UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, Plaintiff, v. CHAD F. WOLF, *in his official capacity as Acting Secretary of Homeland Security,* et al., Defendants.	No. 20-cv-1127 (JMF)
R. L'HEUREUX LEWIS-MCCOY et al., *on behalf of themselves and all similarly situated individuals*, Plaintiffs, v. CHAD WOLF, *in his official capacity as Acting Secretary of Homeland Security*, et al., Defendants.	No. 20-cv-1142 (JMF)

AMICUS CURIAE BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PLAINTIFFS ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTERESTS OF AMICUS CURIAE

The Competitive Enterprise Institute (CEI) is a non-profit 501(c)(3) organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI regularly participates as an amicus or direct litigant in cases of administrative overreach that threaten our constitutionally limited government.

Additionally, a member of CEI's board of directors, Jean-Claude Gruffat, has been a resident of New York since 2011, when he also became a participant in the Global Entry Trusted Traveler program at issue in this case. In the past, he has extensively used Global Entry. Mr. Gruffat's current Global Entry membership expires on November 6, 2021, and he would normally renew his eligibility in advance of its expiration. Under the new rules created by the Department of Homeland Security, Mr. Gruffat will be unable to renew his current status when it expires.

INTRODUCTION

At issue in this case is DHS's apparent retaliation against the citizens of New York State, in order to coerce the state into enacting laws designed to assist federal law enforcement. Specifically, in response to the passage of New York's Green Light Law, which prohibited the state from assisting federal immigration law enforcement, DHS prohibited any New York resident from continuing to participate in Trusted Traveler programs. Such retaliation cannot be sanctioned in a society which values states as sovereigns independent of the federal government.

In its motion for partial summary judgment, DHS seeks to short-circuit judicial review and slam the courthouse door on citizen challenges to these allegedly illegal acts by stopping them from asserting a cause of action for judicial review under the Administrative Procedure Act (APA). The APA cannot be so easily avoided.

The Trusted Traveler system set up by DHS is fundamentally no different than that which DHS set up for Deferred Action for Childhood Arrivals (DACA), which the Supreme Court held, only last month, is subject to APA judicial review in *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (June 18, 2020).

DHS hides behind the discretion it supposedly has over individualized threat determinations. DHS says there is no guidance from Congress, but Congress explicitly required that such decisions be based on actual "security threat assessments." 8 U.S.C. §1365b(k)(3)(A). As such, DHS's actions in this matter cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (as required by 5 U.S.C. § 706); DHS must show that it has reason to believe there are actual threats to our national security. Instead, however, DHS has categorically retaliated for, in its own words, "lack of security cooperation from the New York DMV." Record at 2.

Several hypotheticals illustrate the arbitrary nature of DHS's approach. Imagine a foreign national who has spent her entire life outside the United States, but who recently gets a green card to become a lawful permanent resident of New Jersey. She informs DHS that she has no criminal history. DHS would potentially allow such an individual to become a trusted traveler, even though it has no direct access to her foreign criminal history records. But DHS now claims that any resident of *New York*, even the President of the United States (who resides at Trump Tower), would be too great a security risk due to the agency's lack of access to New York DMV records. DHS would do so even if that person personally handed a notarized copy of all her New York DMV criminal records to DHS. The fact that, under its rule, DHS would treat even the President as a security risk shows the rule's absurdity. The basis for DHS's actions must

be real threats to national security, as Congress required. *See* 8 U.S.C. §1365b(k)(3)(A). The rule fails to meet that standard.

If this were not enough, New York even allows DHS to have access to the records it seeks as long as it does not use them for immigration enforcement purposes. Part YYY, New York Senate Bill No. 7508B. But DHS still insists on New York assisting federal immigration enforcement before it will allow any New York residents renewed access to the program. This makes it clear that its objective is to commandeer the state to enforce federal law in violation of the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 925 (1997).

DHS concluded that "this Act and the corresponding lack of security cooperation from the New York DMV requires DHS to take immediate action to ensure DHS's efforts to protect the Homeland are not compromised." Record at 2. DHS might believe that lack of law enforcement cooperation by New York is harmful to certain of its goals, but it is not constitutional for DHS to punish the citizens of New York on that basis. And it is certainly not legal for DHS to deny judicial review under the Administrative Procedure Act (APA) to citizens adversely affected by these actions. They are entitled to have a court determine whether DHS's actions are based on actual threats to national security in the "security threat assessments" that Congress required.

