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

REPLY BRIEF FOR THE PETITIONERS

MARK BRNOVICH
Attorney General

DOMINIC E. DRAYE
Solicitor General
Counsel of Record
JENNIFER M. PERKINS
RUSTY D. CRANDELL
OFFICE OF THE
ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-3333
solicitorgeneral@azag.gov

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITY

REPLY BRIEF FOR THE PETITIONERS

Arizona issues driver's licenses to individuals who can establish "presence in the United States . . . authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). While Congress has the ability to confer lawful presence, the President does not. The Deferred Action for Childhood Arrivals ("DACA") program is wholly a product of the executive branch. Therefore, Employment Authorization Documents ("EADs") issued by the executive branch under DACA do not establish presence authorized under federal law. Notwithstanding this straightforward logic, Respondents continue to avoid the central question in this preemption case: whether DACA is both law and lawful such that it can have preemptive force. The Ninth Circuit assumed that the President can unilaterally bestow legal presence on noncitizens. The Fifth Circuit, the only other court to consider this question in the context of DACA's 2014 expansion and the related DAPA program, reached the opposite conclusion. This Court should grant certiorari to resolve this direct conflict and numerous other doctrinal aberrations in the Ninth Circuit decision. At stake are the separation of powers and federal structure at the heart of our Constitution.

A. The Ninth Circuit's Preemption Ruling Depends on an Incorrect Test and the Assumption that DACA Is Federal Law.

Respondents do not defend the Ninth Circuit's standard for finding preemption. Instead, they deny that the lower court departed from established precedent from this Court and others. Br. in Opp. 19–20. But the Ninth Circuit's language and reasoning

are inescapable. Rather than requiring a clear and manifest statement from Congress, the Ninth Circuit repudiated that requirement: "neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with a specific congressional purpose is required in order for federal law to preempt state regulations of immigrants." App. 35 (quotation omitted); Pet. 16–17. It attributed this departure to the "unique" context of immigration. App. 35. But this Court and at least three circuits have applied the "clear and manifest" standard in that very context. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009));*Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 528 (5th Cir. 2013) (citing *Arizona* for the "clear and manifest" standard); *Keller v. City of Fremont*, 719 F.3d 931, 943 (8th Cir. 2013) (same); *United States v. Alabama*, 691 F.3d 1269, 1282 (11th Cir. 2012) (same).

Respondents' only argument to downplay this division is to cite cases that do not use the words "clear and manifest." Br. in Opp. 20. In one instance, they are mistaken. *Villas at Parkside Partners*, 726 F.3d at 528. Where courts are silent, none expressly repudiates the standard, as the Ninth Circuit did here. *See Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013). Even if Respondents were correct that the Third Circuit also refuses to apply the "clear and manifest" standard, that division would only intensify the need for certiorari.

Beyond its stated test, the Ninth Circuit's reasoning is incompatible with a search for congressional intent. Despite repeated claims that Arizona's licensing rules

"conflict with federal law," Br. in Opp. 28 (citing App. 39 n.8), scrutiny of federal law reveals just the opposite: "Arizona follows federal law to the letter," App. 4 (Kozinski, J., dissenting); *see also infra* Part B. The core of this disagreement is whether the DACA Memorandum is "law" for purposes of the Supremacy Clause. If it is among the "Laws of the United States . . . made in Pursuance" of the Constitution, then DACA's grant of lawful presence would preempt state law.

If, however, DACA does not make a person "lawfully present," Ariz. Rev. Stat. 28-3153(D), then the preemption analysis is easy. As this Court has already held, a "State may borrow the federal [immigration] classification." *Plyler v. Doe*, 457 U.S. 202, 226 (1982). Unless DACA worked a change in the law, the individuals it affects are present in the United States in violation of federal law. Arizona therefore "may borrow" this federal classification—*i.e.*, lawful presence—when awarding driver's licenses. The distinction between persons who are lawfully present in the United States and those who are not is precisely the federal classification borrowed by Louisiana and upheld in *LeClerc v. Webb*, 419 F.3d 405, 424 (5th Cir. 2005).

