Written by **Warren Mass** on April 18, 2016

Supreme Court Begins Hearing Arguments in Obama Immigration Action Case

The Supreme Court will hear oral arguments on April 18 in the case of *United States v. Texas*, a lawsuit filed by Texas and 16 other states in December 2014 against the federal government following President Obama's November 20, 2014, announcement that he would unilaterally suspend immigration law as applied to four million illegal immigrants who would otherwise face deportation. Nine other states later joined in the suit against the administration.

Ruling on the states' lawsuit, on February 16, 2015, U.S. District Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas in Brownsville issued an order of temporary injunction blocking the federal government from implementing the Obama administration's use of executive actions to grant relief from deportation, legal status, and permission to apply for work permits to illegal aliens who are the parents of a U.S. citizen or a lawful permanent resident.

Hanen's injunction blocked the federal government, and specifically Homeland Security (DHS) Secretary Jeh Johnson, from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program described in Johnson's November 20, 2014 memorandum. That memorandum expanded DACA (Deferred Action for Childhood Arrivals), which was initiated in 2012 by a policy memorandum sent from former DHS Secretary Janet Napolitano. It removed DACA's age cap and also extended work authorization for some illegal aliens who have been granted legal status to three years.

Following a series of subsequent appeals, a three-judge panel from the U.S. Court of Appeals for the Fifth Circuit in New Orleans upheld Hanen's injunction on November 9, 2015. Soon afterwards, a DOJ spokesman stated that the administration would file a petition asking the Supreme Court to review the case and on January 19, 2016, the High Court agreed to review the case, starting with its hearing of arguments on April 18.

The Supreme Court's ruling is due by the end of June.

As we noted in an April 7 article, 43 U.S. senators, led by Senate Majority Leader Mitch McConnell, filed an Amici Curiae (friend-of-the-court) brief to the Supreme Court on April 4, in support of the 26 state states that are plaintiffs in *United States v. Texas*. The senators based their case on constitutional grounds, stating that, as members of the Senate, they had an "interest in protecting the legislative powers that Article I of the Constitution confers upon the Congress of the United States." They argued:

> The Constitution provides Congress with the powers to "establish an uniform rule of Naturalization," to regulate interstate and foreign commerce, and to prescribe all such laws as are Necessary and Proper for carrying those powers into execution.… In exercise of those powers, Congress has enacted a comprehensive scheme for the regulation of legal and illegal aliens in the United States, including providing standards and procedures that determine when they may work

> in this country and when they may enjoy benefits provided from the public fisc [treasury]. Because the Executive's orders contravene the letter and the spirit of the immigration laws, and threaten the separation of powers enshrined in the Constitution, amici submit this brief in support of Respondents [the states].

The same day that the High Court agreed to hear the case, January 19, the *Wall Street Journal's* "Law Blog" noted that in granting the administration's petition, the court prescribed the following:

> In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, §3."

In an analysis of *United States v. Texas* posted on SCOTUSblog.com on April 11, Lyle Denniston, a journalist who specializes in Supreme Court cases, observed:

> When the Supreme Court in mid-January agreed to review the legality of President Barack Obama's ambitious new policy for delaying the deportation of nearly five million undocumented immigrants, the Justices enlarged the case into a major constitutional test. But, with eight Justices now on the bench, the Court could find itself having to decide it on a narrower, yet still historically important, constitutional basis.

In his analysis, Denniston made an interesting observation about the growing tendency of states to file lawsuits against the federal government to rein in what they consider to be abuses of federal power:

> The legal fight was brought on by states where Republicans dominate the governments, and where the idea of suing the national government over policy disputes has grown more and more popular. *United States v. Texas* is as much a part of those efforts as have been the repeated courthouse challenges to Obamacare (the Affordable Care Act), with states playing major roles in those cases, too.

While filing a suit against the federal government is one option for a state that claims its interests have been harmed by excessive federal overreach, and almost half of the senators have joined in *United States v. Texas* as friends of the court on the side of the states, this may not be the most effective strategy for either the Congress or the states.

We noted in our April 7 article that members of Congress squandered a better opportunity to stop the Obama administration's plan to grant amnesty to illegal immigrants when it failed to defund the Department of Homeland Security (DHS) in 2015. By failing to take that more decisive action, the Republican congressional eventually gave the Obama administration what it wanted, banking on the uncertainty of stopping the amnesty-granting executive actions in court.

The states, as well, have more effective ways to stop the federal government from implementing actions that they consider to be unconstitutional within their boundaries, including the important strategy known as nullification.

Though volumes have been written about this legal strategy, consider what was written in a recent article posted by *The New American*, about a pair of companion bills currently working their way through the two houses of the Tennessee state legislature (HB 1828 and SB 1790) that would amend the Tennessee state code to prohibit "state and local governments from enforcing, administering, or cooperating with the implementation, regulation, or enforcement of any federal executive order or U.S. supreme court opinion unless the general assembly first expressly implements it as the public policy of

the state."

The author notes, concerning these bills:

> Beyond the potential protections this bill affords for the right of citizens of the Volunteer State to keep and bear arms (as guaranteed by the Second Amendment and threatened by President Obama's flurry of fiats), it could stop at the state borders enforcement of numerous unconstitutional programs and policies of the federal government.

The article explains that such an act of refusal by states to cooperate in violating the Constitution is called nullification. As Thomas Jefferson wrote, nullification is the "rightful remedy" to federal overreach.

Following the death of Justice Antonin Scalia, the High Court will have to proceed with eight justices. A 4-4 vote on the *United States v. Texas* would mean the lower court's ruling will stand, which is good news for the states, for now. However, in the future, the states may want to consider using the nullification option, as Tennessee — and other states — currently are doing.

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