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# Obama Loses Again in States' Immigration Lawsuit

An appeals court panel has sided with foes of 'executive amnesty.'

By [Steven Nelson](#) ([/topics/author/steven\\_nelson](#)) | Staff Writer

May 26, 2015, at 5:28 p.m.

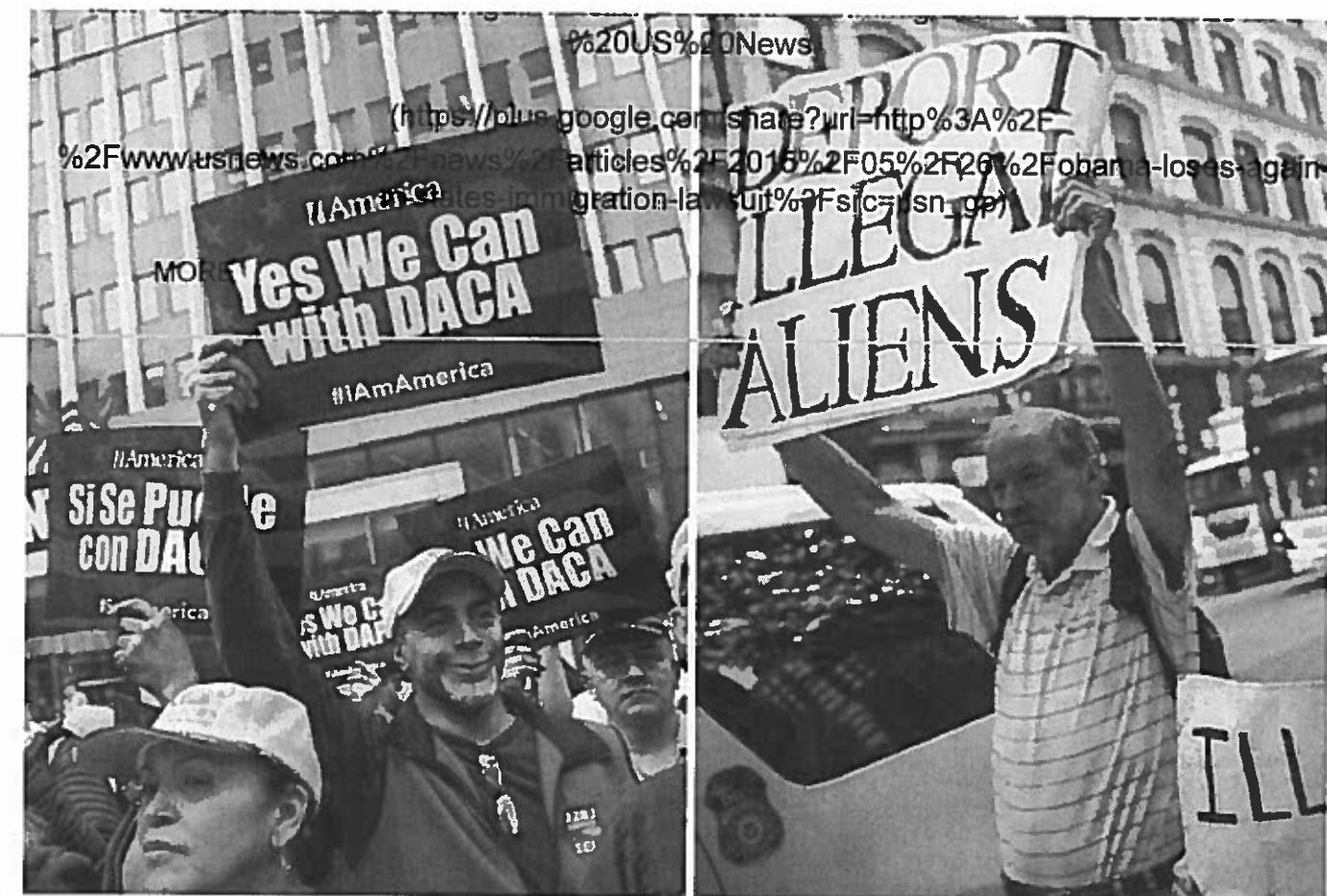
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Activists protest for and against President Barack Obama's immigration policies on May 19 in New York City. Getty Images

State governments fighting the Obama administration's plan to extend a reprieve to millions of people living illegally in the U.S. won again in court Tuesday.