Similarly, the holding in *Dandamudi v. Tisch*, 686 F.3d 66, 81 (2d Cir. 2012), belies Respondents' assertion that it is "fully consistent with" the Ninth Circuit decision. Br. in Opp. 25 n.15. The state law in *Dandamundi* borrowed a federal visa classification—which was unobjectionable to the Second Circuit—but then prohibited the visa-holders from working in the very profession for which Congress had authorized

their visas. Arizona's policy borrows federal classifications but, unlike the law in *Dandamudi*, does not prohibit anything authorized by Congress. Pet. 19–21.

The Ninth Circuit has either created a split with *Plyler* as well as the Second and Fifth Circuits, *see* Pet. 19–21, or it has held that DACA worked a substantive change in the law, *see infra* Part B. This Court's review is necessary to confirm that States may borrow federal immigration classifications. Where they do so in pursuit of acknowledged police powers, App. 38, a uniform presumption against preemption must apply across the entire country.

B. There Is No Valid Federal Law that Arizona Transgresses in Refusing Licenses to DACA Recipients.

1. Abandoning the Ninth Circuit's preemption standard, Respondents attempt to do what the lower court did not: show that Congress evinced a "clear and manifest purpose" to empower the President to declare aliens lawfully present in the United States despite being in violation of immigration law. Br. in Opp. 21–24. But there is a reason the Ninth Circuit thought it easier to buck 70 years of preemption jurisprudence and every other circuit in the country by inventing a new immigration-specific test than to look for a "clear and manifest purpose" in the text of statutes. None of the four statutes Respondents identify can reconcile the Ninth Circuit's holding with precedent from this Court and others.

First, Respondents cite 8 U.S.C. § 1103(a)(3), which authorizes the Secretary of Homeland Security to

"perform such other acts as he deems necessary for carrying out his authority" to execute the INA. Br. in Opp. 4–5, 22. As the Fifth Circuit held, however, this generic provision "cannot reasonably be construed as assigning 'decisions of vast economic and political significance,'" such as DACA, to the Secretary. *Texas v. United States*, 809 F.3d 134, 183 (5th Cir. 2015) (quoting *Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (requiring that a statute "speak clearly" if the purpose is to effect a significant delegation)).

Next, Respondents cite three provisions already discussed in the Petition: the REAL ID Act of 2005, Pub. L. No. 109–13, § 202(c)(2)(C)(i); 8 U.S.C. § 1182(a)(9)(B); and 8 U.S.C. § 1324a(h)(3). *See* Pet. 17–18, 24; App. 7–9 (Kozinski, J., dissenting). Respondents offer no response to the Fifth Circuit's conclusion that these provisions only prove an "intricate system of immigration classifications," which makes "untenable" the conclusion that Congress simultaneously gave the Executive a blank check "to grant lawful presence and work authorization to any illegal alien in the United States." *Texas*, 809 F.3d at 184; App. 8 (Kozinksi, J., dissenting) ("The INA evinces a 'clear and manifest' intention not to cede this field to the executive."). Respondents cannot reconcile these holdings, and their failure to try is telling.

Any circuit applying the "clear and manifest" standard would reject the Ninth Circuit's conclusion that Arizona's policy "strayed into an exclusive domain that Congress, *through the INA*, delegated to the executive branch." App. 36 (emphasis added). This conclusion is squarely at odds with the Fifth Circuit:

"*the INA* flatly does not permit the [executive] reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." *Texas*, 809 F.3d at 184 (emphasis added). The Court should grant review to resolve this conflict and confirm that Congress has not delegated to the Executive the extraordinary power to dispense lawful presence.

2. Because immigration statutes do not establish clear and manifest congressional intent to preempt state licensing requirements, the next place to look is inherent presidential power. Under *Youngstown*, that power is a function of what Congress has done. Although Respondents and the Ninth Circuit refer generically to "federal" power over immigration, *e.g.*, Br. in Opp. 13 (quoting App. 34), that power is not held equally by all three branches. The Constitution entrusts it to Congress. U.S. Const. art. I, § 8, cl. 4. Pursuant to that assignment, Congress has enacted a "comprehensive . . . scheme for regulation of immigration and naturalization." *De Canas v. Bica*, 424 U.S. 351, 353 (1976). As a result, in the context of immigration, the President's unilateral power is at its "lowest ebb," defined as "his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Respondents, on the other hand, assert that creating DACA was at the "zenith" of presidential power. Br. in Opp. 31. This position echoes the Ninth Circuit's reasoning, but it does nothing to reconcile that court's conclusion with precedent from the Eleventh Circuit, which expressly held that the President's

power over immigration is at its lowest ebb. *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir. 1983); *accord* App. 11–12 & n.7 (Kozinski, J., dissenting). Respondents declare *Frade* "a far cry from" DACA's circumvention of the separation of powers, but they offer no explanation for that verdict. Br. in Opp. 34 n.20.

Respondents likewise brush past explicit congressional authorizations for deferred action, saying that they "simply directed the immigration agency's attention" to persons already eligible for class-based deferred action "under the Executive's existing power." Br. in Opp. 34. Nothing in the INA supports that conclusion, which would render superfluous provisions of the Victims of Violence in Trafficking Act, for example, that award eligibility for deferred action. Pub. L. No. 106-386, Sec. 1503(d), (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II),(IV)). The same is true of the myriad provisions of federal immigration law identified in the States' amicus brief, which DACA contradicts. Br. of *Amici* Texas *et al*. 9–18. These regulations are the same provisions on which the Fifth Circuit relied to conclude that the President does not have a freestanding power to authorize an alien's presence as a matter of law. *Texas*, 809 F.3d at 179–81.

Respondents also attempt to neutralize congressional rejection of the DREAM Act by pointing out that Congress has not affirmatively repealed DACA. Br. in Opp. 35. That reasoning is backwards. Congress has no obligation to condemn executive overreach, and it had not done so when this Court defended the separation of powers in *Youngstown* and *Medellin v. Texas*, 552 U.S. 491 (2008). In the same

way, a failure to appropriate sufficient funds to remove every unauthorized alien and statutes directing the Executive to prioritize the removal of aliens who commit crimes, Br. in Opp. 33, do not come close to authorizing the President to award lawful presence in contravention of existing statutes. At least in the Fifth Circuit, the clear notice doctrine prohibits inferring such a significant delegation from the mere fact that Congress has not demanded absolute enforcement. *Texas*, 809 F.3d at 183.

Respondents' best efforts to buttress the Ninth Circuit's bold claim that Congress has ceded the field of immigration to the Executive, App. 36, 50, only prove the opposite. The Fifth and Eleventh Circuits were correct in finding presidential power in this field to be at its lowest ebb. If those circuits are correct, then DACA cannot confer lawful presence and the dissenting Ninth Circuit judges are correct that "Arizona follows federal law to the letter." App. 4.

3. Ultimately, the only constitutional authority vested in the Executive that might conceivably encompass DACA is prosecutorial discretion. DHS describes DACA in these terms, App. 195, but that characterization is implausible, Pet. 23–25. Prosecutorial discretion is simply the Executive's decision not to remove someone who is unlawfully present in the United States. It does not give the Executive power to render the person lawfully present. And that is precisely what the Fifth Circuit held when presented with the identical legal argument: "the INA flatly does not permit the [executive] reclassification of millions of illegal aliens as lawfully present." *Texas*, 809 F.3d at 184; *id.* at 166 (distinguishing prosecutorial

discretion from "affirmatively confer[ring] 'lawful presence'").

Finally, if DACA was only "guidance," Br. in Opp. 5, 31, for field agents to exercise prosecutorial discretion, it would lack preemptive force. *See* Pet. Part II.B. This Court and at least two circuits have treated such "precatory" guidance as "lack[ing] the force of law" for preemption purposes. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330 (1994); *see also, e.g., Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 339 (3d Cir. 2009); *Wabash Valley Power Ass'n. v. Rural Elec. Admin.*, 903 F.2d 445, 453–54 (7th Cir. 1990). Respondents never mention any of these cases, confirming that the Ninth Circuit's preemption holding is impossible under the terms of the DACA Memorandum itself. To hold otherwise would be to countenance what one commentator called "preemption by press release." Michael S. Greve, *Immigration "Law" a la Obama*, Library of Law & Liberty (May 12, 2016), *available at* http://tinyurl.com/kl2v2jx.

This Court should grant certiorari to reject this theory of preemption and bring uniformity to the now divided circuit courts.

C. There Are No "Vehicle" Problems.

More than anything else, Respondents stake their opposition to certiorari on the hope of finding vehicle problems. None of them is availing.

1. The issue of whether the Executive can unilaterally confer lawful presence was argued and decided in the district court, subject to extensive briefing in the Ninth Circuit, and now cries out for this Court's review. What Respondents repeatedly

characterize as waiver is simply the fact that this issue was litigated in the context of the Equal Protection Clause for much of the case.

Between the district court dismissing Respondents' preemption claims and the Ninth Circuit's revival of preemption in the second appeal, this case focused on equal protection. In that context, the question whether DACA exceeded the President's constitutional power remained in the case and was decided in the district court. For example, at oral argument, the district court asked Petitioners: "Do I have to find that the DACA program is legally illegitimate in order to rule your way?" ER544. And, in its opinion granting summary judgment, the district court rejected Petitioners' argument "that DACA recipients are still in the country illegally because the Secretary of DHS lacked the authority to grant them deferred status." App. 117–19. That this controversy arose in the context of equal protection is immaterial. *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174–75 & n.22 (1988).

Petitioners likewise presented the issue to the Ninth Circuit. *E.g.*, Opening Br., No. 15-15307, at 25–38 (June 1, 2015). Following oral argument, the court pivoted to preemption and called for supplemental briefing from the parties and the Department of Justice on both preemption and whether the President acted lawfully in enacting DACA. App. 100–01. Even if the issue were not otherwise preserved, it would have been a travesty of due process for the Ninth Circuit to revive Respondents' preemption claim without enabling Petitioners to raise an obvious defense, especially one resting on a legal

argument decided in a different context by the district court.

The reason the Ninth Circuit said that this issue was not "before our court," App. 44, was that it believed it could decide preemption without addressing presidential power. This is precisely the error that forms the backbone of the six-judge dissent and cries out for this Court's review: can a unilateral action of the Executive that is neither law nor lawful preempt a State's police power regulation?

2. In a telling prioritization, Respondents dedicate the first section of their brief to the notion that this case is unimportant because Arizona's licensing statute is unique. Not so. The issues raised are bigger than licensing. Nowhere is this fact more obvious than in the 26 States that challenged the President's identical assertion of power in *Texas v. United States*—and to whom this Court granted certiorari. As the numerous *amici* supporting Petitioners explain, the separation of powers and the States' "vast residual powers" under the Tenth Amendment, *United States v. Locke*, 529 U.S. 89, 109 (2000), are, in fact, very important. *See* Br. of *Amicus* Jeb Bush 11–12 ("The most important guarantor of liberty in the Constitution is its separation of powers."); Br. of *Amici* Texas *et al.* 6.

3. There is no need to supplement the factual record. Br. in Opp. 27–28. While facts about implementation underscore that DACA is not true prosecutorial discretion, preemption here depends on a legal question: whether the Executive can unilaterally confer lawful presence. The Fifth Circuit has answered this question in the negative, and the Ninth Circuit has answered it affirmatively.

4. Finally, Respondents suggest that the Ninth Circuit panel's lengthy tangent on the Equal Protection Clause should defeat certiorari "because addressing the preemption issues presented would not likely change the outcome in this case." Br. in Opp. 30. To the contrary, whether the Executive can unilaterally authorize an individual's presence under federal law is central to equal protection. If Petitioners are correct that the President lacks this power, then DACA recipients are, as the statues make clear, unlawfully in the United States. It would stretch precedent to conclude that a State cannot rationally distinguish between persons lawfully in the country and those present in violation of federal law. The equal protection discussion below would necessarily require reconsideration.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted.

MARK BRNOVICH
Attorney General

DOMINIC E. DRAYE
Solicitor General
Counsel of Record
JENNIFER M. PERKINS
RUSTY D. CRANDELL
OFFICE OF THE
ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
solicitorgeneral@azag.gov
(602) 542-3333

Counsel for Petitioners

JUNE 1, 2017