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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Victor Viramontes
Julia A. Gomez
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512

Linton Joaquin
Karen C. Tumlin
Shiu-Ming Cheer
Nicholas Espíritu
Nora A. Preciado
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 1600
Los Angeles, CA 90010
(213) 639-3900

Jennifer Chang Newell
Counsel of Record
Katrina Eiland
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0774
jnewell@aclu.org

Michael K.T. Tan
Omar C. Jadwat
Lee Gelernt
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2660

Counsel for Respondents
[Additional Counsel on Inside Cover]

Tanya Broder
National Immigration Law Center
2020 Addison Street, Suite 310
Berkeley, CA 94704
(510) 663-8282

David D. Cole
American Civil Liberties
Union Foundation
915 15th Street, NW
Washington, DC 20005
(212) 549-2676

Kathleen E. Brody
American Civil Liberties
Union Foundation
of Arizona
3707 North 7th Street,
Suite 235
Phoenix, AZ 85014
(602) 650-1854

Counsel for Respondents

QUESTION PRESENTED

Did the court of appeals correctly hold that the comprehensive federal immigration scheme enacted by Congress preempts Arizona's policy of denying driver's licenses to deferred action recipients, where Arizona's policy is based on its own independent classification of deferred action recipients as not "authorized" to be present "under federal law," and where federal law treats deferred action as authorization to remain in the United States?

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INTRODUCTION

Arizona seeks to deny driver's licenses to deferred action recipients—noncitizens who have been granted permission by the Secretary of Homeland Security to remain in the United States—based on Arizona's independent classification of these individuals as not "authorized" to be present in the country "under federal law." The Ninth Circuit concluded that Arizona's classification of deferred action recipients is preempted by the federal government's exclusive power to classify noncitizens. This conclusion reflects a straightforward application of well-established preemption principles, and is in keeping with the decisions of this Court and the other circuits.

Petitioners[1] provide no "compelling reason[]" for this Court's review. Sup. Ct. R. 10. Arizona is the *only* state in the country that denies driver's licenses to deferred action recipients based on a theory that they lack federally-authorized presence. Because deferred action recipients are eligible for driver's licenses in the 49 other states, the Ninth Circuit's ruling is of no consequence outside of Arizona, and there is no circuit split for this Court to resolve.

This case does not actually raise the questions that Petitioners contend are presented. The Ninth Circuit did not "creat[e] an immigration-specific rule

[1] Notably, the Petition states that the *former* governor of Arizona, Janice Brewer, seeks the writ of certiorari from this Court, but the current governor of Arizona is not among the Petitioners. *See* Pet. ii.

under which state police power regulations" are preempted, even if preemption is not "'the clear and manifest purpose of Congress.'" *See* Pet. i. Rather, the Ninth Circuit applied long-settled and uniform preemption precedents of this Court and the lower courts. Those precedents have concluded that a clear and manifest purpose of the Immigration and Nationality Act ("INA") is to give the federal government exclusive power to classify immigrants, and to grant the Executive Branch discretion to enforce the immigration laws. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2499, 2501 (2012). There is no dispute among the circuits—or even the parties—as to either of these principles. At best, Petitioners seek review of the misapplication of well-settled law, which provides no basis for granting review.

Petitioners also attempt to use this case as a vehicle to challenge the legality of the federal government's Deferred Action for Childhood Arrivals ("DACA") program to grant deferred action to individual young immigrants who came to this country as children. But Petitioners never challenged the constitutionality of the DACA program in the district court and only raised it for the first time in the court of appeals. Accordingly, Petitioners forfeited the claim, and the court of appeals properly declined to address the argument. Moreover, Petitioners' challenge rests on a factual assertion about how DACA has been implemented, but because they failed to raise the claim in the district court, they never developed a record on how DACA is in fact applied.

In addition, Arizona's policy is not limited to DACA, but categorically deems *all* grants of deferred action as failing to confer federally authorized presence, even though it concedes that other forms of deferred action are lawful. Thus, the Arizona policy at issue cannot be defended by reference to a specific challenge to DACA. And in any event, even were this Court to take the extraordinary step of resolving a challenge to DACA, it would not be outcome-determinative, as Respondents would be likely to succeed on their equal protection challenge on remand to the court of appeals.

This Court should not grant certiorari to consider the constitutionality of the DACA program when the issue was not properly raised; there has been no factual development of the question; neither the district court nor the court of appeals decided the question; it would not be outcome-determinative; and the federal government, which continues the program to date, is not a party to this litigation.

Arizona's petition should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Deferred Action and the DACA Guidance.

Deferred action is a longstanding form of prosecutorial discretion in which the federal government refrains from seeking a noncitizen's removal and authorizes her to remain in the United States. Under this practice, the Executive Branch forbears from removing a noncitizen, often "for humanitarian reasons or simply for its own

convenience." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Individuals granted deferred action are eligible for employment authorization, 8 C.F.R. § 274a.12(c)(14), and a Social Security Number. ER 689.[2]

For more than four decades, federal immigration authorities have granted deferred action to otherwise removable noncitizens in a variety of circumstances. *See Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015) ("Immigration authorities have made decisions to defer action or take similar measures since the early 1960s."). For example, deferred action has been made available to victims of human trafficking and sexual exploitation; relatives of victims of terrorism; surviving family members of a lawful permanent resident member of the armed forces; spouses and children of U.S. citizens or lawful permanent residents who are survivors of domestic violence; surviving spouses of U.S. citizens; foreign students affected by Hurricane Katrina; and applicants for certain types of visas. ER 158-162. The Secretary of Homeland Security's[3] authority to

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[2] "ER" refers to Appellants' Excerpts of Record filed in *ADAC v. Brewer*, No. 13-16248 (9th Cir. Aug. 30, 2014), Dkt. No. 36-1.

[3] Prior to 2002, the Immigration and Naturalization Service ("INS") was the agency responsible for administering and enforcing the nation's immigration laws, under the direction of the Attorney General. The Homeland Security Act of 2002 eliminated the INS and transferred its functions to the Department of Homeland Security ("DHS"), headed by the Secretary of Homeland Security, effective March 1, 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002). As a result, statutory references to the

grant deferred action derives from the INA, which charges him with "the administration and enforcement" of the country's immigration laws. 8 U.S.C. § 1103(a)(1); *see also id.* § 1103(a)(3); *infra* Argument Point II.B.

