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Lawsuit vs Obama's Immigration Actions Will Fail--If Judge Follows Law

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Supporters of immigration reform are gearing up for what [many expect to be bad news](#) out of a federal court in Brownsville, Texas. Judge Andrew Hanen is about to decide whether or not to block the executive actions on deportations President Obama announced late last year. The actions, which have been challenged in federal court by the State of Texas and 25 other states, expand DACA -- the deportation reprieve offered to undocumented immigrants who arrived in the U.S. as children -- and create DAPA, a temporary deportation reprieve for undocumented parents of U.S. citizens and lawful residents.

The conventional wisdom is that Judge Hanen will enjoin implementation of the executive actions, perhaps as early as this week. Observers cite to a 2013 opinion Judge Hanen wrote in *U.S. v. Navara-Martinez*, an unrelated criminal prosecution for alien smuggling. There Judge Hanen, using extremely harsh language, lamented what he described as "the apparent policy of the Department of Homeland Security of completing the criminal mission of individuals who are violating the border security of the U.S." He went on to say the "Department of Homeland Security should enforce the laws of the United States -- not break them."

To many that sounds like a jurist itching to rule against Mr. Obama's executive action on deportations. And it's likely why the State of Texas filed the case in the Southern District of Texas where Judge Hanen presides. The 30 page lawsuit prominently cites *Navara-Martinez* in an obvious effort to remind the judge that he has already found that the Administration has colluded in a criminal conspiracy to violate the law.

But the conventional wisdom could be way off. In fact, there's a strong chance that Judge Hanen will throw the case out -- if he correctly follows the law.

Here's why:

First, and perhaps most importantly, the State of Texas has filed a bogus complaint; it reads more like a factually inaccurate press release than a legal document. It fails to describe exactly how the plaintiff states are or will be concretely harmed by the temporary deportation reprieves; especially when the Administration has used all resources allocated to it annually by Congress to detain and deport undocumented immigrants -- approximately 400,000 people a year -- leading some to label President Obama the "deporter-in-chief." Further, at least [one federal court](#) has dismissed a similar challenge to the President's executive actions brought by Joe Arpaio, the infamous anti-immigrant sheriff of Maricopa County Arizona, concluding Arpaio lacked standing to sue. While the decision is not binding on Judge Hanen, its cogent analysis of the complex legal doctrine of standing certainly provides persuasive authority for the dismissal of the Texas lawsuit.

Second, there's no question Judge Hanen is extremely frustrated with DHS's policy of reuniting unaccompanied minors with their undocumented parents in the U.S. But his opinion in *Navara-Martinez* was just that, an opinion. While reasonable minds may differ as to the prudence of using a judicial forum to express such views, nothing Judge Hanen did exceeded the bounds of his authority as a federal judge. Indeed, he noted judges are not authorized to make policy. "This Court takes no position on the topic of immigration reform," Judge Hanen wrote, "nor should one read this opinion as a commentary on that issue. That is a subject laced with controversy and is a matter of much political debate which is not the province of the judicial branch."

Third, while Judge Hanen severely criticized what he termed the Administration's "failure to enforce current United States law," he did so in the context of an alien smuggling prosecution. Whether or not one agrees with the judge's views, it's clear he was neither criticizing the Administration's civil immigration enforcement priorities nor questioning prosecutorial discretion in general, including deferred action on deportations. "This Court is not opposed to the concept of prosecutorial discretion," wrote Hanen, "if that discretion is exercised with a sense of justice and common sense." And it would seem -- at least to me -- that common sense immigration enforcement includes processes like DACA and DAPA which allow the Administration to focus limited resources on deporting dangerous felons, national security risks and recent border crossers rather than DREAMERS and mothers and fathers of U.S. citizens and lawful permanent residents.

Judge Hanen, like all federal judges, has sworn to "faithfully and impartially discharge and perform" his duties under the Constitution. That is a serious oath which requires him to fairly

apply the law -- regardless of whether or not he personally agrees with the President's executive actions on deportations. In the meantime many will take comfort in knowing that whatever Judge Hanen decides he will not likely have the last word. That's all but certain to come from the appellate courts.