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Appeals court tosses earlier challenge to Obama's executive action

By Jason Buch

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Judges from the appeals court that will hear a legal challenge to President Barack Obama's executive action on immigration threw out a lawsuit Tuesday over an earlier version of his policy.

Lawyers differed over how much could be divined from the tea leaves in a Fifth Circuit Court of Appeals opinion that found the state of Mississippi couldn't challenge a 2012 policy, known as Deferred Action for Childhood Arrivals, that granted two-year reprieves from deportation for some young immigrants in the country illegally.

The three-judge panel ruled that Mississippi couldn't show harm — or evidence that the state would incur costs — because of the program.

It's not clear if any of the judges in the Mississippi case will sit on the same panel that later this month will hear arguments about an expansion of the deferred action for young immigrants, also known as DACA, and a similar program for the parents of U.S. citizens and lawful permanent residents, known as DAPA.

Announced last year, the two programs are expected to extend benefits to nearly 5 million immigrants in the country illegally.

Regardless of who sits on the panel hearing the arguments about DAPA, which a Brownsville federal judge temporarily halted earlier this year, Tuesday's decision gives a glimpse of how the Fifth Circuit will look at the case, said David Leopold, an immigration attorney and past president of the American Immigration Lawyers Association.

A state that wants to sue the government over DACA or DAPA "has to show concrete harm, and Texas's harm is pretty speculative," Leopold said.

U.S. District Judge Andrew Hanen issued an injunction against the programs in part because Texas said it would have to issue driver licenses to immigrants who, without the executive action, wouldn't be eligible for them.

By showing they'd incur the cost of issuing driver licenses, Texas did a better job of showing harm than Mississippi did in its lawsuit, said Leif Olson, an attorney from Humble who represented the conservative Cato Institute in a "friend of the court" brief filed in the Texas case.

Tuesday's ruling "is showing us how the court is going to look at the question (of costs incurred by the state), but there's nothing in it that indicates how it will rule on the question," Olson said.

Also on Tuesday, Hanen denied the government's request that he lift his injunction on DAPA and expanded DACA and excoriated the government for, he said, misleading him during arguments.

Government attorneys told Hanen in February that they hadn't launched expanded DACA when, in fact, recipients of the 2012 DACA, which was not part of the Texas lawsuit, had begun receiving three year extensions, instead of the two-year work permits they initially received.

"This Court expects all parties, including the Government of the United States, to act in a forthright manner and not hide behind deceptive representations and half-truths," the judge wrote. "That is why, whatever the motive for the Government's actions in this matter, the Court is extremely troubled by the multiple representations made by the Government's counsel—both in writing and orally—that no action would be taken pursuant to the 2014 DHS Directive until February 18, 2015."

Hanen ordered the federal government to turn over documents related to its immigration policies.

Judges have yet to rule on the constitutionality of Obama's executive action. Mississippi was joined in its lawsuit by several U.S. Immigration and Customs Enforcement agents. The Fifth Circuit, agreeing with a federal district judge in Dallas, also ruled they didn't have standing to sue.

The issue of Obama's authority to grant deferred action still is pending before Hanen's court. He ruled that the administration hadn't followed federal rule-making procedures by not holding a public comment period, and didn't address whether the president has constitutional authority for his executive action.