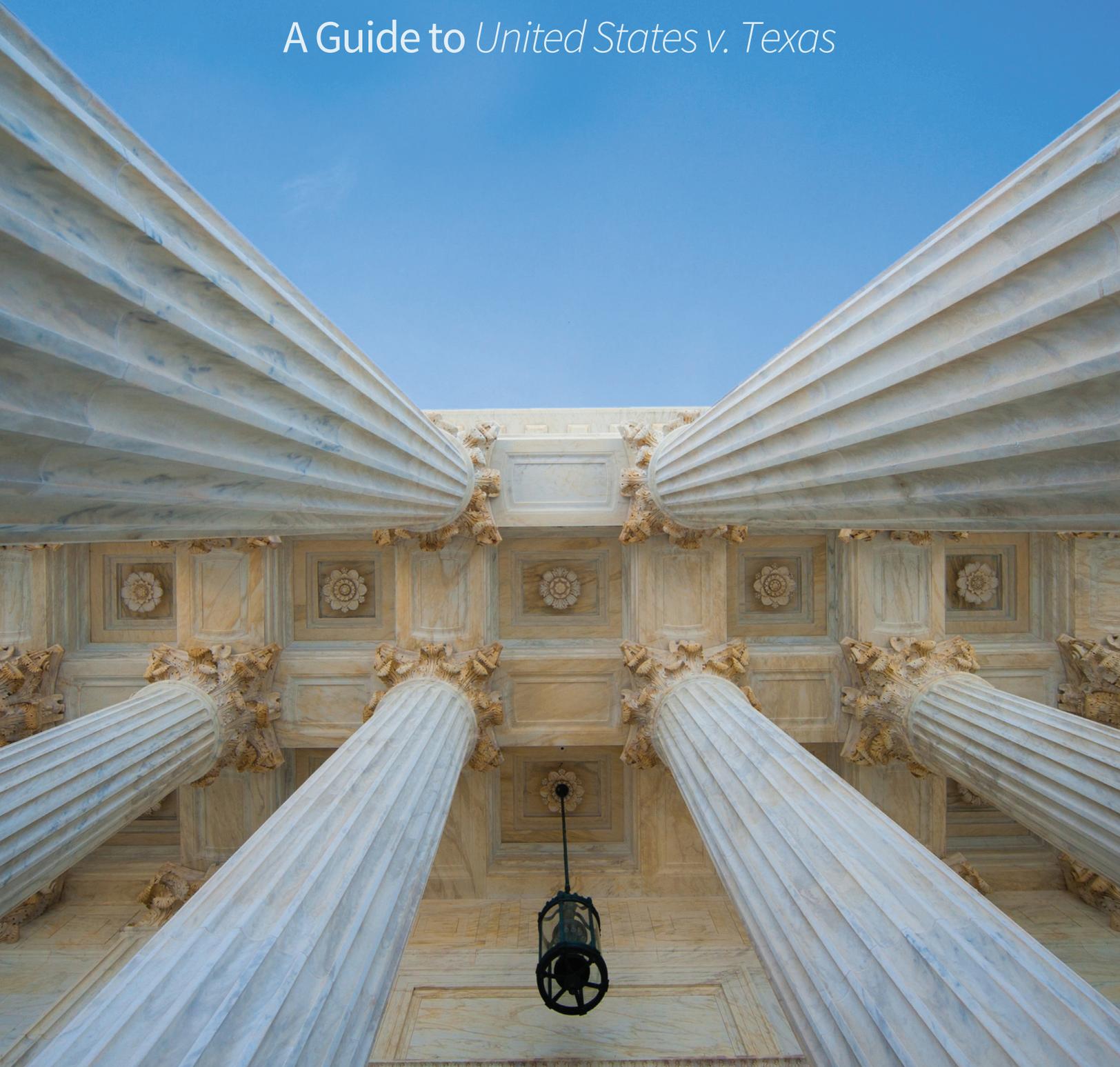


# DEFENDING DAPA AND EXPANDED DACA BEFORE THE SUPREME COURT

A Guide to *United States v. Texas*



## **ACKNOWLEDGEMENTS**

This paper is a product of the American Immigration Council. Josh Breisblatt, Michele Waslin, Beth Werlin, Melissa Crow, Guillermo Cantor, Kristin Macleod-Ball, Eric Gibble and Wendy Feliz contributed to the writing, editing and production of this guide.