A divided three-judge appeals panel, ruling in the states' favor, denied a Department of Justice bid to overturn a lower court order that since February has stalled (<http://www.usnews.com/news/articles/2015/02/17/obama-immigration-actions-on-ice-after-judges-ruling>) the contested immigration policies.

The policies unveiled in November would postpone possible deportation proceedings and grant work permits for as many as 5 million people living in the U.S. without legal permission.

One program would benefit parents of U.S. citizens or permanent residents. The other would expand eligibility for the existing Deferred Action for Childhood Arrivals program, created by the administration in 2012 to provide deportation relief for people brought to the country as minors.

*RZme*

The two-judge majority on the appeals panel found that Texas has standing to challenge the policies and that the Obama administration is unlikely to prevail "on the merits of its appeal" of the February injunction by U.S. District Judge Andrew Hanen. Twenty-five states have joined Texas in the suit. (https://plus.google.com/share?url=http%3A%2F%2Fwww.usnews.com%2Fnews%2Farticles%2F2015%2F05%2F26%2Fobama-loses-again-in-states-immigration-lawsuit%3Fsrc=usn\_gp)

[RELATED: [MORE Appeals Panel Hears Arpaio Immigration Case](#) (//www.usnews.com/news/articles/2015/05/01/obama-immigration-actions-back-in-court-in-arpiao-case))

"Look, we're disappointed, but this was not an unexpected decision at all," Marielena Hincapie, executive director of the National Immigration Law Center, said on an afternoon conference call "But this decision is an outlier."

Hincapie said there's a "strong line of judicial precedent" in favor of using executive authority in immigration policy, giving her confidence of an ultimate victory. She wants the case brought to the U.S. Supreme Court quickly, so the policies could be implemented before Obama leaves office.

Hincapie said confusion and fear "will be felt in immigrant communities across the country as the news is shared," and speculated the lawsuit may have been put in motion to achieve that effect.

As with the lower court ruling, the judges found Texas' driver's license policy – which would require it to issue licenses to beneficiaries of Obama's plan, costing the state money – allowed it to sue. Being forced to change its driver's license policy would also be an injury, the judges rule.

The states have argued that the government violated the Administrative Procedure Act, which requires notice and comment for certain policies that are implemented without legislation.

[READ: [Immigration Advocates Mark Day DAPA Would Have Opened](#) (//www.usnews.com/news/articles/2015/05/20/immigration-advocates-mark-day-dapa-would-have-opened))

Many immigration advocates oppose going through the motions of the act's rule-making process even if doing so would speed resolution of the dispute.

"It might be an expedient solution here, but I would be a little bit concerned about the consequences of conceding it's necessary in this case," says Melissa Crow, legal director of the American Immigration Council, which supports implementation of the policies.

In a strongly worded dissent, Judge Stephen Higginson disagreed with his peers on the New Orleans-based U.S. Court of Appeals for the 5th Circuit, suggesting the policies are a lawful