ARGUMENT

I. DHS's Action Is Reviewable Under the Administrative Procedure Act

The APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140 (1967). That presumption can only be rebutted by a showing that the relevant statute "preclude[s]"

review, 5 U.S.C. § 701(a)(1), or that the "agency action is committed to agency discretion by law," § 701(a)(2). DHS claims, incorrectly, that the latter applies here.

To "honor the presumption of review, [the Supreme Court has] read the exception in §701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). This case is not one of those rare "administrative decision[s] traditionally left to agency discretion" such as prosecutorial discretion. *See Lincoln v. Vigil*, 508 U. S. 182, 191 (1993). Instead,

> Even where there are no clear statutory guidelines, courts often are still able to discern from the statutory scheme a congressional intention to pursue a general goal. If the agency action is found not to be reasonably consistent with this goal, then the courts must invalidate it. The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised.

Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir.1985).

To be exempt from judicial review under the APA, the agency action must be committed to agency discretion "*by law"* (emphases added). 5 U.S.C. 701 (a)(2). The agency points to its own regulations, which provide that such determinations are at DHS's "sole discretion," Def. Memo p. 16, but this alleged discretion was not created by any statute passed by Congress. In other words, it was not created by law and so does not qualify under the APA exemption.

The Global Entry System is in many ways similar to the DACA program created by DHS, which the Supreme Court recently held is subject to judicial review under the APA. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). In both cases, DHS established a set of criteria and set up a "'process' for identifying individuals who met the

enumerated criteria." *Id.* at 1906. And in both cases, these "proceedings are effectively 'adjudicat[ions]," *id.*, and the result is an affirmative act of approval by the agency. And in both cases, DHS has claimed that "agency action is committed to agency discretion by law." *Id.* But, as the Supreme Court held as in the case of DACA, DHS's "creation of that program—and its rescission" in this case for the people of New York—"is an "action [that] provides a focus for judicial review." *Id.*

Finally, even assuming, for argument's sake, that DHS has unreviewable discretion when it makes an individualized decision that a particular individual poses a sufficient security threat to be denied eligibility, that does not mean that DHS's *categorical* decisions concerning the eligibility of New York residents are immune from judicial review.

II. DHS Was Required to Go Through Notice-and-Comment, But Failed to Do So

"Notice and comment rulemaking evokes the spirit of democracy and civic republicanism, acting as a mechanism for adding legitimacy to governmental regulation due to the transparency of the agency action and the involvement of the public as a check before a rule may be promulgated." Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 Okla. L. Rev. 601, 606 (2018).

DHS claims that this decision to prohibit all citizens of New York from the Global Entry program was not required to go through notice-and-comment because it was a "general statement of policy" or in the alternative an "interpretative rule." But "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). "On the contrary, courts have long looked to the contents of the agency's action, not the agency's self-serving label, when deciding whether statutory notice-and-comment demands apply." *Id.*

As shown below, neither of DHS's characterizations are correct.

A. The DHS Decision Was a "Legislative Rule," Not a "General Statement of Policy"

There is an essential difference between a "general statement of policy" and a "legislative rule"; the agency ignores that difference. It describes a "general statement of policy" as an explanation of how an agency will enforce a statute or regulation. Def. Memo 18. While that is true, the same is true of legislative rules as well and for that reason DHS has not offered any meaningful distinction between what requires notice-and-comment and what does not.

In fact, the key distinction for this case between a "general statement of policy" and a "legislative rule" is the scope of discretion that is left open for lower-level employees. *Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 321 (D.C. Cir. 2011) ("because the Guidance binds [agency] regional directors, it cannot, as [the agency] claims, be considered a mere statement of policy"). In other words, does the decision bind the public or the agency to a specific outcome, or does it leave matter to be balanced and decided in the future? *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C.Cir.1997) ("[P]olicy statements are binding on neither the public nor the agency" (internal citation omitted)); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (quoting *Jean v. Nelson*, 711 F.2d 1455, 1481 (11th Cir. 1983), *aff'd*, 472 U.S. 846 (1985)) (asking if "the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case.").