## **ABOUT THE AMERICAN IMMIGRATION COUNCIL**

The American Immigration Council's policy mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, the American Immigration Council provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. We are a non-partisan organization that neither supports nor opposes any political party or candidate for office.

Visit our website at [www.AmericanImmigrationCouncil.org](http://www.AmericanImmigrationCouncil.org) and our blog at [www.ImmigrationImpact.com](http://www.ImmigrationImpact.com).

# CONTENTS

<b>1</b>	Introduction
<b>2</b>	Background and Definitions
<b>6</b>	The Lawsuit Basics
<b>9</b>	At the Supreme Court
<b>14</b>	Impacts
<b>17</b>	Conclusion



## INTRODUCTION

In the spring of 2016, the U.S. Supreme Court will consider *United States v. Texas*, a politically charged lawsuit about the legality of some of President Barack Obama’s executive actions on immigration. The initiatives in dispute—expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—have been on hold since a district court in Texas issued a preliminary injunction in the case in February 2015. A Supreme Court decision in favor of the United States could clear the way for the initiatives to go forward as early as June 2016.

The President’s executive actions are based on commonsense immigration enforcement priorities. The DAPA and DACA initiatives allow law enforcement officials to focus their attention on public safety risks, while allowing noncitizens with significant family and community ties to the United States to obtain temporary, renewable deferrals of deportation. To qualify to stay in this country, individuals will have to meet a variety of requirements and pass a criminal background check.

This guide provides brief answers to common questions about *United States v. Texas*, including what is at stake in the case, how the litigation began, what the contested issues are, and the impact the case may have on our country.

# BACKGROUND AND DEFINITIONS

## Q. What is DAPA?

Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, is an exercise of prosecutorial discretion that provides temporary relief from deportation (deferred action) and eligibility for work authorization to undocumented parents of U.S. citizens or lawful permanent residents (LPRs). The President first announced the initiative on November 20, 2014 as part of the series of administrative reforms—executive actions—on immigration.

DAPA will be open to individuals who:

- Have a U.S. citizen or LPR son or daughter as of November 20, 2014;
- Have continuously resided in the United States since at least January 1, 2010;
- Are physically present in the United States on November 20, 2014 and at the time of applying;
- Have no lawful immigration status on November 20, 2014;
- Are not an enforcement priority, which includes individuals with a wide range of criminal convictions (including certain misdemeanors), those suspected of gang involvement and terrorism, recent unlawful entrants, and certain other immigration law violators;
- Present no other factors that would render a grant of deferred action inappropriate; and
- Pass a background check.

DAPA grants will last for three years.

## Q. What is DACA and expanded DACA?

Deferred Action for Childhood Arrivals, or DACA, is an exercise of prosecutorial discretion that provides temporary relief from deportation (deferred action) and work authorization to certain young people brought to the United States as children—often called “DREAMers.” The Department of Homeland Security (DHS) first launched the initiative in 2012, and since that time it has helped over 700,000 eligible young adults move into mainstream life in the United States, thereby improving their social and economic well-being. To qualify under the original initiative, individuals must demonstrate that they:

- Were under the age of 31 on June 15, 2012;
- Arrived in the United States before turning 16;
- Continuously resided in the United States from June 15, 2007 to the present;
- Were physically present in the United States on June 15, 2012, as well as at the time of requesting deferred action from U.S. Citizenship and Immigration Services (USCIS);
- Entered without inspection before June 15, 2012, or any lawful immigration status expired on or before June 15, 2012;
- Are either in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are honorably discharged veterans of the U.S. Coast Guard or the U.S. Armed Forces; and
- Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors occurring on different dates and arising out of different acts, omissions, or schemes of misconduct, and do not otherwise pose a threat to national security or public safety.

Determinations are made on a case-by-case basis and are within the discretion of DHS. In some cases, individuals who met all the requirements listed above have been denied DACA because, in DHS’s opinion, they did not warrant a favorable exercise of discretion.

On November 20, 2014, the President announced expanded DACA, which modified the original DACA initiative by eliminating the age ceiling and making individuals who began residing here on or before January 1, 2010 eligible. Moreover, the Administration announced that DACA grants and accompanying employment authorization will last three years instead of two.

