Justices May Yet Have to Face Free Speech Immigration Issue

By Suzanne Monyak

Law360 (May 7, 2020, 9:11 PM EDT) -- The U.S. Supreme Court ducked the question of whether a criminal statute banning encouraging illegal immigration is constitutional on Thursday, but its ruling on procedural grounds leaves the door open for others to challenge the law again.

Justice Ruth Bader Ginsburg penned the high court's unanimous decision, reversing a Ninth Circuit ruling that the statute, which makes it a felony to encourage or induce illegal immigration, is too broad and could sweep in protected free speech from immigration lawyers offering legal advice, for instance, or even overzealous grandmothers.

But rather than uphold the law as constitutional, Justice Ginsburg, a former civil procedure professor, said the case had to be sent back on procedural grounds — namely, that the Ninth Circuit had made its decision based on arguments raised not by the parties, but by legal advocacy groups invited to file amicus briefs.

She accordingly instructed the appeals court to redo its decision based on legal reasoning that bears "a fair resemblance to the case shaped by the parties," reviving a conviction under the contested statute against California immigration consultant Evelyn Sineneng-Smith.

However, with a once-winning legal argument now open and available for any similarly convicted person to raise in court without the procedural defects, the justices may still end up tackling the question down the line.

"The issue isn't going to go away," said Gabriel J. Chin, a law professor at the University of California, Davis School of Law. "Everybody charged in the future is going to raise the issue. There's no downside."

The stakes for the case had been high, with free speech advocates warning that the criminal statute, part of Section 1324 of the Immigration and Nationality Act, could be used to prosecute advocates and attorneys who help immigrants, or even grandmothers hoping their grandchildren might stay in the U.S. longer with them.

"Anytime you have an overbroad criminal law on the books that targets protected speech, that's a problem," Esha Bhandari, a senior staff attorney at the American Civil Liberties Union, told Law360 on Thursday. "People should not have to live at the mercy of federal prosecutors exercising discretion."

But rather than dive into the merits of the constitutional question that the justices had taken up, the high court issued a "unanimous duck," said Burt Neuborne, a civil liberties professor at the New York University School of Law who founded the Brennan Center for Justice.

If another circuit court struck down the statute for the same reasons the Ninth Circuit did, an appeal of that ruling could force the justices to reconsider the issue.

The high court could even find itself reviewing the statute's constitutionality once more in the same case if the Ninth Circuit strikes down the statute again on remand. On its second try, the Ninth Circuit could consider Sineneng-Smith's other argument, which was not part of the Supreme Court appeal: that the statute is unconstitutionally vague.

The Ninth Circuit could also ax the statute on the same grounds as before — so long as it is Sineneng-Smith's attorney who raises the issue rather than an amicus filer. The three Ninth Circuit judges who sat on the panel in 2018 are all still on the bench and could come to the same conclusion.

"I don't think the defendant is precluded on remand from raising any arguments that she wants," Neuborne said. "I think that would be a due process violation."

Neuborne said he suspected the opinion may have been a message to the lower courts not to be activists, both to liberal and conservative judges. While it's not routine for appeals courts to invite amici to raise new arguments, it's not uncommon either, he said.

"This is very characteristic of Justice Ginsburg," he said. "Taking the judges, rapping them across the knuckles, and saying, let me tell you what it means to be a federal judge."

But law professors still lamented that the high court had not clearly defined the line between what constitutes judicial overstep and what is an appropriate amount of judicial intervention when judges don't believe that the parties have raised key arguments.

Justice Ginsburg's rebuke of the Ninth Circuit had been sharp, saying that the panel's "radical transformation of this case goes well beyond the pale."

If the appeals court had simply ordered the parties themselves to weigh in on the overbreadth issue or hinted that Sineneng-Smith's attorney should raise that argument, perhaps the Supreme Court wouldn't have had the same issue with the proceedings, said Brian Soucek, another law professor at UC Davis.

"I just don't see anything in today's opinion that calls that practice into question," he said.

Justice Ginsburg acknowledged that the party presentation principle, or the principle that judges should stick to issues presented by the parties, is "supple, not ironclad," noting that pro se filers, for instance, might need more guidance from judges on how best to frame their arguments.

But the justice failed to offer a clear "guiding standard," said Amanda Frost, a professor at American University's Washington College of Law, who authored an article on party presentation for the Duke Law Journal.

"Ginsburg didn't really have a good rationale for why this was beyond the pale," Frost said. "I find it troubling when courts raise issues at the eleventh hour without letting the parties weigh in, but that's not what the Ninth Circuit did."

Though it may have been, in fact, what the Supreme Court did.

In knocking the Ninth Circuit for deciding the case on issues not raised by the parties, the high court issued a decision on a topic that was hardly raised in briefing or at oral arguments, which largely centered on the key question of the case: whether the statute violated free speech.

The issue of the Ninth Circuit pushing the argument itself was raised briefly in the government's reply brief and once by Deputy Solicitor General Eric Feigin during his opening

remarks at oral arguments. However, the issue didn't come up again for the rest of the arguments, with the justices instead spending those 40 minutes testing the limits of the statute with hypothetical scenarios of protected speech.

Frost called it "interestingly ironic."

"It's a little rich that the Supreme Court would go beyond the question presented and the arguments made in order to tell another court that it shouldn't go beyond the arguments made by the parties," Soucek said.

He added that the unanimous procedural opinion may indicate the justices had been struggling with the merits of the case.

"It's never a surprise to see Justice Ginsburg writing about civil procedure," he said. "But the fact that it's a unanimous short procedural decision on a ground not solidly presented by the parties, again, just suggests that the court wanted a way out of this one."

--Editing by Aaron Pelc.