

## **The Latest Attack on Immigration Reform**

By Julianne Hing

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Republican congresspeople and attorneys general across the country have ramped up their multi-pronged attack on the deportation deferral programs President Obama expanded with his historic executive action this past November. The question: Is it working?

Senate Republicans on Tuesday failed to garner enough votes to pass a House-approved bill that attached a rollback of Obama's executive action to Department of Homeland Security (DHS) funding. Without a funding bill, DHS will run out of money on February 27. Both parties are using this date as a deadline for their machinations. But the president has vowed to veto any bill that would undo his programs, which will grant millions of undocumented immigrants temporary work permits and protection from deportation.

Despite the political uncertainty, federal immigration authorities are moving straight ahead and readying themselves to roll out Obama's program. The United States Citizenship and Immigration Services announced last week that it will begin accepting applications for expanded DACA on February 18. The expanded program will extend people's work authorizations from two to three years. It will also remove the age cap on applications. (The old DACA program allowed only immigrants under 31 who had arrived in the U.S. before age 16 and lived here for five years or longer to apply. Now they can be over 31.)

On the state level, a district judge in Brownsville, Tex., is expected to rule any day now on a lawsuit Texas and 25 other states filed challenging Obama's executive action. The suit (PDF) is hardly the first to challenge how the president is using his executive authority, but it's certainly backed by the most robust party of plaintiffs. Filed by Texas' then-attorney general and now governor Greg Abbott in December, the lawsuit started with 17 states and ballooned to more than two dozen. One attorney general, Nevada Republican Adam Laxalt, joined the lawsuit in opposition to the state's Republican governor, Brian Sandoval.

At the heart of the lawsuit is the claim that President Obama overstepped his authority when he offered deportation protection to undocumented youth in 2012 and extended it to others including undocumented parents in 2014.

Texas argues that Obama unilaterally moved to “change the law,” and flout Congress’ wishes and that the federal government “promotes human trafficking,” and “cause[d] a humanitarian crisis” in the form of the child migrant crisis this past summer.

These are serious charges, but immigrant rights advocates say the case is open-and-shut. “We remain extremely confident that at the end of this legal process [the president’s executive action] will be held constitutional and will go into full effect as planned,” Marshall Fitz, vice president of immigration policy at the Center for American Progress, told reporters last week.

Mayors of the country’s largest cities, including Eric Garcetti of Los Angeles, New York City’s Bill de Blasio, Washington, D.C. mayor Muriel Bowser, Chicago’s Rahm Emanuel and 23 more, have filed an amicus brief in support of Obama’s executive action. In November, some 135 immigration law professors signed a letter (PDF) laying out exactly how and why the president had the legal authority to act as he did. Congress has explicitly given the executive branch broad authority to set enforcement priorities, and to name those the country ought and ought not to deport, professors explained.

“The overwhelming consensus among legal scholars is that President Obama was well within his executive sphere in acting as he did,” says Lynne Rambo, a professor of law at Texas A&M University.

But even before addressing Obama’s legal authority, Rambo says, she’s not convinced that Texas and the 25 other states can even clear a legal hurdle that shows they have “standing,” that is, the ability to show that the federal government has harmed them and that the suit’s contents would remedy it.

To establish harm, Texas wrote in its complaint that Obama’s executive action “will expose Texas to the cost of processing and issuing licenses and benefits.” In addition to that, “the states are claiming that by issuing this directive, President Obama has caused the influx of immigrants into their jurisdictions,” Rambo says. In order to have standing, Texas needs to show a direct link between Obama’s executive order and its perceived injuries, explains Drexel University immigration law professor Anil Kalhan.

Two other lawsuits challenging the president’s executive actions— one filed by the union that represents Immigration and Customs Enforcement (ICE) officers and another filed by Arizona’s notorious Sheriff Joe Arpaio—have already been thrown out of court for lack of standing, says Kalhan. The U.S. government has claimed that the suit Texas is spearheading has no standing.

Peter Margulies, a professor at Roger Williams University School of Law who co-wrote an amicus brief the Cato Institute filed in support of Texas, insists that the state does indeed have legal standing in this case. “It doesn’t require more prediction to say that if [DACA and DAPA]

work as intended, Texas will have to spend more money to have its officials do more work in licensing,” Margulies says. With an undocumented population estimated at 1 million, the costs of processing DACA and DAPA recipients should help make Texas’ case for standing, Margulies says.

Margulies also calls Obama’s executive action a “license for lawbreaking.” He argues that by offering work permits to people who would otherwise lack a pathway to legal status, the president is doing more than just setting enforcement priorities. Congress, he says, has offered the president “very generic authority” to set the nation’s deportation priorities but that doesn’t include work permits. “There’s nothing wrong with people wanting to work,” says Margulies. “It just so happens to violate the law.”

Immigration advocates, despite their confidence, are bracing for a hostile ruling. A ruling for the plaintiffs would kick off a long road of litigation, “which would definitely gum up the works,” says Drexel’s Kalhan. And despite quick dismissals of other lawsuits, “this is [about] a high-profile and highly politicized set of issues,” says Kalhan. “If we were talking about the lawsuits against Obamacare at this stage I wouldn’t have guessed that they’d go to the Supreme Court.”

If the Texas case ends in the High Court, Kalhan warns, “all bets are off.”