### **Q. What is prosecutorial discretion?**

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether—and to what degree—to enforce the law in a particular case. In immigration cases, prosecutorial discretion often arises around the question of whether someone should be placed in removal proceedings or whether to execute a removal order.

### **Q. What is deferred action?**

For years, the immigration agencies have employed a form of prosecutorial discretion called “deferred action.” Deferred action is the agency’s decision not to pursue enforcement against a person for a specific period of time. A grant of deferred action does not confer lawful immigration status or alter the person’s existing immigration status, and deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. Nonetheless, an individual with deferred action may apply for work authorization, i.e., an Employment Authorization Document (EAD).

### **Q. How will expanded DACA and DAPA be financed?**

The deferred action initiatives will be financed by a user fee of \$465 per application. This is similar to the DACA initiative that the President announced in 2012. DHS has stated that “there will be no fee waivers and, like DACA, very limited fee exemptions.”

### **Q. How many people are potentially eligible for DAPA and expanded DACA?**

A recent analysis from the Migration Policy Institute estimates that 3.7 million undocumented immigrants could qualify for protection from removal under the two initiatives.

## Q. How has the original DACA initiative already helped the lives of many young people?

Since it was first implemented in 2012, DACA has benefited hundreds of thousands of young people brought to the United States as children. As of December 31, 2015, over 700,000 young people have received DACA, broadening their educational opportunities. Many recipients now have access to public universities, trade schools, and additional scholarship opportunities. Research indicates that DACA recipients experience a pronounced increase in economic opportunities, such as getting a new job, opening their first bank account, and obtaining their first credit card.



## THE LAWSUIT BASICS

### Q. What is the lawsuit about?

Soon after the President announced expanded DACA and DAPA, Texas and 25 other states filed a lawsuit in federal district court in the Southern District of Texas to try to block the implementation of expanded DAPA and DACA.

### Q. What are the claims in the lawsuit?

The 26 states claim that expanded DACA and DAPA violate federal laws and the Constitution. Specifically, they make the following claims:

- Expanded DACA and DAPA violate the “Take Care Clause” of the Constitution, which states that the President must “take Care that the laws be faithfully executed.”
- Expanded DACA and DAPA violate the Administrative Procedure Act (APA) because these initiatives are arbitrary and capricious or otherwise not in accordance with the immigration laws.
- The federal government did not comply with certain technical procedural requirements under the APA, including notice-and-comment rulemaking, before it announced the expanded DACA and DAPA initiatives.

## Q. What is standing?

In order to bring a lawsuit, a person or entity must have a stake in the outcome of the case. This stake is called “standing,” or legal capacity, to file the suit. Whether the 26 states which filed the lawsuit have standing is a threshold issue in this case. This means that if the Court finds that the states lack standing, the case must be dismissed. Only one state needs to show standing for the case to meet this threshold.

Texas and the 25 other states are arguing that they have standing because Texas might incur additional costs when issuing drivers’ licenses to beneficiaries of the deferred action initiatives. In their brief to the Supreme Court, the states assert, “Texas would lose over \$130 per license... Texas therefore would lose millions of dollars if even a small fraction of DAPA-eligible aliens applied for driver’s licenses.” The federal government counters that such claims “are nothing more than allegations of indirect or incidental effects from the [DAPA] Guidance, not invasions of any legally-protected interest under the Constitution.” In fact, “virtually any administration of federal law by a federal agency could have such effects.” Moreover, Texas has chosen to subsidize driver’s licenses in the state. As a result, the alleged harm Texas will suffer—the increased expense of issuing driver’s licenses—is largely self-generated.

## Q. What is the “Take Care Clause”?

The “Take Care Clause” refers to Article II, Section 3 of the Constitution, which states: “[the President] shall take Care that the Laws be faithfully executed.” Essentially, this means that the President must faithfully execute the laws. The states assert that “DAPA violates the ‘Take Care Clause’ because it declares unlawful conduct to be lawful.”

Notably, the lower courts did not address the “Take Care Clause” in their decisions. Instead, they based their decisions on the government’s alleged failure to comply with the APA. However, when the Supreme Court agreed to hear the case, it directed both sides to address whether the President’s actions violated the “Take Care Clause” of the Constitution. The Court’s request for additional briefing on this issue suggests that it wants to resolve all the issues in the case, rather than leaving a loophole that could be the basis for a future decision by the district court, which could further delay the implementation of expanded DACA and DAPA.

