



U.S. Department of Justice
Civil Division

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July 5, 2022

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

RE: *Texas v. United States*, No. 21-40680

Dear Mr. Cayce:

The federal government submits this response to the Rule 28(j) letter submitted by appellees regarding *West Virginia v. EPA*, No. 20-1530 (June 30, 2022). Contrary to appellees' submission, DACA does not involve a "major question" for purposes of the interpretive principles relied on by the Supreme Court in *West Virginia*.

First, taken on its own terms, DACA does not present questions of deep economic and political significance. See U.S. Reply Br. 13-14, 16-17. Instead, it involves two well-established types of agency authority: the exercise of enforcement discretion to defer action on persons subject to removal, *see, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999), and the agency's authority, embodied in a regulation in effect for more than forty years and confirmed by Congress in 8 U.S.C. § 1324a(h)(3), to grant employment authorization to persons with deferred action and others whom the Secretary has chosen to allow to remain in the country on a temporary basis. DACA is significantly more limited in scope than the DAPA policy that this Court addressed in *Texas v. United States*, 809 F.3d 134 (2015), and instead closely corresponds in its dimensions to the Family Fairness policy (see U.S. Br. 33, 37-39).

Second, contrary to appellees' suggestion, Congress has never rejected proposals to amend DHS's authority to create the DACA policy, much less done so "consistently" (*West Virginia*, slip op. 27). As explained in our brief (U.S. Br. 42), the proposed DREAM Act legislative proposals cited by the appellees went far beyond the limited scope of DACA; they would have granted conditional lawful immigration status to DACA recipients and a larger class of noncitizens, while DACA makes no change in immigration status and does not preclude DHS from removing anyone. Congress's failure thus far to enact legislation such as the DREAM Act therefore sheds no light on whether DHS has the more limited authority to temporarily forbear from seeking to remove persons under DACA. And as explained in our brief, several enactments reflect Congress's recognition of the Secretary's authority to provide deferred action and work authorization. See U.S. Br. 4-5, 34-35, 45-46.

Sincerely,

/s/ Scott R. McIntosh

Scott R. McIntosh

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Scott R. McIntosh
Scott R. McIntosh