Nearly five years ago, in June 2012, the Department of Homeland Security ("DHS") issued a memorandum providing guidance for the exercise of prosecutorial discretion to grant deferred action to certain immigrants who arrived in the United States as children, under the Deferred Action for Childhood Arrivals ("DACA") program. App. 195-199. To be eligible for deferred action under the DACA guidance, noncitizens must meet specific educational and residency requirements, pass extensive criminal background checks, and establish that their individual circumstances justify a discretionary grant of deferred action. *Id.* Individuals granted deferred action under DACA are permitted to remain in the United States for a renewable period of two years; shielded from removal proceedings during that period, as long as deferred action is not terminated; required to apply for federal employment authorization; and permitted to apply for a Social Security Number. *Id.*

Like all other noncitizens granted deferred action, DACA recipients are authorized to remain in the United States during the period of deferred action. Indeed, that is the point of deferred action: It is a decision by the federal government to allow an

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INS or its officers have been replaced by reference to DHS or its officials. *See* 6 U.S.C. § 557.

otherwise removable noncitizen to remain for a specified period. *See, e.g.*, *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258 (11th Cir. 2012) (a noncitizen "currently classified under 'deferred action' status . . . remains permissibly in the United States" "[a]s a result of this status")*; see also infra* Argument Point II.B.

The Executive also possesses authority, expressly provided by statute, to grant noncitizens Employment Authorization Documents ("EADs"), permitting them to work in the United States. *See* 8 U.S.C. § 1324a(h)(3) (providing that persons may be authorized for employment by statute "*or by the Attorney General*") (emphasis added); 8 C.F.R. § 274a.12(c)(14) (providing that "an alien who has been granted deferred action" may obtain work authorization upon a showing of economic necessity). This authority reinforces the conclusion that noncitizens granted deferred action are authorized to be present, as authorizing a person to work in the country necessarily sanctions that individual's presence.

Under DACA, which has now been in existence for nearly half a decade, many noncitizens who were brought here as children have been granted authorization to remain in the United States, and have been able to work and study here as a result. The new administration has maintained the program, and continues to grant renewals of deferred action pursuant to DACA.[4]

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[4] *See, e.g.*, Memorandum from John Kelly, Enforcement of the Immigration Laws to Serve the National Interest, at 2 (Feb. 20,

B. Arizona's Policies on Driver's License Eligibility.

Arizona law provides that noncitizens are eligible for a driver's license if their "presence in the United States is authorized under federal law." A.R.S. § 28-3153(D). Prior to 2012, the Arizona Department of Transportation ("ADOT") recognized that all federally issued EADs established that a noncitizen's presence was "authorized under federal law," and were therefore sufficient for issuance of driver's licenses. App. 19. This group of license-eligible individuals included recipients of deferred action, whose EADs bear an administrative code of "(c)(14)." *See id.*; App. 41.

1. 2012 Policy Change Classifying DACA Recipients as Unauthorized.

On the same day that DHS issued the DACA guidance in June 2012, former Arizona Governor Brewer held a press conference to declare her disagreement with the federal government's decision. ER 223-24. In August 2012, Governor Brewer issued Executive Order 2012-06 (the "Order"), entitled "Re-Affirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program." App. 200. The Order stated that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful

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2017) (reaffirming the June 15, 2012 DACA Memorandum), *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

alien applicants" and that "[t]he issuance of Deferred Action or Deferred Action USCIS [EADs] to unlawfully present aliens does not confer upon them any lawful or authorized status." App. 200, 202. The Order instructed state agencies to deny driver's licenses to deferred action recipients. App. 202.

To comply with the Order, ADOT ended its longstanding practice of accepting all federally issued EADs as proof of authorized presence. It issued a revised rule directing that EADs issued to DACA recipients—which bear an administrative code of "(c)(33)"—did not, in Arizona's independent judgment, establish authorized presence "under federal law." App. 19. ADOT continued to accept EADs from all other noncitizens as sufficient evidence of "authorized presence," including EADs presented by other deferred action recipients outside of the DACA program ("2012 policy"). *Id.*

2. 2013 Policy Change Classifying All Deferred Action Recipients as Unauthorized.

In September 2013, after Respondents had initiated this litigation, ADOT revised its policy again, to expand the group of noncitizens ineligible for driver's licenses. The 2013 policy classified, not only DACA recipients as lacking "authorized presence under federal law," but all beneficiaries of deferred action, as well as individuals with deferred enforced departure.[5] App. 20. Arizona continued to

[5] "Deferred enforced departure" is "a temporary, discretionary, administrative stay of removal granted to aliens from designated countries." USCIS Adjudicator's Field Manual, at Ch. 38.2, *available at* https://www.uscis.gov/ilink/docView/AFM/

recognize that other noncitizens who lack a formal immigration status, but who have been granted EADs based on pending applications for cancellation of removal, adjustment of status, or other relief, are authorized to be present under federal law. *Id.* Arizona offered no rational basis for treating some of these individuals as authorized to be present "under federal law," while treating others as not so authorized, when the federal government has authorized them all to remain here lawfully. *See* App. 29-33, 119-25.

II. PROCEDURAL HISTORY

Respondents-Plaintiffs are young immigrants who were first granted deferred action through DACA in 2012, and have lived in Arizona for many years after arriving in the United States as children, and a nonprofit organization that represents noncitizens like them. Compl. ¶¶ 18-23, *ADAC. v. Brewer*, No. 12-02546, 2012 WL 5952174 (D. Ariz. Nov. 29, 2012) ("Compl."). The individual Respondents are students and young adults who, through DACA, have been given the opportunity to pursue an education, advance their careers, support their families, and fully contribute to their communities. *Id.* Arizona's driver's license policy directly and adversely affected their ability to travel to school and work, attend church services, take their children to doctor's appointments, and undertake

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HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html#0-0-0-591. Deferred enforced departure recipients are likewise authorized to remain in the United States during the deferral period. *See id.*

other routine daily activities. *See id.* ¶¶ 52-54; *see also* App. 48, 126-27.