## Q. How did this case get to the Supreme Court?

The 26 states initially filed this case in the district court, where Judge Andrew S. Hanen issued a “preliminary injunction,” meaning that he temporarily blocked the implementation of the expanded DACA and DAPA initiatives and prohibited the government from taking any further steps to implement these initiatives. The government appealed this decision to the Fifth Circuit Court of Appeals.

On November 9, 2015, by a 2-1 vote, the Fifth Circuit upheld the district court’s order granting the preliminary injunction. The majority accepted the district court’s findings that Texas has standing to bring this lawsuit and found that the states were likely to prevail on their APA claim that the federal government should have pursued notice-and-comment rulemaking.

Following the Fifth Circuit’s decision, the Department of Justice announced its intention to seek Supreme Court review. The federal government then filed its formal request—called a petition for certiorari—on November 20, 2015. On January 19, 2016, the Supreme Court granted certiorari (meaning, it agreed to take the case and review the Fifth Circuit’s decision). Oral arguments are set for April 18, 2016, with a decision likely to come in June 2016.

## Q. Does *United States v. Texas* directly impact *original* DACA?

No. Texas and the other states that filed the suit did not challenge the original DACA initiative, first announced in June 2012. As the Secretary of Homeland Security said in a statement after the district court issued a preliminary injunction (which halted expanded DACA and DAPA from going into effect and prohibited the government from taking any further steps to implement these initiatives), “Individuals may continue to come forward and request initial grants of DACA or renewal of DACA pursuant to the guidelines established in 2012.”



## AT THE SUPREME COURT

### Q. What is the Supreme Court’s process and timeline for deciding this case?

On January 19, 2016, the Supreme Court granted certiorari, meaning it agreed to take the case and review the Fifth Circuit’s decision. Oral arguments are set for April 18, 2016, and the Court will likely issue a decision in June 2016.

### Q. What issues are before the Court?

The Supreme Court first will consider whether the states have standing, or legal capacity, to bring the lawsuit. In addition, the Court may consider whether expanded DACA and DAPA are lawful or whether they violate the Constitution or the Administrative Procedure Act (APA).

More specifically, the four issues before the Supreme Court, as designated by the Court, are:

1. Do any of the states have standing (legal capacity) to bring the suit?

“Whether a state that voluntarily provides a subsidy to all ‘aliens’ with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA) to challenge the Guidance because it will lead to more ‘aliens’ having deferred action;”

2. Do expanded DACA and DAPA violate federal law?

“[W]hether the guidance is arbitrary and capricious or otherwise not in accordance with law;”

3. Did the federal government comply with proper procedures when it announced expanded DACA and DAPA?

“[W]hether the guidance was subject to the APA’s notice-and-comment procedures;” and

4. Do expanded DACA and DAPA violate the Constitution?

“[W]hether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.”

## Q. Which side is likely to win this case?

Although no one can say for sure which side will win, it is clear that the President and DHS have legal authority to do what every law enforcement agency does—set priorities and use limited resources to target serious threats to public safety. Through expanded DACA and DAPA, immigration enforcement officials can focus their attention on real public safety risks.

Consider the following:

- The Supreme Court precedent on prosecutorial discretion in the immigration context is clear. In the 2012 case *Arizona v. United States*, Justice Kennedy stated in the majority opinion for the Court that “a principal feature of the removal system is the broad discretion exercised by immigration officials.” Expanded DACA and DAPA fall squarely within this precedent.
- There also is ample *historical* precedent for executive branch action on immigration matters. Since 1956, every U.S. president since Eisenhower has taken executive action to grant temporary immigration relief to those in need of assistance. In at least [39 instances](#), presidents have acted to protect families from separation in response to foreign policy crises or in recognition of pending legislation.

- A grant of deferred action does not confer any type of lawful immigration status, enforceable legal rights, or an ability to remain permanently in the United States.
- Work eligibility stems from longstanding, independent legal authority, not from DAPA or expanded DACA. The states’ argument that the government overstepped its bounds by rendering deferred action beneficiaries eligible to work ignores this fact. Beneficiaries of deferred action in other contexts—including but not limited to certain victims of domestic violence under the Violence Against Women Act, victims of human trafficking and certain other crimes who are eligible for “T” and “U” visas, and foreign students affected by Hurricane Katrina—have been eligible for work authorization since the late 1990s.

