PRACTICE ALERT

United States v. Texas: The Supreme Court's Decision on Biden's Enforcement Priorities[1]

Updated June 30, 2023

On June 23, 2023, the Supreme Court issued a favorable decision in *United States v. Texas*, 599 U.S. (2023), a case brought by Texas and Louisiana challenging the Biden administration's immigration enforcement priorities. The Court held that the States lack Article III standing to challenge the priorities. All of the Justices, except Alito, agreed with the outcome.

KEY SUMMARY FOR PRACTITIONERS

- *United States v. Texas* held that Texas and Louisiana lacked standing to challenge the Executive Branch's enforcement decisions on whether or not to arrest and prosecute individuals suspected of violating immigration laws.
- The decision may have broader implications on states' standing to challenge federal immigration policies, but the Court repeatedly noted that its decision is limited to the context of enforcement discretion over arrests and prosecutions. The Court explained that it does not reach questions regarding standing to challenge provision of legal benefits (such as DACA) or detention of noncitizens who have already been arrested.
- It will take some time for the ruling to take effect. Practitioners should continue to make individualized requests for prosecutorial discretion on behalf of their clients with relevant DHS components, highlighting positive factors and contextualizing any negative factors in the case.

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I. The *United States v. Texas* Decision

A. Procedural History

In September 2021, DHS Secretary Alejandro Mayorkas issued a memo outlining the Department of Homeland Security's ("DHS") immigration enforcement priorities ("Mayorkas Memo" or "Guidelines"). Texas and Louisiana sued the Biden administration over the Mayorkas memo, arguing that it violates the Immigration and Nationality Act ("INA") and Administrative Procedure Act ("APA").

Following a two-day bench trial, on June 10, 2022, Judge Andrew Tipton of the U.S. District Court for the Southern District of Texas issued a final judgment in the case, concluding that the State plaintiffs proved that the Mayorkas Memo was unlawful, requiring vacatur. Judge Tipton held that Texas has standing to challenge the Mayorkas memo because DHS's failure to comply with 8 U.S.C. §1226(c) and §1231(a)(2), which state that DHS "shall" take into custody certain noncitizens, imposes costs on Texas and because, as *parens patriae*, Texas has a "quasi-sovereign interest in protecting its citizens from the criminal activity of aliens subject to mandatory detention under federal law."[2]

The U.S. Court of Appeals for the Fifth Circuit declined to stay Judge Tipton's ruling pending appeal. The Biden administration sought a stay of the decision pending appeal before the Supreme Court in July 2022. In a 5-4 decision, the Court denied the application for a stay. However, the Court granted certiorari before judgment – *i.e.*, agreed to hear the case without waiting for a decision from the Fifth Circuit. The Court directed the parties to address three issues: (1) whether Texas and Louisiana have standing to challenge the Mayorkas Memo; (2) whether the Mayorkas Memo violates the INA or APA; and (2) whether the remedy of vacatur under the APA is barred by 8 U.S.C. § 1252(f)(1).

The National Immigration Project (NIPNLG) and the NYU Immigrants' Rights Clinic submitted an amicus brief to the Supreme Court on behalf of 48 organizations that protect and advance the rights of immigrant communities. The brief argued that the States' basis for claiming to have standing builds on a long history of racist and xenophobic tropes and is motivated by their discriminatory objection to the presence of noncitizen residents within their borders.

B. Summary of Supreme Court's Decision

Justice Kavanaugh, writing for the Court, held that the States lack Article III standing to bring the suit because they have not shown a judicially cognizable interest or injury, one of the elements required to prove standing. The Court did not reach any of the other issues in the case. "In

[2] *Texas v. United States*, 606 F. Supp. 3d 437, 466–67 (S.D. Tex.), *cert. granted before judgment*, 213 L. Ed. 2d 1138, 143 S. Ct. 51 (2022), *and rev'd,* No. 22-58, 2023 WL 4139000 (U.S. June 23, 2023).

sum," the Court held, "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."[3]

