TEXAS V. UNITED STATES
What Happens Now That the Fifth Circuit Has Issued Its Decision?

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On November 9, 2015, the Fifth Circuit Court of Appeals affirmed the order of a Texas federal district court that has blocked the implementation of DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) and *expanded* DACA (Deferred Action for Childhood Arrivals). The court in Texas issued its order earlier this year, in February, after President Obama announced the DAPA and expanded DACA initiatives last November.

The Fifth Circuit's decision means that the two initiatives remain blocked, but it also opens the door for the federal government to ask the U.S. Supreme Court to review the case, which is called *Texas, et al. v. United States, et al.*

There were three judges on the Fifth Circuit panel that affirmed the Texas court's order. Two of the judges voted to affirm the order, and one was in favor of overturning it. The two judges who formed the majority in this decision, Judges Smith and Elrod, had voted earlier this year to deny the federal government's request for an emergency stay of the Texas court's order.

The one judge who was not in favor of affirming the Texas court's order—Judge King—wrote a strong dissent that expands on the arguments made by a judge—Judge Higginson—who, earlier this year, dissented when the Fifth Circuit denied the federal government's request for the emergency stay. Judge King's dissent explains why the order blocking the president's immigration initiatives is legally unsound and should be lifted.

What happens next?

The federal government now can ask the U.S. Supreme Court to review the case, and the U.S. Justice Department has already announced that it plans to do so. It is very important that this be done as soon as possible. We call on the Justice Department to move swiftly.

If the federal government acts immediately and the Supreme Court grants review, it is possible that the Court could rule as early as the end of June 2016 on whether to lift the Texas court's order or keep it in place.

What did the two-judge majority say in their ruling?

In their decision, the two-judge majority first determined that Texas had a right to bring the lawsuit against the DAPA and expanded DACA initiatives because of the amount of harm it might suffer if the initiatives were implemented. They based this determination solely on

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Texas's claim that it would incur costs in issuing driver's licenses to DAPA beneficiaries or be forced to change its driver's license laws.

The two-judge majority also upheld the Texas district court's finding that the plaintiff states had shown sufficiently well that the two immigration initiatives violate the Administration Procedure Act (APA) because the Obama administration did not go through the APA's notice and comment process when creating them. And, in an expansion of the Texas court's ruling, the two-judge majority also found that the immigration initiatives may violate the APA's "substantive requirements," since, as they wrote, DAPA is "manifestly contrary" to the Immigration and Nationality Act.

In a powerful dissent, the panel's third judge found that the Texas court's order was "a mistake" and criticized the majority's opinion for saying that the president's initiatives may violate the APA's "substantive requirements." The third judge's dissent lays out why the Texas court's order should be lifted and finds that DAPA and expanded DACA is a proper exercise of the federal government's prosecutorial discretion.

What this decision means going forward

For now, the Texas court's order that blocks DAPA and expanded DACA from being implemented remains in place, so the two initiatives are still on hold.

The original DACA program—the one that was created in 2012—remains in effect, and people who are eligible for deferred action under that program should apply for it. And the federal government's new "immigration enforcement priorities," also announced last November, can continue being implemented.

The Fifth Circuit's latest decision is a disappointing but not unexpected setback for the immigrant families waiting for the president's DAPA and expanded DACA initiatives. We will continue to fight to ensure that all aspiring Americans who qualify for these vital initiatives will, as soon as possible, be able to more fully contribute to the communities and country they call home.

More information about *Texas v. United States* is available at www.nilc.org/TXvUSlitigation.html.