or the result of a database search alone" in making enforcement decisions. Ex. X at 4. Thus, DHS treats the conditions Congress made the basis of mandatory action as insufficient to trigger any action. This procedurally-invalid substantive rule is thus also contrary to law.

[2] In addition, every alien ordered removed must be detained pending removal. *See* 8 U.S.C. § 1231(a)(2); Plaintiffs' Motion at 31-32.

In addition to the classes of aliens identified by Plaintiffs, Congress has mandated similar enforcement actions be taken with respect to illegal border crossers. For instance, "an alien present in the United States who has not been admitted or who arrives in the United States … shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 1225(a)(1). This designation triggers section 1225(a)(3), which specifies that all applicants for admission "shall be inspected by immigration officers."

Section 1225(b), which governs the inspection of applicants for admission, mandates the expedited removal of aliens who either lack entry documents or attempt to gain admission through misrepresentation.[3] 8 U.S.C. § 1225(b)(1)(A)(i). Subsection 1225(b)(2) governs all other applicants for admission and specifies that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A) (emphasis added).[4] Nowhere in section 1225 does Congress grant the Executive branch authority (discretionary or otherwise) to release any inadmissible applicant for admission into the United States.

In the face of these statutory mandates, DHS has declared that although such illegal border crossers will be treated as enforcement priorities, "there could be mitigating

[3] If such an alien requests asylum, the INA mandates the detention of such an alien throughout the credible fear screening process or pending final consideration of an application for asylum. 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV).

[4] The only alternative to expedited removal or detention for inadmissible applicants for admission is found in subsection 1225(b)(2)(C), which grants DHS the discretion to return an alien who is arriving on land from a foreign territory contiguous to the United States to that territory pending a removal proceeding before an immigration court. DHS does, however, retain narrow authority to parole such aliens into the United States on a temporary, case-by-case, basis. *See* 8 U.S.C. § 1182(d)(5).

or extenuating facts and circumstances that militate in favor of declining enforcement action." Ex X at 4. Here, contrary to law, DHS makes what Congress made mandatory action discretionary.

A motions panel's decision in *Texas v. United States*, 2021 U.S. App. LEXIS 27686 (5th Cir. Sept. 15, 2021), does not show the contrary. The motions panel dodged Supreme Court precedent recognizing that detention of aliens under sections 1226(c) and 1231(a)(2) is mandatory by reframing the question as whether immigration officials retain discretion to initiate removal proceedings against such aliens in the first place. *Id.* at *11-14. Indeed, the motions panel framed the "central merits issue" as "whether Congress has interfered with immigration officials' traditional discretion to decide when to remove someone." *Id.* at *8. In reaching the conclusion that there was no such congressional "interference," the motions panel found it "quite telling" that nobody had "cited a single Supreme Court case requiring law enforcement … to bring charges against an individual or group of individuals." *Id.* at *12.

As Plaintiffs point out, the motions panel decision in *Texas* is nonbinding. Plaintiffs' Motion at 3 (citing *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988)). It is also unpersuasive because it overlooked two provisions in the INA that mandate the initiation of removal proceedings against criminal aliens.

Section 1228(a)(3)(A) requires the initiation of removal proceedings against aliens who have been convicted of an aggravated felony. 8 U.S.C. § 1228(a)(3)(A) (stating that the DHS "shall provide for the initiation and, to the extent possible, the completion of removal proceedings, and any administrative appeals thereof, in the case of any alien

convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony."). And, although there is no Supreme Court precedent analyzing this provision in depth, the Court has observed that any alien who has been convicted of an aggravated felony "faces expedited removal proceedings." *Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016) (citing 8 U.S.C. § 1228(a)(3)(A)).

The motions panel also overlooked section 1229(d)(1), which states: "In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General *shall* begin any removal proceeding as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1229(d)(1) (emphasis added). Section 1227(a)(2) defines all deportable offenses and designates a class of criminal aliens who must be detained under section 1226(c)(1)(B). These two provisions establish the very congressional "interference" on whose supposed absence the motions panel relied in determining that the enforcement decisions governed by the memoranda are committed to agency discretion.

DHS disavows "bright lines or categories" in its September 30 Memorandum, Ex. X at 3, but Congress established such "bright lines" or "categories" when it defined the classes of aliens who are removable and those classes of aliens against whom enforcement actions must be taken. DHS's attempt turn congressionally-mandated actions into options should be rejected by this Court.

II. Defendants Violate the Take Care Clause by Their Active Opposition to the Law

The Court should grant Plaintiffs' motion in order to reinforce the rule of law and the constitutional separation of powers. Under separation-of-powers principles, it falls to Congress to make the laws, to the Executive to enforce the laws faithfully, and to the judiciary to interpret the laws. Under that division of authority, this Court should reject DHS's active opposition to the immigration laws:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952). Justice Jackson put *Youngstown* within a "judicial tradition" beginning with Chief Justice Coke's admonishing his sovereign that "[the King] is under God and the Law." *Id.* at 655 n.27 (interior quotation marks omitted).

The September 30 Memorandum instructs agency personnel that the fact that an alien is a removable under the law "should not alone be the basis of an enforcement action against them." Ex. X at 2. It also makes mandatory enforcement actions against categories of other aliens discretionary. Unless the court enjoins the enforcement priorities, there will be no immigration enforcement, or even removal proceedings, involving a broad swath of removable aliens, and far less enforcement involving yet more aliens, for the foreseeable future.

Such drastically reduced enforcement is both a suspension of the law and a strong incentive for yet more illegal entry, calculated to frustrate the purposes of the law—which include a secure border—and indeed to create a situation diametrically opposed to those purposes: a porous, chaotic, unsecure border. *See, e.g.*, *Texas v. Biden*, 10 F.4th 538, 553 (5th Cir. 2021) (noting that the termination of an immigration enforcement program "has and will continue to increase the number of aliens being released into the United States"). Such drastically reduced enforcement therefore constitutes not only a failure or refusal to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, §3, but active opposition to those laws that offends the Take Care Clause in a way that may be unprecedented.

Political opposition to immigration law enforcement does not justify Executive annulment of enforcement actions that a constitutional law clearly commands. *See 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)). Nor, certainly, does such opposition justify the frustration of the congressional purpose of a secure border.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion to postpone the effective date of agency action or, in the alternative, for preliminary injunction.

Respectfully submitted on November 5, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) and served on all counsel of record.

/s/ Matt Crapo
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