### Q. What are *amicus curiae* briefs?

An amicus brief, or “friend of the court” brief, is a document filed in support of either side in a legal case that provides the court with relevant, additional information or arguments for consideration. In this case, a broad range of organizations and community leaders filed amicus briefs with the Supreme Court in support of the federal government, demonstrating the far-reaching impact of this case. Together, the amici make a strong argument that expanded DACA and DAPA are good for families, public safety and the American economy. The amici include faith-based groups, business owners, law enforcement, educators, former Homeland Security Officials, and current and former members of Congress. Furthermore, 115 mayors, county executives, and localities as well as 16 states and the District of Columbia filed briefs in support of the government’s position.

Several groups also filed amicus briefs in support of the states’ position. The House of Representatives and 43 of the 54 Republican Senators filed separate amicus briefs. Additionally, the National Sheriffs Association, Maricopa County Sheriff Joe Arpaio, U.S. Border Control Foundation, and English Only also submitted briefs in support of the 26 states.

### Q. How Does Justice Scalia’s Death Affect the Case?

It is unlikely that Justice Scalia’s death will have an impact on this case. Nobody who follows the Supreme Court was counting on Justice Scalia to vote with the majority in ***United States v. Texas***. Tellingly, in his dissent in ***Arizona v. United States***—the

case which struck down most of the key provisions of Arizona’s SB 1070—he implied he disagreed with the then new DACA initiative. As the ***New York Times*** reported, “Justice Scalia also took the unusual step of raising an issue that had not been part of the case, assailing President Obama’s executive program granting protection from deportation to young undocumented immigrants, citing it as evidence of the administration’s abdication [of its enforcement authority].”

Should the Justices reach a 4-4 decision, the Court would affirm the Fifth Circuit’s decision. As a result, the injunction preventing implementation of DAPA and expanded DACA would remain in place, and the district court would proceed to the merits of the case.

### **Q. What are the potential outcomes of this case?**

There are several possible outcomes of this case, including:

- **The Court dismisses the case for lack of standing.** Putting aside whether expanded DACA and DAPA violate the law, the Supreme Court could dismiss the case outright because the plaintiff states lack standing, or a legal stake in the case. If the Court dismisses for lack of standing, the entire case will come to an end and the injunction will be lifted. The federal government could then set up a system for accepting and processing applications for expanded DACA and DAPA. Since the government was ready to begin processing expanded DACA applications last year, officials might start that initiative very quickly, while implementation of DAPA could require additional preparation time.
- **The Court reverses the Fifth Circuit on a critical legal issue, allowing the initiatives to move forward.** For example, the Supreme Court could rule that the plaintiff states’ APA claims, referenced above, are unreviewable or unlikely to succeed. By reversing the Fifth Circuit, the Court could clear the way for expanded DACA and DAPA to move forward, permitting the government to implement the initiatives if it chose to do so. However, this would not be the end of lawsuit. The district court could go on to decide if the President’s initiatives are constitutional. The decision of the district court could eventually be appealed, meaning the case could go to the Fifth Circuit and the Supreme Court a second time.

- **The Court affirms the Fifth Circuit decision, which would uphold the preliminary injunction.** This would mean that the Supreme Court agrees with the previous court rulings and does not allow expanded DACA or DAPA to move forward. With a preliminary injunction in place, the case would go back to the district court. The federal government would not be permitted to implement expanded DACA or DAPA while the case continued before the district court. Again, the decision of the district court could eventually be appealed, meaning the case could go to the Fifth Circuit and the Supreme Court a second time.



## IMPACTS

### Q. Who else is affected by this case?

The impact of expanded DACA and DAPA will reach far beyond the qualifying individuals themselves and into other areas of public life.

#### Impact on Families

Expanded DACA and DAPA will help keep American families together. Currently, [3.7 million](#) undocumented immigrants have children who are U.S. citizens or lawful permanent residents. As noted by dozens of educators and child welfare organizations, [research](#) shows that children whose parents are at risk of deportation are more likely to suffer psychological harm, which can undermine their chances for educational and economic success. Furthermore, faith groups have [pointed](#) to a study by [Race Forward](#) that “found that one quarter of the families surveyed that experienced deportation were unable to keep the family together post-deportation. In 2011, more than 5,100 U.S. citizen children were living in foster care after a parent’s detention or deportation.”

