

# HOUSTON CHRONICLE

## Supreme Court sharply divided by Obama immigration plan

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April 18, 2016

WASHINGTON - A shorthanded Supreme Court appeared closely divided on a Texas-led challenge against President Barack Obama's 2014 immigration plan Monday, asking sharp questions about whether the state could bring the case and if the president had overstepped his authority.

The eight justices appeared split across ideological lines with the four liberal appointees seeming to indicate they support the president's plan while the conservative justices questioned the limits of his executive powers. A decision, expected in June, could be the most important related to immigration in decades and comes at the height of a presidential campaign where it has been one of the defining issues.

The court itself is embroiled in a political battle to fill the seat of Justice Antonin Scalia, and his absence has caused it to twice reach a tie. Many experts think the justices would not want to decide a case with such hugely consequential questions without a full bench.

Chief Justice John Roberts and Justice Anthony Kennedy, seen as the two most likely conservative appointees to side with the liberal wing and allow the program to proceed, pressed U.S. Solicitor General Donald Verrilli Monday on whether Texas would suffer if the plan is implemented and how far the president's power extends.

Modeled after a similar but smaller program for young adults that Obama unveiled in 2012, his 2014 initiative would temporarily delay deporting the parents of American citizens and legal residents who have been here since 2010 and provide them with provisional work permits. About 4 million immigrants here illegally could benefit.

The president announced the program after Congress failed to pass immigration reform in 2013. Texas, leading a coalition of 26 mostly Republican states, immediately challenged it.

During the 90-minute oral arguments Monday, Kennedy, who is often the deciding vote in close cases, worried that the administration may have overstepped its reach by having the executive branch set de facto immigration policy, rather than carry out laws passed by Congress.

"It's as if the president is setting policy, and the Congress is executing it," he said. "That's just upside down."

Roberts seemed concerned about the program's scope, asking whether it meant the president could defer the deportation of every immigrant in the country illegally. "Definitely not," Verrilli replied.

The government argues it is not creating new policy, but simply prioritizing which immigrants to deport - necessary given that Congress doesn't allocate enough funding to remove all 11 million immigrants here illegally. Only about 400,000 are deported a year.

Under questioning from Justice Elena Kagan, Texas Solicitor General Scott Keller agreed that the administration has the right to decide who to deport and might even be allowed to delay removing an entire class of immigrants. But it cannot grant them legal authorization, he said, which the state argues the work permits extend.

David Leopold, an attorney and former president of the American Immigration Lawyers Association, said temporary work authorization is usually provided to anyone qualifying for a deferral from deportation otherwise they would be a burden on the government. Having the permit does not grant any legal status and could be repealed anytime, he said.

"Regardless of the thorough questioning today, which we expected, when (the justices) apply the law, especially the law in work authorization, we are going to prevail," Leopold said.

Opponents of the president's plan similarly read positive predictions from the justices' questioning but, if anything, it seemed clear that the court was conflicted.

"The court is quite divided," said Josh Blackman, a constitutional law professor at South Texas College of Law who filed an amicus brief against Obama's plan on behalf of the Cato Institute, a libertarian think tank in Washington D.C. "I think there's a distinct possibility that this case goes to a 4-4."

A tie would uphold a lower court's decision to block the program without deciding any of the underlying questions at hand, so states like California which support it could file suit elsewhere to challenge the injunction.

The prospect of such disarray has some legal experts expecting the justices may decide Texas can't prove it will be harmed by the plan and so doesn't have so-called standing to bring the challenge in the first place. The chief justice in particular has favored such narrow views on when states can sue the federal government. That finding would allow Obama's program to immediately proceed.

Texas argues it will suffer by losing money if it is required to provide driver's licenses to nearly 600,000 eligible immigrants in the state. The state subsidizes the document by about \$130.

But Verrilli argued Monday that the state could simply change its policy, either choosing not to offset the cost of the documents or not to grant them to this group of immigrants.

Roberts said giving the licenses to some but not others could be considered discriminatory, putting Texas in a tough spot.

He asked the government to compare the harm Texas would suffer to a 2007 environmental case in which Massachusetts sued the Environmental Protection Agency about its refusal to regulate

vehicle emissions linked to climate change. The state argued that rising seawater, a result of global warming, would erode its coastline, giving it sufficient claim to sue the federal government. The state prevailed but Roberts led the court's conservative dissent, arguing Massachusetts could not prove it was hurt by the government's policy.

Verrilli said Texas isn't required to discount the license.

"There was no way for Massachusetts to avoid the effects about which it was complaining, and there is a way here," he said.

Justice Stephen Breyer noted that Texas' main claim of injury is that it would lose money. Breyer said accepting that point as a basis for standing would allow any number of states to sue the federal government if they don't like a policy or the costs it imposes.

"We can't just let you sue on the basis that you, as a taxpayer, will have to spend more money," he said. "If we do, taxpayers all over the country will be suing in all kinds of cases, many of them which will involve nothing more than political disagreements of all sides."

In contrast to the serious mood in the courtroom, outside on the steps under a sunny blue sky, immigrants from Texas and across the nation chanted, waved signs and sang hymns.

"We have come to the steps of the Supreme Court to seek justice," said U.S. Sen. Bob Menendez, a New Jersey Democrat.

A crowd numbering in the thousands responded with chants of "Si, se puede," Spanish for "Yes, we can."

Among a group of about 60 Texans was Hilda Salmeron, a 30-year-old kitchen worker from Houston who rode with her family on a nearly 40-hour bus trip sponsored by the Texas Organizing Project, a local advocacy group.

"We need to be heard," she said, speaking over the sound of a mariachi band on a makeshift stage. "We want to be able to live and work without the fear that they are going to come and take us out of our homes."

Some activists sought seats inside the court, joining a line of spectators that wrapped around the block. Giancarlo Tello, a 26-year old from Peru who would benefit from Obama's program, called it "one of the most important days in immigration history."

The party atmosphere lasted until the oral arguments ended, when a dozen conservative administration critics - including Texas U.S. Rep. Louis Gohmert - set up their own loudspeaker system outside the courthouse. Joined by Iowa U.S. Rep. Steve King, another immigration hard-liner, the Republican and his supporters were largely drowned out by the much larger pro-Obama crowd surrounding them.

Texas Attorney General Ken Paxton, speaking to reporters on the courthouse steps, said he was not bothered by the overwhelming display of support for the immigration program.

"We are here defending the Constitution," he said. "So whether we have people out here or not is irrelevant."