

Legal Sidebar

Fifth Circuit Declines to Lift Injunction Barring Implementation of the Obama Administration's 2014 Deferred Action Programs

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In its [recent decision](#) in *Texas v. United States*, the U.S. Court of Appeals for the Fifth Circuit affirmed, by a vote of 2-1, a lower court decision—discussed in [earlier Sidebar postings](#)—that barred implementation of the Obama Administration's [proposed expansion](#) of the 2012 Deferred Action for Childhood Arrivals (DACA) program and a new deferred action program for parents of U.S. citizens and lawful permanent residents (LPRs) (known as DAPA). The Fifth Circuit did so, in part, because it agreed with the lower court's reasoning in finding that the states have standing to challenge these programs, the programs are judicially reviewable, and their establishment represents a substantive rule that should have been subject to notice-and-comment rulemaking. The Fifth Circuit went beyond the lower court's analysis, however, in finding that DAPA and the DACA expansion are impermissible because they conflict with certain provisions of the Immigration and Nationality Act (INA) or, alternatively, represent unreasonable interpretations of the INA. The latter aspect of the decision is noteworthy because it calls into question the permissibility of the 2012 DACA program, which was not challenged in *Texas*. It could also raise questions about the Executive's practice of granting of [work authorization](#) to certain aliens.

This was the second time a panel of the Fifth Circuit has addressed DAPA and the DACA expansion, with the majority of a three-judge panel having [previously rejected](#) the Obama Administration's request for a stay of the lower court's injunction pending the appeal, as discussed in an [earlier Sidebar](#).

Fifth Circuit's Affirmance of the Lower Court on Standing, Reviewability, and Rulemaking

In affirming the lower court on the questions of standing, reviewability, and the need for rulemaking, the majority did not significantly add to or alter the district court's analysis. In particular, as to standing the majority noted that Texas satisfied the requirements for constitutional, [Article III](#) standing, as well as those for prudential standing—an additional hurdle for claims brought under the Administrative Procedure Act (APA). Relying on [Massachusetts v. EPA](#), the court first noted that the plaintiff-states are entitled to “special solicitude” in the court's standing inquiry. As for constitutional standing, the majority concluded, in particular, that, if DAPA were implemented, Texas would suffer a concrete injury because the state would incur “significant costs” by having to issue state-subsidized driver's licenses to DAPA beneficiaries. With regard to prudential standing, the majority concluded that Texas's interest in denying public benefits to “illegal aliens”—which Congress [generally requires](#), absent the enactment of a state law that expressly provides for their eligibility—falls within the “zone of interests” regulated by the INA. The dissent, though, characterized the majority's standing analysis as “deeply troublesome,” noting, in particular, separation of powers concerns because, in the dissenting judge's view, the majority's ruling would “inject courts into far more federal-state disputes and review of the political branches.”

Concerning the court's authority to review DAPA and the DACA expansion, the majority recognized that there are [limitations to judicial review](#) of specific decisions of the Secretary of Homeland Security, but concluded that none of those limitations pertains to the decision to grant “lawful presence” to millions of aliens. The majority also concluded that it can review DAPA and the DACA expansion to determine whether the Executive exceeded its statutory powers

because these programs affirmatively confer lawful presence and permit work authorization. The programs are thus not tantamount to agency decisions not to take enforcement action. The dissent, though, disagreed that this was a basis for review, reasoning that the ability of deferred action beneficiaries to apply for work authorization is not a function of DAPA but of unchallenged regulations that have been in effect for decades.

The majority also affirmed the lower court's ruling that that DAPA and the DACA expansion should have been implemented through notice-and-comment rulemaking pursuant to the APA. The majority did so, in part, because it viewed the programs as [legally binding](#), not as a policy statement. It found no error in the lower court's factual finding that, although the [memorandum](#) announcing DAPA and the DACA expansion "[facially purports to confer discretion](#)," that discretion is "[merely pretext](#)," given the [low rate of rejection](#) in the 2012 DACA program and the provisions made for [handling DAPA applications](#) (a conclusion which the dissenting judge would have found [clearly erroneous](#)). The majority similarly found that DAPA is not a [procedural rule](#), since it [establishes substantive standards](#) by which applications for deferred action are evaluated.