#### Impact on Public Safety

The deferred action initiatives will improve the welfare of communities at the city, county, and state levels. Dozens of sheriffs, police chiefs, and national police associations—including the Major City Chiefs Association—[view](#) expanded DACA and DAPA as a way to “advance public safety by encouraging cooperation and trust-

building between immigrant communities and police.” When police know who is living in their communities, it lessens the tension between police officers and immigrant communities, which in turn helps make these communities safer.

## Impact on the Economy

Those individuals who obtain temporary, renewable work authorization will likely be able to improve their income, better support themselves and their families, and generate additional tax revenue for local and state governments. One [report](#) estimates that expanded DACA and DAPA will allow qualified individuals to earn an additional \$7.1 billion dollars in income.

### Q. What are the economic benefits of DACA and DAPA?

If millions of undocumented workers acquire temporary work authorization, they will make more, spend more on goods and services from U.S. businesses, and pay more in taxes, which will be a boon to the U.S. economy as a whole. Specifically, the President’s actions are likely to increase Gross Domestic Product (GDP), reduce the federal deficit, and raise both tax revenue and average wages—all without having any appreciable impact on native-born employment.

- The White House Council of Economic Advisers (CEA) [estimates](#) that the executive actions would, over the next 10 years, increase GDP by at least 0.4 percent (\$90 billion) or as much as 0.9 percent (\$210 billion). The CEA also [estimates](#) that the executive actions would expand the country’s tax base by billions of dollars over the next 10 years by increasing tax compliance for undocumented workers, and lead to a decrease in federal deficits by somewhere between \$25 billion and \$60 billion over the next 10 years.
- Economists have estimated that wages would increase between 5 and 10 percent for individuals potentially eligible for expanded DACA and DAPA. Such individuals would see wage gains as they become eligible for work permits, find better job matches, and become less likely to be taken advantage of by employers.
- At the same time, the CEA [estimates](#) that the executive actions would raise average wages for U.S.-born workers by 0.1 percent on average by 2024.

- The Center for American Progress (CAP) estimates that if 4.7 million undocumented immigrants with a minor child in the United States received deferred action and work authorization, payroll tax revenues would increase by \$2.9 billion in the first year and up to \$21.2 billion over five years.
- Similarly, the North American Integration and Development (NAID) Center at the University of California, Los Angeles estimated that deferred action for 3.8 million undocumented parents of minors who are U.S. citizens or legal permanent residents would result in new tax revenue of \$2.6 billion over the first two years.
- CAP also conducted research which shows individual states would experience tax gains, as undocumented immigrants begin to work legally and file taxes on slightly higher wages. A few examples include:
  - California, where 1.2 million immigrants may be eligible for DACA and DAPA, could see a \$904 million increase in tax revenues over five years.
  - In Illinois, 214,000 immigrants could be eligible for executive action, leading to an additional \$347 million in tax revenues over five years.
  - The net gain from administrative relief in New York State could be around \$100 million per year in added state and local tax revenues.
  - Even smaller states would see benefits. South Carolina's 13,000 eligible immigrants could contribute an additional \$25 million in taxes over five years.

## CONCLUSION

The Supreme Court is expected to issue a decision in *United States v. Texas* by the end of June 2016. The stakes in this case couldn't be higher. Not only will expanded DACA and DAPA provide temporary relief from deportation to as many as 3.7 million people, but these initiatives will allow more immigrants to work, better support themselves and their families, and pay additional taxes. The President's executive actions on immigration have the potential to positively impact families, communities, and our economy.

Although no one can say for sure which side will win, there is clear precedent for the President and DHS to do what every law enforcement agency does—set priorities and use limited resources to target serious threats to public safety. The Supreme Court has recognized this authority, and every U.S. president since Eisenhower has taken executive action to grant temporary immigration relief. Expanded DACA and DAPA will allow law enforcement officials to focus their attention on public safety risks, while allowing noncitizens with significant family and community ties to the United States to obtain temporary, renewable deferrals of deportation.

Yet, regardless of the outcome of this case, there is more work to be done. The reality is that the only way to update our immigration system once and for all is for Congress to pass immigration reform legislation.