Respondents filed suit in November 2012, challenging Arizona's 2012 policy on equal protection and preemption grounds. Compl. ¶¶ 84-97. Respondents moved for a preliminary injunction on both claims. Petitioners moved to dismiss, arguing among other things that Arizona's drivers' license policy did not conflict with federal law, and therefore was not preempted. Petitioners did not argue that DACA was unconstitutional. On May 16, 2013, the district court dismissed the preemption claim, finding that Arizona's policy did not conflict with federal law. *ADAC v. Brewer*, 945 F. Supp. 2d 1049, 1077-78 (D. Ariz. 2013) ("*ADAC I*"). The court found that Respondents had established a likelihood of success on their equal protection claim, but denied preliminary relief, finding that they had not established irreparable harm. *Id.* at 1067-76.

In July 2013, Respondents appealed the district court's order denying a preliminary injunction. After receiving supplemental briefing on the impact of Arizona's intervening 2013 policy change, the court of appeals reversed. The Ninth Circuit held that, despite the policy modification, Arizona continued to treat deferred action recipients in the DACA program differently from other noncitizens whom the federal government had authorized to remain and to whom it had granted EADs. *ADAC v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) ("*ADAC II*"). The Ninth Circuit held that Respondents were likely to succeed on the merits of their equal protection claim and that they faced numerous irreparable harms. *Id.* at 1067-68. It noted that Respondents' preemption claim might

also be likely to succeed, but declined to resolve that question. *Id.* at 1063 n.3. The Ninth Circuit remanded the case with instructions to enter a preliminary injunction. *Id.* at 1069. In a concurring opinion, one member of the panel concluded that Respondents also had demonstrated a likelihood of success on their claim that Arizona's policy was preempted. *Id.* at 1069-75 (Christen, J., concurring).

Arizona sought en banc review. The United States filed an amicus brief opposing en banc review, arguing that federal law preempted Arizona's policy, because Arizona failed to recognize that deferred action recipients were authorized under federal law to remain in the United States. United States' Br. as Amicus Curiae in Opp'n to Reh'g En Banc, *ADAC II*, No. 13-16248 (9th Cir. Sept. 20, 2014), Dkt. No. 75. The court of appeals denied Petitioners' en banc petition, as well as their motion for a stay of the mandate pending a petition for certiorari. *ADAC II*, No. 13-16248 (9th Cir. Nov. 24 & Dec. 9, 2014), Dkt. Nos. 82, 86. This Court likewise denied Arizona's motion for a stay. *See* App. 132.

On remand, and after extensive discovery, the parties filed cross-motions for summary judgment as to Respondents' equal protection claim. At no point did Petitioners argue that DACA was unconstitutional. The district court granted Respondents' motion for summary judgment on their equal protection claim, and issued a permanent injunction enjoining Arizona's policy. *See* App. 130-31.

On Petitioners' second appeal to the Ninth Circuit, the parties initially briefed and argued Respondents' equal protection claim. After oral

argument, the court requested supplemental briefing on preemption, as a claim that might allow it to resolve the case without reaching Respondents' constitutional claim. The court invited the federal government to file another amicus brief, and the federal government again maintained that Arizona's policy was preempted. United States' Br. as Amicus Curiae in Support of Appellees, *ADAC. v. Brewer*, No. 15-15307 (9th Cir. Aug. 28, 2015), Dkt. No. 62. Petitioners conceded that the court of appeals could reach the preemption question. App. 34 n.6.

On this second appeal, Petitioners asserted a wholly new argument for the first time: that DACA recipients were not similarly situated to other noncitizens eligible for driver's licenses because DACA was unconstitutional. They also asserted for the first time that DACA's purported unconstitutionality defeated Respondents' preemption claim. Despite the fact that they first raised it on appeal,[6] Petitioners' argument rested on a factual assertion: namely, that in its actual implementation, DACA did not involve individualized exercises of discretion. Appellants' Br. at 35-37, *ADAC v. Brewer*, No. 15-15307 (9th Cir. June 1, 2015), Dkt. No. 8. Petitioners conceded that the Executive has constitutional authority to defer action in individual cases, and argued that DACA was unlawful because it did not actually involve the exercise of individualized discretion. Appellants'

[6] *See* Appellees' Br. at 22-28, *ADAC v. Brewer*, No. 15-15307 (9th Cir. June 24, 2015), Dkt. No. 30 (explaining Defendants' forfeiture).

Suppl. Br. at 17, No. 15-15307 (9th Cir. July 31, 2015), Dkt. No. 48.

The Ninth Circuit affirmed the permanent injunction on preemption grounds, explaining that doing so allowed the Court to avoid deciding the constitutional equal protection question. App. 16-17. The Court held that Arizona's policy, which "distinguishes between noncitizens based on [the State's] *own* definition of 'authorized presence,'" App. 39, impermissibly "encroaches on the exclusive federal authority to create immigration classifications." App. 34. It reasoned that, under the comprehensive federal immigration scheme in the Immigration and Nationality Act ("INA"), the federal government has the sole power to determine immigration classifications. App. 35-36. It declined to address Arizona's belated challenge to DACA's constitutionality, finding that it was "not properly before our court." App. 44. In addition, it noted that, because Arizona's policy impermissibly determined that *all* deferred action grants, not just those under DACA, reflect unauthorized presence, the policy was not premised on any particular infirmity relating to DACA. App. 39 n.8. Petitioners moved for rehearing and rehearing en banc, which the court of appeals denied over a dissent. The court issued an amended opinion upon denial of rehearing, and Judge Berzon concurred in the denial of rehearing, agreeing with the court's preemption analysis, but explaining that were the court to reach the issue, she would have held that Arizona's policy also violated the Equal Protection Clause. App. 62.

REASONS TO DENY THE PETITION

I. THIS CASE DOES NOT PRESENT A CIRCUIT SPLIT OR ANY ISSUE OF NATIONWIDE IMPORTANCE.

The court of appeals' decision affects one, and only one, state. Arizona is the only state in the country with a driver's license policy that excludes deferred action recipients. Forty-nine states and the District of Columbia allow individuals with deferred action, including DACA recipients, to obtain driver's licenses. Specifically, twelve states and the District of Columbia issue driver's licenses to all eligible residents regardless of immigration status.[7] At least eight other states provide by statute that persons granted deferred action are eligible for driver's licenses.[8] And all other states, apart from Arizona,

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[7] These states are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Mexico, Utah, Vermont, and Washington. Gilberto Mendoza, *States Offering Driver's Licenses to Immigrants*, National Conference of State Legislatures (Nov. 30, 2016), *available at* http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx.