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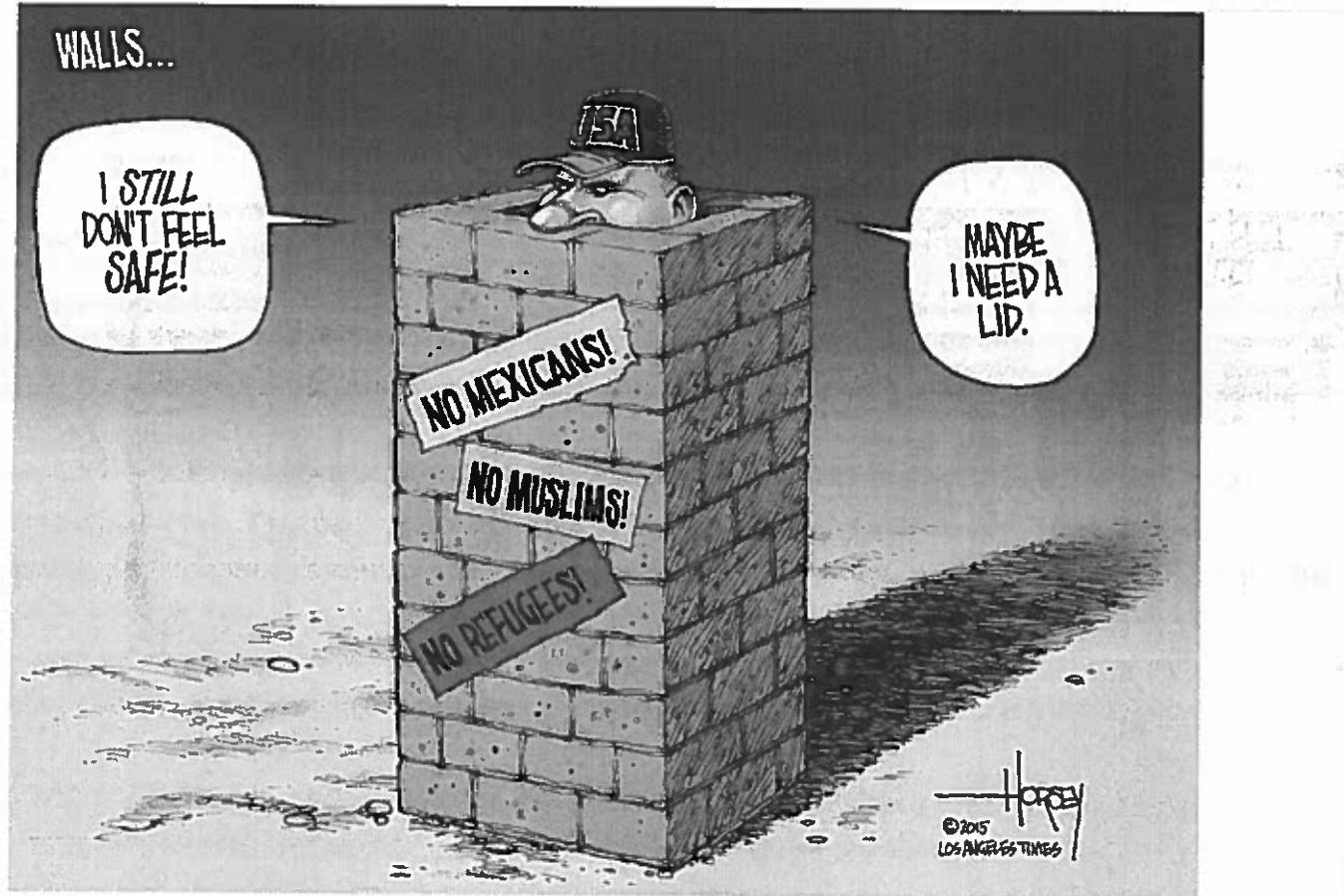
exercise of prosecutorial discretion and that it is up to Congress – rather than the courts – should change laws that allow for executive branch discretion.

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"The political nature of this dispute is clear from the names of the briefs. Hundreds of mayors, police chiefs, sheriffs, attorneys general, governors, and state legislators – not to mention 185 members of Congress, 15 states and the District of Columbia on the one hand, and 113 members of Congress and 26 states on the other," he wrote. "I would not affirm intervention and judicial fiat ordering what Congress has never mandated."

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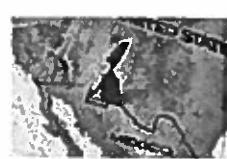
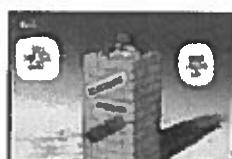
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A ~~panel of the 5th Circuit Court of Appeals~~ ~~earlier this month~~ ~~in the new~~ ~~states' suit~~ ~~against~~ ~~the president's policies~~ (http://www.usnews.com/news/articles/2015/05/26%2Fobama-loses-again-in-states-immigration-lawsuit%3Fsrc=usn\_gp)

Another lawsuit against the president's policies – filed by Maricopa County, Arizona, Sheriff Joe Arpaio <sup>MORE</sup> in the nation's capital – is awaiting a federal appeals court ruling (<http://www.usnews.com/news/articles/2015/04/obama-immigration-actions-back-in-court-in-arpaios-case>). That case, which additionally challenges the original DACA program, appears to face more of an uphill climb and was dismissed (<http://www.usnews.com/news/articles/2014/12/24/arpaios-immigration-lawsuit-against-obama-thrown-out-of-court>) by a lower court judge in December.



