

## Questions and Answers about the Supreme Court's decision in *U.S. v. Texas*

On June 23, 2016, the Supreme Court “affirmed by an equally divided court” the 5<sup>th</sup> Circuit’s decision in *U.S. v. Texas*, leaving intact the preliminary injunction that has prevented certain parts of President Obama’s immigration executive action, DAPA and expanded DACA, from going into effect.

As former United States Solicitor General Walter Dellinger wrote: “Seldom have so many hopes been crushed by so few words.” The hopes and dreams of 4.3 million eligible DAPA and expanded DACA applicants, their more than 5 million U.S. citizen and legal resident family members, and the millions of Americans who believe in justice for immigrants were crushed by these words. But the fight, in the courts and at the ballot box, is not over yet.

This Q&A addresses some of the issues raised in *U.S. v. Texas*.

**Q: What does “affirmed by an equally divided court” mean?**

**A:** When the Supreme Court has an even number of justices voting on each side and there is a tie vote on a case, the justices do not make a decision in the case; instead they issue a “non-decision” statement, and the decision of the court below remains in effect. In the *U.S. v. Texas* case, the 4-4 tie vote is a “non-decision” statement that the 5<sup>th</sup> Circuit decision remains in effect. The 5<sup>th</sup> Circuit decision blocks implementation of DAPA and expanded DACA.

**Q: Why are there only 8 justices instead of 9?**

**A:** The Republican Senate majority refuses to hold hearings to confirm the person President Obama nominated to take Justice Scalia’s place. If that nomination were confirmed, there would be a 9<sup>th</sup> justice – a justice who could cast the tie-breaking vote. Without the 9<sup>th</sup> justice, there are an even number of justices, allowing tie votes. In the past 3 months there have been 3 Supreme Court cases that have resulted in tie votes, and a 4<sup>th</sup> case that was sent back to the circuit court of appeals without a decision.

**Q: Did the *U.S. v. Texas* “non-decision” go into effect on June 23, when the Supreme Court issued its statement?**

**A:** No, the “non-decision” will not become final for 25 days. The Supreme Court allows a petition for rehearing to be filed within 25 days from the issuance of a decision (or “non-decision”). Unless the Supreme Court shortens or extends the 25-day period for filing the rehearing petition, the decision will not be final until 25 days have passed.

**Q: What is a petition for rehearing?**

**A:** A petition for rehearing asks the justices to reconsider their decision. In the *U.S. v. Texas* case, a petition for rehearing could request reconsideration of the decision after the appointment of the 9<sup>th</sup> justice.

**Q: Who can file a petition for rehearing?**

**A:** Only parties to the case can request rehearing. In the *U.S. v. Texas* case, the parties to the case are Texas and 25 other states, the United States, and the Mexican American Legal Defense and Education Fund (MALDEF). Since Texas wants the 5<sup>th</sup> Circuit decision blocking DAPA and expanded DACA to remain in place, only the U.S. or MALDEF would file a petition for rehearing.

**Q: What happens if a petition for rehearing is filed within the 25-day period?**

**A:** The justices meet regularly to decide whether to grant or deny petitions for rehearing. During the time that it takes for the justices to decide on the petition for rehearing, the Supreme Court decision or “non-decision” is not final. One petition for rehearing that is currently before the Supreme Court has been pending for nearly 3 months. There is no time limit by which the Court must either grant or deny a petition for rehearing.

**Q: What does it take for a petition for rehearing to be granted?**

**A:** It is unusual for a petition for rehearing to be granted. It’s also very unusual for the United States to file a petition for rehearing. But the United States has, in a few cases, filed petitions for rehearing. In order for a petition for rehearing to be granted, one of the justices who voted to affirm the decision of the court below must agree to vote to grant rehearing. In the *U.S. v. Texas* case, one of the justices who voted to allow DAPA and expanded DACA to remain blocked would have to vote to grant the petition for rehearing.

**Q: Is the “non-decision” in *U.S. v. Texas* the law for the entire country?**

**A:** This 4-4 split “non-decision” is not precedential. It is the law of the 5<sup>th</sup> Circuit and not the law of the land the way that a Supreme Court decision would be. In the *U.S. v. Texas* case, the 5<sup>th</sup> Circuit decision blocked DAPA and expanded DACA nationwide. Although the 5<sup>th</sup> Circuit decision is good law in the 5<sup>th</sup> Circuit, other circuit courts are not required to follow the 5<sup>th</sup> Circuit decision.

**Q: Does this mean that other circuit courts could decide that DAPA and expanded DACA are lawful in their circuits?**

**A:** Maybe. It’s possible but complicated. Legal advocates are exploring all legal options as we continue the fight to implement DAPA and expanded DACA.

**Q: Does the *U.S. v. Texas* case affect 2012 DACA?**

**A:** No. The 5<sup>th</sup> Circuit decision in *U.S. v. Texas* was specifically limited to DAPA and expanded DACA. In another case, the 5<sup>th</sup> Circuit considered and denied a challenge to 2012 DACA. The 9<sup>th</sup> Circuit discussed the legality of 2012 DACA in the context of an Arizona drivers’ license case and stated that 2012 DACA was lawful under the immigration statute and the U.S. Constitution. In addition, more than 700,000 immigrants have been granted 2012 DACA. This fact distinguishes 2012 DACA program from DAPA and expanded DACA – programs that were proposed but never implemented.