

HOUSTON CHRONICLE

Supreme Court to hear Texas' challenge to DAPA

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April 17, 2016

When Texas makes its case against President Barack Obama's signature 2014 immigration plan at the U.S. Supreme Court on Monday, the most important part of its argument will hinge on the state's \$25 driver's license.

That one little document, owned by nearly 16 million drivers, is the crux of the lawsuit that Texas has filed against the Obama administration's program to grant temporary work permits to about 4 million immigrants in the country illegally. Texas contends that it would lose millions of dollars if it must provide a license to almost 600,000 eligible immigrants in the state. The state subsidizes the cost of each document by some \$130.

The argument is crucial because unless the state can convince the short-handed high court that it would suffer real harm, Texas cannot sue. Deciding the state does not have so-called standing is one possible outcome of the case. The justices also could reach a 4-4 decision - possible because of the death of Antonin Scalia - which would uphold a lower court's blocking of the program but avoid the significant issues at hand. That result could be chaotic because states favoring the initiative might then sue and reverse the injunction.

At issue is how much authority the president wields.

When the justices agreed to take the case, they asked the Obama administration and Texas to specifically address whether the president's executive action violates the constitution by not fully enforcing immigration law and trying to deport all immigrants here illegally. But without Scalia many experts think the justices would not be able to reach a majority decision or want to tackle such a consequential question without a full bench.

"If Texas does not have standing, there is no case," said Muzaffar Chishti, director of the New York office of the Migration Policy Institute, a think tank in Washington, D.C. "For the advocates that would be the best outcome."

It would allow the president to immediately implement the program, designed largely for the parents of Americans and legal residents who have been here illegally since 2010 without committing major crimes. Deciding Texas has no standing may restrict when states can challenge federal programs. Conversely, determining Texas can sue could allow states to challenge any number of federal policies they don't like. Texas argues it's simply trying to prevent the executive branch from running rampant against congressional will.

Both a federal trial judge in Brownsville, where Texas and 26 mostly Republican states filed suit, and the largely conservative U.S. 5th Circuit Court of Appeals agreed the state could indeed

suffer harm as a result of issuing the licenses. But they were only preliminary rulings because the case has never seen a full trial.

In its analysis, the 5th Circuit majority relied on a 2007 Supreme Court decision allowing Massachusetts to challenge the Environmental Protection Agency's refusal to regulate vehicle emissions linked to climate change. Massachusetts argued that rising seawater, a result of global warming, would erode its coastline and hurt the state, giving it sufficient claim to sue the federal government.

A historic case

Texas' argument is similar, the appeals court judges found, because of the "direct, substantial pressure" states would face to change subsidies for licenses or suffer financial loss. A dissenting opinion noted that Massachusetts sued under the Clean Air Act, which specifically allows lawsuits over the government's refusal to regulate. There is no such authority under immigration law.

Immigration advocates and their supporters say that either of two of the court's four conservative judges could agree Texas doesn't have the right to challenge Obama's program based on their previous decisions.

In the Massachusetts case, Chief Justice John Roberts led the conservative dissent in saying the state could not prove it was hurt by the government's policy. He described standing as "a fundamental limitation ensuring that courts function as courts, and not intrude on the politically accountable branches."

In 2012, Justice Anthony Kennedy wrote the court's majority opinion striking down part of an Arizona law targeting immigrants here illegally. In it he embraced a broad view of the federal government's authority to solely regulate immigration.

"The states are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance," he said.

In the bitter fight over filling Scalia's seat, all of the justices may want to wait until an appointment has been made to decide such a historic case, not only on immigration but in defining the limits of presidential authority. All of them maintain an interest in limiting when states can sue the federal government.

"Otherwise that would mean every new federal policy could be challenged before it's ever implemented by some coalition of states," said Steve Vladeck, an American University Washington College of Law professor who specializes in the Supreme Court.

Critics of the Texas challenge to Obama's immigration plan say the state could simply choose not to subsidize driver's licenses. It already provides the documents for some 115,000 youth who received provisional work permits under the president's 2012 executive order for certain young adults who have been here illegally for years. Texas did not challenge that program or argue it

suffered financial losses because of it. Mississippi did, but the 5th Circuit appeals court found it did not specifically detail how it could be harmed.

Immigrant advocates say the cost of the licenses, about \$75 million for the Texas' eligible immigrants, would be offset by the increase in taxes if they can work here legally. If Obama's program goes into effect, Texas would see a boost of more than \$38 billion in its gross domestic product over the next decade, according to a study by the Center for American Progress, an advocacy group in Washington, D.C.

Paxton's focus on policy

Josh Blackman, a constitutional law professor at South Texas College of Law, argues that forcing a state to change its law so that it doesn't suffer financial loss, however small and regardless of whether it can later be recouped, is enough to give it a claim at the high court.

"In my opinion, Texas has the silver bullet," said Blackman, who filed an amicus brief against Obama's plan on behalf of the Cato Institute, a libertarian think tank in Washington, D.C.

State Attorney General Ken Paxton said his office doesn't deal with the economic impact of the president's proposal, but rather is concerned with whether it's against the law for the executive branch to grant such a large group of migrants temporary work permits when Congress hasn't chosen to do so. Qualifying for standing is simply a way to make that greater argument.

"We're not here to deal with the issue of whether we can recoup or not recoup (the money) but whether it's good or bad public policy," he said.

'Not a direct precedent'

The state argues that in creating the program the administration bypassed a little-known federal statute, the Administrative Procedure Act, which requires it to seek public input when changing a significant rule.

The government contends it's only setting priorities for whom it must deport, necessary given that Congress only allocates about \$6 billion a year for enforcement. That's enough to annually remove roughly 300,000 of the 11 million immigrants who are in the United States illegally, according to the government. Texas argues choosing not to deport such a large group of immigrants is in effect creating new policy.

The state also says choosing not to prosecute a mass class of people and proactively granting them the authority to work is abdicating the president's responsibility to enforce immigration law.

"This is not just a case of the federal government versus the states. This is about the limits of executive authority, and there's not a direct precedent," said Chishti, of the Migration Policy Institute.

In the end, it may be the next president who decides the future of what Obama had hoped would be his namesake immigration reform. Even if his plan is implemented this summer, a Republican would likely repeal it upon taking office. If the court rules the administration should have sought public comment on its policy change, a winning Democrat could try to do that.

"This policy will really be determined by the next election," said University of California at Berkeley law professor John Yoo, who served in President George W. Bush's Office of Legal Counsel. "In the end this may be worked out by Congress either way."