No. 16-1180

In the Supreme Court of the United States

JANICE K. BREWER, ET AL.,
Petitioners,

v.

ARIZONA DREAM ACT COALITION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNOR JEB BUSH AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Can an executive order that purports to grant legal immigration status without congressional authorization preempt State law?

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INTRODUCTION AND INTERESTS OF *AMICUS*[1]

This case perfectly illustrates the principle that even when the Nation's leaders in the Executive branch want to do the right thing, they have to do it the right way. The President cannot change statutory law without Congress, nor can he override the laws of the States without first going through procedures necessary to act with the force of law. As this Court has made clear, "[t]he Constitution … is concerned with means as well as ends," and "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Horne* v. *Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015) (quotes omitted). That rule applies in immigration law no less than elsewhere.

Our immigration system is a mess. *Amicus* Governor Jeb Bush—a longtime advocate of humane, practical, economically-driven immigration reform, and the co-author of a book on the subject—has described it as "incredibly cumbersome, complex, opaque, sometimes capricious, and downright bureaucratic."[2] Its weaknesses undermine the rule of law, generate tremendous human suffering, and starve the Nation's

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[1] No one (including a party or its counsel) other than *amicus curiae* Governor Jeb Bush and his counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. Governor Bush provided notice to all parties pursuant to Supreme Court Rule 37.2(a), and all parties have consented to the filing of this brief.

[2] See Jeb Bush & Clint Bolick, *Immigration Wars: Forging an American Solution* xii (2013) ("*Immigration Wars*").

economy of both low- and high-skill labor. Governor Bush's substantive views on immigration policy are not aligned in many respects with what he considers the unduly harsh and counterproductive immigration policies of some other conservatives. He has been critical, in particular, of Arizona's handling of some immigration issues.

Governor Bush nonetheless believes that those policy debates should play out on the field of federal legislation. Real reform requires action by Congress, and executive actions such as President Obama's Deferred Action for Childhood Arrivals ("DACA") program only make the crisis worse in the long run.

It is always tempting for a President to take action to remedy what he sees as public needs that Congress has failed to address. As an immigration reformer (and a former State executive), Governor Bush understands that desire very well. Yet immigration is certainly not the first occasion when the President has wished to pursue his vision of the good beyond what Congress has enabled, and it assuredly will not be the last. The surest protection for our liberty and welfare lies in the constitutional procedures and structures that uphold the rule of law.

STATEMENT

President Obama implemented DACA by executive order in 2012. DACA orders deferral of removal proceedings for a category of non-citizens who entered the United States illegally as children and who meet certain conditions. App. 17–18. DACA's thrust closely resembles the Development, Relief, and Education for Alien Minors Act ("DREAM Act"), which has been repeatedly introduced in recent Congresses but never enacted. See, *e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007).

In addition to avoiding removal proceedings, individuals subject to DACA may receive federal Employment Authorization Documents ("EADs") from the Department of Homeland Security ("DHS"). App. 15, 18. EADs issued pursuant to DACA are referred to as "(c)(33)" EADs. *Id.* at 19.[3]

Arizona requires driver's license applicants to "submit proof satisfactory to the [Arizona Department of Transportation ('Department')] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28–3153(D). Before DACA, Arizona treated all EADs as acceptable for that purpose. App. 19.

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[3] A complete list of EAD codes is available on the DHS website. See DHS, Employment Authorization (available at https://tinyurl.com/l3e36d3) (last visited Apr. 30, 2017).

In response to DACA, Arizona Governor Janice K. Brewer issued Arizona Executive Order 2012–06, *Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program* (Aug. 15, 2012) ("Order 2012–06"). Order 2012–06 announced Arizona's policy that DACA should not be considered as conferring legal authorization on any non-citizen, and so does not provide grounds for provision of any State benefit conditioned on legal status. App. 18.[4] As a result, the Department announced that it would not accept (c)(33) EADs for purposes of issuing drivers licenses. App. 19.