[8] *See, e.g.*, Ark. Code § 27-16-1208(8) (listing "approved deferred action status" as acceptable evidence of lawful status); *id.* § 27-16-1105(a)(1)(D)(viii) (listing "approved deferred action status" as evidence of "legal status" for purposes of obtaining a driver's license); Ga. Code Ann. § 40-5-21.1(a)(5) (listing individuals with approved deferred action status as eligible for a driver's license); Ind. Code Ann. § 9-24-9-2.5(9) (listing "approved deferred action status" as acceptable proof of lawful status for driver's license eligibility); Kan. Stat. § 8-240(b)(2) (listing "approved deferred action status" among the lawfully present categories for purposes of driver's license eligibility); Neb. Rev. Statute § 60-484.04 (confirming that all statuses listed in the

have state policies or practices that allow persons with deferred action to obtain driver's licenses.[9]

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federal REAL ID Act are lawful statuses for purposes of driver's license eligibility); Okla. Admin. Code § 595:10-1-3(b) (referencing Okla. Stat. tit. 21, § 1550.42(B), which authorizes driver's licenses for individuals who present valid documentary evidence of approved deferred action status); Va. Code Ann. § 46.2-328.1 (permitting applicants with "approved deferred action status" to be issued a temporary license, valid during the period of authorized stay); Wis. Stat. § 343.14(2) (including approved deferred action among the categories of individuals considered lawfully admitted for temporary residence for purposes of driver's license eligibility); *see also* Cal. Veh. Code § 12801.6 (grant of deferred action shall be considered proof of authorized presence for purposes of a driver's license); Utah Code § 53-3-205(8)(a)(ii)(B)(V) (listing "approved deferred action status" as lawful presence for driver's license eligibility).

[9] *See, e.g.*, Fla. Stat. § 322.08(2)(c)(7) (recognizing EADs as proof of identity for purposes of obtaining a driver's license) and Fla. Dep't of Highway Safety and Motor Vehicles "Acceptable Document Table" 23 (rev. 5/2/2017) (listing documents presented by individuals granted deferred action generally, and DACA specifically, as acceptable to establish legal presence for purposes of driver's license eligibility), *available at* http://www.flhsmv.gov/ddl/aila/acceptabledocuments.pdf; Me. Rev. Stat. tit. 29-A, § 1301(2-A) (requiring legal presence for driver's license eligibility) and Me. Bureau of Motor Vehicles website, Subsect. U (listing document granting deferred action among those proving legal presence), *available at* http://www.maine.gov/sos/bmv/licenses/noncitizen.html; Mich. Sec'y of State, "Applying for a license or ID? Applicant Checklist" (Rev. 11/16) (EADs listed as proof of legal presence), *available at* http://www.michigan.gov/documents/DE40_032001_20459_7.pdf; Pa. Dep't of Transp. Fact Sheet: Identification and Legal Presence Requirements for Non-United States Citizens 4 (Rev. 4/17) (listing individuals granted deferred action, including DACA grantees, as meeting the "legal presence" requirement for purposes of driver's license

Thus, the court of appeals' decision merely brings Arizona into line with every other state. There is no conflict between the court of appeals' decision and any other circuit on this issue. Accordingly, this case does not present an issue of nationwide importance meriting certiorari.

II. THE COURT OF APPEALS' PREEMPTION RULING APPLIED SETTLED LAW AND THEREFORE DOES NOT WARRANT REVIEW.

Petitioners' first question presented, which takes issue with the court of appeals' application of preemption doctrine, rests on a mischaracterization. Far from creating a new preemption standard, the court of appeals faithfully and correctly applied this Court's precedent. Petitioners' disagreement with the court's application of settled law does not provide a reason to grant certiorari.

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eligibility), available at http://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Publications/pub%20195nc.pdf; Tex. Transp. Code Ann. § 521.142(a) (requiring that "[a]n applicant who is not a citizen of the United States must present to the department documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license"); Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* 4 (Rev. 7/13) (listing an acceptable document for a "[p]erson granted deferred action" as "[i]mmigration documentation with an alien number or I-94 number"), *available at* https://www.dps.texas.gov/DriverLicense/documents/verifyingLawfulPresence.pdf.

A. The Court of Appeals' Preemption Analysis Rested on Well-Established Principles and Did Not Create Any New Preemption Test.

Lacking any circuit split or issue of national importance, Petitioners characterize the court of appeals as creating a new preemption test and rejecting the requirement that Congress show a "clear and manifest purpose" to preempt. But the Ninth Circuit did nothing of the kind. Rather, it applied well-established preemption principles to hold that Arizona's newly created immigration categories represented a "clear departure from federal immigration classifications." App. 42. Thus, the petition calls at best for error correction and should not be granted.

This Court long ago explained that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Under this exclusive power, "[f]ederal governance of immigration and alien status is extensive and complex." *Arizona*, 132 S. Ct. at 2499; *see also id.* at 2498 ("The Government of the United States has broad, undoubted power over the . . . the status of aliens."). Under the comprehensive federal immigration scheme, "[t]he States enjoy no power with respect to the classification of aliens. . . . This power is 'committed to the political branches of the Federal Government.'" *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)); *see also Toll v. Moreno*, 458 U.S. 1, 10 (1982) (discussing "the substantial limitations upon the authority of the States in making classifications based upon

alienage"); *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States.") (citing, *inter alia*, *De Canas*, 424 U.S. at 358 n.6).

Consistent with these precedents, the Ninth Circuit held that "the power to classify aliens for immigration purposes is 'committed to the political branches of the Federal Government,'" App. 36 (quoting *Plyler*, 457 U.S. at 225), and that "[s]tates enjoy no power with respect to the classification of aliens." App. 35 (quoting *Plyler*, 457 U.S. at 225 (internal quotation marks omitted)). Other circuit courts likewise have recognized that states have no power to classify aliens. *See Hispanic Interest Coal. of Ala. v. Governor of Alabama*, 691 F.3d 1236, 1242 (11th Cir. 2012) ("There is no doubt that '[t]he States enjoy no power with respect to the classification of aliens.'") (quoting *Plyler*, 457 U.S. at 225); *City of Chicago v. Shalala*, 189 F.3d 598, 604-05 (7th Cir. 1999) (same); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 537 (5th Cir. 2013) (en banc) (plurality decision) ("[W]e hold . . . the power to classify non-citizens is reserved exclusively to the federal government . . . ."); *id.* at 544 (concurring decision of four judges) (explaining that Congress has enacted "comprehensive and interrelated federal legislative schemes governing the classification of noncitizens").