The Court explained several reasons why a challenge to the Executive Branch's discretion to arrest and prosecute deviates from the Court's "precedents and longstanding historical practice."[4] First, the Court reasoned that in cases where "the Executive Branch elects not to arrest or prosecute," indirect costs associated with the Executive Branch failing to arrest or prosecute are not enough to establish standing.[5] The Court also added, in a footnote, that while states sometimes have standing to sue the federal government, "standing can become more attenuated" when states only rely on indirect effects on state revenues or state spending to establish standing.[6] Second, the Court explained that, under Article II, the Executive Branch possesses the authority to make arrests and prosecutions on behalf of the United States and that this "principle of enforcement discretion over arrests and prosecutions extends to the immigration context."[7] Finally, the Court emphasized that the judicial branch does not have "meaningful standards" to assess prosecutorial discretion policies where the Executive Branch does not have the resources to prosecute every violation of the law.[8] Ultimately, the Court held that "[t]he States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. . . . We decline to start the Federal Judiciary down that uncharted path."[9]

The Court cautioned that its holding is limited to the Executive Branch's decision to exercise prosecutorial discretion over arrests and prosecutions. The Court explicitly noted five issues that the decision does not reach. First, the Court emphasized that its decision does not reach selective-prosecution cases under the Equal Protection Clause.[10] Nor does it affect cases involving prosecutorial discretion where Congress has strongly indicated that judicial review of enforcement discretion would be appropriate.[11] The Court noted that the use of the word "shall" in 8 U.S.C. §§1226(c), 1231(a)(2) is not enough to entitle any plaintiff to enforce that mandate in federal court. Third, the Court noted a plaintiff may have standing if the "Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions."[12] However, the States did not advance such an argument in this case. Fourth, the Court noted that the standing analysis would

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[3] *United States v. Texas*, No. 22-58, slip op. at 14 (U.S. June 23, 2023) (J. Kavanaugh), https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf.

[4] *Id.* at 6.

[5] *Id.*

[6] *Id.* at 8–9, n. 3.

[7] *Id.* at 6–7.

[8] *Id.* at 7–8.

[9] *Id.* at 9.

[10] *Id.* at 9–10.

[11] *Id.* at 10.

[12] *Id.* at 11.

differ if the challenge implicated both enforcement priorities and the Executive Branch's provision of legal benefits or status, citing its 2020 decision on DACA.[13] Finally, the Court explained that its decision does not govern the continued detention of noncitizens who have already been arrested.[14] While the decision contains dicta about broader issues concerning state standing, the Court repeatedly emphasized that its decision is narrow and limited to the question of whether a federal court may "order the Executive Branch to take enforcement actions against violators of federal law."[15]

While eight Justices concurred in the judgment, only five joined Kavanaugh's opinion in full. Justice Gorsuch, joined by Justices Thomas and Barrett, wrote a concurring opinion explaining that while they agree the States lack Article III standing, they see the problem as one of redressability.[16] Justice Gorsuch explained that, under the Court's opinion in *Garland v. Aleman Gonzalez*, 596 U.S. (2022), 8 U.S.C. §1252(f)(1) bars federal courts from issuing relief that would remedy the States' harms.[17] The district court in the case at hand held that the States' requested relief, vacatur under the APA, is not affected by §1252(f)(1). However, Justice Gorsuch explained that, even assuming this is true, vacatur of the enforcement priorities would not remedy the States' harms: "The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which [noncitizens] to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence."[18] Justice Gorsuch also explained that he was "skeptical" that the APA allows for vacatur as a remedy at all and the case brings up "serious" questions regarding federal courts' authority to order vacatur under the APA.[19] Finally, Justice Gorsuch added that vacatur, like "universal injunctions," should "demand truly extraordinary circumstances to justify it."[20]

Justice Barrett, joined by Justice Gorsuch, wrote a separate concurring opinion explaining that the majority opinion's interpretation of its precedent was flawed. Justice Alito was the lone dissenter. In his dissenting opinion, Alito explained that, in his view, Texas has clearly met the elements required for standing.

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[13] *Id.* at 11.

[14] *Id.* at 12.

[15] *Id.* at 13.