Respondents sued Governor Brewer and the other Petitioners, alleging that Arizona's refusal to accept (c)(33) EADs in support of driver's license applications violates the Equal Protection Clause of the Fourteenth Amendment and is preempted by federal immigration law.[5]

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[4] Arizona's decision was supported by the plain terms of DACA itself. "[T]he memorandum announcing the program state[d] that it 'confers no substantive right, immigration status or pathway to citizenship' because 'only the Congress, acting through its legislative authority, can confer these rights.'" App. 5 (Kozinski, J., dissenting) (quoting DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012)).

[5] The Supremacy Clause provides that "[the federal] Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

The Ninth Circuit's controlling opinion issued on February 2, 2017, upon denial of Petitioners' petition for rehearing en banc. App. 1–2; see also *id.* 2–13 (Kozinski, J., joined by O'Scannlain, Bybee, Callahan, Bea, and N.R. Smith, dissenting from denial of rehearing). The panel declined to resolve Respondents' equal protection theory. *Id.* at 29, 33–34. Instead, the panel held that Arizona's refusal to accept (c)(33) EADs for driver's licenses "encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the [Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq*. ('INA')]," App. 34, and is therefore preempted.

SUMMARY OF ARGUMENT

Governor Bush is a longtime supporter of legal immigration and a reformed immigration system. Comprehensive immigration reform should include a number of elements—reorienting immigration to encourage foreign workers, improved border security, and a greater role for the States, to name a few. But it also should include a path to legal residency for immigrants now in the country illegally, including those covered by DACA. In that respect, Governor Bush agrees with some of the former Administration's policy goals and disagrees with some of Arizona's.

But the Constitution did not permit President Obama to override Arizona law by executive order. A

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the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

program like DACA, which purports to change legal rights and (according to the Ninth Circuit) preempt State law has to be passed by Congress. Otherwise, it is not law. For similar reasons, a President's unilateral announcement of policy cannot prevent States from going their own way.

That conclusion follows from the separation of powers, which the Framers of the Constitution considered the Nation's most important guarantee of liberty. The President must work with Congress to make law, rather than by himself, and cannot will out of existence the laws of sovereign States. Although Governor Bush believes DACA would be good policy, it must be enacted in "the constitutional way." *Horne*, 135 S. Ct. at 2428.

ARGUMENT

I. The Nation Urgently Needs Immigration Reform.

The American immigration system is broken: On that, virtually everyone agrees.[6] The current system not only disserves the economic interests that immigration is supposed to further, but has precipitated both a humanitarian crisis and a challenge to the rule of law. Governor Bush considers it essential that the federal government act to restore rationality, orderliness, justice, and compassion.

The Nation needs legal immigration. A confluence of factors threatens a shortage of both low-skilled workers to do jobs that many American citizens are unwilling to take, see *Immigration Wars* 80–82, and the high-skilled workers and entrepreneurs on whom our economic predominance depends, *id.* at 82–83, 89–92. An immigration system driven by economics and the national interest *should* favor individuals with the skills and drive to contribute to our "nation of immigrants." But our current system is not designed to let those people in.

Instead, we have a system largely directed at unifying aliens in other countries with their family members here. Nearly two-thirds of the one million lawful

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[6] A fuller discussion of these issues appears in Governor Bush's public writings. See *Immigration Wars*; Jeb Bush & Clint Bolick, *The Solution to Border Disorder*, Wall St. J., Jul. 23, 2014 ("*Border Disorder*").

immigrants admitted into the United States each year do so through family preferences. See *Immigration Wars* 19–20; William A. Kandel, *U.S. Family-Based Immigration Policy* 1, Congressional Research Service (2014). The options for individuals without family connections, who are simply in search of freedom, work, and safety, are relatively few. Roughly 13 percent of immigrants come for work purposes, and 11 percent as refugees. *Immigration Wars* 19. More than 13 *million* foreign applicants compete in a lottery for only 50,000 remaining slots each year. *Id.* The literal fact of the matter is that "[w]hile past immigrants 'waited their turn in line,' there is no line in which most of those aspiring to become Americans can wait with any realistic hope of gaining admission." *Id.* at 24 (emphasis omitted).

In a world teeming with individuals eager to work and desperate for life in America—where immigrant labor is in demand—putting the process for legal immigration out of reach creates incentives for people to take their chances with the law. "Like any other valuable good or service, immigration operates according to supply and demand." *Id.* at 17. Distortions created by current immigration policy thus exacerbate the "black market": illegal immigration. *Id.*

Part of the problem is lack of security. As the sudden influx of tens of thousands of young Central American refugees in 2014 proved, it is too easy for aliens to arrive on American soil illegally. See *Border Disorder*. We focus too little on interdiction strategies

that stop human traffickers before they reach our borders and that deny them any profit for conspiring to break our laws. *Id.*; *Immigration Wars* 51–53 (advocating efforts to combat drug and human smuggling cartels in Mexico). The federal government likewise has not sufficiently invested in enforcing its immigration laws domestically. *Immigration Wars* 108. The removal process for individuals who are detained, moreover, is in many ways the worst of all possible worlds: cumbersome for all involved, yet full of loopholes. See *Border Disorder*. Many individuals subject to removal proceedings are released from custody during their hearing processes, never to be tracked down and removed as they should be. *Id.* Nonetheless, so long as the root legal and economic causes persist, improved security and enforcement is not the whole solution.

Governor Bush has long been at the forefront of those urging comprehensive immigration reform, and his writings suggest a number of proposals for action. Two are especially illustrative in this case.

First, Governor Bush has recommended creating a path to legal status for immigrants now here illegally. *Immigration Wars* 40–47. For those who entered illegally as adults and have been otherwise law-abiding, he has proposed a path not to citizenship, but to legal residency—on condition that they submit to fines or community service as punishment for unlawful entry. *Id.* at 43. For those who entered as children, though,

he believes they should have the opportunity to obtain citizenship. *Id.* at 46.

Those proposals resemble DACA and the unenacted DREAM Act. The resemblance is not coincidental: Governor Bush has written that "the ideas encompassed in the DREAM Act and President Obama's executive order [DACA] should be made part of fundamental immigration reform." *Id.* at 45. In advocating eventual citizenship for children who were brought to the country illegally, Governor Bush goes *beyond* DACA and the DREAM Act. *Id.* at 46 ("[W]e would go further than President Obama's policy by creating a clear and definite path to citizenship."). He is also in disagreement in some respects with Arizona. See, *e.g.*, *id.* at 212.

Second, Governor Bush has recommended that Congress give the States a greater role in immigration policy. "Our federalist system envisions policy differences among the states, reflecting different needs and priorities[.] In particular, states have varying needs, interests, and priorities when it comes to immigration." *Id.* at 32. Agricultural States, States with high-tech sectors, States that offer generous welfare benefits, States like Arizona that place special emphasis on enforcement of immigration laws—all would benefit, potentially, from more flexibility in how they treat immigrants.

II. Immigration Reform Must Be Accomplished Through Constitutional Channels.

Notwithstanding the urgency of immigration reform, many of the needs Governor Bush outlined in his book remain unaddressed by Congress. The human and economic costs of that inaction are considerable. But all of Governor Bush's proposals call for changes *through legislation*. "[T]he law must be enacted by Congress, no matter how maddeningly onerous the legislative process may be." *Id.* at 110–11.

Therein lies the problem with DACA, which is not a creation of any federal statute. Congress has repeatedly rejected proposals to grant class-wide legal status for illegal immigrants who arrived as children, see Pet. at 6, and has granted the President discretion to award work permits to aliens only in specifically delineated circumstances, see *id.* at 7–8. Congress has certainly not granted the President discretionary authority to confer the status of "authorized presence" on aliens who entered the country illegally. *Id.* at 17–18. The (c)(33) EADs that the Ninth Circuit held the Department must accept are an invention of the Executive branch alone. The Ninth Circuit's decision to give DACA binding effect that preempts Arizona law thus implies either (1) that the President can make federal law by executive order without Congress, or (2) that States can see their police powers overridden by federal policies that are not law.

Either interpretation is offensive to the constitutional order. The most important guarantor of liberty

in the Constitution is its separation of powers: As the Framers knew, "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); see also The Federalist No. 47, at 301 (Madison) (C. Rossiter ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.") For that reason, the Framers divided power against itself—State and federal, executive and legislative—to ensure that it never could be concentrated in that way.[7] As James Madison put it:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

The Federalist No. 51, at 323 (James Madison). By the same token, threats to the separation of powers ultimately threaten the people. However sympathetic DACA's aims might be—and Governor Bush sympathizes deeply—the President has no unilateral authority to override the laws of the States.

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[7] "So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton*, 524 U.S. at 450 (Kennedy, J. concurring).

A. The President Cannot Confer Lawful Immigration Status By Executive Order.

The process for making federal law is well-known and precisely crafted. Both Houses of Congress must pass the same bill and present it to the President, who may sign it, allow it to become law through inaction, or issue a veto (which a supermajority of Congress can override). U.S. Const. art. I, § 7, cl. 2. Neither House can may make law acting by itself. *I.N.S.* v. *Chadha*, 462 U.S. 919, 946 (1983) (holding that the "legislative veto" is unconstitutional). Nor can the President unilaterally excise provisions from the laws that Congress enacts. *Clinton*, 524 U.S. 417. The President's authority to take any action at all "'must stem either from an act of Congress or from the Constitution itself.'" *Medellin* v. *Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)). The notion that the President can make domestic law *by himself* is anathema.

It follows that DACA is not law, and that giving it legal effect aggrandizes the President at the expense of Congress and the States. In holding to the contrary, the Ninth Circuit committed a serious error and split from the Fifth Circuit's decision in *Texas* v. *United States*, which held that federal law does not permit the President to "reclassif[y] … millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits" 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided*

court, 136 S. Ct. 2271 (2016). Review of the Ninth Circuit's decision is called for on that ground alone.

Two complementary doctrines underscore that DACA cannot be accorded legally binding effect. One derives from Justice Jackson's concurrence in *Youngstown*, which set out a three-part analysis for scope of presidential power. 343 U.S. at 634–38 (Jackson, J., concurring); see also *Medellin* v. *Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."). Under that framework, the President's powers are at their height when Congress has specifically delegated power, ambiguous when Congress's distribution of power is unclear, and at their "lowest ebb" when Congress has (expressly or impliedly) denied him power. *Youngstown*, 343 U.S. at 634–38.

This is not a case where Congress has specifically delegated authority to the President: The Ninth Circuit searched the INA for authority relevant to this case and found nothing of significance. See Pet. 17–18; App. 6–8 (Kozinski, J., dissenting). Nor is it a case of ambiguity, for Congress has legislated extensively and set out the President's authorities in detail. That leaves DACA in the third category, where the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Youngstown*, 343 U.S.

at 637–38. Just to state the test is to show that granting legal status to illegal immigrants is not within the President's inherent powers.

Another relevant doctrine derives from modern administrative law. This Court has recognized at least since *United States* v. *Mead Corp.* that Congress sometimes delegates the power to act with the force of law to the President or an executive agency. 533 U.S. 218, 226–27, 229 (2001). But even when such a delegation occurs, the executive must employ formal procedural methods—such as formal adjudication, notice-and-comment rulemaking, or the like—to ensure that a particular act carries legal force. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). Even if Congress delegated authority to the President to determine who is legally in the country and who should be permitted to work here (and it did not), there is no reason to suppose that Congress would have permitted the President to do so by executive order as opposed to a DHS rulemaking. A delegation of authority to act with the force of law by proclamation, with no formal process at all, would be extraordinary.

It does no good to invoke the President's prosecutorial discretion.[8] Even if prosecutorial discretion permits the President not to enforce immigration law against categories of illegal immigrants—a position in

[8] See App. 4 (Kozinski, J., dissenting) ("The panel in effect holds that the enforcement decisions of the President are federal law.").

tension with the Take Care Clause of the Constitution, art. II, § 3—it does not permit the President to award legal rights. See *Texas*, 809 F.3d at 167 ("Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change."). A prosecutor's discretion about whom to prosecute is just that; it does not actually change anyone's status as a lawbreaker. The President's discretion as a prosecutor therefore does not extend to awarding EADs to illegal immigrants and cannot justify the panel's holding.

Distinguishing prosecutorial discretion from lawmaking is critical for another reason: Developing policy through prosecutorial discretion does not work. As the dissent below emphasized, "[p]residential power can turn on and off like a spigot; what our outgoing President has done may be undone by our incoming President acting on his own." App. 12 (Kozinski, J., dissenting). Because it can be reversed at the turn of an election, a President's mere discretion leaves the beneficiaries of DACA "in a continuing state of uncertainty by conferring no definite or permanent legal status," thus perpetuating the problem it is intended to solve. *Immigration Wars* 45; *id.* at 112.