Further, the Ninth Circuit properly recognized that this Court's "[i]mmigration jurisprudence recognizes that the occupation of a regulatory field may be 'inferred from a framework of regulation so

pervasive . . . that Congress left no room for the States to supplement it.'" App. 34 (quoting *Arizona*, 132 S.Ct. at 2501). The court of appeals explained that the "INA provides a pervasive framework with regard to the admission, removal, and presence of aliens." App. 34 (citing, *inter alia*, *Arizona*, 132 S. Ct. at 2499). Thus, the Ninth Circuit ruled that Arizona's state-created immigration categories "encroach[] on the exclusive authority to create immigration classifications and so [are] displaced by the INA." App. 34; *see also id.* at 16 (explaining that "Arizona's policy classifies noncitizens based on Arizona's independent definition of 'authorized presence,' classification authority denied the states under the Immigration and Nationality Act"). Far from breaking new ground, the Ninth Circuit's analysis, fully supported by the United States on two separate appeals, rests on well-established preemption principles.[10]

Petitioners seem to believe that the court of appeals' failure to quote the specific phrase "clear and manifest purpose" means that it was applying a new preemption standard. But in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), this Court explained that "the clear and manifest purpose of Congress . . . . may be evidenced in several ways.

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[10] Petitioners' contention that the Ninth Circuit's decision is based on a conclusion that a federal memorandum has preemptive force, Pet. 29-32, ignores the court's reasoning. The decision below relies not on the memorandum as such, but on the INA's pervasive immigration scheme—which both governs immigration status and delegates discretionary enforcement authority to the Executive.

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* In this case, the court of appeals' cited this very proposition and correctly applied *Rice*, finding that the "pervasive framework" of the federal immigration laws left no room for Arizona to create its own immigration classification deeming deferred action recipients unauthorized to be present. *See* App. 34 (citing *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230), for same proposition).

In any event, there is no talismanic significance to whether a court quotes the words "clear and manifest purpose." Both this Court and the lower courts have found state statutes relating to noncitizens preempted by immigration law, in areas touching on traditional state concerns, without explicitly quoting the "clear and manifest purpose" formulation.[11]

The court of appeals' focus on the pervasive immigration framework and Arizona's contrary classification scheme was also properly guided by this Court's most recent decision on federal preemption in the immigration arena, *Arizona v.*

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[11] *See Toll*, 458 U.S. at 17 (holding that a state policy prohibiting G-4 visaholders from qualifying for resident tuition at the state university was preempted by federal law without quoting "clear and manifest purpose"); *Lozano v. City of Hazleton*, 724 F.3d 297, 300 (3d Cir. 2013) (holding preempted a city scheme governing housing and employment of immigrants, without quoting "clear and manifest purpose"); *Farmers Branch*, 726 F.3d at 539 (holding that a local housing law was preempted, without quoting "clear and manifest purpose").

United States. There the Court held that an Arizona statute regarding local law enforcement's authority to make arrests—another area of state concern—was preempted. 132 S. Ct. at 2505-07. Although the Court referenced the "clear and manifest" standard at the outset, it did not explicitly apply the test to the state law. *Id*. at 2501. Rather, just as the Ninth Circuit did here, the Court inferred intent to preempt from the "[f]ederal statutory structure." *Id*. at 2505-06. Specifically, Arizona's law authorized local officers to make an arrest if they had "probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." *Id*. at 2505 (brackets in original). As the Court explained: "[b]y authorizing state officers to decide whether an alien should be detained for being removable, [the state law] violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id*. at 2506.

In sum, the court of appeals did not create a new preemption doctrine, but applied established principles to the facts presented here.

B. The Court of Appeals' Ruling That Arizona Unlawfully Created Its Own Immigration Classification Is Correct.

In any event, the Ninth Circuit's preemption holding is correct. Petitioners acknowledged in the court of appeals that "conflicting re-classification" of noncitizens by a state "would trigger preemption," and that the states may only "borrow the federal classification." Appellants' Pet. for Reh'g En Banc at 17, 19, *ADAC v. Brewer*, 15-15307 (9th Cir. May 19, 2016), Dkt. No. 74-1 (citation and internal quotation

marks omitted). The Ninth Circuit correctly concluded that, in defining deferred action recipients as *unauthorized* to be present under federal law, when federal immigration law treats such recipients as authorized to remain, Arizona impermissibly created its own state immigration classification in direct contravention of federal law. App. 39-40.

Petitioners do not dispute, *see, e.g.*, Pet. 4, 23, that Congress has granted the Executive Branch discretion under the immigration laws to authorize noncitizens who are otherwise removable to remain in the United States by granting deferred action. *See* App. 25-27. The Executive is responsible for the enforcement of immigration laws, U.S. Const. art. II, § 1, cl. 1, § 3, and Congress, through the INA, has authorized the Secretary of Homeland Security to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" to execute the INA. 8 U.S.C. § 1103(a)(3).[12] This Court has emphasized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. Congress has granted the Executive discretion to decide not to pursue the removal of noncitizens who may be removable and to authorize them to remain in the United States by granting deferred action. *See, e.g.*, *Reno*, 525 U.S. at 483-84 (holding that "[a]t each stage the Executive has discretion to abandon" the deportation process through "deferred action");

[12] *See also* 8 U.S.C. § 1103(a)(1); 6 U.S.C. § 202(5) (charging the Secretary with "[e]stablishing national immigration enforcement policies and priorities").

Arizona, 132 S. Ct. at 2499 (explaining that "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all").

The court of appeals correctly explained that "the federal government permits [deferred action recipients] to live and work in the country for an undefined period of time, provided they comply with certain conditions." App. 39. Other federal courts have reached the same conclusion.[13]

Congress itself has recognized that deferred action is an authorization to remain in the country. For example, Congress has provided that "approved deferred action status" constitutes a "period of authorized stay" for purposes of states issuing driver's licenses that are valid as federal identification. REAL ID Act, 49 U.S.C. § 30301 note, Sec. 202(c)(2)(B)(viii),(C)(ii). Similarly, the INA

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[13] *See Ga. Latino All. for Human Rights*, 691 F.3d at 1258 (a noncitizen "currently classified under 'deferred action' status . . . remains permissibly in the United States"); *Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp. 3d 364, 368 (S.D.N.Y. 2014) (recognizing DACA recipients are "a subclass of lawfully present aliens"); *Hispanic Interest Coal. of Ala. v. Bentley*, No. 11-cv-2484, 2011 WL 5516953, at *20 n.11 (N.D. Ala. Sept. 28, 2011), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012) (deferred action recipients are individuals "whom the federal government has authorized to remain in the United States") (internal quotation marks omitted); *In re Guerrero-Morales*, 512 F. Supp. 1328, 1329 (D. Minn. 1981) (stating that deferred action is a decision "whether to permit an alien to remain in the United States"); *see also Matter of Quintero*, 18 I&N Dec. 348, 349 (BIA 1982) (finding that "deferred action status is . . . . permission to remain in this country"); *Matter of Pena-Diaz*, 20 I&N Dec. 841, 846 (BIA 1994) (deferred action status "affirmatively permit[s] the alien to remain").

expressly recognizes the power of federal immigration officials to authorize a period of stay. *See* 8 U.S.C. § 1182(a)(9)(B) (providing that, in determining the applicability of bars on re-admission for certain noncitizens, a noncitizen in the country pursuant to a "period of stay authorized by the Attorney General," is not "unlawfully present"). And DHS regulations and guidance confirm that a grant of deferred action constitutes authorized presence.[14]

Petitioners' assertion that Arizona's policy merely borrows federal classifications because it distinguishes among various existing administrative codes on federal EADs, Pet. 18, ignores that Arizona's policy has *re-defined* what it deems those EAD codes to mean "under federal law." Thus, Arizona's policy impermissibly "distinguishes between noncitizens based on its *own* definition of 'authorized presence,' one that neither mirrors nor borrows from the federal immigration classification scheme." App. 39. Petitioners have pointed to no authority even suggesting that some administrative

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[14] *See* 28 C.F.R. § 1100.35(b)(2) (referring to deferred action for trafficking victims as "a period of stay authorized by the Attorney General"); 8 C.F.R. § 214.14(d)(3) (recognizing that individuals granted deferred action while awaiting U visas will not accrue unlawful presence for purposes of re-admission bars); USCIS, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, at 42 (May 6, 2009) ("[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see also* 8 C.F.R. § 1.3(a)(4)(iv) (for the purposes of determining eligibility for Title II Social Security benefits, an "[a]lien[] currently in deferred action status" is "lawfully present" and "permitted to remain in" the United States).

codes listed on EADs and not others were intended to define "authorized presence" under federal law.

Petitioners attempt to rely on *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005), a case concerning a state policy that restricted eligibility for certain professional licenses to U.S. citizens and lawful permanent residents. *LeClerc* is inapposite, however, because there the state classification simply borrowed the federal classification, which distinguished between immigrants (lawful permanent residents) and nonimmigrants. *See* App. 43. In contrast, here, Arizona has created its own immigration distinctions wholly unmoored from the federal system.[15]

Because it is well-established that Arizona cannot create its own immigration categories, there are no suitable preemption issues for this Court's review.

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[15] *Dandamundi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012), also cited by Petitioners, is fully consistent with the court of appeals' decision. In that equal protection challenge to a state law limiting pharmacy licenses to certain immigrants, the court reasoned that a state has no power to use federal immigration classifications in a way that conflicts with the way the federal scheme treats those same noncitizens: "[the state's] traditional police power cannot morph into a determination that a certain subclass of immigrants is not qualified for licensure merely because of their immigration status." *Id.* at 69-70, 80. The same holds true here.

III. THE SECOND QUESTION PRESENTED CONCERNING THE LAWFULNESS OF THE DACA PROGRAM DOES NOT PROVIDE A BASIS FOR REVIEW.

A. The Ninth Circuit Properly Declined To Reach Petitioners' Newly Raised Challenge to DACA, and It Should Not Be Decided in the First Instance in the Supreme Court.

Because the Ninth Circuit did not reach Petitioners' constitutional challenge to DACA—raised for the first time on appeal—review of that question is inappropriate here. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 529 (2009). As this Court has stated, review in the first instance is inappropriate where the court below "declined to reach the constitutional question." *Id.* The Court explained, "[t]his Court . . . is one of final review, 'not of first view,'" concluding that there was "no reason to abandon [the Court's] usual procedures in a rush to judgment without a lower court opinion." (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).[16]

The Ninth Circuit correctly concluded that the constitutionality of the DACA program was not

[16] Although Petitioners take issue with dicta in the Ninth Circuit's opinion concerning the constitutionality of the DACA program, *see* Pet. 25, dicta provides no basis for this Court's review. *See, e.g.*, *Fox Television Stations, Inc.*, 556 U.S. at 513, 529 (declining to review constitutional question even where court of appeals opinion contained some dicta on the issue).

properly before it, App. 44, because Petitioners belatedly raised the issue only in the circuit court, and neither raised nor litigated it in the district court.

Because of Petitioners' failure to raise this issue in the district court, the factual record is undeveloped. Petitioners concede that individualized grants of deferred action are lawful, and present no constitutional issue. *See, e.g.*, Pet. 5-6 (acknowledging that "'the Executive has discretion to abandon' removal proceedings in what has 'come to be known as 'deferred action,'" and asserting that "deferred action is a 'case-by-case' decision") (quoting *Reno*, 525 U.S. at 483-84 & n.8); *id.* at 23.[17] Given that concession, Petitioners' attack on DACA, a form of deferred action, rests on a factual question: Does the DACA program involve the exercise of individualized, case-by-case discretion, or not? *See id.* at 24 (contending that "DACA is not discretionary"); *id.* at 25 (arguing that DACA "does not rely on prosecutor's case-by-case evaluation"); *id.* at 27-28 (arguing that Congress has not granted the Executive authority to confer "class-wide deferred action"). Petitioners attempt to rely on facts from *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015),

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[17] At oral argument in the second Ninth Circuit appeal, in response to the question "You're not challenging the administrative branch's ability to defer action, are you?," Petitioners' counsel stated, "No, no, that's a great clarification . . . , because the other side makes it sounds like that's our objective, and it's not." *See* Oral Argument at 6:48–7:12, *ADAC v. Brewer*, No. 15-15307, -- F.3d ---, 2017 WL 461503 (9th Cir. Feb. 2, 2017), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008027.

to argue that the DACA program lacks individualized discretion, *see id*. at 24-25, however, those facts do not appear in the record below.

Petitioners did nothing in this case to develop the factual record on this question. But absent a factual showing that DACA is not applied in an individualized manner, Petitioners' argument collapses. Although the parties engaged in extensive discovery, both at the preliminary injunction stage and on the merits, Petitioners only raised the constitutionality of DACA for the first time in the appeal from the permanent injunction. *See supra* Statement of the Case Point II. "Questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

B. This Case Does Not Properly Present the Legality of DACA Because Arizona's Policy Is Not Limited to DACA.

Even if the issue had been timely raised and there were a factual record and decisions below, this case would not properly present the legality of DACA, because Arizona's policy is not limited to DACA. *See* App. 44. Rather, the policy deems the broader category of *all* grants of deferred action to be insufficient to confer federally-authorized presence. App. 70. Thus, the state's denial of licenses does not rest on any alleged infirmity specific to the DACA program, and extends to deferred action as to which Arizona has no constitutional objection. Thus, Arizona's classification scheme conflicts with federal law irrespective of DACA, App. 39 n.8, and the case

is not a proper vehicle to address the issue Petitioners now raise.

C. Even if Petitioners Were To Prevail on Preemption, the Court's Ruling Would Not Be Outcome Determinative Because Respondents Are Likely To Succeed on Remand on Equal Protection.

An additional reason review is unwarranted is that—even assuming that the Ninth Circuit's preemption ruling were to be reversed—Respondents' equal protection claim would provide a separate ground on which Respondents are likely to succeed. *See* App. 55-63 (Berzon, J., concurring); *ADAC II*, 757 F.3d at 1063-67; App. 112-26. In the course of litigating the equal protection claim in district court, Petitioners forfeited any argument that the DACA program was unconstitutional for violating the separation of powers or the Take Care Clause. However, if this Court were to resolve the preemption issues, which are the only issues on which Petitioners seek review, the case would return to the court of appeals, where Respondents would likely prevail on their equal protection claim.

Notably, the district court's permanent injunction decision examined each one of the state's purported rationales and concluded that Arizona lacked even a rational basis for its policy. App. 121-25. And although the Ninth Circuit declined to reach the equal protection issue in the second appeal, its decision suggested that were it to reach the issue, it would be inclined to agree with the district court's analysis. App. 29-33.

The equal protection claim thus provides an independent basis for denying the petition for certiorari because addressing the preemption issues presented would not likely change the outcome in this case.

D. In Any Event, DACA Is Constitutional, and the Ninth Circuit's Dicta Does Not Create a Circuit Split on This Issue.

Petitioners go to great lengths to suggest that the Fifth Circuit's decision regarding the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program is somehow in conflict with the Ninth Circuit's decision here. But as the Ninth Circuit did not rule on DACA's constitutionality, there can literally be no conflict.

Moreover, because the defendants in the *Texas* litigation did not challenge the DACA program, neither the *Texas* district court nor the Fifth Circuit addressed the constitutionality of DACA in their opinions. Indeed, *no* court has found DACA to be unlawful, and every legal challenge has been dismissed. *See Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015); *Arpaio*, 797 F.3d 11. Accordingly, there is no circuit split with any ruling on the validity of the DACA program.[18]

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[18] Equally untenable are Petitioners' arguments concerning an alleged split between the Ninth Circuit and *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), and *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013). These cases do not even concern the Take Care Clause or whether the government is abdicating its statutory responsibilities, Petitioners' contentions here. *See McLouth*, 838

In any event, Petitioners' constitutional challenge to DACA fails. Petitioners' contention that the Ninth Circuit's decision is at odds with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and its progeny is baseless. In issuing the DACA guidance, the Executive is at the zenith of his power, acting "pursuant to an express or implied authorization of Congress." *Id.* at 635 (Jackson, J., concurring). Indeed, Petitioners concede that the power to grant deferred action is generally within the Executive's authority. *See, e.g.*, Pet. 5-6, 23. They argue, however, that DACA is unlawful because it purportedly does not involve individualized discretion. *See id.* at 24-25, 27-28.

This assertion is factually unsupported and incorrect. As noted above, Petitioners did not develop a factual record to support their position. The only relevant evidence in the record is the DACA memorandum itself, and it makes clear that DACA requires individualized, case-by-case adjudication. The DACA memorandum sets forth guidelines for the exercise of case-by-case discretion. It specifically directs that "requests for relief pursuant to this memorandum are to be decided on a case by case basis," that "DHS cannot provide any assurance that relief will be granted in all cases," and that federal

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F.2d at 1320-22 (holding that EPA's model for predicting hazardous waste levels was a "legislative rule" subject to APA notice-and-comment requirements); *Iowa League*, 711 F.3d at 865 (holding that EPA letter addressing bacteria mixing zones constituted an action "promulgating any effluent limitation or other limitation" for purposes of appellate jurisdiction under the Clean Water Act).

officers should "exercise their discretion[] on an individual basis." App. 197.[19]

Moreover, the DACA memorandum utilizes the same kind of case-by-case method laid out in other guidance on prosecutorial discretion. Every administration since President Reagan's has issued guidance making certain classes of noncitizens eligible for deferred action if they meet specific criteria. For example, as the Office of Legal Counsel noted, after the passage of the Immigration Reform and Control Act of 1986 ("IRCA"), the Executive established the Family Fairness Program, under which INS district directors could exercise discretion and indefinitely defer deportation of certain children and spouses of immigrants for humanitarian reasons. App. 159; *see also id.* at 159-63 (summarizing deferred action programs since the late 1990s); *supra* Statement of Case Point I.A. (discussing other deferred action programs). Prior deferred action programs all established general guidelines and eligibility criteria that cover a sizeable population, but, as with DACA, call for the exercise of case-by-case discretion in determining whether a grant is ultimately warranted. DACA is no different.

There is nothing unlawful about an agency's decision to issue internal guidance to its subordinate

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[19] Petitioners cite to statistics showing that the federal government approved many DACA applications in a limited time frame. Pet. 24. But the mere fact that many people qualify, or that applications have been processed efficiently, does not preclude the exercise of case-by-case discretion.

officers outlining how they should exercise the agency's discretion. *See, e.g.*, *Wayte v. United States*, 470 U.S 598, 600 (1985) (discussing Selective Service Agency's "passive enforcement" policy of initiating enforcement actions only against non-registrants "who report themselves as having violated the law, or who are reported by others").

Congress has directed the Executive, in exercising its discretion, to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, tit. II, 129 Stat. 39, 43 (2015); *accord* Consolidated Appropriations Act of 2014, Pub. L. No: 113-76, div. F, tit. II, 128 Stat. 5, 251 (2014); Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No: 113-6, div D., tit. II, 127 Stat. 198, 347 (2013). Congress directed that the Executive focus its enforcement on certain noncitizens because the funds appropriated to DHS each year are insufficient to remove all removable noncitizens in the United States. *See* App. 148-50. Accordingly, DACA enables DHS to direct its limited enforcement resources away from the individuals who are eligible for DACA and toward those individuals Congress identified as a priority for removal. Far from contravening Congress' intent or abdicating its enforcement duties, DHS' enforcement policies for exercising prosecutorial discretion are an integral part of the Executive's duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Petitioners maintain that Congress implicitly has repudiated the DACA program. *See* Pet. 28. But

Congress has demonstrated no intent to bar the Executive from using its longstanding power to grant deferred action. For example, Congress' expansion of Violence Against Women Act ("VAWA") to provide deferred action for additional survivors of domestic abuse hardly limits other "class-based" forms of deferred action, as Petitioners assert. *See* Pet. 26 (citing 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)). This provision simply directed the immigration agency's attention to a category of persons eligible for consideration under the Executive's existing power; it did not purport to limit other forms of deferred action, though there can be no doubt that Congress was aware of the Executive's broader exercises of deferred action power.[20]

Indeed, Congress has considered—and rejected—legislation that would have temporarily suspended DHS' authority to grant deferred action except in narrow circumstances, demonstrating that it knows how it could limit deferred action, but has chosen not to do so.[21] Congress also has considered bills that would bar implementation of DACA; block

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[20] The DACA program is a far cry from the circumvention of the constitutional limits on the Executive Branch's powers addressed in *United States v. Frade*, 709 F.2d 1387 (11th Cir. 1983) and *Medellin v. Texas*, 552 U.S. 491 (2008). *See Medellin*, 552 U.S. at 525-26 (holding that President lacked authority to convert a non-self-executing treaty into domestic law); *Frade*, 709 F.3d at 1402-03 (holding that regulation under the Trading with the Enemy Act criminalizing assistance with the Mariel Boatlift encroached on Congress' power to regulate international commerce).

[21] *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011).

agency funding unless the program were rescinded; or limit the Secretary's authority to grant DACA recipients work authorization—but enacted none of them.[22] Meanwhile, Congress *has* enacted multiple appropriations bills that fund DHS—leaving DACA untouched.[23]

Although Congress considered legislation known as the DREAM Act, these bills would not have conferred deferred action, as Petitioners imply, but would have granted a pathway to citizenship to eligible individuals. Pet. 27-28; *see also* S. 1291 § 3, 107th Cong. (2001). Accordingly, Congress' decisions with respect to the passage of the DREAM Act have no bearing on the Executive's power to grant deferred action.

Finally, Petitioners contend that DACA is unconstitutional because "DACA provides EADs," which in their view contravenes the INA. Pet. 23. However, IRCA expressly provides that noncitizens may work in the United States if they are "authorized to be so employed . . . by the Attorney General." 8 U.S.C. § 1324a(h)(3). Moreover, noncitizens granted deferred action have been eligible for EADs since long before the DACA program. *See* 8 C.F.R. § 274a.12(c)(14). Indeed, the regulations making deferred action recipients eligible

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[22] *See*, *e.g.*, H.R. 5759, 113th Cong. (2014); S. 3015, 113th Cong. (2014); H.R. 5272, 113thCong. (2014).

[23] *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 2, 129 Stat. 2242, 2493-2526; Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114-4, 129 Stat. 39.

for employment authorization were first promulgated in 1981 and reflected preexisting agency practice even then. *See* Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079-03 (May 5, 1981). Accordingly, when Congress enacted IRCA in 1986, it confirmed the Executive's existing regulatory authority to designate additional categories of noncitizens, including deferred action recipients, eligible for employment authorization.[24]

In sum, DACA continues the longstanding practice of establishing uniform guidelines to direct the use of congressionally authorized prosecutorial discretion, and does not violate the separation of powers or the Take Care Clause. Thus, even if the question were properly presented, it would not warrant this Court's consideration.

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[24] Petitioners' wholly unsupported argument that only categories of noncitizens explicitly granted work authorization by statute are properly eligible for EADs would deny work permits to numerous categories of noncitizens currently eligible under federal regulation, including thousands of applicants for lawful permanent residence and foreign students undertaking practical training related to their fields of study. *See, e.g.*, 8 C.F.R. §§ 274a.12(a)(6), (9), (11), (c)(3), (5)-(7), (9)-(11), (14), (16)-(17), (21), and (25).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Jennifer Chang Newell
Counsel of Record
Katrina Eiland
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA
(415) 343-0774
jnewell@aclu.org

Linton Joaquin
Karen C. Tumlin
Shiu-Ming Cheer
Nicholas Espíritu
Nora A. Preciado
NATIONAL IMMIGRATION
LAW CENTER
3435 Wilshire Blvd.,
Suite 1600
Los Angeles, CA 90010

Victor Viramontes
Julia A. Gomez
MEXICAN AMERICAN LEGAL
DEFENSE AND
EDUCATIONAL FUND
634 South Spring Street,
11th Floor
Los Angeles, CA 90014

Michael K.T. Tan
Omar C. Jadwat
Lee Gelernt
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Tanya Broder
NATIONAL IMMIGRATION
LAW CENTER
2020 Addison Street,
Suite 310
Berkeley, CA 94704

David D. Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Kathleen E. Brody
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
ARIZONA
3707 North 7th Street,
Suite 235
Phoenix, AZ 85014

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