[16] *United States v. Texas*, No. 22-58, slip op. at 1 (U.S. June 23, 2023) (J. Gorsuch, concurring), https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf.

[17] *Id.* at 4–5.

[18] *Id.* at 6.

[19] *Id.* at 8–17.

[20] *Id.* at 17–18.

II. Implications of *United States v. Texas* for Immigration Practitioners

Practitioners should consider the implications of *United States v. Texas* on potential avenues to seeking prosecutorial discretion. Some initial considerations include:

1. The Court's decision does not go into effect immediately. Following the Supreme Court's opinion, Secretary Mayorkas issued a statement noting that it "DHS looks forward to reinstituting these Guidelines." It will likely take at least one month for the Guidelines to go back into effect. Under the Supreme Court rules, the clerk of the Court will provide a copy of the opinion to the Fifth Circuit 32 days after the entry of the Court's judgment (unless the Court shortens or extends the time, or unless the parties stipulate that it be issued sooner). The Fifth Circuit must then issue its mandate consistent with the Supreme Court's decision. We expect that this will happen soon after the Fifth Circuit receives the copy of the Supreme Court's opinion, at which point the district court's final judgment vacating the Mayorkas Memo will be formally reversed.

2. Other memos related to immigration enforcement remain in effect. These include the directive on enforcement against noncitizen victims of crime; the memo regarding workplace raids and workers who are victims of, or witnesses to, workplace exploitation; the memo on enforcement actions in or near protected areas; the directive regarding enforcement against members of the U.S. military; the directive regarding enforcement against people who are pregnant, postpartum, or nursing; and portions of the ICE Office of Principal Legal Advisor memo that do not rely on the Mayorkas Memo.

3. Practitioners should continue to make individualized requests for prosecutorial discretion on behalf of their clients with relevant DHS components, highlighting positive factors and contextualizing any negative factors in the case. Before the Guidelines go back into effect (see #1 above), practitioners may cite to the Mayorkas Memo and argue for discretion based on the factors listed in the Guidelines—however, until the Guidelines are reinstated, be sure to reference DHS's broad authority to exercise discretion in individual cases rather than the Memo itself. Consider including helpful language from the Supreme Court's opinion (on pages 6–9) on the Executive Branch's broad discretion over decisions regarding immigration arrests and prosecutions. For example, on page 7, the Court noted that the long-standing "principle of enforcement discretion over arrests and prosecutions extends to the immigration context" and includes decisions to remove noncitizens. The Court continued, on pages 7–8, that "[i]n light of inevitable resource constraints and regularly

changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies."

4. The federal government has stated that the Mayorkas Memo does not impact decisions regarding continued detention of immigrants who have already been arrested. Under the government's interpretation, the Mayorkas Memo does not cover requests for release of noncitizens who are already detained, and the Supreme Court's decision does not address this issue. Practitioners should still request parole of detained noncitizens and pursue bond hearings, where available, although practitioners should not solely rely on the Mayorkas Memo in requests for parole or release to DHS.[21]

5. The Court's holding leaves several unanswered questions. While the Court's opinion does not leave much room for Texas and Louisiana to continue their suit against the Mayorkas Memo, the Court's emphasis on the narrowness of its decision likely means that red states will continue to stymie immigrant-friendly policies issued by the Biden administration. In addition, as mentioned in Justice Gorsuch's concurrence, the question of whether 8 U.S.C. §1252(f)(1) bars the remedy of vacatur under the APA remains unanswered.

III. Conclusion

The Supreme Court's decision in *United States v. Texas* reaffirms DHS's authority to exercise prosecutorial discretion in immigration. In the coming weeks, NIPNLG will issue more detailed practice advisories on the implications of *United States v. Texas* for immigration and criminal-defense practitioners and update our existing resources on seeking prosecutorial discretion. In the meantime, please contact NIPNLG (amber@nipnlg.org) if you have any questions, and continue to use our listservs to share updates on how DHS is implementing the Court's decision.

[21] *See* Practitioners' Guide to Obtaining Release From Immigration Detention, Catholic Legal Immigration Network, Inc. (updated July 29, 2021), https://www.cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention.