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

SUPPLEMENTAL BRIEF FOR PETITIONERS

MARK BRNOVICH
Attorney General

DOMINIC E. DRAYE
Solicitor General
Counsel of Record
RUSTY D. CRANDELL
OFFICE OF THE
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, AZ 85004
(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 AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONERS

Eager to advance its own extraordinary petition for certiorari before judgment, *United States Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 17-1003, the United States suggests that the instant Petition should be held or even denied. Lost in service of this objective, however, is any discussion of Arizona's arguments supporting certiorari or an explanation of how the petition in *Regents* undermines a case that admittedly "involve[es] similar questions concerning the validity of the adoption of DACA." U.S. Br. at 19.

Particularly concerning is the suggestion that this case is unimportant because only one State has a driver's license statute requiring "presence in the United States . . . authorized under federal law." Ariz. Rev. Stat. § 28-3153(D); U.S. Br. at 12, 19. This case is about much more than driver's licenses. It asks whether the two-dimensional division of power at the core of our Constitution can be collapsed into the President alone. That is the issue that motivated a six-judge dissent in the Ninth Circuit, App. 2–13, an amicus brief supporting certiorari on behalf of fourteen States, Br. of Texas, *et al.*, and a dissent from the denial of a stay pending certiorari from three members of this Court, App. 132. For the United States to declare that "Arizona's opposition to DACA has largely been vindicated, and its concerns about the policy and its effects have been addressed," U.S. Br. at 12, is surprisingly dismissive of the connection between state sovereignty and the constitutional division of power. A state law stands enjoined by the unilateral desire of the federal executive, and all States' ability to borrow

federal immigration classifications to carry out their police powers is in doubt.

The fundamental problem remains. DACA can be one of two things: either precatory advice without the force of law or a substantive change in the law in violation of the Constitution. Either way, preemption is impossible. Vindicating the Constitution's two-fold separation of powers deserves this Court's attention.

A. The Government's Petition in *Regents* Only Emphasizes the Importance of Review Here.

The federal government's brief in this case is not a typical response to the Court's call for the views of the Solicitor General. Instead, its leading argument is that because the Secretary of Homeland Security has "rescinded DACA," the real action lies in *Regents*. U.S. Br. at 11–12. The goal of this argument, lodged just two days before the Court conferenced *Regents*, was to make that extraordinary petition appear necessary. Concerning this case, however, the federal government offers nothing beyond the Ninth Circuit's conclusions and one borrowed point from Respondents' brief in opposition to certiorari. Underscoring the lack of engagement, it mentions the six-judge dissenting opinion and Petitioners' reply brief just once and without responding to any of their arguments. Focused on its own project, the United States offers none of the analysis for which the Court presumably requested its participation.

1. This Court has now denied certiorari in *Regents*. Orders, 583 U.S. ---- (Feb. 26, 2018). As a result, the Northern District of California's injunction remains in effect, and the federal government's hints of mootness in the present case ring hollow. Indeed, this case's importance has only increased as litigation over DACA has proliferated.

As *Regents* itself illustrated, uncertainty over what DACA is and how it binds government actors—whether States or subsequent presidential administrations—plagues the lower courts. Numerous lawsuits challenge the current administration's ability to rescind DACA on a variety of theories. *See, e.g., Regents of Univ. of Calif. v. United States Dep't of Homeland Sec.*, No. 3:17-cv-5211, 2018 WL 339144 (N.D. Cal. Oct. 17, 2017), *Batalla Vidal v. Nielsen*, No. 16-cv-4756, 2018 WL 834074 (E.D.N.Y. Feb. 13, 2018), *Coyotl v. Kelly*, No. 1:17-cv-1670 (N.D. Ga. June 12, 2017). Elsewhere, a criminal defendant has convinced a district court that DACA confers substantive rights matching those of authorized aliens. *Medina v. U.S. Dep't of Homeland Sec.*, No. C17-0218, 2017 WL 5176720 (W.D. Wash. Nov. 8, 2017). State courts are also facing new demands to extend public benefits for authorized aliens to persons covered by DACA. *See, e.g., Alford v. Hernandez*, 807 S.E.2d 84, 90 (Ga. Ct. App. 2017) (rejecting argument "that the DACA policy had the force and effect of a federal law" such that it entitled students to in-state tuition); *State ex rel. Brnovich v. Maricopa County Cmty. Coll. Dist. Bd.*, 395 P.3d 714, 726 (Ariz. Ct. App. 2017), *review granted in part* (Feb. 13, 2018) (similar). Finally, as the United States acknowledges, the Fifth Circuit has struck down the related 2014 DACA expansion for reasons that are

irreconcilable with the Ninth Circuit's reasoning in this case. U.S. Br. at 9 (citing *Texas v. United States*, 809 F.3d 134, 183 (5th Cir. 2015)); *see also* Pet. 28–29; Reply 4–6; App. 3, 8 (Kosinski, J., dissenting).

The message from this tide of litigation—including *Regents*—is that the nation's courts need clarity on what a President can accomplish unilaterally under the immigration laws. The federal government's suggestion that this case "ha[s] been overtaken by events," U.S. Br. at 11, is inconsistent with the foregoing examples and with the acknowledged "overlap in issues between the *Regents* petition and this one," *id.* at 19.

If anything, the present case is a superior vehicle to *Regents* because the leading argument in that case sought to *avoid* judicial review of the rescission memorandum. *See* Petition, *Regents*, No. 17-1003 at 16–24 (filed Jan. 18, 2018) (arguing that 5 U.S.C. § 701(a)(2) and 8 U.S.C. § 1252(g) render rescission unreviewable). Had the government prevailed on that argument, this Court's decision would likely have shed no light on the issues arising around the country in connection with DACA. The present case, in contrast, asks whether DACA is among "the Laws of the United States . . . made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. As such, it seeks the Court's instruction on the core question dividing lower courts, including the Fifth and Ninth Circuits.

2. The United States does not urge certiorari in this case for "the simple reason that the DACA policy has been rescinded." U.S. Br. at 13. That premise is incorrect. The Northern District of California has compelled the United States to "maintain the DACA

program on a nationwide basis on the same terms and conditions as were in effect" before DHS's attempted rescission. *Regents*, 2018 WL 339144, at *27. But beyond undermining the premise for Part A of the United States brief, the injunction in *Regents* dispels any doubt about the continued vitality of this litigation.

Indeed, only Congress has the ability to moot this ongoing controversy. If new legislation created a lawful status for individuals currently covered by DACA, that enactment would instantly satisfy Arizona's requirement of presence authorized "under federal law." But the potential for legislation to moot a case is always present, and it is no reason to deny certiorari. Should DACA become law—actual law—between now and this case's eventual resolution, the Court could dispose of the case under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That course would have the added advantage of vacating a decision by the Ninth Circuit that no one defends. *See* U.S. Br. at 15, 17.

Absent legislation, however, the rescission memorandum does not automatically eliminate the case or controversy needed for this Court to reach the bedrock question of whether a President can unilaterally confer "presence . . . authorized under *federal law*." Ariz. Rev. Stat. § 28-3153(D) (emphasis added). Even if the injunction in *Regents* is lifted on appeal, the rescission memorandum would require the Arizona Department of Transportation to issue licenses in violation of state law until March 5, 2020. Memorandum from Elaine C. Duke, *Rescission of the June 15, 2012 Memorandum*, at 4 (Sept. 5, 2017). Until that time, an applicant could demand a license with

nothing to establish presence in the United States "authorized under federal law" except a federal (c)(33) Employment Authorization Document (EAD).

Despite the federal government's assurances that Arizona's "concerns about the [DACA] policy and its effects have been addressed," U.S. Br. at 12, the rescission memorandum and recent events in *Regents* tell a different story. As the dissent below predicted, the problem of executive-branch lawmaking in the area of immigration will not soon disappear. App. 12–13.