In contrast, to meet the "general statement of policy" exception, "[t]he agency must treat the document as tentative and prospective, without present binding effect on private persons, and the agency must keep an open mind and be prepared to reconsider the policy as individual cases arise." Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 Admin. L. Rev. 1045, 1047

(2000). "The document may not establish a binding norm or be determinative of the issues to which it is addressed." *Id.*

The potential for misuse of policy statements is clear. "Because agencies have a substantial incentive to avoid issuing legislative rules and try to achieve the same objective through the use of general statements of policy, courts have been vigilant in attempting to assure that agencies do not misuse the exception for general statements of policy." William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1333 (2001). "Courts look for evidence that the agency will not use the general statement of policy to decide future cases." *Id.* "It is allowed to influence future cases, but not to decide them." *Id.*

The rule in this case is categorical and leaves no discretion to lower-level DHS employees; no resident of New York will be allowed to renew their Global Entry status. Regardless of whether a lower-level DHS employee believes that a person has demonstrated that they are not a threat to national security and are eligible for the program, DHS leadership has overridden that discretion. Such decisions cannot be considered statements of policy, which might lay out factors to consider but do not categorically decide the issue itself.

B. The DHS Decision Was a "Legislative Rule" Not an "Interpretive Rule"

DHS argues in the alternative that this new rule is "interpretive," and therefore does not need to go through the notice-and-comment process, as it is "does not create (or take away) rights." Def. Memo. 19. This is not correct. Prior to this new decision, New York residents were allowed to register as a part of the Trusted Traveler programs; now they are not. An applicant could walk into a U.S. Customs and Border Protection office (the part of DHS that handles Trusted Traveler enrollment), hand over their notarized New York DMV criminal history record,

and that still wouldn't be sufficient under the new DHS rules. The rule took away New Yorkers' right to demonstrate that they are eligible for this program.

According to DHS, the New York DMV records are "potentially relevant" and so without DHS access an applicant "cannot satisfy CBP of his or her low-risk status." But there is a wide range of "potentially relevant" information: interviews with friends and neighbors of the applicant, FBI files detailing any surveillance they might have done, etc. And yet even without access to all this "potentially relevant" information, DHS approves 1.1 million applicants every year. Customs and Border Patrol, CBP Trade and Travel Report 3 (January 2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/CBP%20FY2019%20Trade%20and%20Travel%20Report.pdf. DHS allows foreign nationals who have recently become U.S. permanent residents to become trusted travelers, without any direct access to the criminal history database from their home countries. What makes this "potentially relevant" information so special in the case of New York residents? DHS doesn't say.

There is no ambiguity in the rules for DHS to interpret, nor does DHS even claim there is any. The agency's decision contained no "reference to the language, purpose, and legislative history of the statute or regulation" *Metro. Sch. Dist. of Wayne Twp., Marion Cty., Ind. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992), nor any "cloistered, appellate-court type reasoning." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996).

The regulations at issue do not *require* DHS to get this information in this particular way, nor does DHS claim they do. This rule is simply not about interpreting the meaning of the regulations; instead it is about applying the discretion in those rules to create a binding decision

on the public. Because this is not an interpreting anything, it must go through notice and comment.

C. *DHS Did Not Include Any Explanation of Good Cause For Failing To Subject the Rule to Notice and Comment*

For the "good cause exception" for notice and comment to apply, under 5 U.S.C. § 553(b)(B), the agency must "incorporates the finding and a brief statement of reasons therefor in the rules issued." DHS acknowledges that no such finding or statement is contained in the rule, and yet asks this court to ignore the law and apply this exception anyway.

The Defendants cite a number of cases on this point: *NRDC v. NHTSA*, 894 F.3d 95 (2d Cir. 2018); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 90 (D.C. Cir. 2012); *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975). But in all of these cases, good cause was claimed and a reason for it was provided by the agency in the rule. This was not the case here. And regardless of whether there was good cause or not, DHS did not include any such finding or statement of such reasons in its rule and so the 5 U.S.C. § 553(b)(B) exception cannot apply.

CONCLUSION

DHS claims the ability to arbitrarily and categorically deny access to these programs, rather than on the basis of actual, individual threats to national security. This is contrary to the "security threat assessments" that Congress required. For that reason, and for the other reasons stated above, we ask this court to deny DHS's motion for partial summary judgment.

Dated: July 17, 2020

Respectfully submitted,

/s/ Devin Watkins

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2778 words (exclusive of the cover page, certificate of compliance, table of contents, and table of authorities), and complies with Local Civil Rule 11.1 of the Southern District of New York

/s/ Devin Watkins
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