It can even make permanent solutions *harder* to reach. Because executive orders are temporary, real solutions to our immigration crisis have to come from legislation. In today's climate, Governor Bush believes, they will also have to be bipartisan. The need

for bipartisan legislation should eventually create an opportunity for comprehensive reform—provided, that is, the President exercises leadership. But DACA purported to enact President Obama's set of solutions without involving either Congress or Republicans. It was not leadership; it was a crutch to create the *illusion* of leadership while avoiding the substance. *Id.* at 111–12. By obviating the process of legislative debate and compromise, it simultaneously allowed Congress to avoid its responsibility to make the laws, and undermined the call for Congress to act. The real business of governing requires more than that, and the law should not reward Congress or a President for taking the easy way out.

To have legal effect, a program like DACA needs to be passed by Congress. This Court should therefore clarify that DACA is not federal law, and so not binding on Arizona.

B. State Laws Can Only Be Preempted By Federal Acts That Carry The Force Of Law.

If DACA is not law (and as explained above, it cannot be) then the Ninth Circuit's decision implies that presidential pronouncements can preempt States even though they are not law. If that were true, it would be "a brazen renegotiation of our federal bargain." App. 11 (Kozinski, J., dissenting). As Arizona's Petition explains, an exercise of its police powers—for example, the issuance of driver's licenses—can be preempted only by clearly established federal law.

Pet. 15 (citing *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009)); see also *Arizona* v. *United States*, 132 S. Ct. 2492, 2501 (2012); *DeCanas* v. *Bica*, 424 U.S. 351, 356–64 (1976).

To have preemptive effect under the Supremacy Clause, an act of the federal government must be a "Law[] of the United States … made in Pursuance" to the Constitution. U.S. Const. art. VI, cl. 2. The process for making such laws is the same process described above, involving bicameralism, presentment, and the President's signature or an override of his veto. App. 11 (Kozinski, J., dissenting) ("The political branches of the federal government must act together to overcome state laws."). There is no room for preemption by executive order alone.

This Court's cases underscore the point. *Medellin* v. *Texas* addressed the preemptive effect of a presidential "Memorandum for the Attorney General" providing that the United States would "'discharge its international obligations'" under the Vienna Convention "'by having State courts give effect to'" a decision by the International Court of Justice. 552 U.S. at 497–98. The United States urged that the Memorandum bound State courts pursuant to the President's "power 'to establish binding rules of decision that preempt contrary state law.'" *Id.* at 523 (quoting Brief for United States as *Amicus Curiae* at 5, *Medellin* v. *Texas*, 552 U.S. 491 (2008) (No. 06-984)). But even in that case—which implicated the Nation's foreign relations, where the President's inherent authority is near

its apex—the Court held that the President has "authority … to execute the laws, not make them." *Id.* at 532. It therefore found no preemption of State law.

A similar issue arose in *Barclays Bank PLC* v. *Franchise Tax Board of California*, where a litigant "point[ed] to a series of Executive Branch actions, statements, and *amicus* filings" as adding up a federal position with preemptive effect. 512 U.S. 298, 328 (1994). As in this case, the Executive branch had proposed that Congress pass legislation that would have had preemptive effect. *Id.* at 329. This Court rejected that argument because the documents were "merely precatory." *Id.* at 330. It explained that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional [an] otherwise valid, congressionally condoned" State regulation. *Id.* at 330.

That straightforward rule of law is critical, not just to ensure proper respect for Congress as a coordinate branch of government, but also to protect federalism, which is just as critical in immigration law as in other contexts. As this Court has emphasized, "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York* v. *United States*, 505 U.S. 144, 181 (1992). In a large, diverse Nation like ours, federalism provides the additional advantage of allowing States to tailor their laws to local needs, sentiments, and policy preferences.

Governor Bush, to repeat, believes that DACA is good policy. Nonetheless, a President's view of good policy is not enough to override State law. The Ninth Circuit's violation of that bedrock principle demands this Court's review.

CONCLUSION

The Court should grant certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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