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# New Pro-Amnesty Lawsuit Undermines Obama's Unlawful Amnesty Executive Order

Next month, the Supreme Court of the United States will hear oral argument in *United States v. Texas* (<http://www.scotusblog.com/case-files/cases/united-states-v-texas/>) [1], which is the legal challenge by Texas and numerous other states to the Obama administration's "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA) program.

That program sought to provide amnesty for 5 million illegal aliens with a stroke of the president's pen (<http://www.heritage.org/research/commentary/2015/3/please-explain-100000-deferrals-for-illegal-alien>) [2]—and it sought to insulate the unlawful action from challenge in court by claiming the action was simply within the "prosecutorial discretion" of the president.

The program was blocked by Judge Andrew Hanen, a federal District Court judge in Texas, and his order was upheld on appeal before the United States Court of Appeals for the Fifth Circuit (<http://www.scotusblog.com/wp-content/uploads/2015/11/15-40238-CV0.pdf>) [3]. It is that Fifth Circuit decision which is before the Supreme Court this term.

One of the key arguments of the government in that case is that DAPA is "presumptively unreviewable prosecutorial discretion because 'lawful presence' is not a status and is not something that the alien can legally enforce" (<http://www.scotusblog.com/wp-content/uploads/2015/11/15-40238-CV0.pdf>) [3].

The Obama administration asserts that DAPA can be revoked at any time and doesn't allow illegal aliens to sue for benefits. Texas claims that DAPA hurts the state because, among other things, DAPA forces Texas to process driver's licenses for the aliens. The federal government nevertheless responds that this cost is only due to Texas's choice ([http://www.scotusblog.com/wp-content/uploads/2016/01/15-674\\_rb\\_us\\_v\\_texas.pdf](http://www.scotusblog.com/wp-content/uploads/2016/01/15-674_rb_us_v_texas.pdf)) [4] to provide these benefits.

Recently, however, an activist group sued the state of Georgia claiming that the federal constitution *mandates* that illegal alien DAPA beneficiaries receive in-state tuition (<http://latino.foxnews.com/latino/news/2016/03/09/latino-civil-rights-organization-sues-in-georgia-for-in-state-tuition-for/>) [5].

The lawsuit ([http://maldef.org/assets/pdf/2016\\_03-09\\_MALDEF\\_GLAHRvDEAN\\_Complaint.pdf](http://maldef.org/assets/pdf/2016_03-09_MALDEF_GLAHRvDEAN_Complaint.pdf)) [6] claims that the DAPA memos have preemptive force: that is, that pursuant to the supremacy clause in Article IV of the Constitution, states cannot interfere with DAPA, which represents "federal immigration law" rather than the abdication or violation of federal immigration law. It also claims that denial of in-state tuition for illegal aliens given amnesty under DAPA violates their Equal Protection rights, because there is no "valid justification" to treat lawful permanent residents differently from illegal aliens in the DAPA program.

Set aside the absurdity of these claims. More important is the fact that the lawsuit itself is a strategic mistake because it undermines the administration's legal position justifying DAPA in the first place.

If it is true that the federal constitution mandates that illegal aliens receive certain benefits from the state, simply because the president has chosen not to prosecute those individuals for a crime, then DAPA itself *does* change legal rights and responsibilities. And in that case, Texas and the many states suing to block DAPA have a stronger case before the Supreme Court next month.

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In fact, it would not be surprising if this lawsuit were brought up at oral argument as a reason why Texas and the other states have standing to challenge DAPA, or as a reason why DAPA should have been subject to formal rulemaking procedures required by federal law (<https://www.archives.gov/federal-register/laws/administrative-procedure/553.html>) [7].

While the actions of one activist group obviously do not bear on the validity of the litigation strategy of the Justice Department in defending DAPA before the Supreme Court, it might give some justices pause to know that vacating the Fifth Circuit opinion could open the door to a host of lawsuits against state governments which, quite reasonably, want to limit government-provided benefits to citizens or legal residents.

*Andrew R. Kloster is a legal fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, focusing on civil rights, the role of the federal courts and other constitutional issues.*

**Editor's Note:** This piece was originally published by The Daily Signal (<http://dailysignal.com/2016/03/11/new-pro-amnesty-lawsuit-undermines-obamas-case-for-his-amnesty-executive-order/>) [8].

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