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

Beyond its pitch for certiorari in *Regents*, the United States says nothing new regarding the merits of the current Petition. It repeats conclusions from the Ninth Circuit's opinion and Respondent's brief in opposition to certiorari, without answering a single point raised in Petitioners' reply brief or the Ninth Circuit dissent. The repetitive nature of the federal government's brief confirms that its purpose was not to comment on the present case as much as to promote its petition in *Regents*.

1. Like Respondents, the United States makes no attempt to defend the Ninth Circuit's holding that "neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with specific congressional purpose is required in order for federal law to preempt state regulations of immigrants." App. 35. The Ninth Circuit's rejection of the "clear and manifest" preemption standard in the immigration

context is contrary to precedent from this Court and at least three circuits. *See* Reply Br. 2.

Without addressing the Ninth Circuit's test, the United States repeats the lower court's conclusion: Arizona impermissibly "'arrang[ed] federal classifications.'" U.S. Br. at 16 (quoting App. 39). In fact, the federal government goes so far as to reimagine Arizona's position, asserting that Petitioners do not disagree "with the rule that the court of appeals applied." *Id.* at 18.

Nothing could be further from the truth. While no one disputes the exclusive domain of Congress to create immigration classifications, Petitioners strenuously dispute the rule announced by the Ninth Circuit that States "create" immigration classifications simply by borrowing them, an action expressly authorized by this Court in *Plyler v. Doe*, 457 U.S. 202, 226 (1982). Without explaining how Arizona, the numerous amici, two academic commentators, *see* Pet. 32 (citing Noah Feldman), Reply Br. 9 (citing Michael S. Greve), and the six judges who dissented from denial of rehearing below have erred, the United States declares that they all "misread" the Ninth Circuit's holding. U.S. Br. at 16. It then simply repeats the language of the lower court without responding to the central problem raised in the Petition: Arizona borrows federal EAD classifications without any modification.

By failing to explain how "borrowing" becomes unconstitutional when paired with "arranging," the United States necessarily downplays the Ninth Circuit's departure from precedent in this Court and the Second and Fifth Circuits. U.S. Br. at 17–18. The United States concludes that these decisions harmonize

with the panel's decision because they all agree that States may borrow federal immigration classifications. *Id.* (citing *Toll v. Moreno*, 458 U.S. 1 (1982), *LeClerc v. Webb*, 419 F.3d 405, 424 (5th Cir. 2005), and *Dandamudi v. Tisch*, 686 F.3d 66, 81 (2d Cir. 2012)). One common premise, however, does not erase the more important issue on which these cases diverge from the decision below. Unlike the Ninth Circuit, *Toll*, *LeClerc*, and *Dandamudi* recognize that States may both borrow and arrange federal immigration classifications. Pet. at 19–21; Reply at 3–4. In the Ninth Circuit, the same practice is preempted. App. 39.

Further complicating the federal government's position is the brief it filed in the Ninth Circuit. There, the United States allowed that a "State might distinguish between aliens who have been accorded deferred action and those who have not" before faulting Arizona for borrowing the more fine criteria of federal EAD classifications. Br. of the United States, No. 15-15307, at 9 (9th Cir. Aug. 28, 2015). It never explained why borrowing a classification at the level of deferred action is permissible while a classification at the level of EADs is not. Nor could it. For purposes of preemption, the only question is whether Congress has clearly and manifestly expressed a view on what States may do. *Arizona v. United States*, 567 U.S. 387, 400 (2012). Nothing in federal law evinces a congressional intent to permit borrowing at the level of deferred-action status while banning it at the level of EAD classifications.

The United States has never identified a congressional enactment to justify either the rule it

proposed in the Ninth Circuit or the rule that eventually emerged from that court. It refers in passing to 8 U.S.C. § 1324a(h)(3) but makes no attempt to rebut the arguments against finding preemptive intent in this provision. *Compare* U.S. Br. at 2 *with* Pet. 24, Reply Br. 5. In the absence of such an enactment and faithful to the principle that a "State may borrow the federal [immigration] classification," *Plyler*, 457 U.S. at 226, this Court and the Second and Fifth Circuits have sanctioned borrowing and "arranging" of federal classifications.