Fifth Circuit Goes Beyond the Lower Court in Addressing Substantive Issues

The majority went beyond the lower court's ruling, however, in finding that DAPA and the DACA expansion violate the APA substantively, as well as procedurally, because they are "[not in accordance with law](#)" and "[in excess of statutory ... authority](#)." In so doing, the majority noted Fifth Circuit precedent that it "[may affirm the district court's judgment on any grounds supported by the record](#)." It further noted that it [assumed](#) that the permissibility of DAPA and the DACA expansion should be assessed under the precedent of [Chevron USA, Inc. v. Natural Resources Defense Council](#), which calls for courts to defer to agency interpretations of their governing statutes where Congress has not "directly spoken to the precise question at issue," and the agency's interpretation of an ambiguous statute is a reasonable one.

The majority found, however, that Congress had spoken to the precise questions at issue here in such a way as to preclude DAPA and the DACA expansion. In particular, it pointed to the INA's provisions regarding which aliens may lawfully enter and remain in the United States; discretionary relief from removal; and work authorization. [For example](#), it noted that DAPA would treat aliens who entered or remained in the United States in violation of federal immigration law and are the parents of U.S. citizens or LPRs as "lawfully present," while the INA permits "illegal aliens to derive a lawful immigration classification from their children's immigration status" only if the child is a U.S. citizen (not a LPR) who is at least 21 years of age, and the alien leaves the United States and waits at least 10 years before applying for one of a limited number of family preference visas. Alternatively, the majority found that even if Congress is not seen to have spoken on the precise questions at issue, the Executive's interpretation is "[unreasonable](#)" because it is "[manifestly contrary](#)" to the INA provisions previously noted. The majority further noted the "major policy" exception to *Chevron* deference—which is [based on the view](#) that Congress does not intend to delegate policy decisions of "economic and political magnitude to an administrative agency"—in finding DAPA and the DACA expansion [impermissible](#). It also rejected the view that DAPA and the DACA expansion are [grounded in historical practices](#) to which [Congress can be seen to have acquiesced](#) by not taking action to bar the practices.

The [dissenting judge](#), in contrast, would not have reached the question of whether DAPA and the DAPA expansion substantively violate the APA, given that the lower court had "expressly declined" to do so, and the Fifth Circuit had received what the dissenting judge viewed as "limited briefing" on the issue.

Implications of the Fifth Circuit's Decision

The Fifth Circuit's decision has obvious implications for the [aliens who had hoped to benefit](#) from the Obama Administration's proposed deferred action programs and their families, as well as states (and [other jurisdictions](#)) seeking to avoid implementation of new programs they allege would impose burdens on them. It would also seem to have implications for the 2012 DACA program, which was not at issue in *Texas*, but had previously been the subject of an [unsuccessful legal challenge](#), because the provisions of the INA noted by the Fifth Circuit in *Texas* could be similarly construed to bar the granting of deferred action and work authorization to aliens brought to the United States as children and raised here. In addition, the Fifth Circuit's decision could have implications for the Executive practice of granting work authorization to aliens not expressly authorized to work in the INA. Like its predecessors, the [Obama](#)

[Administration](#) has relied on the reference to aliens “[authorized to be ... employed ... by the \[Secretary of Homeland Security\]](#)” in the INA’s definition of “unauthorized alien” in claiming broad authority to grant work authorization to categories of aliens whose employment is not directly addressed by the INA. The Fifth Circuit majority, in contrast, viewed this “[miscellaneous definitional provision](#)” as an inadequate basis for the Executive’s granting of work authorization to large numbers of aliens given “[Congress’s stated goal](#) of closely guarding access to work authorization and preserving jobs for those lawfully in the country.” It also noted that Congress could not have intended the Executive to have discretion over [such major policy decisions](#).

The Administration [reportedly plans](#) to request Supreme Court review of Fifth Circuit decision.

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