2. Similarly, nothing about the Ninth Circuit opinion "taken as a whole [or] in context" resuscitates its reasoning. U.S. Br. at 16. Just the opposite. Arizona issues drivers licenses to individuals who can establish "presence in the United States . . . authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). Since Arizona expressly incorporates federal law, the only disagreement can be over its fidelity to that law. And that disagreement is precisely what divides the panel and the six dissenting judges below, notwithstanding the panel's insistence that DACA's legality is immaterial.

The Ninth Circuit panel simply disagreed with Petitioners and with the Fifth Circuit's holding in *Texas v. United States* that DACA is not federal law. While the latter court concluded that "the INA flatly does not permit the [executive] reclassification of millions of illegal aliens as lawfully present," *Texas*, 809 F.3d at 184, the Ninth Circuit decision "holds that the enforcement decisions of the President are federal law," App. 4 (Kozinksi, J., dissenting). To its credit, the United States does not attempt to mask this circuit

split, which was also essential to its own petition in *Regents*. U.S. Br. at 9. Instead, the federal government simply repeats the panel's mantra that Arizona has created its "'own definition of authorized presence,'" *id.* at 16 (quoting App. 39), without exploring whether that assertion is true. For reasons already traced in the Petition, the separation of powers depends on rejecting the Ninth Circuit's premise in favor of the view announced in the Fifth Circuit. Pet. 22–29.

Certiorari is needed to clarify that the "clear and manifest" preemption standard applies to federal immigration laws and that States may borrow and arrange federal immigration classifications. States have historically done so in connection with education (*Plyler*, *Toll*) and professional licensing (*LeClerc*, *Dandamundi*). As long as the federal classifications remain in tact, only a clear and manifest statement by Congress—not the executive—can prevent the States from carrying out their historical police powers as they see fit. *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) ("[I]t is Congress rather than the courts that preempts state law.").

3. The final point in the government's brief is more subtle, likely because Petitioners' reply brief and the record citations contained therein belie it. The United States suggests that Petitioners have not previously argued that DACA is unconstitutional if understood as a substantive change in the law. U.S. Br. at 11, 15. This is a surprising assertion considering that the United States itself filed a brief on that very question

in the Ninth Circuit.[1] *See* App. 100–01 (inviting the United States to file a brief addressing "[w]hether the DACA program violates the separation of powers doctrine and/or the Take Care Clause"); Br. of the United States, No. 15-15307. Indeed, the United States even cites that brief in its Statement. U.S. Br. at 7. What it does not cite is Petitioners' reply brief, which disposes of Respondents' claims of waiver with citations to the record. Reply Br. 9–11. Moreover (as if more were needed), the government is silent on the injustice of treating preemption claims as non-waivable while deeming defenses to those claims waived. *Id.* at 10.

As explained in Petitioners' reply brief, DACA's constitutionality has been a continuous issue in this litigation. *Id.* at 9–11. For the two years between dismissal of Respondents' preemption claims and their resurrection by the Ninth Circuit, the issue of DACA's constitutionality surfaced only in the context of equal protection. When the Ninth Circuit revived preemption, it logically invited all parties and the United States to comment on DACA's constitutionality because an unconstitutional act cannot preempt state law. App. 100–01; *Alden v. Maine*, 527 U.S. 706, 731 (1999). When that court later stated that it was not deciding DACA's constitutionality, it was only because the Ninth Circuit panel thought it could hide its implicit holding that DACA is federal law capable of preemption. App. 44. This did not fool the dissenting

---

[1] The United States has changed its position on the merits of this issue, concluding that DACA was, in fact, "unconstitutional." Letter from Jefferson B. Sessions to Elaine Duke (Sept. 4, 2017).

judges, App. 4 (Kozinski, J., dissenting), and it should not fool this Court.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

MARK BRNOVICH
Attorney General

Dominic E. Draye
Solicitor General
Counsel of Record
RUSTY D. CRANDELL
OFFICE OF THE
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, AZ 85004
solicitorgeneral@azag.gov
(602) 542-3333

Counsel for Petitioners

FEBRUARY 26, 2018